Supreme Court of Canada

Murray *v.* The Queen (1896) 26 SCR 203

Date: 1896-05-18

Harriet Murray, Administratrix &c. and Merritt A. Cleveland (Plaintiffs)

Appellants

And

Her Majesty The Queen (Defendant)

Respondent

1896: Mar. 3; 1896: May 18.

Present:—Sir Henry Strong C.J., and Taschereau, Sedgewick, King and Girouard JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Public work—Progress estimates—Engineer's certificate—Revision by succeeding engineer—Action for payment on monthly certificate.

A contract with the Crown for building locks and other work on a government canal provided for monthly payments to the contractors of 90 per cent of the value of the work done at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer, approved by the Minister of Railways and Canals, stating the value of such work and that it had been executed to his satisfaction; the certificate so approved was to be a condition precedent to the right of the contractors to the monthly payments, and the remaining 10 per cent of the whole of the work was to be retained until its final completion; the engineer was to be the sole judge of the work and materials, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final; and he was to be at liberty tomake any changes or alterations in the work which he should deem expedient. In an action for 90 per cent of work done the Exchequer Court gave judgment for the Crown because the required certificate had not been given. On appeal the defence of want of certificate was waived by the Crown.

*Held,* that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final and could not be re-opened and revised by a succeeding engineer.

*Held* also, that the contractors could sue for monthly payments without waiting the final completion of the work.

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Appeal from a decision of the Exchequer Court of Canada[[1]](#footnote-1) in favour of the Crown.

The plaintiffs now represent the late firm of Murray & Cleveland, contractors for building locks and other work on the Galops Canal. The engineer of the works at the outset was Mr. Page who had, under the powers given him by the contract, directed that a dam for holding the water in the locks should be made considerably deeper than was contemplated originally, and to obtain the necessary earth the excavations from the locks were used. Mr. Page having died his successor, Mr. Trudeau, certified for payment to the contractors of the extra earth used at the contract price and also for the cost of carrying away the earth excavated from the locks. When Mr. Schreiber took charge on the retirement of Trudeau he had the work re-measured and re-classified considering that the contractors should not have been paid for the excavated earth under the two heads and he deducted a certain amount from what was due the contractors as representing such overpayment. The main question for decision on the appeal was as to Mr. Schreiber's right to review his predecessor's work, and another question was as to the contractor's right of action on a progress estimate.

The sections of the contract affecting the case, and the other material matters, are fully set out in the judgment of the court.

McCarthy Q.C. and Ferguson Q.C. for the appellants.

Hogg Q.C. for the respondent.

The judgment of the court was delivered by:

SEDGEWICK J.—This is an appeal from the judgment of the Exchequer Court rendered on the 23rd of

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November, 1895, setting aside a judgment of that court given on the 14th of December, 1894, which latter judgment declared the claimants entitled to the full amount of their claim, viz.: $8,907.30, and costs.

On the 14th of November, 1888, the claimant firm entered into a contract with the Crown, represented by the Minister of Railways and Canals, for "the construction of a lift-lock, guard-lock and supply weir, also the deepening and widening of the upper or western end of the "Galops Canal" on the St. Lawrence River, the works under the contract being still in progress but nearly completed.

The contract was not for a specified lump sum, but contained a schedule of prices to be paid by the Crown for work done and materials provided by the contractors. The 25th clause was as follows:

25. Cash payments equal to about ninety per cent of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractors monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted has been duly executed to his satisfaction and stating the value of such work computed as above mentioned—and upon approval of such certificate by the Minister for the time being, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractors to be paid the said ninety per cent or any part thereof. The remaining ten per cent shall be retained till the final completion of the whole work to the satisfaction of the Chief Engineer for the time being having control over the work, and within two months after such completion the remaining ten per cent will be paid. And it is hereby declared that the written certificate of the said engineer certifying to the final completion of said works to his satisfaction shall be a condition precedent to the right of the contractors to receive or be paid the said remaining ten per cent or any part thereof.

And the 8th clause:

8. That the engineer shall be the sole judge of work and material in respect of both quantity or quality, and his decision on all questions in dispute with regard to work or material, or as to the

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meaning or intention of this contract, and the plans, specifications and drawings shall be final, and no works or extra or additional works or changes shall be deemed to have been executed, nor shall the contractors be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractors to be paid therefor.

