[TRANSLATION]

J. R. Théberge Ltée (*Suppliant*) *v.* **The Queen** (*Respondent*)

Noël J.—Quebec, May 25, June 11, 1970.

Crown—Petition of Right—Contract—Construction Contractor—Loss suffered in the performance of the contract—Damages—Indivisibility of the Crown—The Queen in right of Canada—The Queen in right of a province—Separate persons—Construction at a fixed price—Contract based on plans and specifications—Art. 1690 C.C.—Exchequer Court Act, R.S.C. 1952, c. 98, s. 47.

Following a call for tenders for the construction of a radar system and the refusal by the lowest bidder to accept the contract because the respondent required that the work be carried out and continued during the winter season, the suppliant, the second lowest bidder, agreed to carry out the work without interruption until its completion. Alleging unforeseeable weather conditions constituting for it a situation beyond its control, having to keep on a large number of employees all winter under such conditions, and, after it had begun work on the contract, the increase by Order in Council of the Government of Quebec of the wages of all construction employees, the suppliant is claiming by its petition for the loss of $354,536.31 which it allegedly suffered and which, it says, constitutes an unwarranted gain for the respondent.

As the main defence, the respondent refers to the terms of the contract concluded between the parties, adding that, by a clause in the contract, the suppliant knew that the wage rates mentioned in the call for tenders could be increased by

the competent authorities and that, in any event, it could not receive additional sums as a result of an increase in the cost of the contract caused by an increase and adjustment in wages.

Held, the theory put forward by the suppliant that new wage rates so ordered by Her Majesty the Queen in right of the Province of Quebec should be absorbed by the respondent under the principle that, since the Queen is "one and indivisible" there cannot be two crowns for the two levels of government (federal and provincial), must be discarded. In fact, when acting the Queen in right of the federal government and in right of a province is acting as two separate persons or as two separate purses (*in re Silver Brothers Ltd* [1932] A.C. 514, p. 524). In the circumstances, the action of one (the province) cannot be considered to be the action of the other (federal) so as to involve the responsibility of the latter.

The suppliant's claim cannot be allowed for the further reason that it was a fixed-price construction contract based on plans and specifications, and according to art. 1690 *Civil Code,* the suppliant cannot claim any additional sum on the ground of a change in the plans and specifications or on that of an increase in the labour and materials, unless such changes are authorized in writing and the price thereof agreed upon with the proprietor.

Furthermore, s. 47 of the *Exchequer Court Act,* R.S.C. 1952, c. 98, states that in such a case the Court cannot allow compensation on the ground that the contractor expended a larger sum of money in the performance of his contract than the amount stipulated for therein.

ACTION for damages.

Ovide Laflamme for suppliant.

Paul Coderre, Q.C., and Robert Cousineau for respondent.

NOËL J.—By its petition, the suppliant, a construction contractor, claims from Her Majesty the Queen damages in the amount of $354,536.21 which it allegedly suffered as a result of the construction, on behalf of the respondent, of a radar system which it had undertaken to build by contract concluded in 1960.

It built this radar system at Chibougamau, Lake St. John, P.Q., and under the terms of the contract, the work was to be carried out over a specific period commencing in the autumn of 1960 and continuing uninterrupted through the winter until its completion in 1962. According to the contractor, the respondent had required that a large number of employees be kept in its employ as a measure for easing winter unemployment.

It began to carry out the work during the autumn of 1960 but it claims that the winter of 1960 was so severe, that it made the work almost unfeasible and represented unforeseeable conditions for the suppliant, but because of all sorts of political pressures it nevertheless had to continue the work, and thus suffered a substantial loss which, according to the suppliant, was due to the fact that right after the work was started, labour unions were formed and demanded new working conditions. For the contract in question in this instance, they obtained a new decree approved by the Quebec Department of Labour authorizing 10 to 30 per cent wage increases for all employees, as attested by Order in Council, Exhibit R-1.

The suppliant contends that under these circumstances it had to perform work, on behalf and to the advantage of the respondent, at a loss, the main causes of which are, according to the suppliant:

(*a*) unforeseeable weather conditions constituting a situation beyond its control;

(*b*) the obligation to keep on a large number of employees during the winter, under such conditions, owing to political pressure by both the respondent and public bodies in the area;

(*c*) wage increases by Order in Council for all construction workers at rates which could not be foreseen when the public tender was being prepared.

The suppliant further contends that during the winter it cost two or three times as much to carry out the same work, and that it could easily have delivered the radar within the time limits stipulated in the contract if it had suspended the work, as it had suggested doing at one time to the respondent.

It claims that it paid its employees, because of these circumstances, a sum of $82,393.53 in wage increases and the respondent's officers recommended that it accept $78,645.30 as partial compensation for the sum claimed of $142,952.74, as it appears in the letter from the respondent's engineer, photocopy of which is filed as Exhibit R-5.

The $354,536.21 loss that the suppliant is claiming constitutes, according to it, an unjustified gain for the respondent and the sum of $82,393.93 paid in wage increases in no way benefited the suppliant. The latter added that any other person, company or corporation, including the respondent, carrying out that work, would have had to pay the same additional sum.

