

43, 1937

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**Part I — PLEADINGS**

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**PLAINTIFFS' DECLARATION**

1. That on or about July 29th 1928, the Plaintiff, William I. Bishop Limited, did submit to Defendant a tender for the construction of a certain storage dam known as CEDARS RAPIDS STORAGE DAM, to be constructed across the Lievre River and the bed thereof on Lot "A" in the Fourth Range of the Township of Biglow in the County of Labelle, and Lots One and Two (1 and 2) in the first Range of the Township of McGill in the  
20 County of Labelle in the Province of Quebec.

2. That the said tender was based upon information, plans, specifications and data furnished by Defendant indicating the nature and extent of the work to be done, the material, labour and services to be supplied and details of the construction and other information to enable said Plaintiff to make its estimate of the cost of the indicated work, and to furnish a tender and price for the carrying out of same, and the plans and specifications supplied as aforesaid were in fact the same as those to be incorporated in the contract which the successful tenderer would be called upon to  
30 sign.

3. That said Plaintiff was not called upon nor expected nor required, nor was it possible in the short time given for the submission of tenders to make tests or borings or to verify the data supplied by Defendant concerning the conditions to be encountered in respect of excavation, nature of the river bed and other details of the work, and said Plaintiff was expected to and did rely upon the data upon such matters given by Defendant.

40 4. That on or about November 15th 1928, by letter produced herewith as Exhibit P/1, Defendant accepted said Plaintiff's tender for the said work, and a contract was entered into between said Plaintiff and Defendant, and said Plaintiff thereupon began the work, although at the request of Defendant the actual signing of the said contract was deferred until May 23rd 1929, and the said contract, plans and specifications are produced herewith as Exhibit P-2.

5. That during the course of the work it was found that the plans, specifications, information and data which had been supplied to said Plaintiff by Defendant were grossly inaccurate, erroneous and deceptive, and that the actual undertaking was one of a different character and of much greater magnitude and expense than that reflected by the data supplied and details furnished by Defendant and upon which said Plaintiff's tender was based, which is evidenced by the fact that although the contract price based upon the said data was the sum of Six hundred and nine thousand One hundred dollars, (\$609,100.00) the Defendant has already acknowledged as necessary and paid for work to the amount of Nine hundred and sixteen thousand Seven hundred and twenty-three dollars and fifty-seven cents (\$916,723.57).

6. That said Plaintiff has completed the entire work required for the due and proper construction of the Cedars Rapids Storage Dam to the satisfaction of the Defendant, who has accepted same and entered into the possession, use, enjoyment and operation thereof for its own purposes and profit, but Defendant still owes the sum of Four hundred and twelve thousand eight hundred and forty-six dollars and seventy-five cents (\$412,846.75) representing labour, material, work and services necessarily supplied, outlays made by said Plaintiff and expenses to which said Plaintiff has been put in connection with the said work as well as in connection with the doing of work actually required for said construction and approved by Defendant but not provided for in the contract or as damage suffered by the said Plaintiff for reasons attributable to the faulty, erroneous and deceptive information supplied and representations made by Defendant to said Plaintiff as aforesaid, the whole as more particularly set out in the following paragraphs:

7. **HARDPAN EXCAVATION.** That the data given at the time of tendering, as well as the contract itself, indicated only two classes of excavation, namely, earth and ledge, and this although Defendant had dug certain test pits to determine actual conditions in respect of by-pass and dam excavation, said test pits having been refilled to the top. but said Plaintiff was definitely and distinctly informed by Defendant that the material consisted of 5 fh. yellow sand and loam and the balance gravel with occasional boulders.

8. The said information and data were absolutely erroneous, faulty and deceptive, inasmuch as 4,600 cubic yards of hard-

pan were encountered and excavated by said Plaintiff in the by-pass section alone, and a further amount of 8,335 cubic yards in the excavation for the dam.

10 9. That said hardpan excavation is in no way similar to earth excavation and is invariably recognized as in a class by itself, costing and charged for at a rate more than double of that of earth excavation, and said hardpan excavation as aforesaid was not referred to in said contract but was work required to be done and actually performed by said Plaintiff with the approval of Defendant and accepted by Defendant for which said Plaintiff has not been fully paid and for which Defendant still owes the sum of Twenty-one thousand six hundred and one dollars and forty-five cents (\$21,601.45) as follows:

20 Excavation hardpan at by-pass — 4600 cu. yds.  
“ “ for dam 8335 “ “

Total hardpan excavation —	12935	“	“	
12,935 cu. yds. @ $\frac{2}{3}$ rock price \$4.35 x. 666 \$2.90				— \$37,511.50
Less: 12,935 cu. yds. paid for at earth excavation price of \$1.23				— 15,910.05
				<hr/>
				\$21,601.45

30 10. That said Plaintiff immediately drew the attention of Defendant's Chief Engineer, Hardy S. Ferguson, to the matter of hardpan excavation, and claimed the usual and proper price for said excavation and said Ferguson so notified the Defendant

11. That said Plaintiff further wrote to said Ferguson respecting this hardpan excavation on February 22nd 1929, copy of said letter being produced herewith as Exhibit P-3, but Defendant has neglected and refused to pay for the said work.

40 12. HANDLING OF DEFENDANT'S LOGS. That one of said Plaintiff's obligations under the contract was to adjust its works in a manner to provide opportunity for the passage of logs by Defendant, and said obligation was duly fulfilled by said Plaintiff, and said Plaintiff was not obliged by the contract to provide labour and facilities for the actual driving of the said logs by the site of the dam.

13. That notwithstanding the above, Defendant neglected and refused to carry out the driving of said logs past the site



of the works and to place the necessary booms to accomplish the drive, and Defendant by said neglect rendered it necessary for said Plaintiff itself to supply booms and labour and to pass said logs in order to safeguard the works at an expense of Four thousand One hundred and three dollars and seventy-two cents (\$4,103.72), and said Plaintiff is entitled to claim from Defendant  
10 said sum rendered necessary by reason of Defendant's said neglect, which sum is made up as follows:

Cost of boom and expense of handling logs:

	Labour: .....	\$2,858.59	
	Material: .....	136.83	
		<hr/>	
		\$2,995.42	
20	37% Profit, Overhead etc: .....	\$1,108.30	
		<hr/>	
			\$4,103.72
			<hr/>

14. That said Plaintiff protested to Defendant in respect of its handling of the logs, and in particular wrote to Defendant under date June 20th 1929, forwarding therewith a copy of a report made by said Plaintiff's Superintendent, a copy of said letter and report being produced herewith as Exhibit P-4,  
30 and also addressed a further letter to Defendant under date June 25th 1929, copy whereof is produced herewith as Exhibit P-5.

15. INCREASED COST OF COFFERDAMS AND UNWATERING. That the information, data and contract plans showed the river bottom as bare ledge rock and the said Plaintiff was justified in relying upon the said information and plans and did so rely upon them in making its tender and entering into the contract and planning its work and placing the cofferdams required for unwatering the site of the dam.  
40

16. That the said information, data and contract plans proved to be entirely erroneous, inasmuch as the river bottom instead of being bare ledge rock was covered for a depth of many feet by broken rock, boulders, stones, gravel and other similar material, which allowed the water to pass under the cofferdams in such volume as to prevent the unwatering of the site by the usual methods adopted for ledge rock; and after trying several

expedients and also after using a greatly abnormal quantity of toe fill as instructed by the Defendant's engineers, the said Plaintiff was unable to stop the leaks owing to the nature of the bottom of the river, although its attempts were carried beyond any usual limit, as ten pumps from 12" to 6" were all forced to their utmost capacity at the same time without emptying the  
10 pond.

17. That eventually owing to the nature of the river bottom the said Plaintiff, in order to secure control of the water, was obliged to bring in steel piling and a heavy pile-driver, and to drive fifty-eight tons of steel sheet piling before it could unwater the site and proceed with the construction of the dam across the river.

20

18. Furthermore, the Defendant, in utter disregard of the construction work which was being done for it by the said Plaintiff, sent its logs down the river in great masses, generally at night, which jammed against the main cofferdam, seriously displacing portions of it and increasing the difficulty and volume of the work, and making it impossible to place the necessary plank sheeting in the usual way.

30

19. That the plans, specifications, information, data and the terms of the contract itself concerning the conditions under which said cofferdams were to be placed and unwatering to be done, were erroneous, faulty and deceptive to the extent that the actual work required under the guidance and authority of Defendant's engineers was a work entirely different and of vastly greater magnitude and expense than that contemplated by the contract, and the said work has been done by Plaintiff and completed and accepted by Defendant as the actual conditions required at a cost of One hundred and ninety-seven thousand nine  
40 hundred and seven dollars and thirty-five cents (\$197,907.35) including said Plaintiff's profit, upon which the said Plaintiff has received the sum of Forty-nine thousand and fifty dollars and twenty cents, (\$49,050.20) leaving a balance of One hundred and forty-eight thousand eight hundred and fifty-seven dollars and fifteen cents (\$148,857.15), which is claimed herein as follows:

	Cribwork, including timber, building, loading:	\$22,045.89
	Sheeting and toe fill: .....	41,776.78
	Steel Sheet Piling, including taking in heavy pile-driver: .....	12,085.52
	Pumping, etc: .....	53,297.10
	Removal of Cofferdams: .....	13,782.03
10	Scows and Boats, etc: .....	1,470.60
	37% Profit, Overhead, etc: .....	53,449.43
		<hr/>
		\$197,907.35
	Less payment received: .....	49,050.20
		<hr/>
	CLAIM .....	\$148,857.15
		<hr/>

20           20. That the conditions existing were brought to Defen-  
dant's attention and to the attention of Defendant's Chief En-  
gineer, Mr. Hardy S. Ferguson, who came from New York to  
advise upon the best methods of handling the same and who ad-  
mitted that the plans were in error, and gave instructions to said  
Plaintiff as to how the situation should be handled and told De-  
fendant that the cost of said work should be made the subject of  
arbitration, but notwithstanding this, Defendant has neglected  
and refused to pay for the work or to go to arbitration in the  
manner hereinafter referred to in the present declaration, and  
said Plaintiff produces as Exhibit P-6 a letter from Defendant's  
30 Resident Engineer dated October 2nd 1929 forwarding a memo-  
randum of the conference between the parties, and also produces  
as Exhibit P-7 copy of a memorandum of matters covering said  
conference made at the same time by said Plaintiff and furnish-  
ed to Defendant.

COFFERDAM LOWER END BY-PASS.

40           21. That owing to the unexpected difficulties in by-pass  
and dam excavation, as set out in paragraphs under the heading  
"Hardpan Excavation" herein, and to the extra time necessary  
for said excavation and the vastly increased depth of cut-off rock  
excavation and consequent increased quantities of concrete in the  
base of the dam, none of which could have been foreseen by rea-  
son of the faulty and erroneous nature of the information, plans  
and specifications furnished by Defendant, the work was delay-  
ed long past the contemplated time for completion and on into  
the Spring season and, as a consequence, said Plaintiff was oblig-

ed to construct a cofferdam at the lower end of the by-pass to protect the work against Spring high water, which said cofferdam would not have been necessary or required had the nature and volume of the work been as indicated in said plans, specifications and contract, and the construction of the said cofferdam is a work not provided for in the contract but rendered necessary  
10 by Defendant by reason of the conditions aforesaid, for which Defendant is responsible, and said Plaintiff claims payment for said work from Defendant as follows:

Cost of Cofferdam and removal:

	Labour: .....	\$3,670.94
	Material: .....	390.01
		<hr/>
		\$4,060.95
20	37% Profit, Overhead, etc: .....	1,502.55
		<hr/>
		\$5,563.50
		<hr/>

22. ADDITIONAL COST OF ROCK EXCAVATION.

That the total quantity of rock excavation indicated by the contract was 8,060 cubic yards, which said Plaintiff was justified in believing it would have to remove in the ordinary way,  
30 and its plans and estimates were in accordance.

23. That the said contract quantity of 8,060 cubic yards was grossly in error, and said Plaintiff actually excavated a total of 21,564 cubic yards, or 167.5% over the contract quantity.

24. That owing to the Defendant's lack of knowledge and faulty knowledge regarding the nature of the materials at the site of the dam said Plaintiff was called upon and obliged by Defendant to remove the greater part of this great excess quantity of rock in thin layers as a testing operation and in the form  
40 of irregular pits, a method of procedure entirely different from and more costly than the usual and ordinary methods of rock excavation, and rendered necessary in order that Defendant might procure information as to the character of the rock, which Defendant should have possessed before the job began.

25. That the said manner of handling this great excess quantity of rock was not covered nor contemplated by the con-

tract, and the cost of removing said rock in the manner indicated and required by Defendant was the sum of One hundred and twenty-two thousand four hundred and seventeen dollars and thirty-nine cents (\$122,417.39) including said Plaintiff's profit, upon which said Plaintiff has been paid Eighty-seven thousand three hundred and sixteen dollars and sixty-five cents, (\$87,316.65) leaving a balance owing by and claimed herein from Defendant of Thirty-five thousand One hundred dollars and seventy-four cents (\$35,100.74) as follows:

	Total cost of rock excavation (21,565 c.y.)	
	Labour: .....	\$72,095.58
	Material: .....	17,260.18
20	Total Cost: .....	\$89,355.76
	37% Profit, Overhead, etc: .....	33,061.63
		<hr/>
		\$122,417.39
	Less payment received: .....	87,316.65
		<hr/>
		\$ 35,100.74
		<hr/>

26. That said Plaintiff protested to Defendant with respect to the matters contained in the foregoing, and particularly by letters addressed to Defendant dated June 20th 1929 and August 22nd 1929, copies whereof are produced as Exhibits P-8 and P-9.

27. HANDLING AND TRIMMING EXCAVATED ROCK. That the great quantities of excess rock excavation referred to in the next preceding claim, made large piles of excavated rock which had to be placed where space could be found as it was impossible to get all the material into the place mentioned in the contract, and furthermore, the said Plaintiff was obliged by Defendant to rehandle and trim the piles of loose rock resulting from the excavation at the North end of the dam, in order to give the pile a better appearance, a work which was not called for in the plans and specifications nor the contract, and the sum of One thousand nine hundred and ninety dollars and eighty-two cents (\$1,990.82) is claimed hereinby said Plaintiff as the price and value of said work so ordered by Defendant and performed by said Plaintiff as follows:

	Labour .....	\$ 845.26
	Material, Fuel, etc. ....	522.39
	Plant Rental .....	85.50
		<hr/>
	Total Cost .....	\$1453.15
10	37% Profit, overhead, etc. ....	537.67
		<hr/>
	CLAIM .....	\$1990.82
		<hr/>

28. FROZEN MATERIALS IN RIVER BED: That as previously referred to herein, the whole of the river bottom at the dam site is shown on the contract plans as being ledge rock and there was no excavation price in the contract for this section for any other material than rock.

20 29. That instead of the said river bed being rock a quantity of 811 yds. of the necessary excavation proved to be a mixture of boulders, stones, gravel and sand and other material overlying the rock which had to be taken out in mid-winter in a frozen condition, which was fully as difficult and expensive to handle as rock.

30 30. That the earth excavation price of \$1.23 per cu. yd. allowed by Defendant in no way applies to this material, either as to the nature, condition or location thereof, and there being no provision in the contract for excavation of material at other than rock prices at this point and as the said material was to all intents and purposes rock excavation, said Plaintiff is entitled to be paid the rock excavation price of \$4.35 per cu. yd. therefor and claims from Defendant the balance due for removal of said material, as follows:

	811 cu. yds. frozen boulders, stone, sand etc. at rock price of \$4.35 .....	\$3,527.85
40	Less 811 cu. yds. paid for at earth excavation price of \$1.23 cu. yd. ....	997.53
		<hr/>
		\$2,530.32
		<hr/>

31. WORK UNDER WINTER CONDITIONS. That because of vastly increased quantities of concrete and other material required and work to be done above those contemplated by

the contract, and because of the delay due to the difficulty and extra work required in unwatering resulting from wrong information regarding the nature of the river bottom as hereinabove alleged, and for which Defendant is responsible, said Plaintiff was forced to do nearly 15000 cu. yds. of concrete which was chiefly excess, and to erect nearly 500 tons of structural steel work, the whole under winter conditions instead of under the normal working season conditions contemplated by the contract.

32. That the unit cost of this winter work and the costs of maintaining and heating winter camps etc. were much greater than the corresponding costs to which the said Plaintiff would have been put had the actual conditions of the work been as indicated by the Defendant, and the sum of Ninety-six thousand eight hundred and thirty-two dollars and forty-five cents (\$96,832.45) is claimed herein as being the expense, including said Plaintiff's profit, to which said Plaintiff was put as a result of and arising from the faulty and erroneous information given by Defendant, and the delays resulting therefrom for which as aforesaid Defendant is responsible, particulars of which sum are as follows:

14,396 cu. yds. Class 1 Concrete @ \$3.21 .....	\$46,211.16
951 " " Class 2 Concrete @ \$6.61 .....	6,286.11
470,36 tons structural steel @ \$7.56 .....	3,555.92
	<hr/>
	\$56,053.19
30 <i>Camps, etc.</i>	
Fuel .....	\$5722.40
Protecting water lines .....	1529.50
Protecting steam lines .....	3827.86
Protecting camps .....	1283.31
Extra lighting .....	2264.36
	<hr/>
	\$14,627.43
	<hr/>
	\$70,680.62
Plus 37% .....	26,151.83
	<hr/>
CLAIM .....	\$96,832.45
	<hr/>

33. OVERCHARGE ON LOGS. That the Defendant agreed to furnish the said Plaintiff with logs in the round at McCabe's Mill at \$20.00 per 1000 ft. B.M. Quebec Log Scale, but Defendant has refused to abide by its undertaking in this regard

and has charged the said Plaintiff on the basis of the sawn lumber instead of in the round, thereby depriving said Plaintiff of the advantage of any overrun in the cutting from logs, and said Plaintiff further alleges that Defendant charged it for logs never received by said Plaintiff.

10 34. That there is due by Defendant the sum of Seven thousand two hundred and twenty dollars and nineteen cents (\$7,220.19) as refund of the amounts which have been illegally deducted by Defendant from the sum due under the contract in respect of the foregoing, as follows:

	For difference between sawn lumber measure and Quebec Log Scale .....	\$5,790.59
	For amount deducted by owners from estimates, for logs never received by the contractor .....	\$1,429.60
		<hr/>
20		\$7,220.19
		<hr/>

35. CEMENT FOR APRON IN BY-PASS CHANNEL. That said Plaintiff was not notified regarding placing of a concrete apron in the by-pass channel in time to get the material required in over the winter roads, and as a result of the fault and neglect of the Defendant in this regard said Plaintiff suffered prejudice and damage by reason of having to pay greater sums to bring in material by other means than over said winter roads, for which sums Defendant is responsible, and the sum of Two thousand two hundred and thirty-nine dollars and forty-six cents 30 (\$2,239.46) is claimed herein from Defendant as follows:

	Hauling by tractor from Gracefield to Whitefish Lake & Cameron Bay:	
	Whitefish Lake, 1260 bags -55-1-8 tons @ \$33.30 per ton (\$33.30 — average cost of all hauling by tractor during April 1930).	\$1,835.66
	Hauling by teams from Whitefish Lake to works	125.21
	Hauling by teams from Cameron Bay to works ....	142.33
		<hr/>
40		\$2,103.20
	Less:	
	Cost of hauling on winter roads —	
	55-1-8 tons @ \$8.50 .....	468.56
		<hr/>
		\$1,634.64
	Plus 37% Profit, etc. ....	604.82
		<hr/>
		\$2,239.46



36. SHORTAGE IN PAYMENT FOR CLASS 1 CON-  
 CRETE. That the contract provides that when the actual quan-  
 tity of any class of concrete is less than the contract quantity, the  
 minus difference shall be multiplied by a price fixed in the con-  
 tract, and the sum so obtained shall be deducted from the princi-  
 pal sum and similarly that where the actual quantity of any class  
 10 of concrete is greater than the contract quantity, the difference  
 shall be multiplied by a price stated in the contract and the sum  
 so obtained added to the principal sum, and the only contract con-  
 dition requiring or permitting the addition to or deduction from  
 the principal sum is that concrete of that class has been increas-  
 ed or reduced as the case may be in relation to the amount pro-  
 vided in the contract.

