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NOVA SCOTIA COURT OF APPEAL

[Cite as: D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General) 2000 NSCA 44]

Glube, C.J.N.S.; Bateman and Cromwell, JJ.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA Appellant - and - D.W. MATHESON & SONS CONTRACTING LIMITED Respondent	)	J.D. MacIsaac, Q.C. for the appellant Aidan J. Meade for the respondent Appeal heard: January 24, 2000 Judgment delivered: April 5, 2000

THE COURT: Appeal and cross-appeal dismissed; leave to appeal on costs is granted and the respondent's appeal is allowed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Bateman, J.A. concurring.

CROMWELL, J.A.:

I. Introduction:

[1] In July of 1988, D.W. Matheson & Sons Contracting Limited ("Matheson") contracted with Her Majesty the Queen in Right of Canada represented by the Minister of the Department of Public Works ("Public Works") to build a breakwater. Construction was to be completed in 18 weeks, but the contract engineer had a discretion to grant extensions. Delays were encountered and Matheson requested an extension. Before a decision had been made to grant or refuse the extension, Public Works removed Matheson from the project and called on its bonding company to complete the work. The bonding company subcontracted the work to Matheson and the work was completed in the fall of 1989.

[2] In 1997, Matheson sued Public Works for wrongfully removing it from the contract. As assignee of the bonding company, Matheson also sued Public Works for amounts it alleged were owing in connection with the completion of the work.

[3] After an eight day trial, Moir, J. awarded Matheson $432,719 with interest. On the issue of whether Public Works had wrongly removed Matheson from the contract, the judge found that Public Works had breached the contract in two ways. First, he held that Public Works breached the contract by removing Matheson while its application for an extension was outstanding. Second, he held that Public Works also breached the contract by wrongly taking over the role of contract engineer which, in turn, deprived Matheson of its right to an impartial and fair determination of the

extension application. The trial judge found Matheson's case for an extension was compelling and that, but for the wrongful assumption by Public Works of the role of the contract engineer, an extension to the spring or summer of 1989 would have been granted.

[4] In relation to Matheson's claim for wrongful removal, the judge awarded Matheson its expenses incurred as a result of the wrongful call on its bond, and expenses incurred as a result of having to work in winter conditions. He declined to award damages claimed by Matheson for loss of future profits holding that they were too remote.

[5] On the claims relating to Matheson's completion of the work as subcontractor of the bonding company, the judge found that Public Works had contrived to avoid Matheson's contractual right to renegotiate prices for certain materials. He also resolved disputes about the proper charges for other items. He fixed the applicable prices for all of these claims.

[6] With respect to pre-judgment interest, the trial judge awarded interest as provided for in the contract with respect to amounts he found were due under the contract. He ordered interest pursuant to statute on other amounts he ordered to be paid.

[7] In light of Matheson's success in the action, the judge awarded costs to

Matheson. However, he disallowed Matheson's claim for fees paid to two engineers it called to testify as fact witnesses about their supervision of Matheson's work.

II. The Issues:

[8] Public Works appeals the trial judge's award of contractual and statutory interest on the sums found due to Matheson. Two issues are raised. First, did the trial judge err in finding that interest was payable, pursuant to the contract, on certain amounts owing and, second, did the trial judge err in failing to limit the period of the statutory award of interest on account of the long delay on Matheson's part in bringing its claims before the court?

[9] Matheson cross appeals the dismissal of its claim for loss of future profits. The issue is whether the trial judge erred in finding the loss profit claim too remote. Matheson has also filed an application for leave to appeal the judge's costs award. The issue is whether he erred in disallowing, as a disbursement, the fees paid to the engineer witnesses.

III. The Facts and the Trial Judge's Decision:

[10] Compared with the multitude of intricate issues addressed by the trial judge, the questions raised on appeal are narrow and specific. Nonetheless, it is necessary to put these issues in the context of the contract between the parties and the litigation resulting from it.

1. The Contract:

[11] The contracted work was the construction of a new west breakwater at Grand Etang, Inverness County with the cost estimated not to exceed $649,927.

a. unit price table:

[12] The contract was a unit price contract. Article A5 of the Articles of Agreement sets out various items of labour, plant or material and, for each, a unit price, an estimated quantity and an estimated total price. Under the contract's General Conditions, the unit price table is used for the purposes of determining the cost of the items listed in it: see GC48. Under the Terms of Payment, the amounts payable to the contractor are the aggregate of the amounts referred to in the Articles of Agreement (i.e., the amounts calculated as set out in the unit price table) and the amounts, if any, that are payable under the General Conditions. (see TP2.1)

[13] The General Conditions provide for additions or amendments to the unit price table. Stripped of detail, these provisions permit the contract engineer to amend the unit price table by agreement with the contractor or, failing agreement, according to a formula set out in the conditions. For the purposes of this case, the most significant provision is GC47.1.2 which triggers a right to renegotiate unit prices where the actual quantities used are less than 85% or more than 115% of the estimated quantity. As I will discuss more fully later in my reasons, the trial judge found that Public Works contrived to defeat this right to renegotiate new prices for certain items. It will be helpful

to set out GC47, 48, 49 and 50 in full and I have reproduced them in Annex “A” to my reasons.

b. terms of payment:

[14] The contractor’s right to payments under the contract is triggered by three types of certificates issued by the contract engineer: progress certificates, an interim certificate of completion and a final certificate of completion. A brief summary of the payment provisions follows.

[15] At the end of each payment period (30 days or such other interval as may be agreed), the contractor submits a written progress claim describing the work completed and material delivered to the work site during that period. The engineer is to inspect the work and issue a progress certificate indicating the value of the part of the work and material described in the progress claim that, in his opinion, is in accordance with the contract and has not been included in any other progress report. Payment of 95% of the value indicated in the progress report is then to be made. These amounts are referred to as progress claims or progress payments. All of this is described in TP4.

[16] The interim certificate of completion is the certification by the engineer that the work is sufficiently complete to be acceptable for use although certain work remains to be done: see GC44.2, also in Annex A, attached. Pursuant to that certificate, the balance of the contract price becomes due excluding the estimated amount necessary to rectify any defects and to complete any work remaining to be done: see TP4.7, Annex A.

[17] By a final certificate of completion, the engineer certifies that the work has been completed and the contractor has complied with the contract: see GC44.1. Pursuant to that certificate, the remaining amounts payable are to be paid.

[18] Although the contract sets out the times within which payments are to be made, it also addresses the issue of delay in making payment. Such delay is specified not to be a breach of contract but the contract provides for interest on delayed payments which are due pursuant to progress certificates and the interim certificate of completion. TP6 provides as follows:

> **TP6 Delay in Making Payment**
>
> 6.1 Notwithstanding GC7 any delay by Her Majesty in making any payment when it is due pursuant to these Terms of Payment shall not be a breach of the contract by Her Majesty.
>
> 6.2 When Her Majesty delays in making a payment that is due pursuant to TP4.4 and TP4.7, the Contractor shall be entitled to receive simple interest on the amount that is overdue from and including the day that it became overdue up to and including the date that the payment was made, at the annual rate of interest described in TP6.3.
>
> .....
>
> 6.4 The Contractor shall not be entitled to receive interest on any other amount that is unpaid including, without limitation, an amount that is calculated in accordance with GC50. (emphasis added)

2. Disputes between the parties:

[19] The trial judge found that Public Works breached the contract by wrongfully terminating the contract, by wrongfully assuming the role of the contract engineer and

wrongly depriving Matheson of the right to renegotiate the prices of certain aspects of the contract. His award of damages may be broken down into three main components.

a. progress claims:

[20] First, there was an award for unpaid progress claims and hold backs. It was admitted that Public Works owed $105,355 on progress claims submitted by Matheson in 1988 and $16,000 held back. These amounts were not paid because Public Works was advancing a set off for expenses it alleged were incurred as a result of Matheson's failure to complete on time. The award of these amounts followed the judge's finding that it was Public Works and not Matheson that had breached the contract. The judge awarded contractual interest (although running from different dates) on these amounts because they were delayed payments on which interest was payable pursuant to TP6.2. This award is not challenged on appeal.

