HER MAJESTY THE QUEEN (*Defendant*) ..... APPELLANT;

1967

*Feb. 27, 28
*Mar. 1
June 26

AND

EDWIN J. PERSONS (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Contract—Construction of landing strip for airport—Work to be completed by certain date—Clause in contract providing for the cancellation—Whether cancellation justified.

The plaintiff, a contractor, was the successful bidder for the construction of a landing strip for an airport in the province of Quebec. The contract between the plaintiff and the defendant contained a clause for the cancellation of the contract by the Crown for a number of causes and upon notice. The plaintiff commenced work in June 1960 and proceeded until December 1960, when work was suspended because of winter conditions. The work was to be resumed in the spring as soon as the ground was ready to be worked. During the fall of the year 1960, the plaintiff and his employees had been in almost constant state of disagreement with the departmental officers and employees. In the spring of the second year, the plaintiff failed to resume work after receiving a notice to do so. The contract was cancelled and the work was terminated by another contractor. The plaintiff filed a petition of right in which he claimed for work done under the contract and for damages. The Crown filed a cross-demand for the excess over and above the contract price paid to the second contractor to complete the work. The trial judge allowed the petition of right and dismissed the cross-demand. The Crown appealed to this Court.

Held: The appeal should be allowed and the cross-demand should be returned to the Exchequer Court to ascertain the damages to be allowed to the Crown.

The trial judge was in error in his finding that there had been no proper cancellation of the contract in accordance with the provisions thereof and that the purported cancellation had been a breach of the contract.

It was not necessary to express any opinion as to whether the purported assignment by the plaintiff of the benefit of the contract to a bank had deprived him of his right to bring action.

Couronne—Contrat—Construction d'un terrain d'atterrissage pour aéroport—Les travaux devant être terminés à une certaine date—Clause dans le contrat prévoyant la résiliation—La résiliation était-elle justifiée.

Le demandeur, un entrepreneur, a obtenu le contrat pour la construction d'un terrain d'atterrissage pour un aéroport dans la province de Québec. Le contrat entre le demandeur et la défenderesse contenait

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Hall and Spence JJ.

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une clause prévoyant la résiliation du contrat par la Couronne pour de nombreuses causes et après avis. Le demandeur a commencé les travaux en juin 1960 et les a continués jusqu'en décembre 1960, alors que les conditions d'hiver en ont forcé la suspension. Les travaux devaient être recommencés au printemps aussitôt que la terre serait en état d'être travaillée. Durant l'automne de 1960, le demandeur et ses employés ont été en désaccord presque continuellement avec les officiers et les employés de la défenderesse. Au printemps de la seconde année, le demandeur n'a pas recommencé les travaux après avoir reçu un avis de le faire. Le contrat a été résilié et les travaux ont été terminés par un autre entrepreneur. Le demandeur a produit une pétition de droit dans laquelle il réclamait pour les travaux faits en vertu du contrat et pour des dommages. La Couronne a produit une demande reconventionnelle pour le montant qu'elle a payé au second entrepreneur en excédent du montant prévu au contrat. Le juge au procès a maintenu la pétition de droit et a rejeté la demande reconventionnelle. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et la demande reconventionnelle doit être renvoyée à la Cour de l'Échiquier pour la détermination des dommages qui doivent être accordés à la Couronne.

Le juge au procès a erré lorsqu'il a conclu qu'il n'y avait pas eu une vraie résiliation du contrat selon les termes de ce contrat et que la prétendue résiliation avait été une violation des termes du contrat.

Il n'est pas nécessaire d'exprimer une opinion sur la question de savoir si la prétendue cession par le demandeur des bénéfices du contrat à une banque l'avait privé de son droit d'action.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier du Canada[1], sur une pétition de droit. Appel maintenu.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1], on a petition of right. Appeal allowed.

Louis M. Bloomfield, Q.C., P. M. Ollivier, Q.C. and *D. Miller,* for the defendant, appellant.

Alexander Stalker, Q.C., and *Robert J. Stocks,* for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from a judgment rendered by Noël J. in the Exchequer Court of Canada[1] on November 2, 1965. By that judgment the learned Exchequer Court Judge allowed the petition of right filed by the suppliant awarding damages of $33,094.10 and allowed the

[1] [1966] Ex. C.R. 538.

petitioner his costs including the sum of $5,000 to cover the value of engineering and accounting work done prior to the trial. The learned Exchequer Court Judge dismissed the cross-demand filed by Her Majesty the Queen with costs, providing, however, that only one counsel fee at trial should be taxed.