37. That the Defendant in computing its estimates for  
 20 Class 1 concrete before February 1930, made such computations  
 in accordance with the provisions of the contract, but since the  
 said month the Defendant has prepared its estimates in an im-  
 proper and erroneous manner and has illegally deprived said  
 Plaintiff of the sum of Thirty-one thousand five hundred and  
 forty-nine dollars and fifteen cents (\$31,549.15) in respect of  
 adjustment on Class 1 concrete, and the sum of Thirty-one thous-  
 and five hundred and forty-nine dollars and fifteen cents  
 (\$31,549.15) is justly due and owing by Defendant on the follow-  
 ing basis of measurement and computation under the contract.

Concrete	Contract quantities Cu. Yds.	Actual Quantities Cu. Yds.	Difference Cu. Yds.	Rate per Cu. Yds.	Amounts to be added to or deducted from principal sum
Class 1 without plums .....	9,690	23,656	13,966	\$18.92	\$264,236.72
Class 1 with plums	10,800	6,781	4,019	9.31	37,416.89
	20,490	30,437	9,947		\$226,819.82
Engineer's Estimate .....	20,490	30,437	9,947		\$195,270.68
Difference, being the amount by which the en- gineer's estimate for Class 1 concrete falls short) of showing a proper payment under the contract					\$31,549.15

38. That said Plaintiff protested against Defendant's illegal and arbitrary actions in respect of change of computation as aforesaid, and in particular by letter to Defendant under date March 17th 1930, copy whereof is produced herewith as Exhibit P-10.

10           39. PLANT REMOVAL. That by reason of delays due to false information and to the great excess quantities of work over that contemplated by the contract for which Defendant is responsible, said Plaintiff was unable to get a large part of its plant away from the site of the work on the winter roads of January and February 1930 as it could have done had the work been such as was contemplated and covered by the contract, and said Plaintiff has suffered loss and damage for which Defendant is responsible, owing to heavy articles of plant and the necessary tractor to haul  
20 them to the railway being necessarily held idle till the coming winter and to the fact that said Plaintiff has lost all opportunity to utilize its plant by rental, sale or otherwise for a whole year, and said Plaintiff is entitled to claim from Defendant the sum of Five thousand eight hundred and twenty-three dollars and forty-nine cents (\$5,823.49) representing outlays and losses in respect of the foregoing as follows:

	Moving equipment to temporary storage, outside of owner's land as required by contract .....	\$ 681.10
	Extra cost of tonnage hauled March & April 1930	
30	58.45 ton @ \$6.55 plus 47 tons @ \$25.09 .....	1,562.07
	Estimated extra cost of hauling out Boiler, Crusher and Cable for Cable way .....	400.00
	One year's additional rental of Garage for tractor and equipment .....	425.00
	Dismantling and preparing Tractor for storage .....	219.50
	Additional insurance on Buildings and Equipment	
	(\$5,000) \$85.	
	“       “       “ Tractor \$50.	135.00
		\$3,422.67
40	Plus 15% on \$3,422.67 .....	513.40
		\$3,936.07
	Plus allowance for tractor and equipment tied up not available for one year say 15% on \$12,582.81 .....	1,887.42
		\$5,823.59

40. STANDBY AND OVERHEAD EXPENSE. That by reason of the grossly wrong information regarding the nature of the material forming the bed of the river, particularly at the site of the upstream cofferdam, the whole of that part of the dam between the shore lines of the river was held back approximately three months beyond the time which would have been required, had conditions been as contemplated by the contract and shown on the plans, and the said delay is indicated by the fact that the average of five unrestricted months estimates was \$82,015.87, and the average of the said three restricted months estimates was \$33,797.80.

41. That said delays for which Defendant is responsible and not contemplated by the contract nor the nature of the work as originally indicated, necessitated additional outlays by said Plaintiff for standby charges of plant, maintenance and overhead expenses, amounting to the sum of Forty-nine thousand One hundred and forty-seven dollars and forty-one cents (\$49,147.41) which said sum said Plaintiff is justly entitled to claim from Defendant as follows:

	The average maintenance and overhead, etc. for the months of July & August is \$21,190.30, which at the same rate for September, October, November equals \$21,190.30 x 3 .....	\$63,570.90
30	The average of the Resident Engineer's estimates for July and August is \$84,580.10, and therefore the proportion of standby to work done is \$21,190.30 /84,580.10 equals .25	
	Credit for Sept. work — \$38,772.26 x .25 — \$ 9,693.06	
	“ “ Oct. “ — 16,794.64 x .25 — 4,198.66	
	“ “ Nov. “ — 45,826.49 x .25 — 11,456.62	
	<hr/>	
40	Total credit for Sept., Oct., and Nov. ....	25,348.34
	<hr/>	
	Net unused standby for Sept., Oct. and Nov. ....	\$38,222.56
	 The proportion of net unused standby to full standby equals \$38,222.56/63,570.90 -.601	
	 Plus 15% Profit .....	5,733.38
	<hr/>	
		\$43,955.94

Plus plant charge  $2\frac{1}{2}\%$  per month on \$115.174. (plant value) for 3 months — \$8,638.05

For the same proportion of net unused plant charge to full charge as for standby (.601) net plant charge equals \$8,637.00 x .601. ....

5,191.47

10

**TOTAL CLAIM** ..... \$49,147.41

20

42. That Defendant did withhold payment for a period of sixteen days, to wit, from August 18th to September 3rd 1930, of the sum of Eighty-nine thousand five hundred and ninety-eight dollars and seventy-eight cents (\$89,598.78) due to said Plaintiff, and did withhold payment from August 18th to September 17th 1930, of the sum of Two thousand and eighty-two dollars and sixty-eight cents (\$2,082.68) and said Plaintiff is entitled to claim interest from the Defendant at the rate of 7% for said delays, which interest for the two items amounts to Two hundred and eighty-six dollars and ninety cents (\$286.90).

30

43. That the sums referred to and claimed in the foregoing paragraphs of this declaration form a total of Four hundred and twelve thousand eight hundred and forty-six dollars and seventy-five cents (\$412,846.75) which is justly due and payable by Defendant for labour, material and services supplied and work done and money illegally withheld and damage suffered by said Plaintiff in respect of the matters aforesaid.

40

44. That the written conditions supplied to said Plaintiff at the time of tendering, and also the written contract, Exhibit P-2 herein, entered into between said Plaintiff and Defendant, contained a direct statement that should any dispute arise as to the interpretation of the terms of the contract as to cost of changes and extra work performed or in regard to any other matter or thing regarding the execution or final settlement of the contract, it should be referred to a Board of Three Arbitrators, one to be selected by the Defendant and one by the said Plaintiff and the third to be selected by the two thus chosen and that the decision on such arbitration should be final and binding on both parties.

45. That when said Plaintiff proposed arbitration to Defendant on matters arising out of the foregoing as they arose, said Plaintiff was referred to Defendant's Solicitors, Messrs Ayles

& Aylen, and accordingly said Plaintiff in good faith did, through its own Solicitors, call upon Defendant to arbitrate matters referred to herein.

10 46. That in particular on December 9th 1929, said Plaintiff did tender to Defendant as aforesaid a reasonable and proper draft agreement covering the naming of arbitrators and other details, together with eleven (11) submissions prepared in clear and categorical form on various matters and claims then in dispute, as appears by copy of letter dated December 9th 1929, with said draft agreement and submissions produced herewith together as Exhibit P-11, and said documents were acknowledged by said Attorneys acting for and on behalf of Defendant under date December 12th 1929, as appears by letter of said date produced herewith as Exhibit P-12.

20 48. That a further letter was sent to Defendant's Solicitors on January 6th 1930, copy whereof is produced herewith as Exhibit P-13, to which a reply was received from Defendant's Attorneys to the effect that said documents had been forwarded to Defendant who had the same under consideration, as appears by said letter dated January 7th 1930, produced herewith as Exhibit P-14.

30 49. That a further letter was sent to Defendant's Attorneys on February 21st 1930, complaining of the delay and requesting that Defendant name its arbitrator, as appears by copy thereof produced herewith as Exhibit P-15, and a reply was received under date February 28th 1930, which said letter is produced herewith as Exhibit P-16.

40 50. That a further letter was sent to said Solicitors of Defendant on March 1st 1930, calling upon Defendant to proceed to arbitration within one week, as appears by copy of said letter produced herewith as Exhibit P-17, and to said letter no reply was received

51. That further on the 6th November 1930, through the ministry of Mtre E. J. Leblanc, N.P., said Plaintiff did by Act of Notification call upon Defendant to proceed to arbitration as provided in the contract, and copy of said Notification is produced herewith as Exhibit P-18.

52. That notwithstanding the foregoing Defendant has violated the letter and spirit of the contract between the parties

and has neglected and refused to proceed to arbitration on the said matters and claims in the manner and form, set forth in the contract, the whole to the prejudice and damage of said Plaintiff.

10 53. That with respect to all copies of letters referred to in the present declaration as emanating from said Plaintiff to Defendant or its representative, said Plaintiff hereby calls upon Defendant to produce the originals thereof at the trial of this case, failing which said Plaintiff reserves its right to make secondary proof of the contents thereof.

20 54. That the completion of the work concerned herein took place on or about June 15th 1930, and said Plaintiff did on the 26th day of June 1930, cause to be registered under No. 2 in the Registry Office for the County of Labelle in which the immoveables concerned herein are situate, a statement of the claims arising out of the matters referred to herein amounting to the sum of Six hundred and sixty thousand two hundred and twenty-eight dollars and three cents (\$660,228.03), as appears by registered copy of said statement produced herewith as Exhibit P-19, and did on June 28th 1930 give notice of said registration to Defendant, proprietor of the said works, by Act of Notification made by the said Notary, produced herewith as Exhibit P-20, the whole as by law required in order that there might be established a builders privilege upon the following immoveable property, namely: Lot "A" in the Fourth Range of the Township of Biglow in the County of Labelle and Lots One and Two (1 and 2) in the First Range of the Township of McGill in the County of Labelle and the bed of the Riviere du Lievre lying between the said Lot "A" Range Four, Township of Biglow, and the said Lot One (1) in the First Range of the Township of McGill, in the Province of Quebec, and in so far as may be necessary the title of the Defendant to the said immoveable property.

40 55. That there is presently due and owing by Defendant, and subject to the said privilege, the sum of Four hundred and twelve thousand eight hundred and forty-six dollars and seventy-five cents (\$412,846.75) as set out herein, for which said Plaintiff is justly entitled to have it declared that a privilege exists upon the said described immoveables on which said works are erected, as well as upon the additional value given thereto by the said works.

56. That the said Plaintiff, William I. Bishop Limited, has assigned unto the Plaintiff, Bank of Montreal, as collateral security for money owing by said William I. Bishop Limited unto the said Bank the entire sum due and owing by Defendant to said Plaintiff, William I. Bishop Limited, as claimed herein, and signification of said assignment has been made on Defendant, and  
10 Plaintiffs declare that said sum is payable unto the Plaintiff, Bank of Montreal, for the benefit and account of Plaintiff, William I. Bishop Limited.

WHEREFORE Plaintiffs pray that Defendant be condemned and adjudged to pay unto the Plaintiff, Bank of Montreal, for the benefit and account of Plaintiff, William I. Bishop Limited, the said sum of Four hundred and twelve thousand eight hundred and forty-six dollars and seventy-five cents (\$412,846.75), the whole with interest and costs, including costs of exhibits; and further that it be adjudged and ordered that the said  
20 described immoveables and the works thereon constructed are charged and affected by a privilege for the payment of the said sum of Four hundred and twelve thousand eight hundred and forty-six dollars and seventy-five cents (\$412,846.75) with interest and costs, including costs and exhibits; and further that the Misen-Cause, A. DUBREUIL, be summoned for the purposes of these presents in order that he may make the necessary entires in the Index to Immoveables or other records of the Registry Office in  
30 his charge concerning the present action and the judgment to be rendered thereon, but without costs against him unless he contests the present action.

Mont Laurier, this 4th day of December 1930.

Brown, Montgomery, & McMichael,  
Attorneys for Plaintiff.

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40 **PARTICULARS FURNISHED BY PLAINTIFF PURSUANT TO JUDGMENT OF COURT OF KING'S BENCH ON DEFENDANT'S MOTION FOR PARTICULARS.**

(a) Particulars under Paragraph 2 of Plaintiff's Declaration as to the "information and data" therein referred to stating what same consisted of, and when same are claimed to have been supplied or communicated to Plaintiff, and if in writing that same be produced.

10 PARTICULARS ON THE ABOVE. The information and data (other than plans and specifications) referred to consisted of statements made on or about the 19th and 20th of July, 1928, that the bottom of the river upon which the works were to be constructed was unobstructed ledge rock ;that the character of the bed of the river being ledge would present no difficulties in unwatering or placing of cofferdams; that the only excavation required would be excavation of rock and excavation of earth; that in the by-pass section test pits had been dug and carried down to rock indicating that the material consisted of five feet of yellow sand and loam and the balance gravel with occasional boulders. The matter comprising conversations between the Plaintiff and the Defendant upon the foregoing are not in writing.

20 (b) Particulars under paragraph 7 of Plaintiff's Declaration as to when and where the information therein referred to is claimed to have been communicated to the said Plaintiff.

PARTICULARS ON THE ABOVE. Said information was given on or about the 19th July, 1928, at Cedar Rapids.

(c) Particulars under paragraph 10 of Plaintiff's Declaration indicating whether information was given verbally or in writing to Defendant's Engineer as to hard-pan excavation, and if in writing that same be produced.

30 PARTICULARS ON THE ABOVE. This information was given to Defendant's Engineer both verbally and in writing in November, 1928, the writing being Item Number 3 in a letter dated November 21st, 1928, from the Plaintiff to Hardy S. Ferguson, copy of which is produced with the present Particulars as Plaintiff's Exhibit No. 21.

40 (d) Particulars under paragraph 18 of Plaintiff's Declaration stating the time when it is claimed Defendant sent its logs down the river disregarding the construction work being carried on by said Plaintiff.

PARTICULARS ON THE ABOVE. The acts of Defendant referred to above took place practically continuously from June 1st to August 30th, 1929, and were specially aggravated on Saturday June 15th, July 15th, July 30th, August 5th, August 22nd and 23rd all in 1929.



(e) Particulars under Paragraph 20 as to what instructions are claimed to have been given to Plaintiff by Hardy S. Ferguson, and when and where and to whom some are claimed to have been given.

10 PARTICULARS ON THE ABOVE. Instructions given were to put an additional blanket of material on the river bed up stream from present toe fill embankment in the deepest section of the river; to excavate the material between cofferdams with orange peel buckets or clam shell down to ledge rock; to get out as far as possible by secondary cofferdams from island and south shore to permit placing additional concrete; to shut down pumping until more blanketing was put in.

20 These instructions were given to Mr. William I. Bishop at Cedar Rapids on October 1st, 1929, and at High Falls on October 2nd, 1929.

(f) Particulars under paragraph 21 of Plaintiff's Declaration stating what erroneous information (other than plans and specifications) consisted of, and in what respect the plans and specifications were erroneous in respect of said matters.

30 PARTICULARS ON THE ABOVE. The information referred to consisted of the same statements as those mentioned in paragraph (a) of these particulars, which said information proved to be erroneous. Plans and specifications were erroneous in respect of said matters concerned in this paragraph in as much as same showed only earth and rock excavation whereas a large portion of excavation was hardpan; the depths to which excavation were to be carried was not correctly shown; the surface of sound rock was not correctly shown.

40 (g) Particulars under paragraph 27 of Plaintiff's Declaration requiring that if instructions regarding trimming of rock were in writing such writing should be produced.

PARTICULARS ON THE ABOVE. Said instructions were not in writing.

(h) Particulars under paragraph 33 as to the "agreement" or "undertaking" referred to therein stating when and where same is claimed to have been made and if in writing that same be produced.

PARTICULARS ON THE ABOVE. The agreement was verbal and was made on or about the 20th July, 1928, at Buckingham, P.Q.

10 (i) Particulars under Paragraph 39 of Plaintiff's Declaration as to false information referred to in the second line of said paragraph.

PARTICULARS ON THE ABOVE. Plaintiff declares that the above refers to allegations in this regard in its Declaration and in the present bill of particulars.

Mont-Laurier, September 1st, 1931.

Brown, Montgomery & McMichael,  
Attorneys for Plaintiff.

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#### DEFENDANT'S PLEA

1. As to paragraph 1 of the declaration same is admitted.
2. As to paragraphs 2 and 3 of the declaration defendant says that William I. Bishop, President of Plaintiff William I. Bishop Limited and A.B. McEwen, Engineer of said Plaintiff, visited the site of the work in question when preparing the tender of said plaintiff and inspected the existing conditions; that  
30 any information furnished said plaintiff respecting the nature and extent of the work, excavation, nature of the river bed or other matters apart from that contained in the contract, plans and specifications, was supplied in answer to inquiries by said parties and was the best information that defendant had respecting the matters in question; that such information as defendant had concerning said matters had been obtained by test pits and by soundings as was explained to said parties; that as said parties well knew information so obtained was at the best only an  
40 indication in a general way of the conditions that might exist; that such information was given in good faith and without intent to deceive and proved to be substantially correct; that said plaintiff was not entitled, however to rely upon any information so given as constituting any representation or warranty, but it rested with said plaintiff to determine or assume the character and nature of the work and especially of the material to be excavated, and defendant denies the allegations of said paragraphs as alleged, and also the particulars as delivered by plaintiff under paragraph 2 aforesaid.

3. As to paragraph 4, defendant says that the letter from defendant to said plaintiff of November 15th, 1928, the contract between said parties and the plans and specifications referred to in such contract all speak for themselves, and the allegations of said paragraph are denied save as they agree therewith.

10 4. As to paragraph 5 defendant says that under said contract the contract price consisted of a principal sum with additions and deductions dependent on the quantities of work actually done; that it clearly appears from said contract that the total consideration thereof might exceed the principal sum of \$609,-100.00 therein mentioned and the method of calculating the contract price by means of unit prices for various classes of work is clearly set forth in said contract; that the amount which said plaintiff has actually received from defendant under said contract is \$916,814.48, and the allegations of said paragraph 5 are  
20 denied save as they agree with the present paragraph.

5. As to paragraph 6 defendant admits that said plaintiff has completed the said contract and that defendant has entered into possession of said Lievre River Storage Works, but defendant denies the other allegations thereof and for further answer thereto refers to the following paragraphs hereof.