b. wrongful removal:

[21] The trial judge found that Matheson had been wrongfully removed. As noted, he found that it had been a breach of contract for Public Works to remove Matheson while its extension request was pending and that it was also a breach for Public Works to assume the role of the contract engineer and thereby deprive Matheson of a fair consideration of its extension request. The judge further held that if these breaches had not been committed, Matheson's extension request would have been granted. He stated:

> ..... In determining liability, I have stated my finding that Matheson had a compelling case for extension to the spring or summer. Now that I have to determine the present issue, it is necessary to go a little further with this finding. Cognizant that it is a matter involving the expertise of engineers, I am, nevertheless, satisfied that an engineer, acting judicially, would have granted the request. I find that, but for the broader breach, the completion date would have been extended to the spring or summer. That would have permitted a winter shut-down. The added cost of performing under winter conditions is well within the limits imposed by the rule respecting remoteness. To destroy the power to extend time would obviously destroy opportunities for a justified shut-down. The expense of performance was increased to the extent that winter work was less efficient and more costly to Matheson. Its expenditures for the additional labour and the additional costs of operating equipment during winter are, therefore, recoverable as out-of-pocket expenses occasioned by the government's breach. (emphasis added)

[22] The trial judge found there were three components to this part of the wrongful removal claim, namely, the amount owed by Matheson to the bonding company ($78,160), additional costs resulting from working in winter conditions ($27,894) and extra costs for removal of seaweed ($2,698) for a total of $108,752. (There appears to be a clerical error in the judge's reasons where the total of these damages is stated to be $167,575. There is no dispute on appeal that $108,752 is the correct amount.)

[23] The trial judge awarded interest on these amounts (as well as amounts awarded in relation to extras ($9,993) and certain admitted claims ($914) for a total of $119,659) pursuant to statute at a rate (8.65%) agreed to by the parties. He noted that the statutory authority to award pre-judgment interest is found in s. 31 of the **Crown Liability and Proceedings Act**, R.S.C. 1985, c. C-50 as amended by S.C. 1990, c. 8, s. 31. That provision applies the statute law of the province in which the cause arose (in this case, s. 41 (i) and (k) of the **Judicature Act**, R.S.N.S. 1985, c. 240). However, s. 31(6) of the federal **Act** provides, in effect, that interest may not be awarded prior to

February 1, 1992. The judge awarded interest from that date although the claim arose in 1989.

[24] Public Work's argued at trial that a shorter period of interest should be ordered because of undue delay by Matheson in asserting its claim. The trial judge rejected this argument, finding the delay was not undue in all of the circumstances. The decision not to limit the period of interest is one of the two issues raised by Public Works on appeal.

c. other amounts:

[25] The dispute concerning the trial judge's award of contractual interest relates to whether contractual interest was properly ordered on three amounts.

[26] The first relates to a renegotiated price for 9 - 12 tonne armour stone. The trial judge assessed this amount at $167,591.00 and found that interest pursuant to the contract was payable on it. Only the decision respecting interest is under appeal. To understand the interest issue, however, it is necessary to set out the basis of the trial judge's assessment of the main claim.

[27] As noted, the trial judge found that Public Works breached the contract by taking over the functions of the contract engineer. He further determined that this assumption of the engineer's functions effectively deprived Matheson of its right to renegotiate prices for certain items in the unit price table pursuant to GC47 (which I

have set out in Annex A). GC47 provides that a price in the unit price table may be renegotiated if the quantity of that item used or expected to be used is less than 85% or more than 115% of the estimated quantity shown on the table. The new price may be set by mutual agreement of the engineer and the contractor or, failing agreement, pursuant to the provisions of GC50.

[28] The trial judge found that Public Works had wrongly ordered extra 9 - 12 tonne armour stone to defeat this entitlement to renegotiation and hence a possibly increased price. He said:

> ..... The contract prescribes a unit price for the nine to twelve tonne armour stone (A5.1.13), but it also provides that the contractor may obtain a greater price in some circumstances. .....
>
> The nine to twelve tonne armour stone placed as originally contracted weighed less than 85% of the estimated 10,500 tonnes. Thus, Matheson would have been entitled to renegotiate with the engineer, and, if those negotiations were unsuccessful, to be paid in accordance with GC50. However, Public Works twice directed Matheson or the bonding company to place extra nine to twelve tonne armour stones, and, when these are included, the percentage increases to 86.1%. .....
>
> ..... I am satisfied that the sole motive for ordering both extras was to incorporate more than 85% of the estimated quantity of the largest armour and, thereby, defeat Matheson's right to renegotiate the price. .....
>
> ..... The government is also liable to Matheson on account of the actual quantities of the largest armour stone, ... having not exceeded 85% of the estimated quantities, which liability regards three contracted rights: the right to negotiate a new price with the owner, the right, if those negotiations failed, to have the price impartially and fairly determined by the engineer without cost to Matheson, and an ultimate right to the difference between the original price and a price calculated by the engineer in accordance with the requirements of the contract. (emphasis added)

[29] When he turned to the remedy for this breach, the judge determined the price to which the engineer and Matheson would have agreed had Public Works not wrongly

defeated Matheson's right to renegotiation and not wrongly taken over the role of the contract engineer. He said:

> The object of this assessment is to place Matheson in the position it would have occupied had the government not breached the contract. One of the breaches that is the focus of this assessment is the government's contrivance to avoid renegotiation by ordering unnecessary extras, which deprived Matheson of more than a right to a new price calculated under GC50, but deprived it also of a right to good faith negotiations, and a right to have the engineer calculate the price. However, the general breach throughout, taking over the role of the engineer, is also part of this assessment. Not only did that deprive Matheson of the same rights just referred to, it also made calculation under GC50 impossible because so many of the costs within the various categories of GC50.2 depend upon the judgment of the engineer. To put Matheson in the required position involves an inquiry into what price an engineer, acting fairly, would calculate under section GC47.3 and pursuant to GC50, and also, what price the owner would have offered on negotiations under GC47.1. The costs recognized by GC50, and the allowance for overhead and profit, will overshadow other considerations, as GC50 would have overshadowed the negotiations and as it would have been determinative of the engineer's calculation, but that is not to say that the plaintiff has to prove damages by evidence fitting strictly within GC50. To approximate price under GC50 is to put Matheson in the required position, because that is precisely what Matheson and the engineer would have done in the mandated negotiations, and because that approach does not shift the obligation to make the calculations from the engineer to the contractor. (emphasis added)

[30] The other two amounts relevant to this part of the judge's award are $10,115.00 assessed for additional dredging and filter stone and $13,999 for other extras, work on another breakwater and concrete removal. As regards the $10,115.00 for dredging and filter stone, the right to renegotiate these prices was triggered by the 115% provision in GC47.1.2 because the amount required was more than 115% of the estimated amount. There was no contrivance to avoid this right to renegotiation; the only question at trial was what the prices should be. The trial judge approached this in the same fashion as the 9 - 12 tonne armour stone, by determining what price would have been agreed upon had the role of the contract engineer not been wrongly assumed by Public Works.

[31] The final amount under this head of $13,999.00 related to properly ordered extras. While different provisions of the contract apply to determining the prices to be paid for these items, the basic question was the same: what price would have been arrived at through agreement with the engineer against the background of GC50.

