

9, 1938

In the Privy Council.

No. 14 of 1937.

ON APPEAL FROM THE COURT OF KING'S
BENCH FOR THE PROVINCE OF QUEBEC
(APPEAL SIDE).

BETWEEN

CLIFFORD SIFTON, et al., (PLAINTIFFS IN THE SUPERIOR
COURT AND RESPONDENTS IN THE COURT OF KING'S
BENCH) - - - - - *Appellants*

and

ROBERT OLIVER SWEEZEY (DEFENDANT IN THE
SUPERIOR COURT AND APPELLANT IN THE COURT OF
KING'S BENCH) - - - - - *Respondent.*

CASE FOR THE APPELLANTS.

1. This is an appeal from a majority judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec, dated 9th June, 1936, maintaining Respondent's appeal and annulling a judgment of the Superior Court dated 15th January, 1935, which had condemned Respondent to pay Appellants \$53,972.61 with interest and costs. RECORD. pp. 98-101. p. 95.

2. The Appellants, as executors of the late Winfield Sifton, claimed the money under an agreement between Respondent and the late Winfield Sifton entered into in 1927. p. 1.

3. Early in 1927 the Respondent formed a Syndicate (the members of which changed from time to time each being allowed to sell his interest with the consent of the Syndicate managers) and acquired all the shares of Beauharnois Light, Heat & Power Company, Limited incorporated under Quebec Statute, 2 Edward VII, c. 72 (1902) with the object of developing hydro electric power from a series of rapids in the St. Lawrence River between Lake St. Francis and Lake St. Louis in the Province of Quebec, some twenty to thirty miles above Montreal. p. 153. p. 158.

RECORD.

4. The enterprise included the construction of a ship canal near the Village of Beauharnois on the south bank of the river, for navigation between the two lakes and the diversion of waters from the St. Lawrence River and it was necessary to obtain the approval of the Department of Public Works of the Government of Canada, under the Navigable Waters Protection Act, R.S.C., 1927, Cap. 140, which contained the following amongst other provisions :—

“ 4. No work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council 10

“ 7. The local authority, company or person proposing to construct any work in navigable waters, for which no sufficient sanction otherwise exists, may deposit the plans thereof and a description of the proposed site with the Minister of Public Works, and a duplicate of each in the office of the registrar of deeds for the district, county or province in which such work is proposed to be constructed, and may apply to the Governor in Council for approval thereof 20

“ 12. Parliament may, at any time, annul or vary any order of the Governor in Council made under this Part.

2. Any action of Parliament in that behalf shall not be deemed an infringement of the rights of the local authority, company or person concerned.”

5. The Respondent made an application to the Quebec Legislature for an amendment to the Act incorporating the Beauharnois Light, Heat & Power Company to enlarge its powers so that it might carry out the work. This application was refused and during the following months of June, July and August, 1927, matters were at a standstill. At this stage the Respondent approached Winfield Sifton to secure his services in connection with the venture. He was known to the Respondent as having been largely concerned a few years before with a combined navigation and power project known as the Georgian Bay Canal. 30

p. 52.
ll. 15-20.
p. 52,
ll. 21-31.
p. 65,
l. 30 et seq.
p. 52,
l. 31 et seq.
p. 66, ll. 1-4

6. In September 1927 the late Winfield Sifton was engaged by Respondent on terms which were confirmed in the following correspondence :—

“ Montreal, 15th Oct., 1927.

“ W. B. Sifton, Esq.,
Mallorytown, Ont.

“ Dear Sir,

“ I apologize to you for the delay in writing you, as I promised I would some time ago. 40

“ This letter is to confirm our conversation in which I agreed to pay you Five Thousand Dollars as a retaining fee, in connection with

Ex. P.4,
p. 175.

the St. Lawrence and Beauharnois Power situation, which amount has already been sent you.

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" It is agreed between us that we pay you One Hundred Dollars a day and expenses (when employed away from your home) for such time as we may require your services as our work and efforts proceed.

" It is further agreed between us that when our plans have been passed and approved by Dominion Government with the aid of your counsel and efforts, we shall pay you the sum of Fifty Thousand Dollars (\$50,000).

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" Yours truly,

" R. O. Sweezey."

" Assiniboine Lodge
Mallorytown.

Oct. 17/27.

" R. O. Sweezey, Esq.,
136, St. James St.,
Montreal.

Ex. P.5,
p. 176.

" Dear Bob,

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" I beg to acknowledge your letter of Oct. 15th confirming arrangement between us, and agree and approve same as stated by you.