6. As to paragraphs 7, 8, 9, 10 and 11 of the declaration (dealing with claim in respect of HARDPAN EXCAVATION)  
30 defendant says:—

(a) None of the material amounting to 12,935 cubic yards which said plaintiff classifies as hardpan can properly be classified.

(b) Such material really consisted of sand, loam and gravel with occasional boulders and under the contract said plaintiff was entitled to be paid and was paid for excavating same only at the rate provided for earth excavation, in accordance with said contract. Moreover, even if such material could  
40 be called "hardpan", which is denied, nevertheless under said contract same was properly classified as "earth".

(c) The difficulties encountered by said Plaintiff in connection with excavation, especially in the early period of the contract, were due to lack of proper equipment to carry out the work and absence of proper supervision and control.

(d) Moreover while said contract and specifications provided for increasing or decreasing the principal sum in case the quantities of certain classes of work proved to be greater or less than the estimates thereof contained in the contract, it was however specifically provided that any additional excavation which the contractor might choose or be obliged to do for by-passing in connection with the flow of the river during the construction of the dam was to be performed as part of the work for which the principal sum alone was to be the compensation, and that should a by-pass channel be excavated during construction work the contractor should perform all such work at his own expense and cost, payment for same being included in the principal sum.

(e) That said plaintiff was not required to handle the water in this particular manner, but chose to do so, and cannot claim anything from defendant beyond the principal sum by reason of the character of excavation encountered.

(f) That said plaintiff is not entitled to vary the said contract or add thereto for its benefit, as said plaintiff seeks to do by claiming an arbitrary price for such work.

(g) Defendant files herewith as Exhibit D-1 copy of letter from defendant's Engineer Hardy S. Ferguson to said plaintiff dated March 22nd, 1929 in reply to the letter filed by said plaintiff as Exhibit P-3.

(h)—The allegations of said paragraph and the particulars delivered under paragraphs 7 and 10 are denied as alleged.

(i) In the premises said plaintiff is not entitled under said contract or otherwise to claim the sum of \$21,601.45 or any additional sum from defendant in respect of said alleged hardpan excavation, even if said plaintiff incurred such extra expense, which is not admitted.

7. As to paragraphs 12, 13 and 14 (dealing with claim for HANDLING DEFENDANT'S LOGS) defendant says:—

(a) That any expense incurred by said plaintiff in connection with the passing of defendant's logs was due to the failure of said plaintiff to supply adequate facilities for such operations or suitable opportunities for the passage of such logs as said plaintiff undertook to do by said contract, and especially because of the failure of said plaintiff to provide guide booms and because the gaps left between the cofferdam cribs were too narrow to permit the free passage of logs.

(b) Defendant endeavored at all times to bring down its logs so as to inconvenience said plaintiff to the least possible extent and frequently to assist said plaintiff held back its logs for considerable periods at great inconvenience and loss to defendant.

10 (c) In the premises said plaintiff has no claim against defendant in connection with the matters referred to in said paragraphs, even if the said sum of \$4,103.72 or any part thereof was actually expended by said plaintiff as alleged in said paragraphs, which is not admitted.

(d) Defendant files herewith as Exhibit D-2 copy of letter from defendant to said plaintiff in answer to the letter from said plaintiff to defendant filed as part of Exhibit P-4.

20 (e) The allegations of said paragraphs are denied save as they agree with the present paragraph.

8. As to paragraphs 15, 16, 17, 18, 19 and 20 (dealing with claim for INCREASED COST OF COFFER DAMS AND UNWATERING) defendant says:—

30 (a) That the contract plans indicated the elevations at which it was expected to find ledge rock at certain points on the river bottom at the place in question in accordance with the best information which defendant had been able to obtain by means of soundings, and that when the river channel was unwatered, such indications proved to be substantially correct.

(b) That notwithstanding such indication on the plans said plaintiff must have or should have expected to find some overburden of stones, gravel and other similar material overlying such points and between the same.

40 (c) That the trouble and difficulty encountered by said plaintiff in connection with its coffer dams and any expense that said plaintiff may have incurred in connection therewith, were due to lack of proper equipment and personnel supplied by said plaintiff and to the failure of said plaintiff to properly construct and put in position the cribs of said coffer dams and to the sheeting thereof not being properly driven or forming a continuous surface and to the fact that said plaintiff should have provided a diver in connection with such work, which said plaintiff failed to do in due time and to the failure of said Plaintiff to excavate a by-pass channel of sufficient width.

(d) That if said plaintiff had supplied proper equipment and constructed its coffer dams with reasonable and proper skill, no difficulty would have been encountered by reason of any overburden that was actually found overlying such rock.

10 (e) Defendant, moreover, believes and alleges that the quantity of overburden which said plaintiff found at the place in question was in part washed down during the construction period, due to the construction work and the increased velocity of the water in the main channel at such time, and consisted partly of toe-filling from the upstream side of the coffer dam, and was in part rock and loose material from the site of the dam which said plaintiff permitted to accumulate in the river bed.

20 (f) That the steel piling eventually utilized by said plaintiff was necessary only because of leakage in the coffer dams and would not have been necessary if said plaintiff had proceeded with such work with proper equipment and reasonable skill.

30 (g) Defendant denies that defendant's Engineer Hardy S. Ferguson, ever admitted errors in the plans of said work as alleged in paragraph 20 or ever gave any instructions to said plaintiff as alleged therein; that said Engineer at the request of said plaintiff made certain suggestions to said plaintiff as to the best manner in which to proceed in view of the difficulties that said plaintiff was then confronted with, due to the faulty manner in which said plaintiff had been proceeding with such work, but said plaintiff was not obliged or required to accept or act upon such suggestions.

(h) That under the said contract all labor and materials used for the construction of coffer dams was part of the work for which the principal sum alone was to be the compensation.

40 (i) That the memorandum prepared by said Plaintiff following the conference between said plaintiff and said Hardy S. Ferguson filed by said plaintiff as Exhibit P-7 does not correctly set forth what took place at such conference and defendant files herewith as Exhibit D-3 letter from said Ferguson to said plaintiff dated October 7th, 1929 to that effect

(j) That defendant at all times brought down its logs in a reasonable and proper manner so as to inconvenience said plaintiff to the least possible extent and defendant frequently,

10 to assist said plaintiff, held back its logs for considerable periods at great inconvenience and loss to defendant; that any difficulty that was encountered in passing defendant's logs was due to the failure of said plaintiff to supply adequate facilities for such logging operations or suitable opportunities for the passage of such logs as said plaintiff undertook to do by said contract, and especially because of the failure of said plaintiff to provide guide booms and because the gaps left between the coffer dam cribs were too narrow to permit the free passage of logs.

(k) Defendant disputes its liability to said plaintiff for any of the amounts claimed in respect of the matters referred to in said paragraphs, even if such amounts were ever actually expended by said plaintiff as set forth in paragraph 19, which is not admitted.

20 (l) The allegations of said paragraphs and the particulars delivered under paragraphs 18 and 20 are denied save as they agree with the present paragraph.

9. As to paragraph 21 (dealing with claim in respect of COFFER DAM LOWER END BY-PASS) defendant says:—

(a). That under the contract said plaintiff was obliged as part of the principal sum to construct all coffer dams and provide all work and materials extraneous to the permanent structure of the dam itself.

(b) That said plaintiff is not entitled to claim from defendant any additional sum in respect of such coffer dam by reason of the season in which same was constructed, and that to do so would be changing the contract for the benefit of said plaintiff.

(c) That if as said plaintiff alleges the said coffer dam would not have been necessary if the work of excavation had been finished at an earlier date, which is not admitted, the delays in such work were due solely to said plaintiff and cannot be attributed in any way or manner to defendant.

(d) That if the cost of said coffer dam was as stated in said paragraph, which is not admitted, the cost thereof was altogether excessive.

(e) In the premises said plaintiff has no valid claim against defendant in respect of the matters referred to in said paragraph, and the allegations thereof and the particulars delivered thereunder are denied save as they agree with the present paragraph.

10           10. As to paragraphs 22, 23, 24, 25 and 26 (dealing with claim in connection with ADDITIONAL COST OF ROCK EXCAVATION) defendant says:—

20           (a) That it clearly appears from said contract that the actual quantities of excavation and other work might prove to be either greater or less than the estimates of such work mentioned in the said contract, and provision was made for the amounts that said Plaintiff was to receive in said event, the whole as appears from the said contract.

          (b) That said plaintiff is not now entitled to claim anything from defendant by reason of the fact that the quantity of rock excavation actually performed by said plaintiff was greater than the estimate thereof contained in said contract, as said plaintiff has received the excess prices for such work mentioned in the contract.

30           (c) That the specifications forming part of said contract provided for the manner in which rock was to be removed to obtain proper foundations for the dam and that the work of excavation should be done as directed by and to the satisfaction of the Engineer of the Quebec Streams Commission and that the method of excavation might be in any approved means and that the depth excavated should not be lower than necessary.

40           (d) That the manner in which said excavation was required to be done by said Engineer was a reasonable and proper means of carrying out the work provided for by the contract, in accordance with the said contract and the said plans and specifications and said plaintiff is not entitled to complain as to the manner in which said Engineer deemed it proper to carry out the same.

          (e) That the cost to said plaintiff of the rock excavation work might have been decreased had said plaintiff carried out its blasting operations more skilfully and especially if said plaintiff had not loaded the holes too heavily, as was pointed out to said plaintiff by defendant's Resident Engineer.



(f) In the premises said plaintiff has no valid claim against defendant in respect of any of the matters referred to in said paragraphs, even if the amounts set forth in paragraph 25 were actually expended by said plaintiff in connection with such work, which is not admitted, and the allegations of said paragraphs are denied as alleged.

10

11. As to paragraph 27 (dealing with claim of said plaintiff in respect of HANDLING AND TRIMMING EXCAVATED ROCK) defendant says:—

(a) That said plaintiff under the specifications forming part of said contract was obliged at all times to remove all surplus materials and to maintain the premises in a safe, neat and orderly condition.

20

(b) That the work performed by said plaintiff and referred to in said paragraph 27 was work done by said plaintiff in conformity with such obligations and said plaintiff is not entitled to any additional sum in respect thereof, even if said sum of \$1990.82 or any part thereof was ever actually expended by said plaintiff as alleged in said paragraph, which is not admitted, and the allegations of said paragraph are denied.

12. As regards paragraphs 28, 29 and 30 (dealing with claim in respect of FROZEN MATERIALS IN RIVER BED)

30 defendant says:—

(a) That the material excavated by said plaintiff and referred to in said paragraphs was not rock but loose material for which said plaintiff was entitled to be paid at the rate provided for earth excavation.

(b) That under the contract between the parties the price payable in respect of earth excavation was the same whether such excavation was carried out under winter or summer conditions.

40

(c) That such work might have been done by said plaintiff under summer conditions had it not been for delays caused by the said plaintiff itself especially as regards coffer dam construction.

(d) That said plaintiff is not entitled to claim from defendant the said sum of \$2530.32 or any part thereof even if the

same was actually expended by said plaintiff, as alleged in said paragraphs, which is not admitted, and the allegations of said paragraphs are denied.

10 13. As to paragraphs 31 and 32 (dealing with claim in respect of WORK UNDER WINTER CONDITIONS) defendant says:—

(a) That under the contract between the parties the prices payable by defendant in respect of concrete and structural steel work were the same irrespective of whether such work was carried out under winter or summer conditions.

20 (b) That the prices claimed by said plaintiff in said paragraphs in respect of such work are purely arbitrary and are not contained in the said contract.

(c) That said plaintiff with good planning might have done most of such work between the months of March and November 1929 and such work could have been done during that period under the most favourable conditions, had said plaintiff carried out its said contract with reasonable skill and provided suitable plant, equipment and personnel for such work.

30 (d) That said plaintiff commenced work under the contract on or about October 1st, 1928 and same was to be substantially completed by March 31st, 1930; that winter conditions ordinarily prevail for about two-thirds of the period during which the said work was to be carried out and that said plaintiff must have expected a large amount of such work would therefore require to be done under winter conditions.

40 (e) That if part of the concrete and structural steel work covered by the contract which should have been done during the summer of 1929 was delayed until the following winter as said plaintiff apparently contends, this was in large part due to the fact that work that should have been done during the previous winter was delayed until summer without any fault attributable to defendant, and because said plaintiff with its inadequate plant and equipment was unable during the summer of 1929 to make up the work so delayed.

(f) In the premises said plaintiff has no valid claim against defendant in respect of the matters referred to in said paragraphs, and is not entitled to claim from defendant the whole or any part of the sum of \$96,832.45 even if any part of such sum

was ever actually expended by said plaintiff as alleged in said paragraphs, which is not admitted, and the allegations of said paragraphs are denied save as they agree with the present paragraph.

10 14. As to paragraphs 33 and 34 (dealing with claim in respect of OVERCHARGE ON LOGS) defendant says:—

(a) That at or about the time said plaintiff commenced work under said contract, said plaintiff informed defendant verbally that said plaintiff desired to purchase a certain quantity of timber for use in construction work and defendant, although not obliged under the said contract to do so, and quite apart from the said contract, advised said plaintiff that said plaintiff could purchase lumber at McCabe's Mill, situated near the site of said work, at the price of \$20.00 per thousand feet, board measure, plus cost of sawing.

(b) That thereafter said plaintiff obtained various quantities of sawn lumber from defendant at McCabe's Mill, all of which was measured before being delivered and that said plaintiff was charged only for the quantities that said plaintiff actually received, and at the price agreed upon, viz \$20.00 per thousand feet, board measure, plus cost of sawing.

30 (c) That it was never agreed or understood that said plaintiff should pay for a less quantity thereof than said plaintiff received.

(d) Defendant owes nothing to said plaintiff by reason of anything alleged in said paragraphs and the allegations of said paragraphs and the particulars delivered under paragraph 33 are denied save as they agree with the present paragraph.

40 15. As to paragraph 35 (dealing with claim in respect of CEMENT FOR APRON IN BY-PASS CHANNEL) defendant says:—

(a) The contract between the parties provided for a fixed price for all concrete work irrespective of weather conditions that might prevail while such work was being carried out or while the material therefor was being hauled.

(b) That defendant in requiring such apron to be constructed acted within its rights under said contract, and said plain-

tiff is not entitled to claim anything in respect of such work beyond the price provided in the contract for the same, which has been paid to said plaintiff.

10 (c) In the premises said plaintiff has no valid claim against defendant in respect of the matters referred to in said paragraph even if said plaintiff has actually expended the amount mentioned therein or any part thereof, which is not admitted, and the allegations of said paragraph are denied save as they agree with the present paragraph.

16. As to paragraphs 36, 37 and 38 (dealing with claim in respect of (SHORTAGE IN PAYMENT FOR CLASS 1 CONCRETE) defendant says:—

20 (a) That the contract estimate for Class 1 concrete was 20,490 cubic yards, and it was contemplated that part of such concrete would be poured with plums (or boulders) and part without plums, and that the contract estimate of Class 1 concrete with plums was 10,800 cubic yards and the contract estimate of Class 1 concrete without plums was 9,690 cubic yards.

(b) That the actual quantity of Class 1 concrete was 30,437 cubic yards, which was 9,947 cubic yards in excess of the contract estimate, and that said plaintiff was paid in full for the said excess quantity thereof.

30 (c) That the actual quantity of Class 1 concrete poured without plums was 23,656 cubic yards, an increase of 13,966 cubic yards over the contract estimate.

(d) That the actual quantity of Class 1 concrete poured with plums was only 6,781 cubic yards, a decrease of 4,019 cubic yards below the contract estimate.

40 (e) That of the said excess quantity of Class 1 concrete poured without plums (namely 13,966 cubic yards) 5,736 cubic yards would have been poured with plums but for delays in such work attributable solely to said plaintiff and for which defendant was in no way responsible.

(f) That but for the delays attributable to said plaintiff as aforesaid, the quantity of Class 1 concrete actually poured without plums would have been decreased by the said amount of

5,736 cubic yards and the quantity of Class 1 concrete actually poured with plums increased by the same amount, and in said event the excess quantities of Class 1 concrete would have been as follows:—

- 10           8,230 cubic yards without plums;
- 1,717 cubic yards with plums

20           (g) That under the contract between the parties the unit price for increased quantities of Class 1 concrete without plums was \$18.92 per cubic yard and the unit price for such excess concrete with plums was \$17.16 per cubic yard, the cost of such excess concrete without plums being \$1.76 per cubic yard more than that poured with plums, but said plaintiff was under the contract only entitled to such excess prices if the increased quantities of such work were due to “changes of design or depth of foundation from those used for calculating said quantities” and that at least as regards said 5,736 cubic yards, the substitution of Class 1 concrete without plums for Class 1 concrete with plums was not due to any such reason, but solely to delays attributable to said plaintiff as aforesaid.

30           (h) That said plaintiff received excess payments to the amount of \$195,270.68 by reason of the fact that the quantity of Class 1 concrete actually poured exceeded the contract estimate by 9,447 cubic yards, said excess payments being made up as follows:—

	8,230 cubic yards without plums	
	at \$18.92 per cu. yd.....	\$155,711.60
	Increased allowance on	
	5,736 cubic yards poured with-	
	out plums due to delays	
	of plaintiff at \$1.76	
	per cu. yd.....	10,095.36
40	1,717 cubic yards with plums	
	at \$17.16 per cu. yd.....	29,463.72
		<hr/>
		\$195,270.68
		<hr/>

(i) That in the premises said plaintiff has been paid in full for all such excess Class 1 concrete and is not entitled to claim anything further from defendant in respect thereof.

(j) The allegations of said paragraphs are denied save as they agree with the present paragraph.

(k) In the premises defendant is not indebted to said plaintiff in the sum of \$31,549.15 referred to in said paragraphs or any part thereof.

10

17. As to paragraph 39 (dealing with claim in respect of PLANT REMOVAL) defendant says:—

(a) That nothing in the said contract between the parties entitled said plaintiff to claim any extra sum from defendant by reason of the season of the year during which said plaintiff's plant might be removed from the site of the said works.

20 (b) That if said plaintiff in making up its tender took into account the season of the year in which its plant might be removed after the completion of the work, said plaintiff must have allowed for the removal of same under conditions similar to or even less favorable than those existing when such plant was actually removed.

(c) That if said plaintiff was delayed in removing its plant, such delay was due solely to the said plaintiff and defendant is in no way responsible for the same.

30 (d) Defendant owes nothing to said plaintiff in respect of the matters referred to in said paragraph, even if the amounts therein mentioned were actually expended by said plaintiff as stated in said paragraph, which is not admitted, and the allegations of said paragraph and the particulars delivered thereunder are denied save as they agree with this paragraph.

18. As regards paragraphs 40 and 41 (dealing with claim in respect of STANDBY AND OVERHEAD EXPENSE) defendant says:—

40

(a) That under the contract between the parties the maintenance charges and overhead expenses of said plaintiff in no way concern defendant.

(b) That neither under the said contract nor in any other manner did defendant ever undertake or agree that its Engineer's estimates would be the same or approximately the same from month to month or that such estimate for any particular month or months would be not less than a specified amount.

(c) That defendant is in no way responsible for the fact that said plaintiff failed to make as much progress with the work in some months as in others, and that any delays in said work were attributable solely to said plaintiff.