The Crown appealed to this Court from the judgment of the Exchequer Court by notice of appeal which reads as follows:

NOTICE OF APPEAL

TAKE NOTICE that Her Majesty the Queen intends to appeal and does hereby appeal to the Supreme Court of Canada from a part of the Judgment of Mr. Justice Noël of the Exchequer Court of Canada dated the second day of November 1965;

AND FURTHER TAKE NOTICE that Her Majesty the Queen intends to limit Her appeal, and does hereby limit Her appeal to that part of the judgment of Mr. Justice Noël

(a) finding that the assignment executed by the Respondent in favour of the Royal Bank of Canada on March 19th, 1962 was ineffective in law so as to deprive the Respondent of the whole or of a part of the relief sought by its Petition of Right and

(b) finding that in taking the contract work out of the Respondent's hands, Appellant failed to bring Herself within the terms of clause 18 of the contract, thereby committing a breach going to the root of the contract.

When the appeal came on for hearing, the members of this Court expressed grave doubt as to the propriety and effectiveness of this form of notice of appeal. It will be noted that there is no reference therein to the dismissal by the learned Exchequer Court Judge of the Crown's cross-demand and counsel for the respondent in this Court took the position that that dismissal should have been the subject of a specific notice of appeal. It would appear that the notice of appeal filed was one which purports to appeal from the reasons and not from the judgment of the Exchequer Court.

After some consideration of the matter, this Court determined to construe the document as if it were an appeal from the whole judgment of the Exchequer Court except in so far as that judgment fixed the damages of the suppliant at $33,094.10, and that the lettered paragraphs in the said notice of appeal were in fact merely reasons for the appeal. The first of those lettered paragraphs dealing

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with the effect of the purported assignment by the respondent-suppliant to the Royal Bank of Canada is dealt with hereafter in these reasons.

The respondent-suppliant had been the successful bidder for the construction of a landing strip for an airport at Three Rivers in the Province of Quebec. The respondent's tender was for $469,983.50 and was almost exactly $100,000 lower than the second lowest tender.

The learned Exchequer Court Judge noted that the departmental officers were of the opinion that the respondent had made an error in his calculations and conferred with the respondent even going so far as to suggest that he should withdraw his tender and review all the prices and then return to submit a revised tender. The respondent, however, insisted on leaving the tender as filed and the respondent was awarded the contract. This contract was produced at trial and marked as Exhibit S-1. It is a document dated August 5, 1960, and is in very considerable detail occupying in the printed record some 17 pages of close printing.

The respondent commenced work in June 1960 and proceeded until December 1960, when work was suspended because of winter conditions to be resumed in the spring as soon as the ground was ready to be worked. During late fall of the year 1960, the respondent and his employees had been in a well-nigh constant state of disagreement with the departmental officers and employees, both those in Ottawa and those on the site. It would appear that one of the main causes of the contentions between the parties was the desire of the respondent to reduce his costs by utilizing as granular material to be laid over the sub-base to the depth of 22″ a mixture composed of 65 per cent of material coming from the site and 35 per cent from material obtained at a gravel pit known as the Paquette pit, some distance away from the scene.

On November 21, 1960, the resident engineer, Mr. Corish, informed the respondent in writing that the material from this gravel pit had been tested and that in his opinion the contractor's proposed method of blending of a part thereof with the material from the site would not satisfy the contract requirements. This decision by the resident engineer was the subject of bitter complaint by the

respondent and conferences followed. At such conferences, a compromise was reached whereby the respondent would be permitted to lay a 6″ layer of the granular material over the sub-grade and then this 6″ layer would be tested to determine to what extent, if any, it could be blended with the material taken from the airport site.

The 6″ layer of granular material was laid by the respondent early in December 1960. At that time the ground was frozen. The sub-base had not yet been fully compacted to the extent required by specifications and it was agreed that this sub-base would be compacted in the spring by using a 50-ton roller right over the six inches of granular material which covered it.

During the time when work was suspended after winter had set in, complaints, particularly as to the attitude and conduct of the resident engineer of the appellant, the said Mr. Corish, continued to be urged by the respondent and his employee Mr. Leonard. In order to resolve the difficulties, a meeting was held on April 14, 1961, attended by the respondent and his representatives and by officials of the department. The decisions made at such conference are not relevant to this appeal except that the respondent alleges that the officers of the appellant had agreed to give to the respondent a schedule of work prior to the recommencement of the performance of his contract in the spring of 1961.