[32] The contractual interest issue on appeal relates to the judge's decision to award interest on these amounts (i.e., $167,591 for the armour stone, $10,115 relating to dredging and filter stone, and $13,999 relating to work on another breakwater and concrete work, for a total of $191,705) pursuant to the delayed payment provisions of the contract. The trial judge referred to these amounts as "... owing pursuant to promises to pay in the contract, but which were calculable pursuant to GC50 rather than the specific prices." He held that these amounts were payable forty days after submission of the final certificate and awarded interest pursuant to the contractual provisions from October 24, 1989. He found that they did not fall within TP6.4 which excludes interest on an amount "..calculated in accordance with GC50". In his view, the provisions in TP6.4 were contradictory and should, therefore, be construed against Public Works which controlled the drafting of the contract. This holding is challenged in Public Works' appeal.

d. loss of future profits:

[33] Matheson argued at trial that the effect of Public Work's wrongful call on its bond was that it could not compete for larger projects because it could not obtain bonding or post cash. Matheson claimed that, as a result, it lost future contracts and

the profit it would have made on them.

[34] The trial judge held that these losses were too remote. He found that, because of the call on the bond, Matheson was unacceptable to the insurance markets until 1995 and that the firm would have realized much better profits had it not become unbondable and unable to post cash. He also found that it was foreseeable that the call on the bond would result from the kinds of breaches committed and that insurers will not bond contractors for a time after a claim has properly been made on a bond. However, the trial judge concluded that the claim was too remote because "... there is nothing from which [he could] conclude that the same result should occur where the call is unjustified, let alone so obviously unjustified that the bonding company, its counsel and its engineers would ally themselves with the contractor as closely as they did in this case." This holding is challenged on Matheson's cross-appeal.

e. fees paid to witnesses:

[35] Matheson was awarded costs at trial and sought to recover (among other things) $37,960 paid to Mac Williams Engineering Limited. This amount related to the fees charged by Malcolm and Donald Williams in relation to their preparation for and testimony at trial.

[36] As a condition of accepting the bonding company's proposal to subcontract the work to Matheson, Public Works insisted that Matheson engage a superintendent for the project. Donald Williams was so appointed. He is the son of Malcolm Williams

and a principal of Mac Williams Engineering Limited. Both Williams testified on behalf of Matheson at trial. The trial judge acknowledged that their evidence was extensive and crucial but that they did not testify as experts. He noted that, in one respect, they were ordinary witnesses and in another they were assisting counsel and drew upon their professional expertise and their direct knowledge of the complicated events giving rise to the claims.

[37] The trial judge held that the engineer's fees were not recoverable as disbursements for two reasons. First, he thought that fees paid to ordinary or "fact" witnesses, as opposed to expert witnesses, should not be recoverable because it is not necessary to pay such fees; everyone who knows relevant facts has a duty to testify. Second, he thought that the assistance the engineers rendered to Matheson's counsel could be reflected in the counsel fee awarded and that allowance of this disbursement might lead to double recovery. The judge's refusal to allow this amount as a disbursement is challenged in Matheson's application for leave to appeal.

IV. Analysis:

1. The Appeal:

a. the period of statutory interest:

[38] Public Works submits that Matheson was guilty of undue delay in prosecuting its claim and that the trial judge, therefore, erred in awarding statutory interest for 11 years.

[39] As noted earlier, the judge's authority to award interest arose from the **Crown Liability and Proceedings Act** which, in effect, adopts the interest provisions of the Nova Scotia **Judicature Act**. These provisions give the judge a discretion to decline to award interest or to reduce the period for which it is awarded if Matheson had been responsible for undue delay in the litigation. The relevant sections are:

> **Crown Liability and Proceedings Act**
>
> 31. (1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings against the Crown in any court in respect of any cause of action arising in that province.
>
> .....
>
> 31. (6) This section applies in respect of the payment of money under judgment delivered on or after the day on which this section comes into force, but no interest shall be awarded for a period before that day.
>
> **Judicature Act**
>
> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> .....
>
> (i) In any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
>
> .....
>
> (k) The Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,

> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
> (iii) the claimant has been responsible for undue delay in the litigation.
> (emphasis added)

[40] The trial judge found that there had been no undue delay by Matheson in all of the circumstances. He stated:

> Considering the numerous issues involved (note the distressing length of this decision itself), the two weeks of testimony, and the hundreds of pages of documentary evidence, the case was brought speedily to trial once the action was commenced. The question is whether the eight year delay before commencing action was "undue". I find that Matheson delayed commencing this action because it could not afford litigation until it regained financial health in the mid-nineties. That fact alone militates strongly against a finding of undue delay. The expense of civil litigation is a great concern of the bench and the Bar. ..... The problem is acute where a small business finds itself in a complicated commercial dispute and negotiations have reached an impasse. Such cases can rarely be financed on a contingency agreement. They cannot be presented effectively without labourious efforts of skilled professionals. And, because the factual and legal issues are complex, these cases entail great risks. Delay until the company can afford the costs of litigation or absorb the financial consequences of failure, is a prudent, rather than an "undue", course of action. The excuse of financial inability is the more pointed where the other party bears some responsibility for the distress. It is to be remembered that an award of prejudgment interest is more than compensation for a loss. It is also a restoration of property, because the party in breach has had the use of the innocent party's money. In that light, financial inability to litigate a valid claim is always related to behaviour of the party in breach. However, in this case the responsibility is much greater than that. Although I have found that Matheson's expenses for extraordinary financing and its losses on becoming unbondable are too remote for recovery, those expenses and losses were caused by the government's breaches. Thus, the government bears some responsibility for the delay. Although the delay was very long, I cannot find that it was undue. (emphasis added)

[41] As noted, the statutory award of interest cannot relate to a period prior to February 1, 1992. The losses in this case pre-date that by nearly three years so that, in effect, the period of interest was reduced by that length of time.

[42] In my view, Public Works faces a double hurdle in challenging the judge's decision not to further reduce the period for which interest was payable. The decision to

award or withhold interest is discretionary; whether the delay was undue in all of the circumstances is largely a question of fact. Both the trial judge's fact-finding and his exercise of discretion are entitled to deference in this Court. Hallett, J.A. made this point in his reasons for the Court in **K. W. Robb & Associates Ltd. v. Wilson** (1998), 169 N.S.R. (2d) 201, [1998] N.S.J. No 249 (Q.L.) at § 45, 49 and 51:

> I wish to emphasize that the discretion that a trial judge may exercise with respect to pre-judgment interest is extremely broad and it is one that an Appeal Court will not lightly interfere with when exercised in a reasonable manner. .....
>
> This appeal on the interest issues is an appeal from the exercise of a discretionary power by a trial judge. It is trite to state that an appeal court will not interfere with the exercise of a discretionary power unless wrong principles of law have been applied or a patent injustice has resulted. .....
>
> In this appeal, this Court is required to look at the factual basis which led the trial judge to exercise his discretion to award interest for nine years and at the rates of interest he fixed as being fit. The law is very clear that an Appeal Court will not interfere with a trial judge's conclusions on matters of fact unless he has made an overriding error that has affected in an important way the conclusions he reached. ..... (emphasis added)

[43] I agree with Public Works that where, as here, there has been a lengthy delay in pursuing litigation, the party claiming interest should, generally, provide an explanation for it. However, in this case, Matheson did so and that explanation satisfied the trial judge that the delay was not undue. Matheson did not just sit on its hands. It made an initial demand in January of 1990; Public Works was well aware of its claims. Matheson pursued alternative dispute resolution. It attempted to resolve the matter through the intervention of a member of Parliament and a federal cabinet minister. While litigation was not started promptly, Matheson did attempt to assert its claim in other ways. Once Matheson sued, it proceeded speedily to trial.

[44] Public Works referred us to several decisions in which shorter periods of interest were ordered because there had been undue delay in pursuing claims. I do not think much is to be gained by comparing the length of the various periods permitted in other cases; each case turns on its own particular facts. As Hallett, J.A. said in **K.W. Robb, supra**, the burden is on Public Works to show an overriding error of fact, an error in legal principle or an injustice. The fact that the period of interest allowed here is very long compared to most of the decided cases does not, on its own, discharge that burden.