10 (d) That if the amounts received by said plaintiff under said contract are not sufficient to compensate said plaintiff for its overhead charges, which is not admitted, this was due to the failure of said plaintiff to carry out its said contract with reasonable skill and to its failure to provide suitable plant, equipment and personnel for such work, for which defendant is in no way responsible, and in any event said plaintiff cannot vary the said contract for its own benefit.

(e) That the claim against defendant in said paragraphs is absolutely unfounded in fact and in law.

20 (f) That defendant owes nothing to said plaintiff in respect of the matters alleged in said paragraphs, even if said plaintiff's costs for maintenance and overhead during the period in question were as stated therein, which is not admitted, and the allegations of said paragraphs are denied save as they agree with the present paragraph.

19 As to paragraph 42 defendant says that the payments referred to in said paragraph were always available for said plaintiff after same were due but that defendant was entitled  
30 to withhold same as defendant did until said plaintiff executed a partial discharge of the privileged claim hereinafter referred to, and that the delay in making said payments was not attributable to defendant and said plaintiff is not entitled in the premises to claim the interest referred to in said paragraph and defendant denies the allegations thereof save as they agree with present paragraph.

20 As to paragraph 43 defendant admits the arithmetical calculation therein, but denies the other allegations thereof.  
40

21. As to paragraphs 44 to 52 inclusive (dealing with demand of said plaintiff for ARBITRATION) defendant says:

(a) That it admits that said plaintiff in or about December 1929 informed defendant of its desire to arbitrate certain claims which said plaintiff was then advancing against defendant, and that said plaintiff in connection with such demand communicated to defendant's solicitors a draft agreement of submission respecting such matters.

(b) That the letters filed by said plaintiff and referred to in said paragraphs speak for themselves.

(c) Defendant admits the service by E. J. LeBlanc, N.P., on the 6th of November 1930 of the Act of Notification referred to in paragraph 51.

10

(d) That the claims advanced by said plaintiff and referred to in the said draft deed of submission are not claims which defendant under the said contract had agreed to arbitrate and were not disputes arising as to any of the matters referred to or in the arbitration clause of said contract, and included only a part of the claims sued upon herein.

(e) That said plaintiff did not persist in its demand for arbitration or take any proceedings to compel defendant to join in the same and that the matters and allegations set forth in said paragraphs are immaterial and irrelevant to the present action.

20

(f) The allegations of said paragraphs are denied save as they agree with the present paragraph.

22. As to paragraph 54 defendant admits that the work in question was fully completed on or about the 15th of June, 1930 and defendant also admits that said plaintiff caused to be registered a claim as contained in Exhibit P-19, and that notice thereof was given to defendant by Act of Notification filed as Exhibit P-20, and defendant denies the allegations of said paragraph save as herein expressly admitted to be true.

30

23 As to paragraph 55 defendant denies the same.

24. As to paragraph 56 defendant admits that it was served with an assignment by said plaintiff William I. Bishop Limited to plaintiff THE BANK OF MONTREAL, of all claims of said plaintiff against defendant arising out of said contract, and the allegations of said paragraph are denied save as herein expressly admitted to be true.

40

25. That said plaintiff has been paid in connection with said contract the sum of \$916,814.48, which sum comprises the principal sum referred to in the said contract, with the additions thereto to which said plaintiff became entitled by reason of the



quantities of certain classes of work being greater than the estimates thereof contained in said contract, and also the amount of extras authorized in accordance with said contract, and in the premises defendant owes nothing more to said plaintiff in respect of said contract or the work performed by said plaintiff thereunder, or otherwise; and defendant further alleges that  
10 the payments with which said plaintiff credits defendant in paragraphs 7, 19, 25, 30 and 37 of the declaration were all paid to said plaintiff on account of said principal sum and said additions thereto, and on account of the said contract as a whole, in accordance with the provisions of the contract respecting payment, and that said plaintiff is not entitled to apply the payments received by said plaintiff on account from time to time during the progress of the work, or any of them, to the matters specially referred to in said paragraphs.

20 WHEREFORE defendant prays that plaintiffs' action be dismissed with costs.

Mont-Laurier, September 16th, 1931.

Aylen & Aylen,  
Attorneys for Defendant.

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30 PLAINTIFF'S ANSWER TO DEFENDANT'S PLEA.

1. With regard to paragraph 2 of Defendant's Plea, Plaintiff prays acte of the admission contained herein to the effect that Plaintiff gave to Defendant information respecting the work, excavation and nature of the river bed apart from that contained in the contract, plans and specifications but denies that Plaintiff was not entitled to rely on such information, and denies that it rested with the Plaintiff to determine the character and nature of the work and of the material to be excavated  
40 and Plaintiff states that it was well recognized by Defendant that those tendering for said contract would not be required nor would time permit of any investigations being made to verify information given by Defendant, and Plaintiff was justified in relying upon information given by the Defendant as to the work to be done and conditions to be met with upon their own property, and Plaintiff denies the allegations in said paragraph in so far as they are inconsistent with the foregoing.

2. Plaintiff joins issue with Defendant as to paragraph 3 of Defendant's Plea.

10 3. With regard to paragraph 4 Plaintiff states that the additions and deductions provided in the contract and the unit prices set forth therein by the letter and spirit of the contract and by custom and well established usage in such matters are and are intended to be applicable to reasonable over-runs or under-runs in connection with a work the magnitude of which is proportionate to the principal sum stipulated in the contract, and that neither such principal sum nor unit prices can be made the exclusive basis of compensation for a work of such vastly greater magnitude as has been done by the Plaintiff herein.

20 4. Paragraphs 6 (a), (b) and (c) of the Defendant's Plea are denied.

30 5. With regard to paragraph 6 (d) Plaintiff states that the allegations contained therein respecting provisions of the contract concerning additional excavation are irrelevant to the claim of Plaintiff under the head of "Hard-pan excavation" said claim being based upon a wrongful and illegal classification by Defendant of the material excavated, and Plaintiff states that the mention of earth excavation and rock excavation in the contract without mention of hard-pan excavation and the statement of Defendant that the test pits had indicated excavation which could not be considered hard-pan constituted warranty to the Plaintiff that no hard-pan excavation in fact existed, even if part of said excavation were to be done as part of the principal sum provided in the contract which is not admitted.

6. Paragraph 6 (e) of Defendant's Plea is denied.

7. Paragraph 6 (f) is denied as drawn.

40 8. Plaintiff denies the statement contained in the exhibit referred to in paragraph 6 (g) in so far as the same is not consistent with the allegations of Plaintiff's Declaration under this head.

9. Paragraph 6 (i) is denied.

10. Paragraphs 7 (a), (b) and (c) are denied.

11. Plaintiff denies the statements contained in the exhibit referred to in paragraph 7 (d) in so far as the same are inconsistent with the allegations of Plaintiff's Declaration under this head.

10 12. With regard to paragraph 8 (a) of Defendant's Plea Plaintiff prays acte of the statement that Defendant took soundings to determine the nature of the river bottom but Plaintiff states that the soundings were incomplete, faulty and misleading if the results thereof are intended to be reflected as they should be in the plans and specifications accompanying the contract, and Plaintiff denies that the indications proved to be substantially correct when the river channel was unwatered.

20 13. With regard to paragraph 8 (b) same is denied and Plaintiff avers that if Defendant had made proper soundings same would have disclosed such overburden and such overburden should have been referred to in the plans and specifications and not having been so shown Plaintiff was justified in considering that no such overburden existed and in making his estimates accordingly.

14. Paragraphs 8 (c) and (d) are denied.

15. Paragraph 8 (e) is denied as drawn.

30 16. Paragraph 8 (f) is denied.

17. With regard to paragraph 8 (g) Plaintiff denies the interpretation given therein to Defendant's Engineer, and Plaintiff specially avers that such instructions were given with the intent that the same should be acted upon by the Plaintiff.

18. Plaintiff denies paragraph 8 (h) as drawn.

40 19. Paragraphs 8 (i) and (j) are denied.

20. Paragraphs 9 (a) and 9 (b) are denied as drawn.

21. Paragraphs 9 (c), (d) and (e) are denied.

22. Plaintiff denies paragraphs 10 (a) and (b) as drawn and refers to paragraphs 3 of the present Answer.

23. Paragraph 10 (c) is denied as drawn.

24. Paragraphs 10 (d), (e) and (f) are denied.

25. With regard to paragraph 11 (a) Plaintiff states that the said specifications in respect of the matters referred to speak for themselves, and that the allegations contained in said paragraph 11 (a) are irrelevant to Plaintiff's claim under this head.

10

26. Paragraph 11 (b) is denied.

27. Paragraph 12 (a) is denied.

28. Paragraphs 12 (b) and 12 (c) are denied as drawn.

29. Paragraph 12 (d) is denied.

20

30. Paragraphs 13 (a) and (b) are denied as drawn.

31. Paragraph 13 (c) is denied.

32. Paragraph 13 (d) is denied as drawn.

33. Paragraphs 13 (e) and (f) are denied.

34. Paragraphs 14 (a), (b) and (c) are denied in so far the same are inconsistent with the allegations of Plaintiff's Declaration under this head.

30

35. Paragraph 14 (d) is denied.

36. Paragraphs 15 (a), (b) and (c) are denied as drawn.

37. Plaintiff prays acte of the statements as to quantities of concrete as set out in paragraphs 16 (a), (c) and (d).

38. Paragraph 16 (b) is denied as drawn.

40

39. Paragraphs 16 (e) and (f) are denied.

40. Paragraph 16 (g) is denied as drawn.

41. With regard to paragraph 16 (h) Plaintiff admits having received the sum of One hundred and ninety-five thousand two hundred and seventy dollars and sixty-eight cents (\$195,270.68) but states that there is still owing the sum claimed in Plaintiff's Declaration under this head under a proper computation according to the terms of the contract.

42. Paragraphs 16 (i) and (k) are denied.

43. Paragraphs 17 (a), (b), (c) and (d) are denied.

10 44. Plaintiff denies paragraphs 18 (a), (b), (c), (d), (e)  
and (f) or Defendant's Plea.

45. Paragraph 19 is denied.

46. Plaintiff prays acte of the admissions contained in  
paragraphs 21 (a) and (c).

47. Paragraphs 21 (d) and (e) are denied.

20 48. Plaintiff prays acte of the admission contained in  
paragraph 22.

49. Paragraph 25 is denied as drawn.

WHEREFORE Plaintiff prays for the dismissal of the  
said Plea with costs.

Mont-Laurier, 26th November, 1931.

Brown, Montgomery & McMichael,  
Attorneys for Plaintiffs.

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REPLY OF DEFENDANT TO ANSWER TO PLEA.

Defendant denies the allegations of said answer which  
conflict in any way with defendant's plea all of which is here-  
by reiterated.

40 WHEREFORE defendant persisting in its plea prays  
that said answer be dismissed, the whole with costs.

Mont-Laurier, December 3rd, 1931.

Aylen & Aylen,  
Attorneys for Defendant.

*THOMAS F. KENNY (for Plaintiff) Examination in chief.*

**Part II — WITNESSES**

10

**PLAINTIFF'S EVIDENCE**

**DEPOSITION OF THOMAS F. KENNY,**

A witness produced on behalf of Plaintiff.

20 On this fifteenth day of February, in the year of Our Lord, one thousand nine hundred and thirty-three, personally came and appeared: Thomas F. Kenny, of Buckingham, in the Province of Quebec, Civil Engineer, aged 58 years, a witness produced on behalf of the Plaintiff, who being duly sworn doth depose and say as follow:—

Examined by Mr. L. A. Forsyth, K.C., of Counsel for Plaintiff:—

Q.—Mr. Kenny, you are an officer of the Defendant Company?

30 A.—Yes.

Q.—What is your official title?

A.—I am a director and chief engineer.

Q.—We sent a subpoenae to Mr. Albert MacLaren, but I understand it has been found more convenient to have you comply with the subpoenae?

A.—Yes.

40 Q.—In that subpoenae we asked for correspondence between the W. I. Bishop Company, the Plaintiff Company, and the Defendant Company, and its officers. Have you that correspondence with you—letters and copies of letters?

A.—Yes.

Q.—And also for correspondence between the MacLaren Company, the Defendant Company, and Mr. Hardy S. Ferguson?

A.—Yes.

Q.—You have the correspondence?

A.—Yes

*THOMAS F. KENNY (for Plaintiff) Examination in chief.*

Q.—And between the Defendant Company and D. W. O'Shea?

A.—Yes.

10 Q.—You have that?

A.—Yes.

Q.—And also any correspondence that might be in the custody of the Defendant Company passing between Mr. Ferguson and Mr. O'Shea. Have you any such correspondence?

A.—Anything we have?

Q.—And correspondence between the Defendant Company and the Quebec Streams Commission?

A.—Yes.

20 Q.—Also the Petition for the approval of the plans and specifications for the work, that is, the Petition to the Lieutenant Governor in Council of the Province of Quebec?

A.—I have what we can find of that. The Petition, of course, is not with us.

Q.—You have not a copy of it?

A.—We may have a copy. I think there is a copy, not the original.

Q.—And the correspondence with respect to that?

A.—Yes.

Q.—And have you also a copy of the Order in Council approving the works?

30 A.—No, not an official copy. We have a copy.

Q.—Would you let us see the copy of the Order in Council which you have?

A.—I have a copy of the report of the Executive Council of date 12th December 1929. I think that is what you want.

Q.—Will you apply to the proper officer of the Provincial Government at the Plaintiff's expense, for a certified copy of the Petition for the approval and of the Order in Council?

40 Mr. Geoffrion: We object to this question as irrelevant.

Mr. St. Laurent: It is part of our case that the exact location where this work had to be performed was imposed upon us, that we could not vary it in any way, and we had to take the conditions as they were actually found at that spot.

Mr. Geoffrion: The Order in Council has nothing to do with that.

THOMAS F. KENNY (*for Plaintiff*) Examination in chief.

10 Mr. St. Laurent: Your Lordship knows of the case, concerning the City of Hull, in dealing with hard pan, in which case it was held though there was no provision for extra payment for hard pan, this work had to be done at the place where it was done because it was for the location of water mains and sewer pipes, and the contractor had to do it there, and that having to do it there, he was entitled to be paid for the nature of the work that was found at that point.

Mr. Geoffrion: That is argument.

20 Mr. St. Laurent: My learned friend asked what is the purpose of having these documents. I am stating the argument in support to that.

Mr. Geoffrion: The contract calls for building according to certain plans. It is only on account of the contract that my learned friend's client is bound to build. If the contract had given him the option, no Order in Council could affect him. We might be in trouble with the Government.

His Lordship reserves the objection.

By Mr. Forsyth:—

30 Q.—Will you apply to the proper officer of the Government for a certified copy of the Petition for approval, and of the Order in Council approving the plans?

A.—Yes. I have a copy of the Petition here.

Q.—If you will just ask for both of those?

A.—Yes.

Q.—Have you with the original specification and plans upon which the Plaintiff was asked to submit his tender?

A.—No, we have not got it.

40 Q.—Do you mean by that that you have not any copy of the specification on which you asked the tender to be made?

A.—No.

Q.—Did you ever have one?

A.—Yes.

Q.—You do not know what became of it?

A.—Well, they were revised and used up for various purposes. The only thing I found was the tender.



*THOMAS F. KENNY (for Plaintiff) Examination in chief.*

Q.—Am I not right in saying this, that there was an original specification, and an original contract form upon which the tender was asked, and that subsequently certain changes were made?

10 A.—Yes.

Q.—I want to ask you whether you have the original not the one that signed, the original contract form?

A.—No, I could not find one.

Q.—Have you got the plan upon which the Plaintiff was asked to tender?

A.—No, I have not got the plan. I think we can give you a set of photostats. I have here a set of photostats copies of the original plans.

20 (Witness produces photostat copies of plans numbered, B-2444, B-2571, B-2577, B-2578, B-2579, B-2580, B-2581, B-2582, B-2583, B-2584, B-2585, B-2586, B-2587, B-2588, B-2589, B-1987, C-714, C-715, C-472, C-714, S-2479, S-2480).

Q.—Those are on the same sheet?

A.—Yes.

Mr. Geoffrion:—I am informed that these are exactly the plans with the same numbers as the plans filed in the action?

30 Mr. St. Laurent:—They are filed with blue prints, but looking at these, it is easier to pick up the figures from these photostats than on the blue prints. On the blue prints the figures are in white and it is rather difficult. Here, the bottom is white and grey and the figures are black so they stand out better on these photostats. I think you will find it easier to follow the figures on the photostats than on the blue prints.

40 Mr. Forsyth:—I was going to suggest, subject to what my learned friends may say, that we ask Mr. Kenny to give to these plans he has enumerated one number as an exhibit, and I will later co-relate them with the blue prints we have produced so when we refer to any one of the other exhibits, I will transfer the numbers from the blue prints that are produced to these, and give them the same numbers.

Mr. St. Laurent:—They could be called P-22, and then we can state that such sheet of P-22 is such another blue print.

*THOMAS F. KENNY (for Plaintiff) Examination in chief.*

By Mr. Forsyth:—

Q.—Well then, will you produce as P-22 the plans, the numbers of which you have read into the record?

10 A.—I do.

Q.—I understand that Mr. Hardy S. Ferguson, an Engineer of New York, was retained by the MacLaren Company to prepare the plans and the specification upon which the tenders were asked for, to do this work?

A.—Yes.

Q.—Had your company in its possession any notes made by Mr. Ferguson of his surveys preparatory to the approving of the plans and specification.

20 A.—No, we did not have his surveys.

Q.—And you never had any?

A.—No. All we had was what appeared on the plans.

Q.—Have you the original tender of Mr. Bishop?

A.—Yes. We had that on these files. I might say, my Lord, they only asked us for these papers the day we were leaving Buckingham, and we are not as familiar with them as we might be. I will bring it down later.

30 Q.—I am going to ask you later to produce the tender as exhibit P-23. During the course of this work of construction of the dam at Cedar Rapids did you, from time to time, receive progress charts, or were progress charts made for your Company, showing the progress of the work with the relative dates of completion?

A.—No.

Q.—You have not that?

A.—No. All we had was the monthly reports of Mr. Ferguson's Engineer.

Q.—You have those with you?

A.—His monthly reports, yes.

40 Q.—During the course of this work, or at some time, at any rate, either before the work started, or during the course of the work, the Plaintiff Company arranged to purchase some logs from the MacLaren Company?

A.—Yes.

Q.—As I understand it, those logs were to be delivered to the mill operated by a man named McCabe, who was sawing them for Bishop?

A.—You have not got it just right. The logs had already been held up adjacent to McCabe's mill for this work.

*THOMAS F. KENNY (for Plaintiff) Cross-examination.*

Q.—Let me put it this way: at any rate the arrangement was that Bishop made arrangements with McCabe to saw logs for him?

10 A.—No, we made arrangements with McCabe.

Q.—At any rate, you delivered logs to McCabe? We will put it that way?

A.—Yes.

Q.—We are right about that?

A.—Yes.

Q.—Were those logs scaled before being delivered to McCabe?

A.—No, not that lot.

Q.—Not what lot?

20 A.—The lot above McCabe's Mill.

Q.—And you did not know how many logs you had there?

A.—We had the number of logs. We knew what we had there.

Q.—And you knew the quantity that you had?

A.—We did not know the board feet. We knew the number of logs

Q.—And you never ascertained the number of board feet by the Quebec scale?