And the 5th clause:

5. The engineer shall be at liberty at any time, either before the commencement or during the construction of the works or any portion thereof, to order any extra work to be done, and to make any changes which he may deem expedient in the dimensions, character, nature, location, or position of the works, or any part or parts thereof, or in any other thing connected with the works, whether or not such changes increase or diminish the work to be done, or the cost of doing the same, and the contractors shall immediately comply with all written requisitions of the engineer in that behalf, but the contractors shall not make any change in or addition to, or omission, or deviation from the works, and shall not be entitled to any payment for any change, addition, deviation, or any extra work, unless such change, addition, omission, deviation, or extra work shall have been first directed in writing by the engineer, and notified to the contractors in writing, nor unless the price to be paid for any addition or extra work shall have been previously fixed by the engineer in writing, and the decision of the engineer as to whether any such change or deviation increases or diminishes the cost of the work, and as to the amount to be paid or deducted as the case may be in respect thereof, shall be final, and the obtaining of his decision in writing as to such amount shall be a condition precedent to the right of the contractors to be paid therefor. If any such change or alteration constitutes, in the opinion of the said engineer, a deduction from the works, his decision as to the amount to be deducted on account thereof shall be final and binding.

And item 6 of the schedule of prices reads as follows:

6. EARTH EXCAVATION.—Over water-line for the widening of canal on the north side from a point 100 feet east of present guard-lock to end of section, including all kinds of materials (solid rock and boulders containing one-fourth of a cubic yard excepted), hauling the same across canal and for a distance of 700 feet to 3,600 feet to form a dam of round bay shoal to enclose space for lock, per cubic yard, $0.50.

The demand which the appellants now seek to enforce is for a balance alleged to be due for work done

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and materials furnished under the contract between the 1st of February and the 31st of August, 1893. They allege that the work done during these months as certified by the departmental engineers amounted in value to the sum of $88,541.53; that they were entitled to be paid under clause 25 above set out that amount, less 10 per cent, viz., $79,687.38, but that they were paid but $70,790, leaving the difference still due. Leaving out of view in the meantime certain technical defences as to the form of certificates and the approval of the Minister, the Crown substantially admits the truth of these allegations, but claims the right to deduct from that sum an equivalent amount under the following circumstances (and which I take in substance from the appellants' factum, admittedly correct in these particulars): This counter-claim relates to 39,500 cubic yards of earth used to form a certain dam described in the specifications. This dam was for the purpose of enclosing after the manner of a cofferdam the space covered by water to be occupied by the new locks. The evidence shows that the dam was originally intended to be of a depth of about seven feet below the natural bed of the river; that it was contemplated that all the material necessary for it would be obtained at McLaughlin's Point, as described in clause 12 of the specifications, and that the claimants were to be paid 50 cents per cubic yard for this material as mentioned in item 7 of the schedule of prices. After the commencement of the work, however, the then Chief Engineer, Mr. John Page, decided, owing to the soft nature of the material in the river bed, to increase the depth of the foundation of the dam to about 23 feet below the river bed. This decision was carried out, the result being that a great deal more of material was required for the dam. The contractors exhausted all that was to be got at McLaughlin's Point, and thereupon they

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were directed by the Chief Engineer to utilize for the dam so much of the material excavated from the lock pits and the entrances thereto as would be found suitable for the purpose, and were told that they would be paid for putting it on the dam at the same rate as if they had taken it from McLaughlin's Point, that is to say 50 cents per cubic yard, in addition to the prices mentioned in items 8 and 13 of the schedule for excavating it, it being contemplated according to the specifications and schedule that all the material taken for the lock pits and entrances would have been wasted in Round Bay. 39,588 cubic yards of material taken from the lock pits and entrances were found suitable for the dam and carried over and put into it instead of being wasted in Round Bay. This was done principally in the summer and autumn of 1889 and the spring of 1890. The evidence is meagre on the point, but so far as it goes it establishes that the expense of removing material from the excavations to the dam was in excess of the expense of removing it to Round Bay. As will be seen later on Mr. Page and his successor, Mr. Trudeau, allowed 50 cents per cubic yard for this excess of expense, and Mr. Schreiber, the present engineer, was willing to allow 25 cents for it.

In the estimates that were prepared in 1889 and in the spring of 1890 no allowance was made by the resident engineers for this work so far as putting the material into the dam was concerned, no formal instructions having been given them by Mr. Page, but the appellants were paid for the excavation of it under items 8 and 13 of the schedule.

Mr. Page died in July. 1890, not having included in the estimates up to that time the work in question. In September, 1890, on the contractors' application and after investigation and inquiry, the resident engineer, Mr. Haycock, as directed by the then Chief

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Engineer, Mr. Trudeau, with the approval of the then Minister of Railways and Canals returned it one-half in the October estimate and one-half in the November estimate for 1890, under item 6 of the schedule of prices at 50 cents a cubic yard—the same as the material taken from McLaughlin's Point.

These estimates were signed by the Chief Engineer, Mr. Trudeau, and approved of by the Minister, and the amount estimated, less proper deductions, paid over to the contractors, and from month to month thereafter, until March, 1898, the works progressed and estimates were periodically issued and the moneys certified as due there under paid.