[45] Public Works argues that Matheson's weak financial position should not have been accepted as an excuse for the delay. I agree that, as a general rule, reasonable limits must be placed upon the extent to which the plaintiff's financial inability to pursue a claim will justify interest being payable through a period of what would otherwise be considered unreasonable delay. However, I do not think that the discretion to award interest under s. 41 is confined by strict principles of remoteness or mitigation which apply to the assessment of damages. Interest is awarded on money the use of which the plaintiff has wrongly been deprived. In determining that sum, the applicable limiting doctrines, such as remoteness and mitigation, have already been applied. Moreover, the defendant has had the benefit of the use of the money throughout the period for which the plaintiff has been deprived of it.

[46] The question, in my opinion, is whether the plaintiff unduly delayed pursuit of

the claim in all of the circumstances. Here, the trial judge decided, in effect, that Matheson was reasonable to pursue the claim in other ways and to commence litigation only when its financial position permitted it to do so. In my view, he did not err in taking into account as factors supporting this conclusion that Matheson was financially unable to pursue the litigation and that this inability was brought about at least in part by Public Works. While the eight year delay here is very long, the judge did not apply a wrong principle nor was his decision to award interest unjust.

[47] For these reasons I would reject Public Work's submission that the trial judge erred in awarding statutory interest from February 1, 1992.

b. contractual interest:

[48] This interest issue relates to the judge's award of interest pursuant to the contract on amounts totalling $191,705.00. He characterized these as amounts "... owing pursuant to provisions to pay in the contract, but which were calculable pursuant to GC50 rather than the specific prices ....". I have set out at §25-31 the basis of the award on which contractual interest was found to be payable; it related to the recalculated price of the 9 - 12 tonne armour stone ($167,591), excess dredging and filter stone ($10,115) and extras ($13,999).

[49] Public Works submits that the judge erred by awarding contractual interest on these amounts. It argues that contractual interest is excluded by two provisions of TP6.4. First, TP6.4 provides that the contractor shall not be entitled to receive interest

on any other amount that is unpaid, it being fairly clear that “any other amount” refers to amounts other than those referred to in TP4.4 (progress amounts) and TP4.7 (interim certificate of completion). Public Works says that the amounts in question are GC50 amounts and, therefore, no entitlement to interest on them arises under the contract. Second, Public Works relies on the second branch of TP6.4 which provides that the contractor shall not be entitled to receive interest on an amount calculated in accordance with GC50. Public Works submits that this makes it abundantly clear that no interest is payable pursuant to the contract on delayed payment of sums determined pursuant to GC50 and that the amounts on which the trial judge awarded contractual interest are GC50 amounts.

[50] The trial judge, as noted, awarded interest pursuant to the contract on the following basis. He determined that the provision relied on as excluding interest on these amounts was ambiguous; in his view, TP6.2 and TP6.4 are contradictory when read in the context of the whole contract. He therefore interpreted the contract *contra proferentum* with the result that the contradiction was resolved against Public Works which had control of the drafting of the contract. Public Works submits that the judge erred in finding these provisions self contradictory; it submits that the exclusion of interest on GC50 amounts is clear and unambiguous. Matheson, on the other hand, supports the reasoning of the trial judge and submits that, in essence, only payments pursuant to the final certificate of completion, such as for defects or costs to complete, calculable under GC50, are caught by the exclusion of interest under TP6.4.

[51] To consider this part of the appeal, I think it essential to go back to basic principles. The first question is what compensation should be awarded for Public Works' breaches of contract. The judge described the relevant breach and its effects as follows:

> ... the government's contrivance to avoid renegotiation by ordering unnecessary extras, which deprived Matheson of more than a right to a new price calculated under GC50 but deprived it also of a right to good faith negotiations and a right to have the engineer calculate the price. However, the general breach throughout, taking over the role of the engineer, is also part of this assessment, not only did that deprive Matheson of the same rights just referred to it also made calculation under GC50 impossible... **To put Matheson in the required position involved an inquiry into what price an engineer, acting fairly, would calculate under section GC47.3 and pursuant to GC50, and also, what price the owner would have offered on negotiations under GC47.1**.

[52] The trial judge also stated:

> Matheson lost more than a right to prove damages according to the standards of GC50. It lost the right to negotiate with the owner through the engineer ... An engineer discharging this function would have the same obligations of impartiality and fairness as referred to previously. **Thus Matheson also lost the right to have the price calculated impartially and fairly and without cost to it. Section GC50 does not operate as a contracted method of proving damages. Rather it is the last resort in a scheme for mediating price**.

[53] In my opinion, the judge found that, if the contract had been performed by Public Works, two things would have happened. First, Matheson's entitlement to seek new prices under the contract for some of the items in question would have been triggered. Second, the engineer and Matheson would have reached agreement on fair, new prices on these and other disputed matters. In other words, the trial judge found that, had the contract been performed in the relevant respects, the new prices which he determined at trial would have become payable under the contract. The trial judge's reasons as a whole make it clear that he did not assume that GC50 would have been

invoked but rather that good faith bargaining, conducted as it would have been against the background of GC50, would have led to agreement on fair, new prices.

[54] At some points in his reasons, the trial judge referred to these claims as amounts owing pursuant to promises to pay in the contract, but which were calculable pursuant to GC50. This, at first glance, suggests that the compensation awarded was in the nature of debt rather than damages for breach of contract and that the amounts were, in fact, GC50 amounts. I think when the reasons on this aspect are read as a whole, however, that what the judge meant by the phrase “amounts owing pursuant to promises to pay in the contract” is that these are amounts which would have been settled by agreement and become payable had the contract not been breached by Public Works contriving to avoid renegotiation and wrongly assuming the role of the engineer. In other words, the compensation is calculated to put Matheson in the position it would have been in had the contract been performed in these respects.

[55] If the contract had been performed, would contractual interest have been payable on these amounts? In my view, there are two aspects to this question. The first is whether these amounts would have become payable pursuant to TP4.4 (progress certificates) and TP4.7 (interim certificate of completion) had Public Works not breached the contract. Assuming that they would have been so payable, the second is whether contractual interest on them is excluded because they were GC50 amounts?

[56] It is convenient to start with the second aspect. The contract provides for

interest on amounts due pursuant to TP4.4 (progress certificates) or TP4.7(interim certificate of completion) if such payments are delayed. I agree with the trial judge that if the provision (TP6.4) excluding interest "... on an amount that is calculated in accordance with GC50" is read literally, it would contradict the provision (TP6.2) for interest on delayed payments due under TP4.4 or TP4.7. As the judge pointed out, the contradiction is as clear as if TP6.2 said interest is to be paid on amounts calculated in accordance with GC50 and TP6.4 said it was not. Such a self contradiction could not have been intended. There is no serious dispute in this Court that interest accrues on delayed payments of amounts due under TP4.4 or TP4.7, even if the amounts so due were calculated under GC50. I would hold, therefore, that the exclusion of interest on GC50 amounts in TP6.4 does not exclude interest on amounts that became payable under TP4.4 or TP4.7.

[57] There is some support for this view, at least by analogy, in **Award Industries (Mechanical) Ltd. v. Canada**, [1985] F.C.J. 14 (C.A.), (Q.L.). There the Court stated that the contract engineer's wrongful refusal to approve a progress claim is not a bar to recovery of contractual interest pursuant to a provision similar to what is now TP6.2. This is consistent with the view that if, but for the breach, the amount would have become payable and, if not paid, attracted contractual interest, such interest may be awarded to remedy the breach. In my view, that is the situation in this case.

[58] I turn then to the second aspect. The contract only provides for interest on

delayed payments of amounts due on progress certificates (TP4.4) and the interim certificate of completion (TP 4.7). If the contract had been performed, would those amounts have become due pursuant to progress certificates (TP4.4) or the interim certificate of completion (TP4.7)?

[59] When the trial judge's reasons on this point are considered as a whole, I think it is clear that he found first that, had Public Works not breached the contract, new prices would have been negotiated and second, that those renegotiations would have resulted in the amounts calculated pursuant to the renegotiated prices becoming due pursuant to TP4.4 and/or 4.7. Payment not having been made, he awarded interest on these amounts pursuant to the contract from, approximately, the time of completion of the work.