A.—No.

Q.—And you have no record of that?

30 A.—No.

Mr. Forsyth:—It may be we will have to recall Mr. Kenny after we have examined the documents produced so that we can have him produce any we think important in arguing the case.

Cross-examined by Mr. Aime Geoffrion, K.C., of counsel for Defendant.

40 Q.—Mr. Kenny, you stated there were some logs at McCabe's?

A.—Yes.

Q.—Which you delivered to McCabe to be sawn, and which were afterwards delivered over to the Plaintiff?

A.—Yes. Lumber was delivered to McCabe.

Q.—And you said these were not measured according to the Quebec scale?

A.—No.

*THOMAS F. KENNY (for Plaintiff) Cross-examination.*

Q.—Does that cover all the logs that you sold to Mr. Bishop's Company or what quantity was covered ?

A.—It covers only the quantity that were at McCabe's mill in the summer of 1928.

10 Q.—In your answer to Mr. Forsyth you were only stating what he needed ?

A.—Only those logs at that point.

Q.—Can you give me the quantity ?

A.—Yes. Those logs sawed out, 157481 feet board measure, plus 245747 feet board measure That makes 403,228 that I have.

Q.—You are reading from a statement of your Company which was prepared under your direction ?

A.—Yes.

20 Q.—Entitled, "Statement MacLaren Company Limited, logs deliverable to McCabe's mill for William I. Bishop Company, Cedar Rapids Dam" ?

A.—Yes.

Q.—Giving the date, quantity, numbers, amount, voucher number, etc. Here I see only the two first items which you have added together are entitled, "Not measured as sawn lumber". All the subsequent items are marked "Measured as logs" ?

A.—Yes.

Q.—Is that correct ?

A.—That statement is correct.

30 Q.—Therefore, during the first two instalments, that is sawn lumber ?

A.—That is all we sold him which was measured as sawn lumber. Everything else delivered to McCabe's mills was measured as log measure.

Q.—Will you file that statement as exhibit D-4 ?

A.—Yes.

Q.—Measured according to Quebec Scale ?

40 A.—The first two items are measured as board measure, and the logs are measured as per Quebec Log Scale.

By Mr. Forsyth:—

Q.—All the others ?

A.—Everything else.

And further for the present deponent saith not.

*DANIEL O'SHEA (for Plaintiff) Examination in chief.*

DEPOSITION OF DANIEL O'SHEA

10 A witness produced on behalf of the plaintiff.

On this fifteenth day of February, in the year of Our Lord, one thousand nine hundred and thirty-three, personally came and appeared: Daniel O'Shea, of Buckingham, Quebec, Civil Engineer, aged 39 years, a witness produced on behalf of the Plaintiff, who being duly sworn doth depose and say as follows:

20 Examined by Mr. L. A. Forsyth, K.C., of counsel for plaintiff.

Q.—Mr. O'Shea, you were a representative of Mr. Hardy Ferguson?

A.—Yes.

Q.—As Engineer on the Cedar Rapid Construction built by the Plaintiff, Bishop?

A.—Yes.

Q.—Were you engaged with Mr. Ferguson in the preliminary surveys made for the preparations plans of this work?

30 A.—I looked after some test borings in the summer of 1928, and I also extended some of the cross sections over the by-pass.

Q.—The test borings of which you speak, were made on the river banks, that is, in the river bed?

A.—No.

Q.—Were any borings made in the river bed?

A.—I did not make any.

Q.—Do you know of any having been made there?

A.—No.

40 Q.—Have you any record of your field notes?

A.—Yes.

Q.—Have you got that with you, and will you please produce them? I am not going to ask you to have these numbered now, because, I want to look at them, and perhaps call upon you later for some explanation of them because, probably you will know more about them than we do. We will just take those for the moment. Those are extracted from a loose leaf note book that you kept at the time?

A.—Yes.

*DANIEL O'SHEA (for Plaintiff) Examination in chief.*

Q.—Would you just look at plan B-2444 produced as part of exhibit P-2, and also as part of P-22 in the photostat, and tell us whether you secured the data which is set out on that plan as to elevations etc?

10 A.—Everything that is extended there, what is shown on that photostat was secured by me — these sections over here.

Q.—This B-2444 is not the same as the photostat?

A.—The photostat was on the first set of contract plans sent out, and these sections on the blue print.

By Mr. St. Laurent:—

Q.—On the lower portion?

20 A.—And also on the upper portion.

By Mr. Forsyth:—

Q.—That is, the elevations shown on the blue print B-2444 which do not appear on the photostat B-2444 were secured by you?

A.—Yes.

Q.—Do you know by whom the others were secured, the other ones that appear on the photostat only?

A.—Yes, by another engineer from our office.

30 Q.—What is his name?

A.—Mr. Stratton.

Q.—Do you know where Mr. Stratton is now?

A.—I believe he is in Minneapolis.

Mr. Geoffrion:—He will be here.

By Mr. Forsyth:—

40 Q.—Looking at B-2571 produced as part of exhibit P-2, and also as part of P-22, would you tell us whether that plan was prepared by yourself, or whether you had any part in it?

A.—I had nothing to do with this.

Q.—Did you have anything to do with the preparation of the working plans, the detailed plans?

A.—No.

Q.—Have you brought with you the correspondence which you had with Mr. Ferguson during the course of the work?

A.—Yes.

*DANIEL O'SHEA (for Plaintiff) Examination in chief.*

Q.—And also copies of your correspondence with the Mac-laren Company?

A.—Yes.

10 Q.—That would include the reports and any memoranda which you submitted to them during the course of the work?

A.—Yes.

Q.—Did you as the work progressed, make any progress charts?

A.—No — do you mean picture?

Q.—Yes.

A.—No.

Q.—You did not make anything of that kind?

A.—No.

20 Q.—How many test pits were taken on the work by you?

A.—I think five, but I am not sure about that.

Q.—Would you make test pits on both sides of the river?

A.—No, just on the east side of the river.

Q.—That is the side on which the bypass was excavated?

A.—Yes.

Q.—Can you tell me to what depth you went with those test pits?

A.—Whatever is shown on the drawing — on the blue print with the extended cross section.

30 By Mr. St. Laurent:—

Q.—You might perhaps put a red circle around that blue print B-2444, produced as part of P-2?

(The witness has identified by a red circle the location of the test pits which he made.)

By Mr. Forsyth:—

40 Q.—Test pit No. 1 which is that located nearest to the river, was taken to what elevation?

A.—To elevation 98.

Q.—If it is marked elevation 98, do you say you carried it down to elevation 98?

A.—Yes.

Q.—And test pit No. 2, which is the next adjacent one to No. 1, was carried to elevation 97?

A.—Yes.

*DANIEL O'SHEA (for Plaintiff) Cross-examination.*

Q.—We will number the upper one of all in red pencil. To what elevation was that carried?

A.—This shows the bottom to 102.5, but I actually went lower than that. It is marked L-99.

10 Q.—You established the ledge in that one at elevation 99?

A.—Yes.

Q.—I am marking No. 4 almost immediately below No. 3: the bottom of the pit is at elevation 99.2, and No. 5 which is the only remaining one, the bottom of the pit at elevation 101, is that right?

A.—Yes.

Q.—What would be the diameter or the width across these pits?

20 A.—About 5 x 5.

Q.—5 feet by 5?

A.—Yes.

Q.—You state you did that work in 1928?

A.—Yes, either late in May or early in June

Mr. Forsyth:—Subject to our examination of the documents I have nothing further to ask Mr. O'Shea at the moment.

Cross-examined by Mr. Geoffrion, K.C., of counsel for Defendant.

30 Q.—As to these indications marked on the plan you have been examined about, I see the letters T.P. in each of them. That means test pit?

A.—Yes.

Q.—Some with numbers?

A.—Yes.

Q.—I suppose the exact location is where you have that little circle with the dot inside?

A.—Yes.

40 Q.—And then, you have bottom which means bottom and elevation?

A.—Yes.

Q.—These data are correct according to your calculation, those you put on the plan there?

A.—Yes.

Q.—You do not know personally if other test pits had been made by Mr. Stratton before you?

A.—Yes.



*DANIEL O'SHEA (for Plaintiff) Cross-examination.*

Q.—They appear on the plan?

A.—Yes.

Q.—You do not know anything about them yourself?

A.—No.

10 marked? Q.—You said something that I did not catch, about being

A.—That is No. 3, L-99.

Q.—It is marked 99?

A.—Yes.

By Mr. St. Laurent:—

Q.—What does “L” mean?

A.—Ledge.

20

By Mr. Geoffrion:—

Q.—There you have ledge?

A.—Yes.

Q.—That means you have reached the rock?

A.—Yes.

By Mr. St. Laurent:—

30 at the Q.—Wherever the L is preceding elevation, it means ledge figure stated at the elevation?

A.—In the test pit.

Q.—There is also “L” in the adjacent section?

A.—They are after the elevation. In this case the “L” is in front of the figure.

By Mr. Forsyth:—

40 you find it? Q.—I understand the letter “L” means ledge wherever

A.—Yes.

By Mr. Geoffrion:—

Q.—But the others are made by Mr. Stratton, not by you?

A.—Not by me.

Q.—Of the five test pits you reached the lower one. At other times you stopped at the bottom and not at ledge?

A.—It is not recorded there. I think I reached ledge at No.

1.

And further for the present deponent saith not.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

DEPOSITION OF WILLIAM I. BISHOP

10 A witness produced on the part of the Plaintiff.

On this fifteenth day of February, in the year of Our Lord, one thousand nine hundred and thirty-three, personally came and appeared: William I. Bishop, of the City of Westmount, General Contractor, aged 57 years, a witness produced on behalf of the Plaintiff, who being duly sworn doth depose and say as follows:

Examined by Mr. Forsyth, K.C., of Counsel for Plaintiff.

20 Q.—Mr. Bishop, you are the president of the Plaintiff Company?

A.—Yes.

Q.—And that Company carries on business of general contracting?

A.—Yes.

Q.—And either as president of that Company, or for yourself, you have been in the contracting business for some time?

30 A.—As superintendent for other contractors, and on my own account for over thirty years.

Q.—Have you prepared a statement of the work that your Company and you have done?

A.—Yes.

Q.—That is, the larger structures?

A.—I have here a statement showing the experience in this particular line of work, not including lots of others.

As General Superintendent for Contractor.

40 T. A. GILLESPIE Co. 1½ years in North Carolina on large hydro electric development.

Jas. Stewart & Co. 1 year in Toronto on harbor work and water power in Northern Ontario.

As General Contractor. Dams and Power Developments. Northern Aluminum Company, Shawinigan Falls, 35000 H.P. water power development.

City of Peterborough Plumbing plant & 1500 H.P. water power development.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Sherbrooke Railway & Power Co., 2500 H.P. water power development.

10 Eastern Canada Power & Pulp Co. Murray Bay, Que. 10000 H.P. water power development.

Town of Magog, Que. Dam & 2000 H.P. water power.

Bird & Son, Pont Rouge, Que. Dam.

Nashwaak Pulp & Paper Co. Marysville, N.B. Dam.

Price Bros. & Co. Ltd. Chicoutimi, Que. 12000 H.P. water power development.

20 Rolland Paper Co. St. Jerome, P.Q. Dam and Power house.

J. C. Wilson & Co. St. Jerome, Que. Dam and power house.

East Kootenay Power. Co. Elk River, B.C. Dam and tunnel.

Nfld. Light & Power Co. Petty Harbour, Nfld. Dam and penstock.

Nfld. Paper Co. Main Dam Nfld. Dam 75' high 1200' long.

30 International Paper Co. Deer Lake, Nfld. 50000 H.P. power house.

Large Drydock at St. Johns, Nfld. to handle vessels 16000 tons. Numerous wood storage dams, river improvements, holding booms & piers.

Wharves in St. Johns, Nfld and Three Rivers, Quebec.

40 Q.—In the summer of 1928, the question of taking some work for the Maclaren Company at Cedar Rapids on the Lievre River came up?

A.—Yes.

Q.—Would you just state to the Court how the matter came to your attention, and then continue to describe the preliminary negotiations in connection with it?

A.—We heard that this work was going to be tendered on. I had already discussed the matter with Mr. Ferguson in New York.

Q.—That is, Mr. Hardy S. Ferguson?

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

A.—And Major McEwen. Major McEwen, our Chief Engineer, called one of the Maclaren people at Buckingham, and we were told that the tender from us would be considered.

Q.—You were told that the tender from you would be  
10 considered: well then, what was the next step that you took?

A.—I first visited the site of the Cedar Rapids Dam on July 19th 1928 with Major A. B. McEwen our Chief Engineer, for the purposes of obtaining information to enable us to make our tender.

Q.—At that time did you have the plans and the specification?

A.—We had a set of plans and specification.

Q.—Are those the plans that are produced here as P-2?

A.—They are the same plans which were afterwards at-  
20 tached to the contract.

Q.—And when you went to the site of the dam at Cedar Rapids, were you with any other person but Major McEwen?

A.—We were accompanied by Mr. D. W. O'Shea, who had been introduced to us by Mr. Kenny as representing the Melaren Company for that purpose.

Q.—That is, Mr. O'Shea was introduced to you by this officer Mr. Kenny?

A.—Yes.

Q.—As an engineer who could furnish you with inform-  
30 ation?

A.—Yes.

Q.—After the visit to the site you did submit a tender?

A.—Yes. We completed the tender on July 29th, and this tender was submitted to the Maclaren Company by Major McEwen on July 31st, 1928.

Q.—Before dealing with the tender, will you tell us whether there was at the site of the dam, any discussion with Mr. O'Shea with respect to the test pits?

40 Mr. Geoffrion:—I object to this question inasmuch as the contract is not attacked and that any preliminary conversations are irrelevant.

The Court reserves the objection.

A.—We were shown four or five places where test pits had been dug and subsequently refilled to the top.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

By Mr. Forsyth:—

Q.—Were you told what the test pits disclosed?

A.—Yes.

10 Q.—Who told you this?

A.—Mr. O'Shea.

Q.—What did he say?

A.—He told us that the material in those pits had consisted of about five feet of yellow sand, and the balance loose gravel with occasional boulders.

Q.—I understand that between the 5th of August and the 5th September 1928, you, yourself, were not present in Montreal. You were in Newfoundland?

20 A.—The reason for that was, we were told that there was some hold-up in getting the permission of the Quebec Government to proceed with this enterprise.

Q.—Let me interrupt you there: were you advised, or had you had some advice before you left for Newfoundland that you were the successful tenderer?

A.—No.

Q.—At any rate, there was some delay in the awarding of the contract?

A.—Yes.

30 Q.—And you went to Newfoundland between the 5th of August and the 5th September 1928?

A.—Yes.

Q.—And in the meantime, what persons of your organization, if any, had charge of negotiations with the Maclaren Company?

A.—Major McEwen and Mr. A. W. Thwing.

Q.—Then, you came back to Montreal?

A.—They went to Buckingham.

Q.—They went to Buckingham, and had some discussions?

A.—That is, of course, for them to say.

40 Q.—At any rate, you returned to Montreal about the 5th September of that year?

A.—Yes.

Q.—What happened then?

A.—On my return I was informed by Mr. R. M. Kenny and Mr. Albert Maclaren...

Q.—Those are two officials of the Maclaren Company, the Defendant?

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

A.—President and General Manager, as I understand, Mr. Albert Maclaren being President, that they had decided to give us the work, but that they were still help up for permission from Quebec.

10 Q.—By the Provincial Authorities?

A.—By the Provincial Authorities, yes.

Q.—Did you do anything about that ?

A.—Well, I went down and talked to Mr. Taschereau.

Mr. Geoffrion:—My objection is general. I will not put it each time.

Same reserve.

20 Witness continuing:—and had a discussion with him about what the probabilities were.

Same objection.

Same reserve.

By Mr. Forsyth:—

30 Q.—At any rate, you came back to Montreal. Did you see Mr. Kenny of Mr. Maclaren when you came back ?

A.—I reported the result of the interview to Mr. Albert Maclaren and Mr. Kenny. I went down again to Quebec on September 28th in company with Mr. Albert Maclaren and T. F. Kenny.

Q.—Well then, what was the next thing that happened after those interviews ?

A.—We received a letter from the owners on November 15th, although we had started work somewhat earlier than that.

40 Q.—When did you actually start the work ?

A.—We went ahead on verbal assurance about October 12th. We received a letter officially authorizing us to proceed with the work on November 15th 1928.

Q.—The letter to which you refer as the letter of November 15th, is the one produced as P-1 ?

A.—Yes.

Q.—Were those sheets subsequently inserted in the contract as previously drafted ?

A.—Yes.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—And they formed part of the document which was signed?

A.—Yes.

10 Q.—The contract then as finally signed by your Company and the Maclaren Company Limited, is contained in exhibit P-2 on the 23rd May, 1929?

A.—Yes, and it is signed on the 23rd May, 1929.

Q.—Then, when the contract was signed, you had been working seven months on the job?

A.—Just about. I might explain too that that involves more than the contract in ordinary locations because all of the cement and the materials had to be hauled in over snow roads in preparation for the work.

20 Q.—Just while we are on that. That was the next thing I was coming to. Will you just describe to his Lordship so we will have a picture of what we are doing, in a general way, what this contract involved, the locus of the works, the relative distance to transportation and so on?

A.—The work was located. The dam was on the Lievre River at a point which is known as the Cedar Rapids, a small rapids. The distance from Gracefield on the C.P.R. in one direction over the height of land between that Lievre River and the Gatineau was thirty miles of very rough road with steep hills. The distance to Buckingham was again on the Canadian Pacific  
30 Railway — it is approximately fifty miles.

Q.—The nature of the project in general, that is, the type of work that was to be done...

A.—Consisted in the building of the storage dam with deep sluices to unwater the lake and stoney gates and stop logs openings to regulate the flood discharge, and in addition to this were provided log sluices for passing of logs at all three different elevations of the Lake.

Q.—What were the average sizes of those log sluices?

40 A.—I don't remember exactly; somewhere about ten feet. I can take them off the plan for you.

Q.—And the type of the structure was that what you call gravity?

A.—Gravity section, concrete dam.

Q.—To be built right straight across the stream. of course?

A.—Built across the stream for the purpose of raising the water and forming a storage lake.

WILLIAM I. BISHOP (for Plaintiff) Examination in chief.

Q.—Of course, one of the things that you had to do there then, was to unwater the channel section or the river section, so that you could excavate and pour your concrete?

A.—Yes.

10 Q.—And as an incident to that it was necessary to deal with the flow of the river?

A.—Yes.

Q.—While you had the channel section unwatered?

A.—Yes.

Q.—And how was that provided for?

A.—The plans showed a method by which a bypass was dug through the peninsula, you might call it, and the water raised and diverted by means of a cofferdam, the pipe of which was indicated on the plans.

20 Q.—Looking at the plan B-2571 produced as part of exhibit P-2 and part of exhibit P-22, we observe that the figure at the top of the plan shows the appearance of the dam has to be built straight across?

A.—Yes.

Q.—Then, we get on the left hand side of the plan near station 4, we see “cofferdam” top elevation 108”?

A.—Yes.

Q.—That is the indication of the location of the upstream cofferdam by which this river section was to be unwatered?

30 A.—Yes.

Q.—And just directly below we have first, “Alt. location for cofferdam top elevation 98”, and then, “Lower cofferdam top elevation 96”?