On the other hand, the respondent refers to the terms of the contract concluded between the parties, states that she is unaware of most of the facts alleged by the suppliant and adds that even if they had been proved, they would not justify the suppliant's conclusions. She says that she cannot in fact be held responsible for the losses suffered by the suppliant. She states that the obligation to carry on the work throughout the winter season stemmed from the actual terms of the contract and from negotiations which had preceded the conclusion thereof. She says that by its very nature and according to its conditions, the execution of the contract required that the work be continued uninterrupted through the winter; the suppliant was aware of and had agreed to this. She denies that she can be held responsible for the consequences of the Order in Council concerning wage increases.

She declares that in actual fact, the suppliant did not deliver the various installations stipulated in the contract on the dates agreed upon but was substantially late in delivering them.

She admits that she rejected all compensations to the suppliant because in law and in fact it was her obligation to do so.

She states that the suppliant's so-called losses can be explained by its poor administration in the execution of the contract, its inefficiency and its lack of foresight.

She submits that the respondent received nothing from the suppliant above and beyond the installations stipulated in the contract and, further, that she received them subsequent to the dates which had been agreed upon, and for this, moreover, the suppliant received the price agreed upon. She therefore asks that the petition be dismissed with costs.

The contract in question was awarded to the suppliant after the lowest bidder Donolo had refused the contract precisely because the respondent required that it be carried out and continued during the winter season. The president of the suppliant, the second lowest bidder, was called to Ottawa and he agreed to carry out the work and to construct the required buildings without interruption until completion. Work began in early October 1960 and already by December of that year the suppliant realized that the winter work, because of a severe cold spell, was becoming unfeasible and extremely costly, necessitating in some cases—for example, in the concrete work—twice the manpower and the use of heating materials and equipment. On the recommendation of its engineers and foremen, the suppliant's president Théberge came to Ottawa for a meeting with the respondent's representatives and asked that the work be suspended. This request was rejected because the terms of the contract required that the work proceed uninterrupted; furthermore, the suppliant had agreed to this in full knowledge of the facts since the contract had been awarded to it precisely because the lowest bidder, Donolo Construction, had refused to work through the winter season. Théberge therefore had to return to Chicoutimi and work was resumed.

The suppliant was again put to the test a few months after it had begun work on the contract, when a decree bearing the number 1743, passed by Order in Council of the Government of Quebec, increased the wages that the suppliant had to pay its employees so that the carrying out of the work cost it $82,393.53 more, it said, the estimate of the cost of labour for carrying out the project having been based on the wage scale which accompanied the call for tenders as well as the contract and which was consistent with the wage rates in force under the order which was in fact amended by Decree 1743.

On this wage item, the suppliant contends first that it could and ought to have relied on the wage rates filed with the respondent's calls for tenders and attached to the contract, rates which corresponded to those in force at that time, and even if it could not rely on them, the new rates provided for in Decree 1743, passed by Her Majesty the Queen in right of the Province of Quebec, should be absorbed by the respondent under the principle of the indivisibility of the Crown. The suppliant claims in fact that the Queen, being one, cannot, without assuming responsibility therefor, thus unilaterally increase the wages of employees on a worksite and complicate the situation for the parties.

We should first say that it is not correct to contend that the suppliant should have taken the wage rates mentioned in the list accompanying the call for tenders as a basis since by virtue of clause 67 of the contract, it knew

that those rates could be increased under proper authority and that it could not in any event receive additional sums as a result of an increase in the cost of the contract by reason of a wage increase or adjustment.

Indeed, clause 67 of the contract states clearly:

> The Wage Rates set out or referred to in the said Labour Conditions are subject to increase or adjustment under proper authority, and the amounts payable to the Contractor hereunder shall not be increased by reason of any increase in the cost of the work due to any wage increase or adjustment.

As for the argument that the Crown is indivisible, since the above clause provides for a possible wage increase under proper authority and since that authority can be none other than Her Majesty the Queen in right of the province that passed Decree 1743, which the suppliant is contesting, it appears to me that the suppliant undertook in advance not to claim extras for this item.

Furthermore, I am not overly impressed by the suppliant's argument that since the Queen is "one and indivisible" there cannot be two crowns for the two levels of government, federal and provincial. Whether we consider the Queen as a trustee, acting for a separate group of beneficiaries in each jurisdiction, or whether we simply maintain that the British North America Act implicitly establishes the legal status of an artificial person in each unit, the result is that when the Queen acts in right of the federal government and in right of a province it is as if she were acting as two separate persons, or as the Privy Council stated in *in re Silver Brothers Ltd*[1] at page 524, as two separate purses:

> . . . Quoad the Crown in the Dominion of Canada the Special War Revenue Act confers a benefit, but quoad the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantages. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different.

It does not appear to me that, in the circumstances, the action of one—the province—can be considered as also being the action of the other—the federal authority—in such way as to involve the responsibility of the latter.