In the opinion of the officers of the appellant, the ground was ready to work in early May of 1961. Several attempts were made to get in touch with the respondent in order to determine when he would start work. Such attempts were not successful and answers which the said officers received when they spoke to the persons in the employment of the respondent were, to put it conservatively, evasive. Finally, on June 1, 1961, Mr. H. J. Connolly forwarded to the respondent the following notice:

> Pursuant to clause 18 of the contract in writing between HER MAJESTY THE QUEEN IN RIGHT OF CANADA, represented by the Minister of Transport, and E. J. PERSONS, doing business under the firm name and style of E. J. PERSONS CONSTRUCTION of Sweetsburg, in the Province of Quebec, dated August 5, 1960, bearing No. 64840 in the records of the Department of Transport, being in respect of the construction of a Runway 6,000′ x 150′, a Parking area 300′ x 300′, a connecting Taxiway and Access Road at Three Rivers Airport, Three

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Rivers, Province of Quebec, I hereby give you notice that I require you to put an end to your default and delay in diligently executing the works to be performed under the said contract.

And I have to advise you that in the event of failure on your part to comply with this notice on or before June 12, 1961, the works will be taken out of your hands and will be completed by the Department as may seem fit, and, in this connection, your attention is called to Clause 18 under which you will have no claim for any further payment, but you will be chargeable with and shall remain liable for all loss and damage suffered by Her Majesty and to clauses 48 and 50 under which the security deposit made by you will be forfeited.

(sgd.) H. J. Connolly,
Director, Construction Branch,
Department of Transport.

The respondent replied to this notice by his solicitor's letter dated June 7 which read as follows:

H. J. Connolly, Esq.,
Director of Construction Branch,
Department of Transport,
OTTAWA, Ontario.

RE: THREE RIVERS AIRPORT—E. J. PERSONS, CONTRACTOR:
YOUR FILE NO. 2R-93

Dear Sir:

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

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

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

Yours truly,

HJS:LHP

"H.S. McD."

The Fidelity Insurance Company of Canada which had received a copy of Mr. Connolly's communication of June 1, replied thereto by letter of the same date, June 7, which included a statement "and we have been assured he will be on the site to resume work on Monday, June 12th".

The respondent himself telegraphed to Mr. R. L. Davies, Regional Construction Engineer, of the Department of Transport at Montreal on June 8 in the following words:

> Re Three Rivers Airport please be advised that our engineer Mr. Mike Skinners is now at Airport stie (sic) will be ready to resume work monday june twelfth

On June 14, 1961, Mr. Connolly, Director of the Construction Branch of the appellant in Ottawa, prepared a notice in the following terms:

> Reference is made to my notice of June 1, 1961, addressed to E. J. Persons Construction giving notice pursuant to clause 18 of the above mentioned contract to put an end to the default and delay in diligently executing the works to be performed under the said contract.
>
> In view of the fact that the work covered by Contract No. 64840 has not been proceeded with pursuant to my notice, aforesaid, of June 1, 1961, I have to advise E. J. Persons Construction that the Department is taking the work out of the said contractor's hands and has entered into a contract with another contractor, namely, H. J. O'Connell Limited, to complete the work covered by the said contract.

He signed this notice and took it with him leaving it in the Montreal office of the Department with instructions that it should be held to be dealt with in accordance with orders which he would communicate to the office by telephone. He proceeded from that office to the site with officials of the department. His purpose was to determine whether the respondent was complying with the notice of June 1 which I have recited above. Arriving at the site, he found a Mr. Shinners, a young man who was the representative of the respondent on the job and who was evidently the "Mr. Skinners" referred to in the telegram from the respondent which I have recited above. Mr. Connolly testified that Mr. Shinners told him he had no instructions at all and further that there was only one machine operating pushing stumps off the runway and someone was working on an old building off to one side. A little Wobbly wheel roller was present but there was no sign of any 50-ton roller. Mr. Connolly telephoned to the Montreal office and his notice dated June 14, 1961, which I have recited above was dispatched. H. J. O'Connell Limited came on the job and completed the work covered by the contract.

The respondent filed his petition of right in which as suppliant he claimed an amount of $492,397.59 of which $180,397.59 was for work allegedly completed prior to

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December 31, 1960, and $312,000 was for damages allegedly sustained as the result of the appellant cancelling the contract. The respondent later produced an incidental demand claiming additional damages in the amount of $152,800.

