

La Compagnie de Pulpe de Chicoutimi - - *Appellants,*

v.

La Compagnie de Pulpe de Jonquière - - *Respondents,*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 23RD JANUARY, 1917.

Present at the Hearing :

THE LORD CHANCELLOR (LORD BUCKMASTER).

VISCOUNT HALDANE.

LORD DUNEDIN.

LORD PARKER OF WADDINGTON.

SIR ARTHUR CHANNELL.

[*Delivered by* LORD DUNEDIN.]

The appellants and respondents are owners of mills driven by water power situated on the Chicoutimi and Sables Rivers respectively. These two rivers issue from Lake Kenogami at opposite ends. For many years Lake Kenogami has been used as a reservoir of water. To effect a proper storage, dams were constructed on the two rivers at Portage des Roches on the Chicoutimi River, and Pibrec on the Sables River. Quarrels arose between the mill owners, and various litigations ensued, but the whole matter was eventually settled by an agreement and contract of date the 23rd August, 1904, which contract it is common ground is binding, and regulates according to its terms the rights of the parties. The contract provides (article 1) for the rebuilding of the existing dams, and then follows article 2 in the following terms :—

“2. The said dams shall be built according to plans to be settled and approved by Mr. Alexander McDougall, C.E., engineer for the Jonquière Company, and an engineer to be chosen by the Chicoutimi Company, and shall be so constructed as to make an effective water-tight reservoir, to hold not less than 8 feet of water above lowest level of Lake Kenogami, and the said dams shall be provided with gates which will enable the water in Lake Kenogami to be distributed at all times in the following proportions, to wit: one-third of the said water through the gates at the Rivière aux Sables dam, to the Jonquière

Company, and two-thirds of the said water through the gates at the Portage des Roches dam, to the Chicoutimi Company. As far as possible, the surplus water flowing, when the reservoir is full, shall be distributed in the same proportions."

Article 8 is in the following terms:—

"8. The waters in Lake Kenogami, from and after the construction of the new dams provided by the present agreement, shall be under the control of an independent person, who shall be named by the two companies, and whose salary and expenses shall be paid in the proportion of one-third by the Jonquière Company and two-thirds by the Chicoutimi Company. Such person shall distribute the waters to the two companies in accordance with the present contract."

The other articles of the contract provide for various matters which may arise, but are not of importance in the present case, except article 18, which is of importance. It is in the following terms:—

"18. The Jonquière Company shall have the right at any time to enter upon the Rivière aux Sables between the dam on such river and Lake Kenogami, including the outlet of Lake Kenogami at the Rivière aux Sables, for the purpose of blasting ice or removing it, or any trees, logs, or other obstruction which may interfere with the natural flow of the river, and may impede their receiving a third of the water stored and flowing from Lake Kenogami at any time; but they shall give reasonable notice to the Chicoutimi Company of their intention so to do: provided the power hereby given shall not confer any right to mine any part of the natural bed of the river."

The dams were duly constructed. Levels were settled in the following manner: A benchmark was placed near the lake and marked conventionally as 100 feet in height. A sufficiency of storage, as stipulated in the contract, was secured by making the crest of the dam at Portage des Roches at 87 feet and at Pibrec at 84 feet. The difference of height was necessary for equalisation, in view of the fact that the breadth of the dam at Portage des Roches was not exactly twice the breadth of the dam at Pibrec. The dams were furnished with sluices, whose sills were at the bottom of the dam, the sluices being 6 feet square, six of them at Portage des Roches and three at Pibrec. There were also crest gates arranged at the top of the dams to deal with the surplus water, and the tops of these crests were at 92 feet each. The distributor appointed under the contract was, at the date of the raising of the action, a certain Mr. Vézina. Among other duties he kept charts, which tabulated from time to time the level of the lake and the amount of water discharged at each dam. Vézina manipulated the discharge by opening or shutting the sluices, and he based his action on various calculations which had been made as to the amount of water which would pass from the sluices at each dam.

Some time in 1909 the respondents, seeing the charts, perceived that they were getting less than their stipulated one-third of the total water discharged, while the appellants were

getting more than two-thirds. They wished Vézina to alter the sluices, but the appellants, taking the matter into their own hands, prevented Vézina from altering what he was doing. They alleged that the deficit in the respondents' supply was not due to an improper regulation at the sluices, but was due to obstruction in the River Sables, which the respondents had neglected to remove, as they might have done, under article 18 of the contract. After much correspondence the respondents raised the present action in May, 1910. Their declaration set forth in greater detail the facts above summarised, and also asserted that a just distribution, as provided for by the contract, could not be effected if the level of the lake were allowed to fall below the point 82 feet upon the scale above mentioned. The declaration was subsequently amended to the effect of substituting 83.5 for 82. The relief claimed was clearly expressed, and consisted in three declarations, (1) that the respondents were at all times of the year entitled to have one-third of the water in Lake Kenogami from the sluices, and that the sluices should be so regulated as to effect this; (2) that the appellants were not entitled to interfere with the action of the distributor; and (3) that a just distribution could not be effected by the sluices if the lake were allowed to fall below the 83.5 level. The appellants in their answer did not object to declaration 1, which is a mere echo of the contract, but, as regards 2 and 3, they simply denied the facts upon which these declarations were based.