Nor can the suppliant legally claim from the respondent the increased labour costs resulting from the new decree since it had undertaken in the contract, as we have seen, to assume any increase under proper authority and since, moreover, by that very fact, as any prudent bidder, it had to provide for increases which might occur during the execution of the contract. This obviously does not exclude the possibility for the respondent, in a case such as this one where the average wages are substantially increased under proper authority shortly after the work has been started, of agreeing if she so wishes, by means of an appropriate authorization, but in an *ex gratia* fashion however, to compensation for this item.

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[1] [1932] A.C. 514.

The suppliant is claiming reimbursement for losses totalling $354,536.21 in the execution of this contract. This amount, although proof of the various items that it covers is not very precise, seems to include first the sum of $82,393.53 for the wage increase under the new decree, the sum of $142,952.74 which was studied by engineer Mousseau of Defence Construction Limited and for which he recommended the payment of the sum of $78,645.30, a payment which was not authorized by the Treasury Board however, and finally the sum of $129,189.94 regarding which the suppliant's engineer Rinfret attempted to give certain details. It is by letter dated February 20, 1963 that the suppliant's president, J. R. Théberge, claims the sum of $142,952.74 as compensation for the increased cost of the work during the winter season. He states at page 2 of his letter:

> In view of the above, we are then submitting to you a compensation claim of $142,952.74 as the extra cost of the work performed during this abnormal winter over and above that had been estimated in our bid.

The suppliant's engineer Rinfret specifies that this sum of $142,952.74 is attributable first to increased labour costs and to what he calls camp loss (probable increase in food and accommodation costs due to the extra men employed on the project). In this amount should also be included the extra concreting work resulting from the cold weather. As for the sum of $129,189.94, this witness states that this includes amounts spent because of wintertime difficulties. He says that this contract was executed over a 2½-year period and, he adds, during the last winter the contractor also had to work in very severe weather conditions which resulted in a loss of $129,189.94. Asbestos pipes broke in some fifty different places; this cost approximately $25,000 because they had to be relaid; as for the balance of about $100,000, he says that it can be "charged to the item direct worksite administration" such as equipment, various heating devices, additional fuel and stoppage of machinery because of inclement winter weather. According to Rinfret, the large number of change orders may also have caused a portion of that loss, although he concedes, in cross-examination, that the majority of the 60 change orders authorized were carried out profitably by the contractor and even that additional sums were granted to the contractor for certain work provided for in the main contract, such as levelling on the site, and in one case where the contractor had to divert a watercourse he was in fact paid higher unit prices than those for which he had tendered. Indeed, his original bid was for the sum of $3,034,722.19 and he was granted, if we take into account certain increases agreed to for work stipulated in the original contract, as well as the sums allotted for additional work, an additional sum of $932,831.63, for a total sum of $3,987,000. It should also be noted that the work provided for in the original contract was performed at the wage rates stipulated in the contract while the additional work was at the new rates.

Therefore, it appears to me that for the execution of this contract the suppliant received not only what it was entitled to receive according to the terms of the contract but, in some cases, additional sums. With regard to the addi-

tional work covered by work orders, it received sums which were negotiated between the parties and which consequently were accepted by the contractor and which, moreover, the suppliant is not claiming except, perhaps, for a certain increase in what it calls the administration costs of the contract. In fact, it is claiming, as its president states in his letter of February 20, 1963 (Exhibit R-3) only the extra cost of the work performed over and above the amount that it had estimated in its bid. It cannot claim this extra amount even if, as the suppliant alleges, certain pressure actually was brought to bear on it by the authorities to employ as many men as possible in order to ease winter unemployment, which, furthermore, has not been proved; the suppliant's president at the most only vaguely claimed that "first the government people, then members of the Quebec organization, unions, then workers' organizations" asked him to employ workers. Moreover, even if the suppliant could claim this extra amount, this Court could not award it since we have here a contract for construction at a fixed price, based on plans and specifications and article 1690 C.C. stipulates that, in such a case, the contractor cannot claim any additional sum upon the ground of a change from the plan and specifications, or of an increase in the labour and materials, unless such changes are authorized in writing and the price fixed by the proprietor; furthermore, s. 47 of the *Exchequer Court Act* also states that in such a case this Court cannot allow compensation on the ground that the contractor expended a larger sum of money in the performance of his contract than the amount stipulated therein. With respect to the claim for $142,952.74, the departmental engineer Mousseau did recommend that the contractor be granted $70,467 as compensation, which he explains in a letter (Exhibit R-4) to his superior, L. D. Brien, in these words " . . . We understand that legally we owe nothing to the contractor due to the type of winter but morally we believe that the present claim has some grounds"; however, this is only a recommendation for a payment which the governmental authorities alone, namely, the Treasury Board, might very well have and indeed still could authorize; but they refused to do so, as we have seen, and unfortunately for the suppliant, it is not within the powers of this Court, in these circumstances, to award it any compensation.

I therefore find that I have to dismiss the present petition with costs.