The appellant filed a cross-demand claiming from the respondent the sum of $131,495.45 made up as follows:

Net amount paid to Cross-Defendant (Suppliant) is $167,600 less hold back of $16,700	$150,840.00
Total amount paid or payable to H. J. O'Connell for completion of the project	440,209.31
Total	$591,049.31
If Cross-Defendant had proceeded with the project to completion, total cost according to Cross-Defendant's unit price	$459,553.86
	$131,495.45

Noël J., in elaborate and very carefully worked out reasons held for the respondent granting judgment as I have set out above. He came to this conclusion for the following reasons, apart from the assignment to the Royal Bank of Canada with which I shall deal hereafter:

(1) That the notice threatening cancellation of the contract given by the appellant on June 1 was not sufficiently detailed and explicit.

(2) The respondent was justified in not complying with that notice and getting on with the work by June 12, 1961, as he was awaiting a schedule of work from the appellant and he was entitled to await such schedule of work.

(3) That the schedule of work when it was given to the respondent's representative on the site on June 12 superseded the notice of June 1, 1961.

(4) That the cancellation of the contract by the notice of June 14, 1961, was premature in view of the terms of the notice of June 1, 1961.

(5) That the contract was not cancelled by the Minister as required by the provisions thereof.

I shall deal with these reasons seriatim.

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Firstly, as to the sufficiency of the notice dated June 1, 1961, Article 18 of the Contract between the parties (Ex. S-1) provides, in part:

> In case the Contractor shall make default or delay in commencing or in diligently executing, any of the works or portions thereof to be performed, or that may be ordered under this Contract, to the satisfaction of the Engineer, the Engineer may give a general notice to the Contractor requiring him to put an end to such default or delay, and should such default or delay continue for six days after such notice shall have been given by the Engineer to the Contractor, or should the contractor make default in the completion of the works, or any portion thereof, within the time limited with respect thereto in or under this contract, or should the Contractor become insolvent, or abandon the work, or make an assignment of this contract without the consent required, or otherwise fail to observe and perform any of the provisions of this contract then, and in any such case, the Minister for and on behalf of Her Majesty, and without any further authorization, may take all the work out of the contractor's hands and may employ such means as he, on Her Majesty's behalf, may see fit to complete the works...

It would seem apparent, therefore, that the contract requiring only a general notice, there could be no validity to the submission that the letter of June 1, 1961, was not sufficiently detailed. In addition to that ground in law, the respondent himself took no such position on receipt of the notice dated June 1 either personally or through his solicitor. On the other hand, I have quoted his telegram and his solicitor's letter, and in both documents the respondent simply undertook to comply with the notice.

I am in agreement with the submission made by counsel for the appellant that the respondent at all times was himself the best judge of what he was and was not doing. As the learned Exchequer Court Judge found on the basis of the evidence adduced at trial he would have been prepared to hold that the appellant's engineers were entitled to assume, from the inactivity of the respondent on the site of the work in the spring of 1961, that he was not diligently prosecuting the work and that there was great doubt that he would have completed the job on time, it would appear that the respondent's default has been established.

Secondly, as counsel for the appellant points out, the respondent was the only person who testified that there was any agreement that the respondent should be supplied with a schedule of work before he commenced the carrying

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out of the contract in the spring of 1961, although Mr. Davies for the appellant recalled that the matter of written instructions had been discussed.

Section 5 of the contract between the parties provided, in part:

> The work shall be commenced, carried on and prosecuted to completion by the Contractor in all its several parts in such manner and at such points and places as the Engineer shall, from time to time, direct, and to his satisfaction, but always according to the provisions of this contract, and if no direction is given by the Engineer, then in a careful, prompt and workmanlike manner.

It would appear, therefore, that there was no right in the respondent to require a schedule of work and that failing the receipt of one he was under a duty to carry out the contract in a fashion which the learned Exchequer Court Judge found he had failed to do. The conference at which it was alleged this agreement to supply the respondent with a schedule of work was reached took place on April 14, 1961. On April 24, 1961, Mr. Connolly reported to the Assistant Deputy Minister for Air upon the Three Rivers Airport construction contract. In para. 4 thereof he recited that a meeting had been held and in para. 5 reported:

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

On May 18, 1961, Mr. Connolly wrote a letter to the E. J. Persons Construction Company, the last paragraph of which reads as follows:

> Our Regional Construction Engineer will be communicating with you in the next few days requesting a schedule of your operations for this coming construction season showing the dates for completion of the various phases of the work, but it must be kept in mind that there will be no extension in time for the completion of the contract.