" I think your last paragraph is slightly ambiguous. It is of course understood that I shall use my best endeavours on your behalf, and I shall act subject to yr. instructions. Having done so, my understanding is that upon the plans being passed and approved by the Dominion Govt. the additional fee of \$50,000 shall become due and payable to me. I don't think it will be possible now or hereafter to produce evidence that such passing of plans will be due to the 'aid of counsel and efforts' from any particular person. I think therefore that it would clarify our understanding if this phrase were eliminated.

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" Yrs. Tly.

" W.B.S."

" Montreal, 19th Oct. 1927.

" W. B. Sifton, Esq.,
Mallorytown, Ont.

Ex. P.6,
p. 177.

" Dear Sir—

" I have your letter of October 17th, which for purpose of clearer understanding I quote herewith:—

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' It is, of course, understood that I shall use my best endeavours on your behalf, and shall act subject to your instructions. Having done so, my understanding is that upon the plans being passed and approved by the Dominion Government, the additional fee of \$50,000 shall become due and payable to me. I do not think it will be possible now, or hereafter to

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produce evidence that such passing of plans will be due to the aid of counsel and efforts from any particular person. I think therefore it would clarify our understanding if this phrase were eliminated.'

" I fully agree with your views as expressed in the above, and for this reason it clarifies my letter to you of the 15th instant.

" Yours faithfully,
" R. O. Sweezey."

p. 14.
ll. 28-30.
p. 56,
ll. 19-29.
p. 42,
ll. 24-25.

7. Sifton worked incessantly on the scheme from the time of his employment early in September 1927 until his death on the 13th of June, 1928. 10
By that time everything he was to do had been done.

p. 76,
ll. 40-44.

8. In January 1928 the plans and the description of the proposed site were, as required by Section 7 of the Statute, submitted to the Department of Public Works of Canada with a formal application to the Governor-General in Council for approval.

9. In March 1928, the Company obtained the necessary amendment to its charter and permission to expropriate and use lands required for the canal and power development. 18 Geo. V. (1928) Chapter 113 (Quebec).

p. 191,
ll. 25-39.
p. 193,
ll. 29-41.

10. Under Order-in-Council (Quebec) dated 27th April, 1928, the Beauharnois Light, Heat and Power Company obtained from the Govern- 20
ment an Emphyteutic Lease dated 23rd June, 1928, whereby the Company acquired the rights of the Province of Quebec to develop power by diverting 40,000 cubic feet of water per second through the canal on condition that the Dominion Government authorize the diversion within one year.

p. 196,
ll. 20-25.
Ex. P.33.
p. 190.

11. In January, 1929, a formal hearing on the application was held in the office of the Minister of Public Works, and, on 8th March, 1929, an Order-in Council (P.C. 422) was passed approving plans and the site and the diversion of 40,000 cubic feet of water per second, subject to certain conditions, one of which was as follows :

" 11. The Company shall not commence the construction of the 30
works until detailed plans of construction and all necessary information respecting the said works have been submitted to and approved of by the Minister, provided that such plans and information shall be submitted within one year."

12. Approval was expressed in the following terms :

" The Committee, on the recommendation of the Minister of Public Works, submit for Your Excellency's approval, under Section 7, Chapter 140, Revised Statutes of Canada, 1927—the Navigable Waters Protection Act—(subject to the foregoing conditions and to such additions, improvements, alterations, changes, substitutions, 40
modifications or removals as may be ordered or required thereunder) the annexed plans of works, and the site thereof, according to the descriptions and plans attached, in booklet form, which works

are proposed to be constructed by the Beauharnois Light, Heat and Power Company, with respect to the diversion of 40,000 cubic feet of water per second from Lake St. Francis to Lake St. Louis, in connection with a power canal to be built by the said Company along the St. Lawrence River between the two lakes mentioned; the said approval to take effect only after an agreement incorporating the conditions enumerated above and satisfactory to the Minister of Public Works of Canada has been executed between the Beauharnois Light, Heat and Power Company and His Majesty the King, as represented by the said Minister.”

10 13. On the 22nd June, 1929, the agreement was approved by Order-in-Council (P.C. 1081) and was executed on 25th June, 1929. Within a few days thereafter the Company began construction on 7th August, 1929, and in September 1932 the Company began to generate electric power from the plant.

p. 209.
p. 47,
ll. 14-16.
p. 47,
ll. 22-27.