[60] There are certain passages in the judge's reasons which, at first glance, suggest otherwise. He, at times, refers to these amounts as "GC50 amounts"; however, his findings concerning the nature of the breach make it clear that, in his view, had the contract been performed, new prices would have been negotiated. He also held that these amounts were payable "... forty days after the submission of the final certificate..." and ordered interest to run from October 24, 1989 which is forty days from the date of completion of the work on September 14, 1989. Of course, amounts payable at the time of the final certificate do not attract interest under TP6.2 or TP 6.4 and, in any event, the relevant period is 60, not 40 days. However, it seems to me that what the trial judge intended, given his decision to award interest, was that, but for the breach,

the renegotiated prices would have been settled prior to the interim certificate of completion and, therefore, interest would have become payable pursuant to TP4.7 by at least the time work was substantially complete. Delayed payment would, therefore, attract interest pursuant to the contract. I think the trial judge's discussion of the "final certificate" and the date of completion are in the context of his determination of an appropriate point in time from which interest should run. The reconstruction of what would have happened but for the breach is not an exact science. The judge's choice of a date linked to substantial completion of the work was reasonable.

[61] That said, I should add that I accept, in general, the submission of Public Works that contractual interest cannot accrue on amounts that are not liquidated and due under the contract; I agree, in general, with the statement in Public Works' factum that "... until an agreement is concluded, or a claim resolved, ... GC50 claims ... do not become payable under the contract. Until obligations become overdue, they do not attract interest." (To the same effect see **Entreprises Blanchet Lteé v. Canada** (1986), 8 F.T.R. 31; [1986] F.C.J. No.395 (T.D.), (Q.L.) at p. 36; aff'd (1988), 95 N.R. 75.) However, in my opinion, what the trial judge found in this case is that had Public Works not breached the contract, these amounts would have been agreed upon and become payable under the contract so as to attract interest if payment were delayed. He did not err, therefore, in awarding contractual interest as part of the remedy for this breach.

c. disposition of the appeal:

[62] For the reasons I have given, I do not think the trial judge erred in either his decision to award contractual interest on the portion of the award which he did or in awarding interest pursuant to statute from February 1, 1992. I would, therefore, dismiss Public Works' appeal.

2. The cross-appeal and the Appeal by Matheson from the Award of Costs:

a. loss of future profits:

[63] Matheson claimed for profits lost as a result of inability to bid on jobs. This inability allegedly arose from it being unable to obtain performance bonds or post cash which, in turn, resulted from Public Work's wrongful call on its bond.

[64] The trial judge found that Matheson suffered a loss of profits as a direct result of the breaches by Public Works. He also found that the call on the bond was a foreseeable result of the kinds of breaches that occurred. He concluded that it is notorious insurers will not bond contractors for a time after a claim has properly been made on a bond. He could not conclude, however, that the same result would occur where the call is unjustified, let alone so unjustified that the bonding company and its engineers would ally themselves with the contractor as closely as they did in this case. In short, the judge held that it was not in the reasonable contemplation of the parties at the time of contracting that a wrongful call on a bond in circumstances in which the contractor continued to enjoy the confidence of the bonding company, would result in

Matheson becoming unbondable.

[65] The trial judge also rejected Matheson's claim for interest and service charges, professional fees and overhead expenses incurred in obtaining extraordinary bank financing to complete the work. This part of the judgment is not appealed, but I think the judge's findings of fact on this aspect are relevant. The judge observed that Matheson's balance sheet had been so severely affected that during the winter of 1989 it was unclear whether it could commit to complete the work as subcontractor and that financing of $300,000 had been required which had only been obtained after extensive efforts. The trial judge, however, rejected the claim related to this extraordinary financing for several reasons including that it was too remote and that Matheson would have experienced financial stringency even without Public Works' breach. In this regard he stated:

> ..... Even if the government had not removed Matheson and even if the engineer had granted an extension, the project would have taken a year to complete, with a large increase in expenses over the initial costing, which was based on eighteen weeks. Accepting $500,000 as the over-all loss in cash flow, I would estimate the loss would have been $350,000 in any case, allowing for the withheld progress claims, the inefficiencies of winter work and ten percent for miscellaneous expenditures. It appears Matheson had the resources to finance $200,000 and it would have needed another $150,000 in extraordinary financing even if there had been no breach.
>
> ..... the claim exceeds the limits of the rule respecting remoteness of damages. Remoteness or proximity is determined by looking at the breach from the perspective of the parties at the time the contract was made, and asking "... whether the parties, at the time of contracting, could reasonably have contemplated the occurrence of the type of loss suffered given their knowledge of each other's affairs. [Harvin D. Pitch and Ronald M. Snyder, *Damages for Beach of Contract*, 2nd ed. (Toronto: Carswell, 1989, rel. 1998), p. 7-1] The assessment is to be made based upon knowledge imputed to the parties of those things which occur in the ordinary course [Ibid., p. 7-5], but it is also to be based upon any actual knowledge of special circumstances material to the claim [ibid., p. 7-7]. There is no suggestion that Matheson was extraordinarily vulnerable, let alone

> that any special circumstances were known to the government at the time of the contract. Matheson undertook a project both parties recognized as involving significant risk because the length of the project could not be predicted with much certainty, and because the source of materials was not vouched safe. The government was entitled to expect that Matheson had the resources or bank financing to handle the losses if the project should cause losses rather than produce profits. I find that when the contract was signed, the parties would not have reasonably contemplated a requirement for extraordinary financing as a possible result of the kinds of breaches that occurred. (emphasis added)

[66] In my opinion, the trial judge concluded that any special financial vulnerability Matheson may have had was not in the contemplation of the parties and was not communicated to Public Works and, further, that Matheson would have experienced some financially stringency even if Public Works had not breached the contract.

[67] Matheson argues that the trial judge erred by focussing his analysis on the fact that the call on the bond was unjustified; it submits that the proper approach is to focus on the time the contract was signed and whether it could be reasonably contemplated by the parties that a breach of contract which resulted in a call on the bond would prevent Matheson from being able to obtain bonding subsequently. As counsel put it in the factum, this is "... a simple matter of wrongful call on a bond causing a contractor to become unbondable resulting in a loss that was reasonably foreseeable."

[68] There is no dispute in this case concerning the legal test for remoteness. The trial judge expressed it both in terms of what the parties would reasonably have contemplated at the time of contracting and in terms of what they would have foreseen. As the Supreme Court of Canada has noted, whether expressed in the traditional

contract language of reasonable contemplation or traditional tort language of foreseeability, there is probably no practical difference, subject of course to special knowledge, understanding or relationship of the contracting parties and the terms of the contract: see e.g., **Asamera Oil Corp. v. Sea Oil & General Corp.**, [1979] 1 S.C.R. 633 at 673; **B.D.C. Ltd. v. Hofstrand Farms**, [1986] 1 S.C.R. 228 at 243 - 4; **B.G. Checo Int. Ltd. v. B.C. Hydro & Power Authority**, [1993] 1 S.C.R. 12 at 42.

[69] The dispute here concerns the application of the test to the facts. The starting point, in my opinion, is recognition that remoteness imposes on damage awards reasonable limits which are required by fairness: see e.g., **Amar Cloth House Ltd. v. LA Van & Co.**, [1997] B.C.J. No. 1048 (Q.L.); [1997] 6 W.W.R. 382 (S.C.) at §43. As McLachlin, J.A. (as she then was) pointed out in **Houweling Nurseries Ltd. v. Fisons Western Corp.** (1988), 49 D.L.R. (4th) 205 (B.C.C.A.) at 211, it is not fair to require a defendant to pay damages he or she could not reasonably foresee at the time of contracting because, if made aware of them, the defendant could have decided not to accept that risk of breach and contracted with someone else.