The action came to depend before Mr. Justice Letellier, at Chicoutimi, who heard evidence and pronounced judgment in favour of the respondents, giving them a declaration under all the heads above specified. Appeal was taken to the Appellate Side of the King's Bench in Quebec. The Appeal Court maintained the appeal and ordered a remit to experts, *i.e.*, engineers, called an "expertise." They framed a set of questions to be put to the experts and remitted to the Court at Chicoutimi to get the report and pronounce judgment. The experts, after personal inspection, taking of reports and consideration, made a report. This report came to the same conclusions as Letellier, J., had come to, with the sole exception that they considered the minimum level of Lake Kenogami should be 83 in lieu of 83.5. Letellier, J., not being quite satisfied with some of the answers, remitted the matter to the experts to give him some further details and answer some specific questions. The experts presented a supplementary report, and Letellier, J., then repeated his former judgment, merely substituting the figure of 83 for 83.5. The appellants then went again to the Court of Appeal, who, after discussion, confirmed the judgment of Letellier, J., except as to a matter of costs. The appellants now appeal to this Board against this judgment.

Before their Lordships the appellants, through their counsel, admitted they were wrong in interfering with the distributor, and were wrong in attributing the unequal distribu-

tion—which they admitted occurred—to any failure of the respondents to clean the River Sables. They further did not resist the declaration granted under heads 1 and 2. Their whole argument was directed to the declaration under head 3, which ordained the maintenance of the lake at a level of 83.

It may now be well to explain shortly how the trouble really arose. When the level of Lake Kenogami is above 83, the effective head of water at each dam is practically the same, and consequently no difficulty is met with in so adjusting the sluices as to distribute the water in the agreed proportions. This state of affairs would continue at lower levels if the Rivers Sables and Chicoutimi, respectively, issued at the same level from the lake, but in fact what may be called the lower sill of the outlet of the River Sables is considerably higher than the lower sill of the Chicoutimi. This is so much the case that at a level of 80·3 the water of Lake Kenogami no longer enters the River Sables, while it will still freely enter the Chicoutimi. As the lake in falling approaches this level, it is evident that the effective head at the dams, so far from being equal, is quite dissimilar, the amount of dissimilarity being a varying quantity as the water descends towards the level of 80·3. Now inasmuch as in such circumstances no water can pass the dams, except as allowed to escape from the sluices, it is obvious that it is theoretically possible to measure what is the exact escaping flow at Pibrec on the Sables, and then so regulate the sluice at Portage des Roches, on the Chicoutimi, as to allow exactly double that amount to pass. The appellants' whole argument, when stripped of accessories, was reduced to this: that inasmuch as there was no mention made of any lake level in the contract, but only provision for a two-thirds to a one-third distribution, there was no reason to put a limit which would stop water being divided which was in the lake and available for supply, and which could, with proper appliances, be justly divided. Their Lordships are bound to say that this point was made anything but clear in the appellants' pleadings as defendants to the action. The point was clearly made in the respondents' complaint. It was answered, as above stated, by a mere denial without explanation. In the evidence the respondents clearly put the point to their witnesses, who, admitting that a distribution under the level of 83 and down to 80·3—when all distribution must cease—was theoretically possible, and could be actually done with the provision of gauges, &c., said that practically it was not to be done, and could not be effected by the mere manipulation of the sluices. The appellants put the point to their own expert witness, who said he was not prepared to go into the question, and there the matter was left. Their Lordships have no doubt that on a just consideration of the contract the whole machinery of the dams and sluices was intended to be what may be styled self-contained. Article 2 seems conclusive on this point: "The said dams shall be provided with gates which will enable the

water of Lake Kenogami to be distributed at all times in the following proportions." Accordingly, if the condition of affairs is such that the agreed on distribution cannot be practically effected by the manipulation of the gates without bringing into aid other appliances than those stipulated, then in their Lordships' opinion there cannot be that distribution for which the contract intended to provide. This view seems to their Lordships to be the hypothesis of the import of the contract, upon which the experts proceeded. Their report, and not the evidence, is, as to the facts, the real basis on which judgment proceeds. The experts clearly had the point before them, because question 2, as settled by the Court of appeal to be put to them, was as follows:—

"2. At what level does the water of Lake Kenogami require to be kept in order to distribute the water in proportion of two-thirds to the defendant and one-third to the plaintiff, and does the level of the lake, for this purpose, differ in winter and summer, or at different times or seasons, or under varying conditions of wind, and state the extent of this difference, if any?"

In their original answer to this question the experts point out that some water will flow down the Sables River at any height of Lake Kenogami above 80.3, and that it is physically possible to measure whatever water flows; but they proceed to say that the effect of winds in summer and ice in winter will disturb the river's action, and that accordingly, though water would pass in still conditions at 82, so as to allow operation of the mills, yet, to meet contingencies, a level of 83 should be maintained. This answer was deemed ambiguous, as, indeed, it was, owing to the introduction of the words "operation of the mills," and consequently in the supplementary reports all reference to the mills is omitted. They say:—

"Our decision was that the level of the lake be held at elevation 83.0, and we never at any time suggested that elevation 82.0 was the level at which the contract could be fulfilled.

"No doubt the water may at times be divided when the lake is at a lower level, in favourable seasons, but in order to ensure compliance with the requirements of the contract, the elevation of 83.0 is, in our opinion, necessary.

"Our decision was reached after a careful study of the whole of the evidence in the case, and we analysed this in conjunction with the plans and various exhibits, including the contract. We also examined the site under summer and winter conditions."

This view commended itself to both the Trial Judge and the Court of Appeal. Their Lordships are of opinion that, on the materials before them, both Courts took a correct view, and rightly construed the contract, and that the appeal falls to be dismissed.

They will humbly advise His Majesty accordingly. The appellants will pay the costs of the appeal.

In the Privy Council.

LA COMPAGNIE DE PULPE DE
CHICOUTIMI

v.

LA COMPAGNIE DE PULPE DE
JONQUIÈRE.

DELIVERED BY LORD DUNEDIN.