14. In 1930 a change of Government took place in Canada. On 3rd August, 1931, an Act of Parliament (21-22 Geo. V. Chapter 19) was passed, which came into force by Proclamation on 1st March, 1932, annulling the two Orders-in-Council of 1929, but permitting the Company to divert
20 the required amount of water subject to such terms and conditions as might be prescribed by Order-in-Council. The preamble and Section 1 of the statute read as follows :

“ WHEREAS it is provided by section twelve of Part I of the Navigable Waters Protection Act that Parliament may, at any time, annul or vary any Order of the Governor in Council under this part; and whereas grave doubts have arisen as to the validity of Order in Council P.C. 422, dated the eighth day of March, 1929, as amended by Order in Council P.C. 1081, dated the twenty-second day of June, 1929, which purported to be made under the provisions of the said
30 Navigable Waters Protection Act, and also as to the validity of an Agreement based upon the terms and conditions of said amended Order in Council, made between the Beauharnois Light, Heat and Power Company, Limited and His Majesty the King, which was executed on the twenty-fifth day of June, 1929; And whereas in the opinion of Parliament the said Company has not complied with all the terms and conditions of the said amended Order in Council which are also embodied in said Agreement ;

“ Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, declares and enacts
40 as follows :—

“ 1. The Order in Council P.C. 422, dated the eighth day of March, 1929, as amended by Order in Council P.C. 1081, dated the twenty-second day of June, 1929, and the Agreement between the Beauharnois Light, Heat and Power Company, Limited, and His Majesty the King, dated the twenty-fifth day of June, 1929, are hereby annulled.”

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15. Another Dominion statute passed on the same date, 3rd August, 1931 (21-22 Geo. V. Chapter 20), which came into force immediately, referred (in Section 1) to "the canal now being constructed by the Beauharnois Light, Heat and Power Company, Limited, . . . between Lake St. Francis and Lake St. Louis" and declared the canal and other appurtenant works to be "works for the general advantage of Canada."

p. 58, l. 42 to
p. 59, l. 46.
Ex. P.27,
pp. 188-189

16. Winfield Sifton received, in his lifetime, the preliminary fee of \$5,000.00 and part of his *per diem* fees and expenses. After his death Appellants received the balance of his *per diem* fees and expenses.

Ex. P.9,
p. 189.

17. Appellants not being aware that the terms of the agreement under which Winfield Sifton was employed were contained in any written document or that there was an obligation to make a final payment of \$50,000.00, asked Respondent to confirm the terms of his agreement in writing. On the 14th July, 1928, a month after Winfield Sifton's death, Respondent wrote to Appellant Victor Sifton, one of the executors: "You may wonder why I have not written as promised in regard to confirming my agreement with Win." and he explained there would be a further delay before he could write. 10

p. 40, ll. 9-22.
Ex. P. 10,
p. 267; P.11,
p. 268; P.28,
p. 269.

18. Early in 1932 Appellant Clifford Sifton, another executor, found the 1927 correspondence and made demand on Respondent for payment of \$50,000.00. 20

Ex. P.13, p. 270;
Ex. P.14, p. 271.

19. On 11th June, 1932, after further correspondence there was an interview at Montreal between the Respondent and the Appellant Clifford Sifton, when the Respondent was pressed for payment and to secure an extension of time for payment gave Clifford Sifton a letter reading as follows:

p. 63, ll. 28-39.
p. 42, l. 9,
et seq.
E.C. P.8, p. 272.

" June 11th, 1932.

" Mr. Clifford Sifton,
Executor Estate Winfield Sifton

" Dear Sir,—

" In consideration of the executors' undertaking not to press this matter for six months from today, I hereby acknowledge that I owed Winfield Sifton at his death, subject only to approval of Beauharnois plans at Ottawa, the sum of fifty thousand dollars, this being an undertaking I made in connection with Beauharnois Syndicate whose assets and liabilities were assumed by Beauharnois Power Corpn. Ltd. 30

" Yours truly,

" R. O. Sweezey."

Ex. P.30,
p. 273.

20. After expiration of the six months' delay, Appellants made further demands for payment. In the interval Respondent had been endeavouring to have the claim paid by a new company, Beauharnois Power Corporation 40

Limited, which had acquired all the Syndicate's rights. On 5th September, 1933, Respondent wrote to Appellant Clifford Sifton :

RECORD.
Ex. P.19.
pp. 274-275.

“ 5th September, 1933.

“ Mr. Clifford Sifton,
Canada Permanent Bldg.
Bay and Adelaide Streets,
Toronto 2, Ont.

“ Dear Mr. Sifton,—

10 “ In regard to the problem of collecting from the Beauharnois Company on behalf of your brother's estate, I have been giving this considerable thought and am now preparing a memorandum, to be addressed to the President of the Beauharnois Power Corporation. In this connection I would appreciate your sending me a copy of the letter which I wrote your brother, and in which it was agreed that he should receive Fifty Thousand Dollars (\$50,000) when the Order-in-Council was passed in Ottawa.

“ The reason I would like to have this letter is that all the Beauharnois Syndicate files are in the possession of the Beauharnois Power Corporation, and I have not access to them.