In December, 1892, Mr. Trudeau ceased to be Chief Engineer and was succeeded by Mr. Collingwood Schreiber, C.E., who certified the monthly estimates for December, 1892, and February, 1893, there being none for January. After this last estimate it would seem that Mr. Schreiber caused a new examination and measurement of the work to be made and no subsequent estimate was made until September, 1893, when one was made numbered 45, to which special reference must be made. By this examination and re-measurement Mr. Schreiber, having ascertained that the contractors had been paid for excavating the 39,588 cubic yards according to the prices partly of item 8 and partly of item 13 of the schedule, and also at 50 cents a cubic yard for carrying it over and putting it into the dam, formed the opinion that they should not have been paid for it under both of these classifications and reported that the 50 cents a cubic yard should be taken back from them as having been improperly paid. This action of Mr. Schreiber was communicated to the contractors and resulted in the estimate no. 45 above referred to being made, by which 25 cents a yard was allowed to the contractors for the

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39,588 cubic yards as "estimated extra cost of depositing it (the material) according to order in dam" instead of the 50 cents a cubic yard which had been previously allowed and paid under the estimates for October and November, 1890.

The contractors refusing to accept the 25 cents for the 50 cents a cubic yard the same order in council directed a reference to the Exchequer Court to determine whether the 50 cents had been regularly and properly allowed under the provisions of the contract, and whether even if it had not been so regularly and properly allowed the Department could set up these irregularities and take advantage of them after payment, or whether these irregularities had not been thereby waived, and also whether Mr. Schreiber had the right to revise the former estimates in this respect and reduce the price from 50 cents to 25 cents a cubic yard. The reference was in due course made to the Exchequer Court and the case was tried upon such reference upon the examination of witnesses, but without pleadings; and we are now called upon to decide whether upon the evidence and the admissions of counsel there should be. judgment for the contractors or for the Crown.

It is, I think, to be regretted, that in the present case there are no formal pleadings. At the argument before us, when the case was presented, it was difficult to apprehend all the points upon which the Crown might or intended to rely as a defence to the claim. For instance, the contract provided that the whole work was to be completed on or before the 15th of June, 1891, and that time was to be considered as of the essence of the contract. Did the Crown rely upon these stipulations? The contract provided (see clause 25), that before any payment could be made there should be a certificate that the work had duly been executed to the satisfaction

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of the Engineer. No such certificate, in terms, had ever been signed, although, without detriment to the public interest, large amounts had been paid under it. The estimate and certificate of September, 1893, had been acted upon by the Department, and the contractors had obtained the moneys thereby appearing due, although no evidence appeared upon the face of the document that the Minister of Railways and Canals had approved of it, and although the contract had made his approval a condition precedent to payment. Clause 25 of the contract required that there should be as a condition precedent to payment so far as the September, 1893, estimate is concerned a certificate in substantially the following form, signed by the Chief Engineer and countersigned by the Minister, viz.:

I certify that the work for or on account of which the certificate is granted, viz.: for the months of February, March, April, May, June, July and August, 1893, has been duly executed to my satisfaction, and I state the value of such work computed according to the contract schedule of prices to be the sum of $88,541.53.

..............................

Approved. Chief Engineer.

...........................

Minister of Railways and Canals.

No such certificate was ever signed; but as a substitute for it, and (as I suppose) in intended compliance with the provisions of the contract there was this document attached to a detailed statement of all work previously done under the contract:

I hereby certify that the above estimate is correct, that the total value of work performed and materials furnished by Messrs. Murray & Cleveland up to the 31st August, 1893, is $722,592.53, and the drawback to be retained $72,252.53, and the net amount due $650,340.00 less previous payments.

(Sgd.) E. DENIEL,

Tom S. Rubidge.,

Engineer's Audit Office, Suptg. Engineer.

Department of Railways and Canals.

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Total amount certified on this contract $722,592.53. All previous payments to be deducted.

(Sgd.) COLLINGWOOD SCHREIBER,

Examined and checked, Chief Engineer.

(Sgd.) GEO. A. MOTHERSILL.

27th Sept., 1893.

Progress and final Estimate Sheet.

Ottawa, 27th September, 1893.

It was manifest that a certificate of this character did not comply with the terms of clause 25 of the contract, although it was doubtless sufficient for the purposes of audit. There was no certificate, in terms, that the work had been executed to the satisfaction of the Chief Engineer; there was no approval by the Minister of the certificate of the Chief Engineer; there was no specific statement in the certificate itself of the value of the work done since the issue of the last previous estimate. These and other minor objections presented themselves to us as conclusive reasons, if urged and relied on, why the contractors could not as a matter of technical law (though not of natural justice) maintain their action, and there being no pleadings Mr. Hogg, Q.C., the learned counsel for the Crown, was asked by members of the court to define what apparent defences were waived, with a view of ascertaining some idea of the substantial defence of the Crown. The following is the minute of the admission of the Crown counsel as noted by the learned Chief Justice in his note-book and read to counsel and assented to by them (and which admission, I think, was under the circumstances most properly made):

Crown does not raise any purely technical formal objection that certificate does not state (shew) on its face that there was no approval of Minister, and also no objection that certificate does not state work done to the satisfaction of the Engineer in so many words, and further (admits) that certificate and estimate are sufficient in form.