A.—Meaning that this could be placed in one place or the other.

Q.—Where did you place it, as a matter of fact?

A.—Approximately here (indicating).

Q.—That is, you took one mark alternative location?

A.—Yes.

40 Q.—And at the right of this same figure where we see the words. “bottom elevation 97”, and then below them, “cofferdam top elevation 110”, that is the locus of the bypass channel of which you spoke a moment ago?

A.—Yes.

Q.—And the figures would indicate that that was to be begun at the upstream end to a bottom elevation of 97?

A.—Yes.



*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—And that the downstream elevation 96.3?

A.—Yes.

10 Q.—Looking at the plan B-2571 which you have before you, can you indicate to us in a general way, where the test pits were located — I do not mean the individual locations, but generally where the test pits were that you referred to in your evidence with respect to your visit with Mr. O'Shea at the site before the tender was made?

A.—I understand they were located in the general line of the by-pass.

Q.—Who gave you to understand that?

A.—Mr. O'Shea.

20 And it now being 12.30 the further testimony of this witness was adjourned until 2.15 p.m.

And further for the present deponent saith not.

---

DEPOSITION OF WILLIAM I. BISHOP (continued)

And at 2.15 o'clock in the afternoon personally came and reappeared the said witness, William I. Bishop, and his testimony was continued as follows:—

30

By Mr. Forsyth:—

Q.—I think when we adjourned I had referred to some matters on the plan: the elevations, by pass, and so on. You told me this morning you started work on the Cedar Rapids about October 12th, 1928. When was the work completed?

A.—April, 1930.

40 Q.—When you tendered on this work, and when you started this work, had you had prepared a schedule of operations under which you proposed to carry out the work?

A.—Yes, I prepared a tentative schedule, and after we started we made up a more correct one on the same basis.

Q.—Have you a copy of that working programme or schedule?

A.—Yes.

Q.—While it is being looked up, perhaps I might ask you about the personnel and equipment you prepared, and which you

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

had to do this work, because that will tie up more or less with your schedule, I presume.

A.—I will recite it, if you wish.

The work was started under Major McEwen, as Works  
10 Manager at both High Falls and Cedar Rapids. We were at the same time carrying out a contract at High Falls.

Q.—Major McEwen was in charge of both High Falls and Cedars, as the head man of the organization on the job?

A.—Yes.

Q.—And who was next in command at Cedar?

A.—We had several experienced foremen, all of whom had worked for us before, carrying out the various parts of the  
20 work. We did not attempt to bring in very much equipment until the snow roads had formed, but we got started on the by pass.

Q.—What were you doing before the snow roads formed?

A.—We started putting up all the temporary buildings, and started excavating in the by pass.

Q.—How was the excavation being done?

A.—It was being taken out with a travelling derrick—a three line derrick,—operating a one yard heavy orange-peel excavating bucket.

Q.—That was before the snow roads formed?

A.—Yes.

30 Q.—While we are on the subject, you told us this morning that the information you had from Mr. O'Shea was that there were about 5 feet of light yellow material.

A.—Yes.

Q.—And, below that gravel, with occasional boulders?

A.—Yes.

Q.—Was that orange-peel bucket and the travelling derrick a type of equipment which was suitable and adequate for excavation of that type of material?

A.—It was suitable for the material described. I had moved  
40 ed hundreds of thousands of yards with that same type of excavating equipment.

Q.—I understand you now have the progress schedule before you?

A.—Yes. This was made up when the work was started.

Q.—Perhaps you had better start with the original?

A.—I have not the absolute original here. The one I have was made up in February. It would be the same thing, only drawn on a small scale. It was made up at the time we were making the tender.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—You had formulated a progress schedule, on which you anticipated the work could be done, which was on a smaller scale than what you now have before you, and that one has been mislaid?

10 A.—Yes.

Q.—The work started in October, 1928; and this document I see, bears date February 12th, 1929?

A.—Yes.

Q.—Was that the date at which this schedule was prepared?

20 A.—It was put in this shape on that date, but this is the programme we were working to from the start. The idea being to get all the equipment in over the thirty miles of snow road, including the cement and other materials, complete to work under summer conditions, and to haul all the equipment out the following winter. This was the basis from the start, and this is the idea put in formal shape.

Q.—Will you produce this document as Exhibit P-24?

A.—Yes.

30 Q.—Will you mind giving His Lordship a short explanation of Exhibit P-24. I notice on the extreme left hand column there are items numbered from one to twenty-eight, beginning with “Temporary Building”, and running down to “Returning Construction Plant”, including “Roads”, “Transportation”, “Erecting Plant”, “Erection bypass”, “Earth excavation”, etc. The columns consecutively to the right from that bear the years 1928 and 1929, and they begin with the months of October, November and December 1928, and then show the months consecutively in the year 1929?

A.—Yes.

Q.—Reading from Exhibit P-24, will you tell His Lordship the stages at which the work would have proceeded under this construction programme?

40 I notice, for instance, in connection with Item No. 1, “Temporary Buildings”, there is a black horizontal line opposite the item, which shows as beginning approximately the middle of October, 1928, and which terminates at March, 1929.

A.—Correct.

Q.—Do I understand from that that all your temporary buildings would be put under way in October, 1928, and that you

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

would be through with any work of construction of that type in March, 1929?

A.—Yes.

10 Q.—And, following each item down, if we note where the black horizontal line opposite any particular item begins, and note where it terminates, we will have the programme for that particular item as you anticipated the construction to proceed?

A.—Yes.

Q.—Taking the cofferdam as a typical illustration, item No. 8, you proposed to begin in the middle of June, 1929, and to have completed by the end of July of the same year?

A.—Yes.

20 Q.—May I ask you if Exhibit P-24 was prepared having in view certain quantities of work to be done?

A.—Yes.

Q.—What were those quantities? Where did you ascertain those quantities?

A.—The quantities are those shown on the contract, plus an allowance of about 20% for possible overruns.

Q.—That is to say, you were giving yourself a margin of 20% of safety in your construction programme?

A.—Yes.

30 Q.—Would it be correct to say that this construction programme was prepared having regard to the equipment which you either had done the ground or proposed to put on it.

A.—Yes.

Q.—You told us that at the commencement of the work, or in the early part of the work, when you were excavating for the by pass you had your travelling derrick and your orange-peel bucket with which you worked on the job?

A.—Yes.

Q.—What other equipment did you propose to bring on, and what other equipment did you actually bring on, for the purpose of this work?

40 A.—I have a list here, which I could file if you wish.

Q.—Is this a list of what you proposed to bring on, or is it a list of what you actually did bring on?

A.—That was what was on the job. That was brought on the job.

Q.—Will you file this list as Exhibit P-25?

A.—Yes.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

By Mr. Geoffrion:—

Q.—Exhibit P-25 is a complete list of everything you had on the job at any time?

10 A.—Not right from the beginning, but through the main part of the work.

By Mr. Forsyth, continuing:—

Q.—It is a complete list of the equipment you brought on during the period you were working on the job?

A.—Yes.

20 Q.—Dealing with this equipment, and reading from Exhibit P-25, I note you have three boilers in the main plant, with a total capacity of 230 horsepower. Did you anticipate using the three boilers in your main plant, when you entered upon this work?

A.—Not necessarily. We might have had one as a spare.

Q.—What I had more particular reference to was the question of the pumps. Would you look at the pumping equipment you had on the job during the course of the work, and tell me whether when the progress schedule was made up you anticipated the necessity of using the pumping equipment you brought on the job?

30 A.—No, we did not.

Q.—Will you tell me how much your anticipated requirements were exceeded?

A.—At least trebled.

Q.—The pumping equipment was at least trebled over what you thought would be necessary?

A.—Yes.

40 Q.—Dealing with the question of personnel, you told us that Major McEwen was the chief of the two jobs, the one at High Falls and the one at Cedar Rapids; and that you had at Cedar Rapids some very experienced foremen who had worked on other jobs for you before?

A.—Yes. And, in addition to that, on January 16th Mr. H. E. Lindskog was placed on the work as General Superintendent, and stayed there until April, 1930.

Q.—With what work was Mr. Lindskog concerned?

A.—The Cedar Rapids only.

Q.—And, no other?

A.—No.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—Had you known Mr. Lindskog before?

A.—He had been working with me for several years.

Q.—What progress had been made when Mr. Lindskog came on the job?

10 A.—I think Mr. Lindskog is prepared to give you a complete detail of that, and I think it would be better to leave it in his hands.

Q.—In any event, in order to get the picture complete: the unwatering of the river had not been entered upon?

A.—No: nothing whatever done on that.

Q.—Would it be correct to say the work that had been done up to the time Mr. Lindskog came on the job consisted generally in the erection of your camps and temporary buildings, and some excavation in the by pass?

20 A.—Yes.

Q.—In addition to the list of equipment, I think Exhibit P-25 contains the operating capacity of the main items?

A.—The estimated capacity, yes.

Q.—In order to make the position plain in regard to the operating capacity of the main items in this list, I suppose certain types of equipment have a rated capacity, which is standard. Take, for instance, the boilers of 100 horsepower rated capacity; I suppose that is a matter arrived at from knowing the type of apparatus?

30 A.—Yes, in a general way.

Q.—Correlating the equipment you had with your progress schedule, how do you tie the two together? Is that matter of experience?

A.—Yes. You must know the capacity of the crushers, and the mixers, and so on, under average working conditions, weather, and so on; and we generally try to allow a very considerable margin of safety.

Q.—And did you in this instance allow a considerable margin of safety?

40 A.—Yes.

Q.—Can you tell us how the estimated capacity of the equipment, as shown in Exhibit P-25, compared with the work actually performed by that equipment on the job?

A.—It checked out satisfactorily to me.

Q.—It appears that the Quebec Streams Commission at a certain time assumed the direction of some of the works—in any event, of the engineering part of this work. Was there any cons-

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

truction plan or layout plan submitted to the Quebec Streams Commission by you?

A.—No.

Q.—Did Major McEwen design a plan?

10

A.—Yes.

Q.—Have you a copy of it here?

A.—We have the Streams Commission Plan showing it all. I can find it, and file it tomorrow.

Q.—On the question of personnel, had you any discussion with anyone representing the Defendant Company as to the nature and the ability of your personnel there?

20

A.—Mr. O'Shea on several occasions expressed his satisfaction with Mr. Lindskog, and, in fact, said that he would like to have as good a man on the work at High Falls.

Q.—Following that did Mr. O'Shea, or anybody else, ever suggest that there was any deficiency, or lack, or inefficiency in your personnel at Cedar?

A.—Not until after we began to get into difficulties with the unwatering, and there were a lot of compliments handed around at that time—I cannot just remember what they were.

30

Q.—Dealing with the question of the equipment, will you state to His Lordship whether this equipment did in actual practice prove to suitable and adequate for the job? And possibly by an examination of the rate of progress made you may be able to make a definite statement.

A.—Yes. As much as over 6000 yards of concrete were poured in one particular month, which was fully up to the schedule provided for at the outset.

Q.—That is, your construction programme, Exhibit P-24, did not contemplate any larger quantity than 6000 yards in a month?

A.—No.

40

Q.—And, with the equipment you had you were able to do that?

A.—With the equipment we had we were able to do that.

Q.—With the equipment you had, and under the actual conditions of work, can you tell us at what time the contract quantities and the over-run could have been completed if those unwatering difficulties to which my learned friend referred in his opening had not arisen? Let me put it to you in this way: assuming the contracts were as the contract plans and the contract itself exposed them to me, at what time could this equipment have completed the job?

A.—As now finished, or as originally contemplated?

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—I mean the original contract, plus the total over-run.

A.—Under contract conditions, even with the over-run found, the work could have been completed by December 25th, 1929.

10 Q.—How can you fix that date as being the date upon which it could have been completed?

A.—On one particular item, for instance: in round figures, there were 30,000 yards of concrete. With a progress rate of 6000 yards per month, and starting on the first of May, we would have completed the concrete work by the first of October. Allowing for certain delays (it is more or less of an estimate) I am positive we could have been finished by Christmas.

20 Q.—Have you any memorandum which will demonstrate just what is meant by the over-run on this contract?

A.—I remember the main figures.

Q.—Take the contract figures, first, and then give us the actual figures performed?

A.—The excavation on rock quantities exceeded the original estimate by 167% ; in other words  $2 \frac{2}{3}$  times the amount of excavation was removed. In one section of the work the percentage of over-run was high as 1500%.

The concrete quantities exceeded the amounts given in the contract by approximately 46%—practically half as much again.

30 Q.—You have spoken of the increase in the rock excavation quantities. Was there a corresponding decrease in the earth excavation quantities?

A.—No.

Q.—How did the earth excavation quantities run?

A.—I do not remember that. It was not serious.

Q.—We have been speaking of earth excavation quantities. What was classified as earth?

40 later. A.—I do not remember what it is. We can get it for you

Q.—In any event, there was no corresponding decrease, to compensate for the huge increase in the rock?

A.—None whatever.

Q.—I show you a plan, which was apparently prepared by the Quebec Streams Commission (and which I ask you to produce as Plaintiff's Exhibit P-26). The blueprint bears the facsimile of the signature of Mr. Lefebvre, Chief Engineer of the Commission. Will you look at the first design or first figure on that plan, and explain to us the meaning of the various lines.



*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

I take it this is the construction as completed, and the solid white line which appears at the right hand of the upper figure is the mean lay of the surface of the earth?

10 A.—That is what it is marked.

Q.—And, the dotted line, marked “Mean Line of Original Rock Surface” is the place to which the foundation was indicated to go by the contract plan?

A.—No. That line shows what they actually found. We can file a plan showing the line. This shows the actual conditions found: the surface of the ground, and the mean line of rock surface.

20 Q.—The lower hatched line is the actual depth to which the foundation was carried?

A.—Yes.

Q.—Will you file, as Plaintiff’s Exhibit P-27, a plan showing a comparison with the contract drawing?

A.—Yes.

Q.—This plan Exhibit P-27 was prepared by your own staff?

A.—Yes.

30 Q.—The brown representing the original ground surface; the bluish purple representing the original rock surface; the reddish representing the bottom of the dam as shown on plan B-2571, part of Exhibit P-2; and the yellow brown representing the actual bottom of the dam—as disclosed by the legend on the plan marked “Key”.

A.—Yes.

Q.—This is a longitudinal section?

A.—Yes.

Q.—The first claim which your Company sets up in its Declaration is in respect to what is called hardpan excavation?

A.—Yes.

40 Q.—You told me this morning that you went to the site of the dam, and had certain information from Mr. O’Shea as to the nature of the excavation to be made in the by pass section, where the test pits had been dug?

A.—Yes.

Q.—If I remember your evidence correctly, you said you were informed there were five feet of yellow sand and loam, and the remainder would be gravel with occasional boulders?

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Mr. Geoffrion: He said he was informed that was what the test pits showed. There is a slight difference between that and the way my learned friend puts it.

10 Mr. St. Laurent: Perhaps the witness will tell us what he was told.

Witness: That is what they told me they found in the test pits.

By Mr. Forsyth, continuing:—

Q.—And, what did you find there?

20 A.—We found the five feet of yellow sand, but we found some very hard boulder clay material from that point down to the bottom of the by pass excavation—what is commonly known as hardpan. This material was quite distinct from the yellow sand, as it was of a dark bluish-grey color throughout, indicating the presence of a certain amount of clay.

Q.—Could it be described by the words “loose gravel with an occasional boulder”?

A.—Decidedly not.

30 Q.—You said it was a material usually called hardpan. In your opinion, what is the definition of “hardpan”? What would you call hardpan?

A.—The term “hardpan” is generally used to describe material that is more or less cemented together. In many cases (as was the case at this point) it was almost as difficult and expensive to take out as solid rock.

Q.—I think you told us the equipment you had provided for the by pass excavation consisted of this travelling derrick and the orange-peel bucket?

A.—Yes.

40 Q.—Would the orange-peel bucket and the travelling derrick have been adequate to remove sand and loam, and loose gravel with occasional boulders?

A.—Yes.

As I have already said, I had moved hundreds of thousands of yards of such material with that description of outfit. In this case we wrecked one orange-peel bucket trying to dig it. Then we were obliged to blast and shoot almost the whole of the rest of it.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—Did you make any complaint about this?

A.—As soon as I discovered the condition I wrote to Mr. H. S. Ferguson.

10 Q.—Mr. Ferguson is the gentleman whose name appears on those plans?

A.—Yes.

Q.—His address is given as No. 200 Fifth Avenue, New York. He is a consulting engineer of some reputation?

A.—Of very considerable reputation, yes.

Q.—He is the gentleman to whom you referred this morning as being the person from whom you learned the work would be let?

A.—Yes.

20 Q.—You say you wrote to Mr. Ferguson. I show you Exhibit P-21, being a copy of a letter from W. I. Bishop, Limited, to Hardy S. Ferguson, dated November 21st, 1928; and I ask you whether that is a copy of the letter you wrote?

A.—Yes. The first two paragraphs of this do not refer to the hardpan.

30 Q.—The last paragraph of the letter refers to the lower ten feet of the by pass cut as being “practically hardpan, and is very much more difficult to excavate than the material described as having been found in the test pits. If this condition continues throughout the cut we shall ask you for an adjustment to cover the difference in cost”.

A.—Yes.

Q.—Did Mr. Ferguson reply to that letter?

A.—I think he did.

Mr. St. Laurent: The original went to the MacLaren Company and Mr. Ferguson sent us a copy of his letter to the MacLaren Company.

40 By Mr. Forsyth, continuing:—

Q.—I show you a letter dated November 28th, 1928, from Mr. Hardy S. Ferguson, to the James MacLaren Company, Limited (which we received from the files of the MacLaren Company) and I ask you if this is the original letter a copy of which you received from Mr. Ferguson?

A.—Yes.

Q.—Will you produce this letter as Exhibit P-28?

A.—Yes.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—You received a copy of this letter from Mr. Ferguson?  
son?

A.—Yes.

10 In the answer I pointed out that I had never examined the test pits.

Q.—As a matter of fact, did you ever examine the test pits yourself?

A.—No. They were filled when we arrived on the site to figure on the work.

Q.—You received a copy of Exhibit P-28 on November 29th, 1928?

A.—Yes.

20 Q.—I understand that on February 22nd, 1929, you had further correspondence with Mr. Ferguson about this hardpan that was discovered in the by pass?

A.—I am not sure of the exact date.

Q.—I show you Exhibit P-3, which purports to be a copy of a letter written to Mr. Ferguson on February 22nd, 1929, (and I understand from my learned friends that the use of the copy is conceded).

A.—That is correct.

30 Q.—You received from Mr. Ferguson a letter dated March 22nd, 1929, a copy of which has been filed by the Defendant Company as Exhibit D-1, which is stated to be a reply to your letter of February 22nd?

A.—Yes.

Q.—On April 8th, 1929, you wrote again to Mr. Ferguson; and I show you what purports to be a copy of your letter to him, which I ask you to produce as Plaintiff's Exhibit P-29.

A.—That is correct.

40 Q.—To which Mr. Ferguson replied, on April 11th, 1929; and I show you his letter, which I will ask you to produce as Plaintiffs' Exhibit P-30.

A.—That is correct; and I produce the letter.

Q.—Did you ever get any arbitration on the question of the hardpan?

A.—No.