[70] Matheson relies principally on two cases, neither of which, in my view, supports its position. **Canlin Ltd. v. Thiokol Fibres Canada Ltd.** (1983), 142 D.L.R. (3d) 450 (Ont. C.A.) concerned a claim by a manufacturer of swimming pool covers against the supplier of defective materials. It was known to the supplier that the manufacturer was in the business of selling its product to distributors and that the

materials were to be used for the purpose of manufacturing the items in question. Cory, J.A. (as he then was) held that damages for loss of profits could be recovered where the loss resulted from the supply of defective materials by the supplier because the supplier could reasonably foresee the very effects of its breach. In other words, it was taken to be reasonably foreseeable that a loss of profits would flow from the supply of defective goods known to be intended for manufacture of articles for resale. I do not see the parallel between **Canlin** and the case at Bar. In **Canlin**, it was known to both parties that the purpose of the contract was to permit the plaintiff to manufacture goods for resale at a profit. There are no similar circumstances here.

[71] Matheson also relies on the decision of Green, J. (as he then was) in **Rose (T.) Construction Ltd. v. Omex International Inc. et al.** (1994), 122 Nfld. & P.E.I.R. 280 (S.C.). Green, J. concluded that the contractor's loss of future work was, in the special circumstances of that case, a probable and foreseeable consequence of the owner's failure to pay : at § 33. However, the special circumstances included the fact that the defendants not only knew that their failure to pay would essentially shut down the plaintiff, but also insisted that the plaintiff not take on any other jobs during the currency of the contract. In short, the defendants insisted that the plaintiff, in effect, entrust its continued financial health totally to the defendants' hands: see § 28 and 29. There are, of course, no similar circumstances in the case before us.

[72] Matheson's claim for lost profit is, in effect, a claim for the loss of other

business opportunities caused by financial stringency resulting from Public Works' breaches of contract. While such losses may be recoverable, they will generally be so only when the circumstances of the transaction and the dealings between the parties are such that the financial vulnerability of the plaintiff and the likely impact of breach may be said to be within their reasonable contemplation at the time of contracting. Simply put, the question is whether, in light of all the circumstances, the defendant, by entering into the contract, may justly be considered as having undertaken this risk of breach.

[73] **Rose Construction, supra**, is a good example; the defendant actually knew of the circumstances and requested the actions of the plaintiff which created the risk: see § 29. Similarly, in **General Securities Ltd. v. Don Ingram Ltd.**, [1940] S.C.R. 670, consequential damages were awarded for breach of a contract to loan money, but the Court stressed the defendant's knowledge of the consequences of breach. On the other hand, where such knowledge is absent and cannot justly be imputed, similar claims have tended to be rejected as too remote: see e.g. **Andre Knight Ltd. v. Presement**, [1967] 2 O.R. 289 and, in a very different context, **B.D.C. Ltd. v. Hofstrand Farms Ltd.**, [1986] 1 S.C.R. 228 at 243-246.

[74] With great respect, I do not agree with the trial judge that Public Works' call on Matheson's bond, because it was so obviously wrongful, could not have been expected to result in Matheson becoming unbondable. Whether a call on a bond is

justified or not is determined, often years later, in court. I do not think the rule of remoteness of damages in contract attributes to the parties such a nuanced sense of whether the call will be perceived by the insurance markets as justified or not. The key question, however, is whether Matheson's inability to bid on jobs was within the reasonable contemplation of the parties. The trial judge found that the project entailed significant risk, that there was no suggestion that Matheson was extraordinarily vulnerable and that no special circumstances of Matheson's special vulnerability were known to Public Works at the time of contracting. I do not think it would be just in such circumstances to hold that Public Works should be considered as having undertaken the risks arising from Matheson's financial vulnerability in the event of breach. Absent special circumstances, one party to a commercial contract generally does not become the insurer of the other party's financial health.

[75] While I do not subscribe to all of his reasoning, I do not think the trial judge erred in finding the loss of profits on secondary transactions too remote and I would not disturb his conclusions in this regard.

b. costs of the engineer witnesses:

[76] Two engineers from the firm Mac Williams Engineering testified on behalf of Matheson at trial and were paid professional fees for preparation and court time. They did so as fact witnesses rather than experts but in their capacities as engineers. The trial judge refused to allow their fees as disbursements. He did so for two reasons: first, because the engineers testified as fact witnesses and therefore had a duty to give

evidence pursuant to subpoena and, second, because of the danger of double recovery through an overlapping with the counsel fee awarded.

[77] I should say at the outset that I do not find the second of these two reasons persuasive. Double compensation can always be prevented through exercise of discretion to set an appropriate counsel fee.

[78] Is an allowance for preparation time of a fact witness permitted under the **Rules** and the Tariff? Under **Rule** 63.04 (subject to some exceptions not relevant here), the costs between parties shall be fixed by the court in accordance with the Tariffs unless the court otherwise orders. Pursuant to **Rule** 63.10A, a party entitled to costs is entitled on the same basis to that party's disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs, unless the Court otherwise orders. Both of these Rules, give a broad discretion to make an order other than in accordance with the Tariffs. In addition, under **Rule** 63.36, special allowance may be made for any just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses. Tariff D deals with disbursements allowable to a party entitled to costs. Under section 1, "Witnesses", attendance money payable to witnesses excluding parties is provided for. The amounts specified include a $35 per day attendance fee, mileage and $30 for each necessary overnight stay at the place of trial. Under section 2 of the Tariff, these attendance fees are recoverable from the opposite party. The same section also

provides for recovery of the reasonable cost of experts reports and of fees paid to expert witnesses: see section 2(3) and 2(4). Section 2(13) gives a broad discretion to allow "all other reasonable expenses necessarily incurred, when allowed by the taxing officer." The relevant **Rules** and the Tariff appear to me to confer a broad discretion to permit recovery of an allowance for preparation time for a fact witness.

[79] There is an argument to be made that the Tariff differentiates between expert and other witnesses and that this reflects a decision to restrict recovery of disbursements relating to non-expert witnesses to the attendance money specifically provided for in the Tariff. In other words, the specification of the amounts recoverable for the attendance of ordinary witnesses could be seen as excluding any other allowance.

[80] In my opinion, this is a compelling argument against any additional allowance in relation to the amount a witness may insist upon to answer a subpoena to testify at trial. It is clear under **Rule** 32.03(2) that the prescribed attendance money is all that is required. Similarly, the specification of the amount of attendance money is a strong argument against any additional allowance in relation to the time the witness testifies. However, the specification in the Tariff relates only to attendance money for the purposes of testifying; it does not address specifically the question of allowance for necessary preparation time. That silence, coupled with the broad discretion conferred under s. 2(13) of Tariff D and **Rules** 63.10A and 63.36 make it clear that, far from

excluding such an allowance, the wording of the **Rules** and the Tariff is amply broad to include a discretion to permit it. I note that there is no issue here as to any allowance beyond the tariff in relation to additional out-of-pocket expenses of witnesses and I do not address that issue. Nor am I concerned here with the costs of attendance at examinations for discovery.

[81] The key question, then, is not whether the **Rules** and Tariff confer such a discretion to make an allowance for preparation time; they clearly do. The question is whether the discretion should be exercised.

[82] As the trial judge pointed out, excluding recovery recognizes the duty of everyone with relevant information to respond to a subpoena. The obligation to testify is a civic duty which is essential for the due administration of justice. As Fraser, J. said in **Northland Properties Ltd. v. Equitable Trust Co.** (1992), 10 C.P.C. (3d) 245 (B.C.S.C.) at 254 - 5:

> The involuntary participation of non-involved persons in litigation is a longstanding tradition of the legal system. The rationale underlying the fact that persons can be compelled to be witnesses ... without being fully compensated for their loss of time is that the right of litigants to have justice done requires sacrifices on the part of others who have no interest in the outcome.