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With this admission before us only two questions would seem to arise on this appeal. First, whether we can gather from the certificate and from the estimates to which it is attached (and which estimates must be considered as forming part of it) the value of the work done between 1st February and 31st August, 1893. If so, under the admission, that amount may be considered as having been certified by the Engineer and approved by the Minister. In other words, we will have a certificate such as I have above suggested as the proper one under clause 25 of the contract with the value of the work done in those months filled in, and that sum less 10 per cent will be the amount payable to the contractors.

And the 2nd question will be: Assuming the certificate shews the value of the work in respect of which it is given, can the Engineer in the present case go behind a previous decision either of himself or his predecessor and make the deduction which is here sought to be made?

As to the first question. The estimate we have to consider is that of 31 st August, 1893, numbered 45, and it is to that estimate that the certificate I have set out above is attached. That certificate states that the estimate is correct. If then we can gather from it the amount of work done during the months in respect to which it relates we have a certificate under the admissions substantially as required by clause 25 of the contract. Now these estimates shew that the amount of such work was $88,541.53. That abundantly appears from an intelligent perusal of the documents themselves as well as in a statement in the case prepared by the Railway Department, where it is in effect admitted that the estimates shew the value of the work in question to be the sum stated. All that portion of the certificate which relates to the total value of the work

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done and to the amount of total deduction made is no necessary part of a certificate to a monthly estimate. It may be convenient for departmental purposes; it may be accurate or inaccurate; but it is not required under the contract; the contractors are not bound by it, and as to them it is mere surplusage.

The result is that so far as the certificate is concerned there has, under the admissions, been a substantial compliance with the requirements of the contract, and the contractors have shown themselves entitled to the amount so certified, less the ten per cent deduction.

The further question remains: Can the Crown give effect to the Chief Engineer's proposal that the contractors refund one-half of the amount received by them upon the certificate of the late Engineer approved as it was by the Minister, for the 39,588 cubic yards of excavated material?

I am of opinion that it cannot. There had been a question as to the character of that work, as to its classification and its value, and that question had been determined by the then Engineer. Under clause 8 above set out he was made the sole judge and his decision was declared to be final. This was one of these very cases for which clause 8 was intended to provide. The Engineer did decide, the Minister approved, and the money was paid. I do not think that in the absence of fraud a decision so come to and acted upon can be re-opened or reversed by a succeeding engineer, or be regarded otherwise than as final and conclusive as between the contractors and the Crown. See the case of *Jones* v. *Jones[[2]](#footnote-2)*, cited in Emden on Building Contract[[3]](#footnote-3) in support of the proposition that when a certificate had been given by an architect he was *functus officio.*

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Apart, however, from the purely legal question the merits as disclosed in the evidence would appear to be with the contractors. There was, as already pointed out, some evidence that there had been an overcharge but that evidence was far more than balanced by the evidence the other way. The onus was on the Crown to prove the fact of overpayment. It has signally failed to do so, and as the case at present stands it would appear that the original classification was proper and the payments made under it justly due.

In expressing this opinion I am not to be understood as holding the view that monthly estimates under this contract may not be revised. Under clause 25 the monthly measurements are not intended or expected to be exactly accurate; they are mere approximations coming as nearly as may be to the reality, but always subject to the final measurement when the work is completed and the balance due the contractors has to be determined.

But I am of opinion that when in such a case as the present a classification of a specified work has been made under clause 5 or 8 of the contract, and a price fixed and the money paid, such a determination is final, and in the absence of fraud cannot under this contract be reviewed either by the engineer who made it or by his successor.

One further point remains. The Crown contends that the contractors are not in any event entitled to proceed by action upon a progress estimate. A simple perusal of clause 25 which contains an unqualified covenant on the part of the Crown to pay the sum less 10 per cent thereby certified for will show that such contention is untenable.

In my opinion the appeal should be allowed with costs, including the costs of the rehearing below, and the original judgment of Mr. Justice Burbidge restored

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It need only be added that had the case come before that learned judge in the same way as it was presented to us his judgment would manifestly have been the same as ours.

Appeal allowed with costs.

Solicitor for the appellants: A. Ferguson.

Solicitors for the respondent: O'Connor & Hogg.

1. 5 Ex. C.R. 19. [↑](#footnote-ref-1)
2. 17 L. J. Q. B. 170. [↑](#footnote-ref-2)
3. 2 ed. p. 126. [↑](#footnote-ref-3)