Q.—You have stated that this hardpan is a material which is sometimes almost as expensive as rock to excavate. Did you tell His Lordship what methods you had to use to excavate the actual material you spoke of as hardpan in this by pass excavation?

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

A.—I did, to some extent, but I can elaborate it, if you wish.

10 We were obliged to drill; and the drilling in that sort of material is more difficult than solid rock, because you go down and hit a round boulder, and the drill goes off. When you blast it out, it merely shoots up a pot hole. The blast does not shatter the material the way it would in solid rock. We did that, and we went ahead as well as we could excavating with the orange-peel bucket, proceeding under protest, and getting through with it.

By Mr. Geoffrion:—

20 Q.—You drilled, and blasted?  
A.—Yes.

By Mr. Forsyth, continuing:—

Q.—Will you tell His Lordship whether had you known, or had you been advised, that there was hardpan in this section of the work your price in your tender would have been any different?

30 Mr. Geoffrion: I object to the question. My learned friend is not claiming rescission of the contract. He is suing under the contract, which means for something payable under the terms of the contract, or damages for breach.

The objection is reserved by the Court.

A.—The price would have been very much higher.

By Mr. Forsyth, continuing:—

40 Q.—I notice that in your Declaration, Paragraph 9, you claim \$2.90 per yard as the price for excavation of the hardpan?

A.—Yes.

Q.—What have you to say to that as a fair and reasonable price for that type of work?

A.—It is figured on a basis of two thirds of the price per cubic yard for ledge rock; which, in my opinion, is a fair price for that work.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—The excavation you did there was paid for at the earth excavation price, of \$1.23?

A.—Yes.

Q.—And, you are allowing what you received for that?

10 A.—Yes.

Q.—So, your total claim in respect of the hardpan excavated is \$21,641.25?

A.—Yes.

Q.—In the excavation of the by pass did you encounter any ledge rock?

A.—There was ledge rock jutting out from the south side of the by pass upstream from the stony sluice sections, and there was a great amount of boulders of half a cubic yard and over throughout the balance of the work.

20 Q.—First, with reference to ledge rock; of course, there is a price stipulated in the contract for ledge rock, and boulders half a yard and over?

A.—That was agreed on as a basis for ledge measurements.

Q.—Did you make any claim for the excavation of rock in this by pass?

A.—Not in our Action. We claimed it throughout the work, but we never received it.

By Mr. Geoffrion:—

30 Q.—And, you are not claiming it now?

A.—No, sir.

By Mr. Forsyth, continuing:—

Q.—You are satisfied to take the hardpan?

A.—If that hardpan claim is put through fairly, we will call off the rest.

40 Q.—Are you aware as to whether anybody made any examination of that material, to determine what was its nature or classification?

A.—Yes.

Q.—Who did?

A.—Mr. Ferguson visited the work.

Q.—I mean, apart from Mr. Ferguson?

A.—Professor Mailhot, of the Ecole Polytechnique visited the work, in February, 1929, for the purpose of investigating the geological conditions, for the Quebec Streams Commission.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—Who sent him there?

A.—The Quebec Streams Commission, of which Mr. Lefebvre is Chief Engineer.

10 Q.—Did he (Professor Mailhiot) make an examination of this material?

A.—I asked him specially to make an examination of that material.

Q.—And, are you proposing to call him as a witness to describe the material to His Lordship?

A.—Yes.

Q.—The next claim you have set up in your Declaration deals with some cost of handling the logs of the Defendant Company?

20 A.—Yes.

Q.—May I ask you, first, whether this question of handling logs was originally in contemplation when the tendering was done?

Mr. Geoffrion: I object to the question as illegal.

Mr. Forsyth: I have asked my learned friends to produce the original specification, and they say they have not it. My Kenny says he has not it.

30 Mr. Geoffrion: My learned friend is trying to prove the contents of the specifications.

Mr. Forsyth: I am trying to prove the absence of something from its contents.

40 Mr. Geoffrion: My friend has not yet proved that those specifications are not discoverable. The Plaintiff should have them; he tendered on them. When Mr. Bishop tendered he had the specifications before him.

By Mr. Forsyth, continuing:—

Q.—Have you any copy of the original specifications?

A.—No.

Q.—Or, the original contract form?

A.—No. The sheets, embodying certain changes, were sent to us—just the sheets. We took the other sheets out, and replaced them, and the ones that were taken out have just disappeared.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—So that I may join issue with my learned friend, I will put the question in this way: did the original proposal upon which you tendered have any reference to the driving of logs through the work?

10 A.—No.

Q.—Subsequently to the submission of your tender, the specifications of the contract form were changed so as to provide that the contractor should so construct the cofferdams and arrange and manage the construction of the works the whole that logs of the owner of the owner or of others might be driven by the site of the dam during the driving season of 1929, and was to provide such opportunities for the passage of logs as the construction work might render necessary. When you entered upon  
20 the work, having signed that contract or that specification, I presume you had that in mind?

A.—I consented to the insertion of that clause, with the understanding . . .

Mr. Geoffrion: I object to any evidence of any understanding, which is not in writing.

The objection is reserved by the Court.

Witness: Had I what in mind?

30 Mr. Forsyth: The clause in the specification that logs could be driven past the site.

Witness: Yes.

By Mr. Forsyth, continuing:—

40 Q.—Did you make any enquiries as to how long the driving would continue; or when it would start, and when it would be over?

Mr. Geoffrion: I object to the question, as irrelevant, or as tending to construe a contract by conversations.

Mr. Forsyth: It cannot be irrelevant to an Allegation that those logs came down in an absolutely unreasonable way.



*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Mr. Geoffrion: If it were unreasonable, it would not depend on the conversations of my friend's client. My friend is trying to prove some sort of collateral oral representation or agreement that we would drive in a certain manner. If it is not  
10 that, then the question is irrelevant.

Mr. Forsyth: We had undertaken by a contract to provide opportunities for driving the logs through the works. The question I am asking the witness is whether he had that in mind.

His Lordship: I will reserve the objection.

By Mr. Forsyth, continuing:—

20 Q.—Did you make any enquiries as to how long the driving would continue; or when it would start, and when it would be over?

Witness: That is after the work was undertaken, and the contract signed?

Counsel: Yes.

30 A.—The only conversation I had with regard to that was on either June 26th or July 3rd—I am not positive of which date. I met Mr. Jack Coyle in Notre Dame du Lac. Mr. Coyle was foreman in charge of the driving operations for the MacLaren Company. In answer to a question as to how long he expected to have logs driving past the works, he told me that in two, or not over three weeks the drive would be finished.

Mr. Geoffrion: I object to this evidence.

His Lordship: That was after the contract was signed?

40 Mr. Forsyth: Yes, your Lordship. I intend to show that Mr. Bishop did what a man with that obligation would do. He found out from the person who could give him the information how long the drive would continue, and I intend now to have him tell your Lordship what facilities or what opportunities he provided for the passage of those logs.

By Mr. Forsyth, continuing:—

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—In your construction programme how was it proposed to deal with those logs?

A.—The general plan was to place the cofferdam in sections.

10 Q.—That is, cribs?

A.—Yes.

Leaving at no time less than 30 feet clear for the passage of logs. When the last crib was placed, the water would be diverted into the by pass. In the by pass, and through the main stony sluice section openings 24 feet wide, of which at least two would be effective, were left in the work.

20 Q.—That is to say, in the construction of the cofferdam in the river, by placing the cribs in a certain way you always had 30 feet available for the passage of logs, and with sufficient depth to float them?

A.—Yes.

Q.—How much water would you have?

A.—At least 15 feet.

Q.—And, when the construction operation necessitated closing the gap of 30 feet, you would have a gap in the by pass?

A.—Yes.

Q.—Of not less than what size?

30 A.—At the entrance of the by pass, when the water was first diverted, there was an opening at least 30 feet wide, and 5 feet deep.

I might explain this opening. We would have made it wider, but we encountered solid rock where earth was indicated, and we merely dredged it enough, or excavated it by this orange-peel bucket, to pass the summer flow of the river, which we calculated was quite sufficient to pass the logs. Later on, in order to pass the fall flood we blasted the rock, and extended the channel to the full width shown on the plan.

Q.—Are you in a position to say whether at the time the logs were coming down you had at all times available openings sufficiently wide to permit their passage, and sufficiently deep to carry them?

A.—I was not present during that month; I was down in Newfoundland. Some of our people will be able to give you direct evidence on that point.

WILLIAM I. BISHOP (*for Plaintiff*) Examination in chief.

Q.—I suppose the figures of cost in connection with the handling of those logs is something upon which you have no personal knowledge?

A.—No. I take it from our records.

10 Q.—There was some correspondence, was there not, in connection with this matter of the logs?

A.—Yes.

Q.—I understand your Superintendent, Mr. Lindskog, wrote a letter to you on June 17th, 1929?

A.—Yes.

Q.—And, on June 20th, 1929, you passed that letter on to the MacLaren Company, the Defendant?

A.—Yes.

20 Q.—And, Mr. Lindskog's letter to you, and your letter enclosing the copy, are filed as Plaintiffs' Exhibit P-4?

A.—That is right.

Q.—You received from the James MacLaren Company over the signature of Mr. Kenny, a letter dated June 21st, 1929, of which Exhibit D-2 is a copy?

A.—Yes.

Q.—You wrote the James MacLaren Company under date June 25th, 1929, a letter copy of which has been filed as Plaintiffs' Exhibit P-5?

A.—Yes.

30 Q.—Mr. Lindskog wrote Mr. O'Shea under date July 30th, 1929. Will you produce this letter as Exhibit P-31?

A.—Yes.

Q.—Will you produce, as Plaintiffs' Exhibit P-32, letter dated August 3rd, 1929, from the Defendant to the Plaintiff?

A.—Yes.

Q.—Will you produce, as Exhibit P-33, letter from the Plaintiff Company, addressed to Mr. Kenny, dated August 13th, 1929?

A.—Yes.

40 Q.—Will you produce, as Exhibit P-34, letter of August 21st,

1929, from the MacLaren Company to Wm. I. Bishop, Ltd.,; and as Exhibit P-35, a letter from the MacLaren Company to Wm. I. Bishop, Ltd., also dated August 21st, 1929?

A.—Yes.

Q.—On August 23rd, 1929, there was a letter from Mr. Lindskog, your Superintendent, to the Defendant Company?

A.—Yes.

WILLIAM I. BISHOP (*for Plaintiff*) Examination in chief.

Q.—Will you file the letter as Exhibit P-36?

A.—Yes.

Q.—So far as your recollection serves you, does that conclude the correspondence on that subject?

10 A.—Yes.

Q.—Under the next claim we will have to deal with the plans, to some extent. I show you Plan No. B-2571, forming part of Exhibit P-2. Reading this plan, will you tell me what the depths and the nature of the bottom in the river section of this work are indicated to be?

A.—There is another special plan to indicate the nature of the bottom.

Q.—That is the plan B-2444?

A.—These two together.

20 Q.—That is, you read B-2444 and B-2571 together?

A.—Yes.

Q.—Will you tell His Lordship what those plans indicate with reference to the river section: that is, the underwater section of the dam, and the cofferdam locations?

A.—Plan B-2444 indicates almost continuous ledge rock across the site shown on the plan for location of the upper cofferdam.

30 Q.—Reading from Plan B-2444, at station 4 as a point of departure, you find that the upstream face of the cofferdam shows a condition of practically continuous ledge across?

A.—Both the upstream and the downstream faces.

Q.—Both the upstream and the downstream faces of that cofferdam show ledge right across?

A.—Yes.

Q.—What shows that?

A.—The elevation of the bottom as shown by the letter “L” which indicates ledge rock.

Q.—That is the same letter “L” Mr. O’Shea was speaking about this morning?

40 A.—Yes.

Q.—Looking then at the plan B-2444, at the line proceeding from station 4 we find the elevation of the river bed, followed by the letter “L”, which indicates ledge rock?

A.—Yes.

Q.—Then, what do you find referring to plan B-2571?

A.—At the site of the dam, the centre line of which is about 60 feet downstream from the cofferdam, the cross-section is hatched, to show solid rock. No indication of any other material—“C-C”.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

By Mr. Geoffrion:—

Q.—Is that the cross-section in the upper corner?

A.—Yes.

10

In addition to that the quantities of excavation for that section of the work provided for only ledge rock, no other material being anticipated at that point.

By Mr. Forsyth, continuing:—

20

Q.—That is to say, the quantities which the contract indicates will be removed at the section to which you have just referred are rock, and nothing else—or, call for rock, and nothing else?

A.—That is right.

Q.—When was the upstream cofferdam started?

A.—The shore piers were put in in the early spring of 1929. Mr. Lindskog will give you evidence as to the date of placing the remainder of the cofferdam.

Q.—You went to Newfoundland on July 10th, 1929?

A.—Yes.

30 The two shore piers or abutments had been placed at that time.

Q.—Those were cribs, which were not be sunk in the water, but were on dry land?

A.—And on rock.

40 Q.—Going back for a moment to the question of the contract, and the provision made for quantities of excavation, I note page 6 of the contract contains certain quantities for certain sections. I would like you to indicate, with reference to page 6, which section we have been discussing, which contains only the rock?

A.—Section 5, on page 6 of the contract, shows “Earth: Nothing; Ledge rock, 700 yards”. No earth whatever.

Mr. Geoffrion: Where is Section 5?

Mr. Forsyth: Section 5 is identified by reference to pages 4 and 5, the sluice gates.

WILLIAM I. BISHOP (*for Plaintiff*) Examination in chief.

By Mr. Forsyth, continuing:—

Q.—And, that is the portion which lies between the two letters “C” on the plan B-2571?

10 A.—The cross-section is “C-C” is through that part of the work.

Q.—With reference to the layout for cofferdamming and unwatering this section; assuming the information on the plans is correct, what have you to say about the location of the cofferdam shown on the plan B-2571?

A.—The location and plan indicated on Mr. Ferguson’s plan was a perfectly proper system for the purpose.

Q.—Assuming that the information was correct?

A.—Yes.

20 Q.—What have you to say as to the design of the projected cofferdam (and, I do not mean the location of it, but the design) and the method to be used in unwatering? Always assuming the information on the plans as to the foundation, and so on, was correct?

A.—We followed the usual methods I had used on many jobs before. Simple cribs, in sections, to be sheathed with plank upstream.

Q.—So that we may have a description of it on the Record. That would involve the construction of log cribs?

30 A.—Yes.

Q.—Which are sunk to the bottom, filled with stone and other material, and then sheathed with tongue and groove planking on the face?

A.—Either tongue and groove, or square edge planking with a caulking seam—just a little bevel on each edge, and the dirt and stuff would fill it up.

Q.—After the sheathing is put on the face of the crib, you toe fill it?

40 A.—We put a certain amount of toe fill, depending on the nature of the bottom.

Q.—With a ledge bottom would you anticipate any difficulty in unwatering following that system?

A.—None whatever.

Q.—In fact, assuming the foundation conditions which the plans disclose, what other commercial way of unwatering that site would occur to you?

A.—I do not know of any other commercial plan to ensure getting that work in in the time limit at our disposal. I do

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

not say it is the only way, but there is no other commercial way to do it in the time.

Q.—Would any other method occur to you, assuming that you had ledge right across the river?

10 A.—No.

Q.—You left for Newfoundland on July 10th, 1929?

A.—Yes.

Q.—You returned, and I believe you were in hospital for a while?

A.—I returned a month afterwards, and I was in the hospital, or laid up, for a month after that again.

Q.—I understand your first visit to that work after July 3rd was on August 26th?

20 A.—August 26th.

Q.—What did you find there with reference to this cofferdam?

A.—I found the cofferdam was in a very unsightly condition.

Q.—Would you mind describing just what you mean by that?

A.—One of the cribs had been pushed away downstream. Another had been canted over, and filled in. Altogether it was a very irregular and extraordinary looking structure.

Q.—Had all the cribs been placed at that time?

30 A.—Yes.

Q.—Will you produce, as Exhibit P-37, a plan dated December 10th, 1929, prepared by your staff, showing the cofferdam cribs, the sheathing, and the steel sheet piling—that is, the upstream cofferdam—and also superimposed in yellow pencil the location of the cofferdam in the drawing B-2571?

A.—Yes.

Q.—I think I would like to have a little more information about this. Actually the wood sheathing is placed shown by the double solid white line, which runs from a point which I mark  
40 “A” to the point “B”?

A.—Yes.

Q.—At the point “C” some steel sheet piling was driven, following the line to the point “D”?

A.—Yes.

Q.—And, below the cofferdam steel sheathing was driven, from “E” to “F”, shown by a solid white line?

A.—Yes.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—Then from “X” to “O” is the top of the toe fill which was placed outside the wood sheathing “A-B”?

A.—Yes.

10 “R”?

A.—Yes.

Q.—Will you produce, as Plaintiffs’ Exhibit P-38, a plan bearing date December 11th, 1929, prepared by your staff, and purporting to show the profile of steel sheet piling above upstream cofferdam, which appears on Exhibit P-37 as lying between the line “C”-“D”?

A.—Yes.

20 was driven?

A.—Yes.

Q.—The lowest point being, I believe, elevation 71.2?

A.—Mr. Allison will be able to give you more definite evidence on that.

And it being 4.15 o’clock, the further testimony of the witness is continued to Thursday February 16th, at 10.30 o’clock in the forenoon.

And further for the present deponent saith not.

30

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DEPOSITION OF WILLIAM I. BISHOP (continued)

And on this Sixteenth day of February, in the year of Our Lord One thousand nine hundred and thirty-three personally came and reappeared the said witness, William I. Bishop, and his testimony was continued as follows:—

40

By Mr. Forsyth:—

Q.—Before continuing with your evidence on the cofferdam work, I would like to ask you to produce as Plaintiffs’ Exhibit P-39, the general layout plan which we discussed yesterday but which we did not have before us at the moment. This is a plan dated September 6th, 1929, prepared by engineers of your staff, I understand?



*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

A.—Prepared by the engineers of the Quebec Streams Commission.

Q.—This shows the layout of plant, camps, and so on, as at September 6th, 1929?

10 A.—Yes.

Q.—The layout itself was made by you?

A.—Yes. It was laid out roughly, but a lot of things were added to it from time to time. It probably was in that condition long before September 6th, 1929.

Q.—In any event, this shows what it was at that date?

A.—Yes.

20 Q.—Yesterday I asked you about the personnel and equipment. Apart from the services of Mr. McEwen and Mr. Lindskog in general charge of this matter, did you personally take any active part in the overseeing of the work?

A.—Yes. I would like to file a list of the dates on which I visited the works, and also of the dates I visited the work at High Falls, practically every day of which I telephoned Cedar Rapids.

I visited the Cedar Rapids work a total of thirty visits, and was sixty-one days on the work.

30 Q.—How many times were you at High Falls?

A.—I was at High Falls 126 days besides this.

Q.—And, when you were at High Falls you communicated with Cedar Rapids by telephone?

A.—Practically every day.

Q.—Will you file a list of those visits as Plaintiffs' Exhibit P-40?

A.—Yes.

40 Q.—When we adjourned yesterday we were considering Exhibit P-38, a profile of the steel sheet piling which appears on the plan Exhibit P-37 along the line C-D. Will you tell His Lordship the method of the cofferdamming as it actually was done, using the plan Exhibit P-37. You told us yesterday cribs were sunk in the stream in the order as they are numbered on the plan, and at the dates which appear on the plan, and as a result of some logs coming down disturbances took place in those cribs—that one of them was moved downstream somewhat, and another was cauted over. Will you tell me what you would normally do in cofferdamming this work? What would be the normal thing to do?