[83] The trial judge put it well when he said that no one has a duty to become a witness (in the sense of a duty to witness relevant events) but everyone has a duty to testify to that which they have witnessed. This distinction in relation to costs between experts and fact witnesses has long been recognized. In the 1843 case of **Webb v.**

Page 1 Car. & K. 23, Maule, J. said:

> There is a distinction between the case of a man who sees a fact and is called to prove it in a Court of justice and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge -- without such testimony, the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him. (emphasis added)

[84] The trial judge noted, however, that there are arguments of principle which favour allowing witness preparation fees as disbursements. Where the witness has been involved in complex matters, extensive trial preparation will not only be desirable but, in practical terms, essential. Such preparation time may far exceed the burden imposed by the civic duty to give evidence. While everyone with relevant information has a duty to testify pursuant to a subpoena, there is generally no legal duty to meet with counsel for preparation to give evidence. However, duty or no, thorough and proper preparation of witnesses is highly desirable for the orderly conduct of trials. While, in theory, witnesses such as these engineers could simply be served with a subpoena and attend at the trial to be questioned, such an approach would be unworkable in practice. It would significantly diminish the efficiency of the trial process and the comprehensibility of the evidence. As Professor Mewett points out, preparation of witnesses is the mark of good trial lawyer. It is to be commended because it promotes a more efficient administration of justice and saves court time: A W. Mewett, *Witnesses* (looseleaf, updated to release 2, 1999) at 6 - 1 quoting from **State of North Carolina v. McCormick** (1979), 259 S.E. 880 at 882. Such preparation should be encouraged, not sanctioned.

[85] The possibility of allowing recovery of a disbursement of this nature is also consistent with the purpose of awarding party and party costs. A costs order is intended to provide a significant contribution to, but not full indemnity for, reasonable expenses necessarily incurred on behalf of the party awarded costs. Failure to prepare witnesses such as these would seriously impede the efficient trial of the action; it is necessary as a practical matter. Where extensive preparation far exceeding the routine is, practically speaking, necessary, where it is reasonable to compensate the witness and liability to do so is incurred by the party calling the witness, it is consistent with the purpose of awarding costs to recognize this reality by an appropriate allowance.

[86] Some jurisdictions explicitly allow for such an award. For example, in British Columbia, Clause 4 of Schedule 3 of Appendix C of the **Rules of Court** states:

> For a witness other than a party or a present officer, director or partner of a party to a proceeding, a reasonable sum shall be allowed for the time employed and expenses incurred by the witness in preparing to give testimony, when that preparation is necessary.

[87] This suggests, at least, that it is not contrary to basic principles of our system of the administration of justice to allow recovery of an allowance for preparation time of fact witnesses.

[88] In relation to the concern that such an allowance might tend to undermine the duty to testify, it is helpful to distinguish between preparation time and time spent in testifying. In our Tariff, it seems to me that the specification of particular fees for the

attendance of witnesses, along with the different treatment of expert witnesses, supports the view that, generally, there should be no other recoverable attendance fees for fact witness attending trial pursuant to a subpoena to testify. However, allowing preparation fees as a disbursement in an appropriate case does not undermine the civic duty to answer to a subpoena but acknowledges the practical necessity of detailed preparation in complex matters. In my view, this underlines, rather than detracts from, the importance of the duty to testify. It also, as I have noted, recognizes the reality of the need for witness preparation in complex litigation, encourages trial preparation and supports the purpose of an award of costs.

[89] I would conclude, therefore, that where an unusual amount of witness preparation is necessary as a practical matter, where it is reasonable to pay a fee to the witness in all of the circumstances for such preparation and where a fee is paid or liability for a fee is incurred, an allowance on account of the preparation fee may be allowed as a disbursement in an award of party and party costs. Both the allowance of such a disbursement and its amount are discretionary. I am concerned in this case with witnesses who are not parties or officers of parties and my reasons are restricted to that type of witness.

[90] The factors relevant to the exercise of this discretion will develop in the case law. However, without attempting to be exhaustive, it may be helpful to set out some of the matters that should generally be taken into consideration:

1. Such a disbursement should generally be allowed only in exceptional

or unusual circumstances. A party and party award of costs is not full indemnification and any fee paid to fact witness for routine preparation is generally not recoverable.

2. As with other disbursements, no award should be made unless it is established that the expense, or liability for it, has actually been incurred. The obligation to pay the fee must not be contingent on success in the litigation or on an award of costs.

3. The amount of the allowance should reflect the nature of the preparation that was reasonably required and the nature of the evidence given. A physician who is a major fact witness in a civil fraud case, for example, is not necessarily entitled to his or her professional rates of compensation for preparing to give evidence unrelated to his or her area of professional expertise. On the other hand, where the witness's involvement as a fact witness arises from his or her professional activities, an allowance closer to the normal professional charges of the witness may be appropriate.

4. It may be appropriate to consider whether any compensation paid to the witness for services which are the subject matter of the evidence implicitly includes an allowance for testifying if required. If so, this may tend to reduce, or perhaps even eliminate, the claim for preparation time.

[91] In this case, the trial judge thought that he was precluded from allowing a

disbursement of this nature. In my opinion, he erred in this respect and I would grant leave to appeal and allow the appeal. Unless the parties can otherwise agree, I would remit the question of whether an allowance should be made and, if so, its amount to the trial judge for the exercise of his discretion in this regard. In doing so, he can, of course, address the possibility of overlap between such an allowance and the counsel fee which he awarded. My holding in this case simply confirms that the discretion to make such an allowance exists; it does not assume either that it should or should not be exercised in this case. That is a decision for the trial judge.

V. Disposition:

[92] For these reasons, I would dismiss Public Works' appeal with costs fixed at $5000 plus disbursements and dismiss Matheson's cross appeal without costs. On Matheson's appeal from the trial judge's award of costs, I would grant leave to appeal, allow the appeal and remit the matter to the trial judge for the exercise of his discretion with respect to the claimed disbursement in relation to preparation time only of Matheson's engineer witnesses. I would not make any other order for costs on Matheson's appeal and would reserve the costs of the proceedings I have directed before the trial judge to him.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Bateman, J.A.

ANNEX "A"

GC44 Engineer's Certificates

44.1 On the date that

44.1.1 the work has been completed, and

44.1.2 the Contractor has complied with the contract and all orders and directions made pursuant thereto,

both to the satisfaction of the Engineer, he shall issue a Final Certificate of Completion to the Contractor.

44.2 If the Engineer is satisfied that the work is sufficiently complete to be acceptable for use by Her Majesty, he may, at any time before he issues a certificate referred to in GC44.1, issue an Interim Certificate of Completion to the Contractor.

44.3 An Interim Certificate of Completion referred to in GC44.2 shall describe the parts of the work not completed to the satisfaction of the Engineer and all things that must be done by the Contractor before a certificate referred to in GC44.1 will be issued.

44.4 The Engineer may, in addition to the parts of the work described in an Interim Certificate of Completion referred to in GC44.2, require the Contractor to rectify any other parts of the work not completed to his satisfaction and to do any other things that are necessary for the completion of the work.

44.5 If the contract or a part thereof is subject to a Unit Price Arrangement, the Engineer shall measure and record the quantities of labour, plant and material, performed, used and supplied by the Contractor in performing the work and shall, at the request of the Contractor, inform him of those measurements.

44.6 The Contractor shall assist and co-operate with the Engineer in the performance of his duties referred to in GC44.5 and shall be entitled to inspect any record made by the Engineer pursuant to GC44.5.

44.7 After the Engineer has issued a Final Certificate of Completion referred to in GC44.1, he shall, if GC44.5 applies, issue a Final Certificate of Measurement.

44.8 A Final Certificate of Measurement referred to in GC44.7 shall

44.8.1 contain the aggregate of all measurements of quantities referred to in GC44.5, and

44.8.2 be binding upon and conclusive between Her Majesty and the Contractor as to the quantifies referred to therein.