20 “ It seems to me that the indebtedness of the Beauharnois Power Corporation to your brother can be shown clearly enough, considering that all legal fees were paid by the Syndicate and all liabilities of the said Syndicate were assumed by the subsequent organization, which became the Beauharnois Power Corporation. As a further indication of the Corporation's indebtedness to your brother's Estate, you will recall that several payments were made to Mrs. Sifton on account, pending the completion of the Order-in-Council approving the engineering details of the work. The then President of the Corporation, including the Secretary, approved these payments in accordance with undertakings that were made to your late brother.

30 “ After I have completed the memorandum to the Beauharnois Power Corporation I should like to submit it to you for advice, as you might possibly offer some valuable suggestion to hastening a settlement of this long delayed matter.

“ With best regards, I am,

“ Yours sincerely,

“ R. O. Sweezey.”

21. In January, 1933, Appellants took action against Respondent 40 claiming \$50,000.00 and interest at 5 per cent. per annum (the statutory rate) from the date of Respondent's letter of 11th June, 1932

Hon. Mr. Justice McKinnon, who tried the action, held that the undertaking contained in the correspondence of October 1917 was a definite

RECORD.

p. 86,
ll. 45-50. undertaking or obligation of the Respondent personally for which he was
p. 89, liable and that he was also personally liable under it as a partner in the
ll. 10-12. Beauharnois Syndicate; that Winfield Sifton worked continuously and
p. 89, diligently on the proposition until his death on 13th June, 1928; that the
ll. 39-42. evidence established that Winfield Sifton's arrangement had been with the
p. 93, Respondent personally; that the approval contemplated by the letters of
ll. 10-14. October 1927 was of the general scheme for the diversion of the water and
p. 93, l. 15 this approval was given by the orders-in-council and agreement entered
to p. 94, l. 14 into pursuant thereto and the fact that since 1st October, 1932, water is
p. 94, l. 46 being diverted and power generated constitutes sufficient approval to 10
to p. 95, l. 3. justify the demand. He gave judgment for the Appellants against the
p. 95, Respondent for the principal sum and interest from 11th June, 1932.
ll. 19-23.

p. 107,
ll. 35-41. The judgment at the trial was reversed on appeal, St. Germain J.
dissenting. Hall J. held that at the time of Winfield Sifton's death the
Respondent owed him a contingent fee but as after his death he was unable to
discharge his obligations of personal service on which the contingent fee was
conditional and since the other condition, the approval of the plans, was not
fulfilled, the conditional debt lapsed and when the action was instituted the
Appellant no longer owed the contingent fee. Bond J. held that the
approval of plans required by the October letters was never obtained either 20
with or without the assistance of Sifton; that the agreement to pay Sifton
\$50,000 was subject to the approval by the Government of Canada of
p. 125, Sweezey's plans; that Sweezey's plans were never approved either with or
ll. 23-31. without the assistance of Sifton but that other plans were subsequently
approved as is evidenced by the plant now being in operation. That fact,
however, appeared to him to have no bearing upon the contract between
Sifton and Sweezey. Tellier C.J. agreed with Bond J. Galipault J.
p. 102. expressed his concurrence with Hall J. and Bond J. St. Germain J.
p. 126. dissented. He agreed with the trial Judge, and was in favour of dismissing
p. 126 and 127. the appeal with costs. 30

The Appellants submit that the appeal should be allowed and that judgment of the trial Judge should be restored for the following among other

REASONS

- (1) Because the plans were passed and approved by the Dominion Government as contemplated by the agreement;
- (2) Because the required approval was of the undertaking and not of the details of construction;
- (3) Because liability was not conditional on Winfield Sifton being alive at the date of approval or on proof that his services brought about the approval; 40
- (4) Because Winfield Sifton prior to his death had performed all the services to be rendered by him;

- (5) Because the terms and conditions on which approval was given were accepted and work was commenced ;
- (6) Because the Respondent on 11th June, 1932, in consideration of an extension of time for payment acknowledged his indebtedness and obtained an extension of 6 months within which to pay it ;
- (7) Because the debt carries interest at the legal rate of 5 per cent. from at the latest 11th June, 1932 ;
- (8) Because the judgments of the trial Judge and St. Germain J. were right for the reasons therein stated.

W. N. TILLEY.

C. F. H. CARSON.

In the Privy Council.

No. 14 of 1937

*On Appeal from the Court of King's Bench for the
Province of Quebec (Appeal Side).*

BETWEEN

CLIFFORD SIFTON *et al.*

(Plaintiffs) Appellants

AND

ROBERT OLIVER SWEEZEY

(Defendant) Respondent

CASE FOR THE APPELLANTS

CHARLES RUSSELL & Co.,

37, Norfolk Street, Strand, W.C.2.

Solicitors for the Appellants.