Therefore, quite plainly, two weeks before the respondent received the notice of June 1, he had had notice in writing that it was not the appellant's officers' duty to produce the schedule of work which he alleges he was promised on April 24 but that it was his own duty. That letter of May 18 apparently went unanswered.

With respect, therefore, I cannot agree with the learned Exchequer Court Judge in his comments that the respondent was justified in not getting on with the work by June 12 as demanded in the letter of June 1 because he was entitled to wait for a schedule of work. The so-called schedule of work in writing was delivered by Mr. Corish to Mr. Shinners on June 12. Mr. Corish, in his evidence, recounts the circumstances surrounding its delivery. When he was asked whether he prepared the documents at the request of Mr. Shinners, he replied:

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

He continued:

> A. Mr. Shinners had appeared on the 8th, and as I said, I was acquainted with the boy and I told him, well, if you want any information, or note—that is why my reference is as is—that he did not even read the specifications. The man himself he was only a graduate engineer of that spring; he had been on the site the previous summer as a student engineer and an employee of Mr. Persons, but mainly, for the record, as far as resident engineer was concerned, there were no other body available. He was the representative of the contractor and this is dated four days after I met him. But, you must understand, I had no office help and it was typed by myself with just one or two fingers and consequently, for me to produce a letter which I wanted for the record, I would draft it and redraft it and study it, because I was afraid what is happening now would happen. I wanted a record for my own personal benefit.

Mr. Corish testified that he did not believe he was aware at that time that Mr. Connolly had given the respondent the notice of June 1 although he was aware of it subsequently. It is difficult, therefore, to understand how the supplying of this document by Corish to Shinners on June 12 could be taken to have superseded Mr. Connolly's notice of June 1. Mr. Connolly's notice was delivered by virtue of the powers set out in art. 18 which I have quoted above, in part. Such a notice was to be given by the engineer, and Mr. Corish, being merely the appellant's superintendent on the job, was certainly not the engineer. "Engineer" was defined exactly in art. 1 of the contract and Mr. Connolly was the officer so defined. No superintendent on the job could effectively countermand a notice delivered by such engineer acting under a specific power granted to him on the contract.

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Moreover, it will be seen that the contents of the document presented by Mr. Corish to Mr. Shinners, produced at trial and marked Exhibit S-8, chiefly consists of requests by Mr. Corish for information as to details which should be supplied by the respondent and in the second request is set out in para. 2(*b*) thereof as follows:

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

Therefore, on considering all the circumstances and the actual terms of the document (Ex. S-8), I am unable to concur in the view that it would have any effect of superseding the exact terms of the notice dated June 1. Therefore, with respect, I must disagree with the learned Exchequer Court Judge.

The learned Exchequer Court Judge in his reasons for judgment said:

> Clause 18 provides that if default or delay continues for six days after notice has been given, then the Minister can take all of the work out of the contractor's hands. In the present case, however, the Department's engineer having chosen to specify a date or a deadline for the commencement of the work and having granted a specific delay for compliance with the notice dated June 1, 1961 (Ex. S-9) namely that work was to be commenced on or before June 12, 1961, and not having simply required the contractor to get on with the work, in which case the six days' delay would have commenced when the notice was given, i.e., June 5, 1961, the delay here would have started running only on June 12, 1961, and the six days continuance of such default could not, therefore, have been completed until the end of June 17, 1961. Thus until June 17, 1961, as urged by counsel for the Suppliant, the Minister had no power under the contract to take the work out of the contractor's hands, and, therefore, the steps taken by the Department of Transport on or around June 14, 1961, were premature, not in accordance with the terms of the contract, and the work was illegally and improperly taken out of the Suppliant's hands.

This Court, on the hearing, was unanimously of the view that art. 18 of the contract and the terms of the notice dated June 1 could not support such an interpretation. By art. 18 of the contract all the engineer for the Department had to do was to give six days' notice requiring curing of the default. If he chose to allow twelve days then there cannot be any justification for adding the six days required by the contract to the twelve days granted by the engineer. It is quite plain that in the notice which I have recited

earlier in these reasons the respondent was required to comply with the notice on June 12, 1961, and not six days thereafter.