GC47 Additions or Amendments to Unit Price Table

47.1 Where a Unit Price Arrangement applies to the contract or a part thereof the Engineer and the

Contractor may, by an agreement in writing,

47.1.1 add classes of labour, plant or material, and units of measurement, prices per unit and estimated quantities to the Unit Price Table if any labour, plant or material that is to be included in a Final Certificate of Measurement referred to in GC44.7 is not included in any class of labour, plant or material set out in the Unit Price Table; or

47.1.2 subject to GC47.2, amend a price per unit set out in the Unit Price Table for any class of labour, plant or material included therein if an estimated quantity is set out therein for that class of labour, plant or material, and a Final Certificate of Measurement referred to in GC44.7 shows or is expected to show that the total quantity of that class of labour, plant or material actually performed, used or supplied by the Contractor in performing the work is

47.1.2.1 less that 85% of that estimated quantity; or

47.1.2.2 in excess of 115% of that estimated quantity.

47.2 An amendment that is made necessary by GC47.1.2.2 shall apply only to the quantities that are in excess of 115%.

47.3 If the Engineer and the Contractor do not agree as contemplated in GC47.1, the Engineer shall determine the class and the unit of measurement of the labour, plant or material and the price per unit therefor shall be determined in accordance with GC50.

GC48 Determination of Cost — Unit Price Table

48.1 Whenever, for the purposes of the contract it is necessary to determine the cost of labour, plant or material, it shall be determined by multiplying the quantity of that labour, plant or material expressed in the unit set out in column 3 of the Unit Price Table by the price of that unit set out in column 4 of the Unit Price Table.

GC49 Determination of Cost — Negotiation

49.1 If the method described in GC48 cannot be used because the labour, plant or material is of a kind or class that is not set out in the Unit Price Table, the cost of that labour, plant or material for the purposes of the contract shall be the amount agreed upon from time to time by the Contractor and the Engineer.

49.2 For the purpose of GC49.1, the Contractor, when requested by the Engineer, shall submit a detailed statement of the cost to him of the labour, plant and material referred to in GC49.1 to the Engineer.

GC50 Determination of Cost — Failing Negotiation

50.1 If the parties or the methods described in GC47, GC48 or GC49 fail for any reason to achieve a determination of the cost of labour, plant and material for the purposes referred to therein, that cost shall be equal to the aggregate of

50.1.1 all reasonable and proper amounts actually expended or legally payable by the Contractor in respect of the labour, plant or material that falls within one of the classes of expenditure described in GC50.2 that are directly attributable to the performance of the contract, and

50.1.2 an allowance for profit and all other expenditures or costs, including overhead, general administrative costs, financing and interest charges, and every other cost, charge or expense, but not including those referred to in GC50.1.1 or of a class referred to in GC50.2, in an amount that is equal to 10% of the sum of the expenses referred to in GC50.1.1.

50.2 For the purposes of GC50.1.1 the classes of expenditure that may be taken into account in determining the cost of labour, plant and material are,

50.2.1 payments to subcontractors;

50.2.2 wages, salaries and travelling expenses of employees of the Contractor while they are actually and properly engaged on the work, other than wages, salaries, bonuses, living and travelling expenses of personnel of the Contractor generally employed at the head office or at a general office of the Contractor unless they are engaged at the work site with the approval of the Engineer;

50.2.3 assessments payable under any statutory authority relating to workmen's compensation, unemployment insurance, pension plan or holidays with pay;

50.2.4 rent that is paid for plant or an allowance for depreciation of plant owned by the Contractor that is necessary for and used in the performance of the work, if that rent or allowance is reasonable and use of that plant has been approved by the Engineer;

50.2.5 payments for maintaining and operating plant necessary for and used in the performance of the work, and payments for effecting such repairs thereto as, in the opinion of the Engineer, are necessary for the proper performance of the contract other than payments for any repairs to the plant arising out of defects existing before its allocation to the work;

50.2.6 payments for material that is necessary for and incorporated in the work, or that is necessary for and consumed in the performance of the contract;

50.2.7 payments for preparation, delivery, handling, erection, installation, inspection, protection and removal of the plant and material necessary for and used in the performance of the contract;

50.2.8 any other payments made by the Contractor with the approval of the Engineer that are necessary for the performance of the Contract.

TP4 Time of Payment

4.1 For the purposes of this Term of Payment, "payment period" means a period of 30 consecutive days or such other interval as is agreed between the Contractor and the Engineer.

4.2 The Contractor shall, on the expiration of a payment period, deliver to the Engineer in respect of that payment period a written progress claim that fully describes any part of the work that has been completed, and any material that was delivered to the work site but not incorporated

into the work, during that payment period.

4.3 The Engineer shall, not later than ten days after receipt by him of a progress claim referred to in TP4.2,

4.3.1 inspect the part of the work and the material described in the progress claim; and

4.3.2 issue a progress report, a copy of which he will give to the Contractor, that indicates the value of the part of the work and the material described in the progress claim that, in his opinion,
4.3.2.1 is in accordance with the contract, and
4.3.2.2 was not included in any other progress report relating to the contract.

4.4 Subject to TP1 and TP4.5, Her Majesty shall, not later than 30 days after the issue of a progress report referred to in TP4.3, pay the Contractor

4.4.1 an amount that is equal to 95% of the value that is indicated in that progress report if a labour and material payment bond has been furnished by the Contractor, or

4.4.2 an amount that is equal to 90% of the value that is indicated in that progress report if a labour and material payment bond has not been furnished by the Contractor.

4.5 It is a condition precedent to Her Majesty's obligation under TP4.4 that the Contractor has made and delivered to the Engineer a statutory declaration described in TP4.6 in respect of a progress claim referred to in TP4.2.

4.6 A statutory declaration referred to in TP4.5 shall contain a deposition by the Contractor that

4.6.1 up to the date of his progress claim he has complied with all his lawful obligations with respect to the Labour Conditions; and

4.6.2 up to the date of his immediately preceding progress claim

4.6.2.1 he has paid his suppliers in full for all materials, and
4.6.2.2 he has discharged all his lawful obligations to his subcontractors.

4.7 Subject to TP1 and TP4.8, Her Majesty shall, not later than 60 days after the date of issue of an Interim Certificate of Completion referred to in GC44.2, pay the Contractor the amount referred to in TP1 less the aggregate of

4.7.1 the sum of all payments that were made pursuant to TP4.4;
4.7.2 an amount that is equal to the Engineer's estimate of the cost to Her Majesty of rectifying defects described in the Interim Certificate of Completion; and
4.7.3 an amount that is equal to the Engineer's estimate of the cost to Her Majesty of completing the parts of the work described in the Interim Certificate of Completion other than the defects referred to in TP4.7.2.

4.8 It is a condition precedent to Her Majesty's obligation under TP4.7 that the Contractor has made and delivered to the Engineer a statutory declaration described in TP4.9 in respect of an Interim Certificate of Completion referred to in GC44.2.

4.9 A statutory declaration referred to in TP4.8 shall contain a deposition by the Contractor that up to the date of the Interim Certificate of Completion he has

4.9.1 complied with all his lawful obligations with respect to the Labour Conditions;
4.9.2 paid his suppliers in full for all material; and
4.9.3 discharged all his lawful obligations to his subcontractors.

4.10 Subject to TP 1 and TP4.11, Her Majesty shall, not later than 60 days after the date of issue of a Final Certificate of Completion referred to in GC44.1, pay the Contractor the amount referred to in TP1 less the aggregate of
4.10.1 the sum of all payments that were made pursuant to TP4.4; and
4.10.2 the sum of all payments that were made pursuant to TP4.7.

4.11 It is a condition precedent to Her Majesty's obligation under TP4.10 that the Contractor has made and delivered a statutory declaration described in TP4.12 to the Engineer.

4.12 A statutory declaration referred to in TP4.11 shall, in addition to the depositions described in TP4.9, contain a deposition by the Contractor that he has discharged and satisfied all his lawful obligations and any lawful claims against him that arose out of his performance of the contract.