1920

Sept. 23rd

Reasons for Judgment.

IN THE MATTER of the Petition of Right of

DAVID BRAULT.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Breach—Damages—Public Work.

On the 22nd August, 1911, S. entered into a contract "for supplying crushed stone required for macadamizing a portion of the road along the west side of Chambly Canal," to be completed on or before October 15th, 1911. Before the 18th of September, the engineer in charge had repeatedly notified S. that he was not delivering enough stone to allow the work to be performed in time. On that date, he called in another contractor to help complete the necessary deliveries, and, notwithstanding that the date for completion of contract was extended a month, and S. delivered all he could, the work was only just able to be completed that season. No quantities were stipulated in the contract and no exclusive right to supply stone was given to S. and all that S. delivered or offered to deliver was accepted.

Held, that, upon the facts, the Crown had committed no breach of the contract, and that S. had suffered no damage for which the Crown was liable.

2. Where a party has by his own act or default put it out of his power to fulfil his contract, the other party may at once treat this as a breach of contract without waiting for the time of performance or completion to arrive.

PETITION of Right to recover from the Crown damages alleged to have been suffered by suppliant by reason of a breach of contract by the Crown.

THE case was tried at Montreal on the 10th of September, 1920.

Mr. G. Fortin, counsel for suppliant.

Mr. O. Gagnon, counsel for respondent.

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The facts of the case are stated in the reasons for judgment.

AUDETTE J. now (this 23rd September, 1920) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of $1,746.55 for damages arising out of a breach of contract with the Crown.

On the 22nd August, 1911, the suppliant entered into a contract with the Crown, "for supplying crushed stone required for macadamizing a portion of the road along the west side of the Chambly Canal,"—and complete such supply on or before the 15th October, 1911.

He had, at the time he tendered for such contract, a small plant, at his quarry, that was insufficient for the performance of this contract, and he was duly notified by Mr. Parizeau, the Government Engineer, of that fact after his visit to the quarry, at the request of the Ottawa headquarters. However, the suppliant promised to purchase additional plant.

He started to make delivery under his contract, on the 10th August, 1911, and on the 1st September, he had delivered 395 tons. From the 1st to the 18th September, he delivered 743 tons.

Euclide Brault, the suppliant's son and foreman, says that at the time they took the contract they had a middling size plant, and that when they perceived that it was not sufficient, ten days or so after starting work, they purchased a larger crusher.

Mr. Parizeau, the engineer in charge of the works for the respondent, testifies that the delivery of stone made by Brault in September varied between 45, 55, and 14 tons a day; and that the average delivery

between the 10th August and 1st September was only an average of 27 tons.

Mr. Parizeau swears that before the 18th September, he has time and again told the suppliant he was not delivering enough stone to allow him to perform the work on time. However, at that date, he says he had realized, he was certain, that Brault was not delivering stone in sufficient quantity, and at the rate the stone was being supplied the works could not be finished in time. Mr. Parizeau further states that he repeatedly informed his superior officer that if the stone was not forthcoming the works could not be executed on time.

Under these circumstances, on the 18th September, 1911, he called in a Mr. Lord to supply similar stone at the contract prices, and with Lord's help and concurrence and all Brault could and did deliver, prolonging and extending the time of completion of the contract to the 15th November, 1911, he was only just able to complete the works.

Brault, ever since the 10th August to the 15th November, 1911, was asked to deliver all he could, and all he has delivered or offered to deliver was duly accepted.

However, it was contended at bar that the Crown was guilty of a breach of contract inasmuch as by calling in Lord, the latter took away from Brault a number of carters to whom he would give wages of 25 cents over and above what Brault was giving up to that date, and by Lord using some of these carters Brault was deprived of their services and could not supply all the stone he would otherwise have been able to deliver.

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From perusal of the contract, it will be seen that there is no quantity of stone mentioned,—that Brault is not given the exclusive supply of the stone, therefore how could he sue for a given quantity supplied by himself exclusively? By clause 5, the works have to be carried on and prosecuted to completion to the satisfaction of the engineer. Clause 16 provided what the engineer may do in case of delay, and there are other such permissive clauses in the contract; but does not the word "may," in such a document, amount to a mere intimation of what might be done and not an obligation to resort exclusively to that method? Had the word "shall" been used instead of "may," it would have tied the engineer to that method and that method only.

However, it is abundantly proven that the contractor has delivered all he could, and that the Crown readily accepted all he offered and delivered, and that but for the help of Lord, according to the testimony of Mr. Parizeau, the works could not have been entirely executed that season. How could it be found under the circumstances that the Crown is guilty of a breach of contract?

If there is a breach of contract, it is a breach by the suppliant and of which he is alone responsible.

Indeed, where a party has by his own act or default put it out of his power to fulfil his contract, the other party may at once treat this as a breach of contract without waiting for the time of performance or completion to arrive. The apprehension of the engineer that the work was unduly delayed was in this case well founded (1).

(1) *Stewart* v. *The King*, 7 Ex. C. R. 55; 32 S.C.R. 483.

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Contractors cannot have the whole matter of the contract in their hands in respect of public works involving public interest. The Crown cannot be at the mercy of the contractor, it must protect itself, and would do no violence to the contract, when realizing that the contractor was going behind in the execution of the works, to buy outside to protect itself.

Moreover, time was by clause 26 of the contract, deemed to be material and of the essence of the contract, and while the stone should have been all supplied by the 15th October, 1911, the Crown extended the period of the contract by a full month and accepted all the stone supplied by the contractor even during the long extension.

Out of the total quantity of 5,119 tons required for the work in question, the suppliant supplied 2,498 tons and Lord 2,621.

If as between the suppliant and the respondent either of them has been guilty of a breach of contract, it is not certainly the Crown, but the suppliant himself.

The suppliant was given every opportunity of delivering all the stone he could from the 10th August to the 15th November, 1911, and all he was able to deliver within that period, which includes several days before and after the date of the contract, was accepted and credited to him. If there were not enough carters available in the contractor's own parish for the discharge of the duties imposed upon him by his contract, he could and should have procured that help from outside. Brault, the son, further adds all we had of crushed stone, we delivered

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to the Government,—and the suppliant says the Crown never prevented us from delivering stone.

Under the circumstances, I have come to the conclusion that the suppliant is not entitled to any portion of the relief sought by his Petition of Right.

NOTE—Exhibit "A,"—a statement of the quantity of stone actually supplied up to a certain date—not to the end of the contract,—was filed at trial, and was to be completed to the end of the contract. The trial took place on the 10th September,—the completion of that exhibit involved the work of at most half an hour,—but it has not as yet come to hand and I am not on that account delaying judgment, because, in the view I take of the case, it is immaterial.

Judgment accordingly.

Solicitor for suppliant: *Georges Fortin.*

Solicitors for respondent: *Rainville & Gagnon.*