The learned Exchequer Court Judge held that the notice of cancellation delivered on June 14, 1961, and signed by H. J. Connolly, Director of the Construction Branch, was not a valid cancellation of the contract under the provisions of art. 18 thereof which I have cited earlier in these reasons and which read, in part,

> . . . the Minister for and on behalf of Her Majesty and without any further authorization may take all the work out of the contractor's hands and may employ such means as he, on Her Majesty's behalf, may see fit to complete the works . . .

In view of the definition of the word "Minister" in art. 1 of the contract, as follows:

> "Minister" shall mean the person holding the position, or acting in the capacity, of the Minister of Transport, for the time being, and shall include the person holding the position, or acting in the capacity, of the Deputy Minister of Transport, for the time being.

and the fact that at the relevant times the Honourable Mr. Balcer was the Minister and Mr. John Baldwin was the Deputy Minister, he held that a notice of cancellation signed by Mr. Connolly was without any validity.

It must be noted that under the provisions of art. 18, the Minister was empowered not to deliver a notice but to take all work out of the contractor's hands, and so long as the decision was made by a person within the definition of "Minister" in the contract, i.e., by either the Minister or the Deputy Minister, then it would be of no importance who wrote the actual formal document notifying the respondent of the decision of such Minister or Deputy Minister.

The evidence shows quite clearly that the Minister was fully cognizant of the problems which had arisen in the completion of this contract. Marked as Exhibit R-8 at the trial was a memorandum from the Director of the Construction Branch to the Assistant Deputy Minister (Air). The penultimate paragraph of that memorandum reads as follows:

> 8. On receipt of his recommendation it is the intention to advise the Contractor of the amount of money due to him for work done to date and instruct him to proceed and complete his contract. If he refuses the

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settlement it will be necessary to have our Legal Branch prepare an order to the Contractor instructing him to commence work within the specified time, failing which the Bond Company will be asked to take over.

Produced as part of the same exhibit was a memorandum from the Deputy Minister, J. R. Baldwin, to the Director of the Construction Branch, dated April 27, 1961, which reads as follows:

> The Minister is generally satisfied with your report hereunder but would like to be kept informed when you send specific instructions in writing to the contractor.

I have perused the evidence of the Minister who was called by the suppliant as a witness at the trial of the action and I think the inference is proper that Mr. Connolly had the Minister's authority to go to Three Rivers and to determine for himself what progress had been made and if the progress was not in accordance with that demanded then to take the action set out in the said para. 8 of the memorandum which I have quoted above.

Therefore, I am of the opinion that when Mr. Connolly delivered the notice dated June 14 to the respondent he was only notifying the respondent of an action taken by the Minister and which the Minister was entitled to take under the provisions of art. 18 of the contract. I am also in agreement with the alternative submission of counsel for the appellant that the Minister, when he wrote to the respondent's solicitors on July 17, 1961, was certainly aware of the action which had been taken and confirmed it giving thereby any ratification required. Such ratification would be effective as of the date of the action taken, i.e., June 14, 1961.

For these reasons, I have come to the conclusion, with respect, that the learned Exchequer Court Judge was in error in his finding that there had been no proper cancellation of the contract in accordance with the provisions thereof, and therefore that the purported cancellation was a breach of the contract.

As I have said, the Crown filed a cross-demand to the suppliant's petition in which the Crown claimed the sum of $131,495.45. That cross-demand was disposed of by the learned Exchequer Court Judge in these words:

> The suppliant was unsuccessful in his incidental demand and it will be rejected with costs; the Respondent was unsuccessful in Her cross-demand and it also will be rejected with costs.

At the hearing of the appeal, counsel for the appellant stated that if the appellant were to succeed in this Court then the action should be referred back to the Exchequer Court for the determination of the quantum of the cross-demand and that the parties had so agreed. Counsel for the respondent, after some discussion with the Court, agreed that there was no defence to the cross-demand if the termination of the contract had been valid and effective, subject, however, to proper assessment of the amount thereof. I am of the opinion that this Court, therefore, should direct that the petition be returned to the Exchequer Court for ascertainment of the proper damages to be allowed to the appellant on the cross-demand.

In view of the conclusion to which I have arrived as to the validity of the termination of the contract, I do not find it necessary to express any opinion as to whether the purported assignment of the benefit of the contract to the Royal Bank of Canada was effective so as to deprive the respondent of any cause of action which he could assert in this petition.

The appellant is entitled to Her costs here and in the Exchequer Court.

Appeal allowed with costs.

Solicitor for the defendant, appellant: E. A. Driedger, Ottawa.

Solicitors for the plaintiff, respondent: Howard, Stalker, McDougall, Graham & Stocks, Montreal.