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

A.—Having placed the shore cribs we would normally expect to place the cribs one to four inclusively, one at a time, and bring them into an approximately straight line, and then proceed to sheath on the face of those cribs from one side to the other  
10 down to the ledge rock indicated on the plan.

Q.—When you say the ledge rock indicated on the plan, to what plan do you refer?

A.—B-2444.

We would then place a moderate amount of gravel toe fill, with clayey material if obtainable, to seal the bottom at the foot of the toe sheathing.

20 Q.—That is upstream from the sheathing on the face?

A.—On the upstream side.

Q.—And, the effect of that would be to divert the flow into the by pass?

A.—Yes.

Q.—And, what about the downstream face?

A.—Practically the same thing, but very much less in height. There would be this difficulty, because the current would be completely stopped by the upper cofferdam.

Q.—What measures would be taken in between those two cofferdams?

30 A.—We would start the pumps, of which we had fairly large pumping capacity, to pull down the water inside, draw this toe fill into any slight leakages at the toe of the sheathing, and afterwards we would expect to unwater a place like that with about one eight inch pump, and keep it dry.

Q.—Having indicated to us what the normal course would be, will you now tell us what was actually done there? In the first place, I note the wood sheathing lying between the points “A” and “B” on the plan Exhibit P-37 does not follow the face of the cribs at all. Can you tell us why that was?

40 A.—I was not present, and I would prefer that that evidence be given by the man who carried it out—our Superintendent. When I got back to the work on September 5th this was all in.

By Mr. Geoffrion:—

Q.—What was all in?

A.—The wood sheathing shown on this plan from “A” to “B”.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

10 Beyond that, I saw them placing this tremendous amount of toe filling upstream—at least a large part of it—and ordered the placing of the steel sheet piling shown as “C-D”, and the light sheet piling downstream of the cofferdam shown as “E-F”.

Q.—From your observation when you went there and saw this wood sheathing from “A” to “B” not running along the face of the cribs, as it normally would, but running at some distance off, were you able to ascertain from your observation as to whether it was necessary to do it that way?

A.—I can only say what I was informed.

20 Q.—You saw them making this toe fill between “X” and “O” at the top, and “P” and “R” at the bottom, and you say you ordered the steel sheet piling “C-D” put in. Why did you do that?

A.—I ordered that because I found that eight or ten pumps were not able to pull the water down to any great extent in the area to be unwatered, and this was a kind of a forlorn hope to try to shut off the water at the deepest point of the old channel. Fortunately it worked.

Q.—Then you ordered the steel piling “E-F”, which is downstream from the cofferdam, put in. What was the purpose of that?

30 A.—Primarily to retain the loose material which existed at the bottom.

Q.—The primary purpose of that was to retain the loose material on the bottom?

A.—Yes; because there was still considerable leakage in through.

To retain that loose material, and also form a sump where we could place the pumps above the dam to be constructed.

40 Q.—The primary purpose of this was to prevent the scouring out under the cofferdam?

A.—To prevent the whole thing shifting.

Q.—And, secondly, to create a pond between the downstream face of the cofferdam and the line “E-F”?

A.—To form a sump. It also served the purpose of reducing the pressure head on the work, and helped to reduce the leakage to some extent.

Q.—Was the quantity of toe fill that was placed as indicated by the lines P-R and X-O a quantity that you would have

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

anticipated using had ledge rock existed as the plan B-2444 indicates?

A.—No. It was many times greater in extent.

Q.—Why?

10

A.—The effort was being made to planket the bottom and do away with the leakage coming through the boulders and logs in the bottom under the cofferdam and upstream from it.

Q.—Did you make any observations yourself—not what you were told—which would enable you to state to His Lordship what was the nature of the bottom—the surface of the river bed—at that point?

20

A.—After the water had been drawn down by the pumps, it was very easy to see what the bottom consisted of. There was absolutely no ledge rock in the bottom of the river. There were at least 9 feet of loose boulders, with some gravel, under the dam itself.

Q.—That is under the cofferdam?

A.—Yes.

Q.—What did the plan B-2444 show as existing there?

A.—It indicated very clearly ledge rock throughout that part of the work.

Q.—With no over-burden?

A.—No over-burden whatever in the centre of the river, the deepest part.

30

Q.—On this question of pumping, you told me that under normal conditions, with the indications of the plans justified, you would have expected to use an eight inch pump to be able to keep the site of your work unwatered?

A.—We would expect to have one eight inch pump running, and another pump or two in reserve in case of breakdown of the operating pump.

Q.—What did you actually have there?

A.—I cannot tell you exactly. Mr. Lindskog can give evidence on that point.

40

Q.—Had you more than one pump running, and another pump or two in reserve?

A.—We had many times more than that.

Q.—Can you tell me what expense the pumping involved?

A.—I can only quote from the books, and that will be given in evidence later.

Q.—Did you make any complaint or representation to Mr. Ferguson about this unwatering condition?

A.—Yes.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—What did you do?

A.—I telegraphed for Mr. Ferguson on September 26th, 1929?

10 Q.—Have you a copy of the telegram?

A.—Yes, I think so.

Q.—Will you produce the copy as Plaintiffs' Exhibit P-41?

A.—Yes.

Q.—What happened in response to that telegram?

A.—Mr. Ferguson came up to the site on October 1st, and went over the situation at that time.

20 I have a long memorandum here of what transpired, which I could either read, or it may be filed.

Mr. St. Laurent: It has already been filed as Plaintiffs' Exhibit P-7.

By Mr. Forsyth, continuing:—

Q.—As a result of your conference with Mr. Ferguson, you prepared a memorandum, and that memorandum has been filed as Exhibit P-7?

A.—Yes.

30 Q.—Will you produce, as Exhibit P-42, a copy of a letter from you to the Defendant, dated October 4th, 1929, with an attached memo dated October 2nd, 1929, which states:

“Mr. Ferguson instructs us as follows:

(1) He wishes us to place an additional blanket of good material on the river bed upstream of present toe fill embankment in deepest section of the river”.

40 Was that done?

A.—Yes.

Q.—“(2) Excavate the material between cofferdams with orange-peel buckets or clamshell down to ledge rock”.

Was that done?

A.—No.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

We started, but we stopped because we thought it might endanger the cofferdam itself by taking it downstream.

10 Q.—“(3) To get out as far as possible by secondary cofferdams from island and south shore to permit placing additional concrete”.

What was done about that?

A.—To a certain extent. They began, as explained in the letter, and it was found too costly to go on that way.

20 Q.—“(4) Mr. Ferguson will arrange immediately for core drilling between cofferdams to determine the nature of the river bed and probable depth to which we will have to go”.

Did Mr. Ferguson do that?

A.—No, he did no core drilling. They made some sort of an electrical determination, which turned out to be a good deal of a farce—it did not indicate the true condition.

Q.—That was some sort of an electrical divining rod business?

A.—Something in that line, yes.

30 Q.—Have you any record of what was done?

A.—Mr. Allison will produce it.

Q.—Did the contract provide for any core drilling?

A.—Yes. Page 9 of the contract covers that:

“It is further agreed that any core drilling or grouting of seams in the ledge beneath the dam which may be required by the engineer shall be considered as extra work and be paid for as such in the manner provided for for extra work.”

40

Q.—Were you ever asked to do any core drilling?

A.—No.

Q.—Did you ever receive any instructions to do any core drilling?

A.—No.

Q.—Would core drilling have been of any advantage in meeting the situation?

A.—Decidedly. It would have been an advantage on the entire work from one end to the other.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

10 Q.—“(5) He will recommend to the owners that arbitration be proceeded with immediately to determine responsibility for all matters concerning the cofferdam and the payment of direct and indirect costs.”

Do you know what Mr. Ferguson’s recommendations were?

A.—No, I do not.

Q.—But, you do know there has been no arbitration?

A.—I do.

20 Q.—“(6) Mr. Ferguson agreed that it was not worth while spending \$600 per 24 hours pumping, and that he would agree to shut down the pumps until some more blanketing (item No.1) was put in.”

A.—That is right as I understood it.

Q.—Does the memorandum Exhibit P-42 correctly set forth the conference and the results of the conference?

A.—That, in combination with what Mr. Geoffrion has in his hands.

Q.—That is, in combination with Exhibit P-7?

A.—Yes. I wrote it down directly and sincerely as I understood it.

Q.—At the time?

30 A.—At the time.

Q.—Exhibit P-6 is a letter received by you from Mr. D. W. O’Shea, and it encloses a memorandum of a conference between Mr. Ferguson, Mr. Bishop and Mr. O’Shea, concerning the cofferdam at Cedar Rapids. It says:

“Mr. Bishop agreed to carry on the following work at once;

40 (1) Put more fill upstream at about the points where the two scows were unloaded on the afternoon of October 1st when Mr. Ferguson was at Cedar Rapids”.

Did you agree to do that?

A.—We agreed to do that, and I believe it was done.

Q.—“(2) Dredge inside the cofferdam with an orange-peel on the site of the deep gates section.”

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Did you agree to do that?

A.—I readily agreed to do what we could, but I decided afterwards it was not safe to do that.

10 Q.—For fear the cofferdam would carry out?

A.—It would at least increase the chances of washout and leakage.

Q.—“(3) Keep on with the concrete work from both ends of the present structures, building small cofferdams if necessary.”

A.—We agreed to try that, and we did try it but found it was impracticable.

20 Q.—“Mr. Ferguson stated that he would take up with the owners the matter of making core drillings on the site of the deep gates.”

A.—I have already stated what I thought about that.

Q.—“It was agreed that it would not be necessary to pump until additional filling would have been deposited.”

We have already discussed that?

A.—Yes.

Q.—“Mr. Bishop will present a formal demand for arbitration to the owners.”

30

Was that done?

A.—We attempted to arrange that.

Q.—In your own memorandum you make the statement that Mr. Ferguson said he would recommend to the owners that the arbitration be proceeded with.

A.—We could not do anything without instructions from the owners.

40 Q.—In your memorandum you state Mr. Ferguson said or agreed that he would recommend to the owners that the arbitration be proceeded with?

A.—Yes, I understood that.

Q.—On October 7th, Mr. Ferguson wrote you a letter, copy of which is filed as Exhibit D-3, in which he said:

“I have received your letter of October 4th, saying: ‘Attached hereto find copy of our understanding of your instructions at the discussion of October 2nd at your office



*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

10 at High Falls'. Your letter and the memorandum attached make it appear that you are proceeding with the work described by the memorandum because of instructions to do so given by me. To this I must take exception, and deny that I instructed or ordered you to do these things."

What have you to say about that?

A.—I understood what he said as instructions.

Q.—He was the engineer in charge for the owners?

A.—He was supposed to be. As far as I knew, he was.

Q.—How many times had Mr. Ferguson been up there before?

20 A.—Only once; on March 3rd, 1929. That was the only time I met him there.

Q.—He goes on to say:

"On the contrary, the filling, dredging, and method of continuing the masonry work from both shores were methods suggested by me for continuing the construction work because you had declared that you did not know how to get the cofferdam tight enough to unwater the river."

30 A.—I answered those points in the letter replying to that, and I think it would be as well to go to the letter because it was written at the time.

Q.—Did you declare to Mr. Ferguson that you did not know how to get this cofferdam tight, or how to unwater it?

A.—No, I did not.

Q.—He goes on to say:

40 "My visit to Cedar dam was in response to a request contained in your telegram received September 26th urgently requesting me 'to meet you to discuss serious situation unwatering main channel caused by fact that we have discovered at least 14 feet loose material on river bed where your plan B-2444 states ledge rock'. I met you at the dam on October 1st, and spent the day there observing and considering the conditions. Next morning we met at High Falls, and discussed the situation".

Did anything arise at the meeting between yourself and Mr. Ferguson at Cedar which negated the statement in your telegram that the loose material existed over the ledge rock?

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

A.—No.

10 Q.—“I found the coffer dam leaking badly, and that nine or ten pumps were operating which were not even lowering the level of the water in the pool between the two cofferdams to any great extent”.

You would agree with that?

A.—Yes.

Q.—“No effort was made to discover the source of the leak and to determine how it could be reduced to reasonable proportions.”

20 A.—It depends on what you call efforts. We were blanketing the bottom, but we were unable to draw the water down low enough to see just where it was coming through underneath.

30 Q.—“A large amount of filling on the upstream side of the cofferdam had been completed, I believe about ten days before the date of my visit, and the only effort to reduce the leakage which had been made subsequently to the completion of the filling was some work on a leak which appeared near the easterly edge of the river channel. This had been reduced to small proportions several days before I visited the dam; pumping had just been resumed, which developed the fact that other and larger leaks existed.”

What have you to say about that?

A.—As much as possible of the leakage at the north end was being carried along a flume, to save pumping. A certain amount of the water backed up, and we were able to run it through a flume.

40 Q.—“You told me that you had spent all the money on the construction of the upper cofferdam and the filling above it that you were able to spend, and that you did not know what further could be done to reduce the leakage.”

What have you to say to that?

A.—I told him we had spent far more than we had any right to spend under the contract, and put it up to him to tell us how to do it, and pay for the rest of it.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

10 Q.—“You advanced the theory that instead of ledge being encountered at the surface of the river at points where our plan B-2444 indicated it to be, there is a deep stratum of loose rock or other pervious material through which the water is doubtless flowing from an area of probably large extent on the river bed above the limits of the filling and that you could see no practical way of overcoming the difficulty and reducing the leaks to a point where a reasonable number of pumps would permit you to unwater the river bed.”

A.—I put it up to him to tell me how to blanket or do something with this loose bottom that existed and was not shown on his plan.

20 Q.—“ You further expressed the opinion that under the area to be occupied by the dam in the river channel ledge would likely be found at 14 feet or more below the surface of the river bed, where the drawing B-2444 indicated it to be at the surface. You took the position that because ledge is not being encountered at the elevations and points where the above mentioned drawings indicate it is to be found a leaky cofferdam has resulted, and that the cost of the completing of the dam will be much greater than otherwise it would have been, and that the owners should pay for this additional cost.”

30 A.—Right.

Q.—“At our discussion this morning I told you that I would not make any ruling on your contention that the owners should pay for any extra works which might be caused by failure to find ledge at the points indicated, and that I thought this was a matter for arbitration if you desired to have arbitration on the point.”

A.—That is right.

40 Q.—“You then said you wanted the matter to be arbitrated, and I told you I would so inform the owners, but that you should make the request directly to the owners in official form.”

A.—Correct.

Q.—“I also told you that I did not believe that your theory that there is a stratum of loose material below the surface of the river bed which is responsible for the leakage of the cofferdam is correct, that it did not seem to me that the question of making the cofferdam tight was at all

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

10           hopeless as you seemed to think, and that irrespective of the merits of the question as to whether the owners should pay for any extra cost of completing the dam you say will be caused by failure to find ledge at the expected elevation I considered it your duty and obligation as contractor to proceed with the work immediately and energetically. I also told you I thought more filling above the cofferdam probably would reduce the leakage, and suggested doing this and other methods of proceeding with the work which seemed to me would promise success.”

20           Did Mr. Ferguson assert to you that he did not believe there was a stratum of loose material on the surface of the river bed?

A.—No.

Q.—What was subsequently established with respect to that theory of yours?

A.—There were at least 9 feet of loose material.

Mr. Ferguson admitted to me on the ground that there was loose material under the cofferdam that we were then trying to build.

30           Q.—Is it true that Mr. Ferguson told you that you should proceed with the work immediately and energetically?

A.—He was quite ready to have us go ahead and spend all the money there was, at our own expense, yes.

By Mr. Geoffrion:—

Q.—Subject to arbitration?

A.—Yes.

40           By Mr. Forsyth, continuing:—

Q.—Of course, you assumed you would get an arbitration?

A.—I did not doubt it at that time.

Q.—Mr. Ferguson did tell you, I suppose, that more filling above the cofferdam would probably reduce the leakage?

A.—We went ahead and placed some while he was up there.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—In any event, you went ahead and put more filling there?

A.—Yes.

Q.—Did it reduce the leakage?

10 A.—Not materially.

Q.—Then he goes on, referring to his suggestions:

“These were made by me because you stated that you did not know what to do, and you agreed to proceed along the line of these suggestions, and in the meantime start arbitration proceedings.”

20 What have you to say in regard to this matter of not knowing what to do?

A.—I deny it most emphatically. I put the proposition up to him as it was, and asked him to tell me what to do. I did not tell him I did not know what to do. He thought of that afterwards.

Q.—He says:

30 “I promised that the owners would determine the elevation of the actual surface of ledge in the river bed under the dam, and expressly stated that pending this determination the work should not stop, and that the fact I agreed to have this determination made should not be considered by you a cause or excuse for holding up the construction work until these determinations were made.”

With reference to Mr. Ferguson’s promise that the owners would determine the actual surface of ledge in the river bed under the dam, what happened? Did they do it?

40 A.—We received no useful information whatever on that point.

Q.—You did subsequently discover where the ledge was?

A.—Yes, we did.

Q.—Who discovered it?

A.—We discovered it ourselves.

Q.—How did you discover it?

A.—We discovered it by controlling the water to a point where we could pump enough, at a high cost, and excavated the overlying material out, and found the ledge.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—Did it cost you anything to do that?

A.—It certainly did.

Q.—How much overlying material did you remove?

A.—We finally found about 9 feet.

10 Q.—Did you hold up the construction work pending the fulfilment of that promise of Mr. Ferguson?

A.—We went ahead as much as it was commercially practicable to do.

Q.—In reply to that letter of Mr. Ferguson, you wrote a letter, under date October 17th, 1929, a copy of which I will ask you to produce as Plaintiffs' Exhibit P-43?

A.—Yes.

20 Q.—I will read this letter to you, because there are one or two questions I wish to ask you about it.

“JAMES MACLAREN CO. LTD.,  
CEDAR RAPID DAM

Replying to yours of October 7th regarding the above. I regret that I must contradict your statement that I declared I did not know how to get the cofferdam tight enough to unwater the river.

30 I asked you to come up to the site to investigate the conditions.

I pointed out that the contract drawing for the cofferdam location indicated ledge rock and that instead of this we had found at least 14 feet of loose material.

You agreed that your plan showed ledge, and agreed that this was what we were expected to base our tender on.”

40 Did Mr. Ferguson make the statement you say in this letter he made?

Q.—Which statement is that?

Counsel:—“You agreed that your plan showed ledge, and agreed that this was what we were expected to base out tender on.”

A.—Yes. I put it up to him whether or not he was going to stand by the information he gave me to make my price on.

WILLIAM I. BISHOP (for Plaintiff) Examination in chief.

Q.—And, what did he say?

A.—He did not say very much.

Q.—The letter goes on:

10                    “I told you that we had already expended double the amount which a cofferdam built on the bottom as per contract would have cost, and that we did not consider we should be called upon to expend any more but that the owner should pay for all expenditures beyond that fairly chargeable to unwatering under conditions contracted for.”

A.—Yes, I told him that.

20                    Q.—The letter continues:

                  “You refused to stand behind the plan you gave us, and said this question would have to be settled by arbitration.”

A.—Right.

                  Q.—“You were naturally anxious to avoid shutting down the work, and outlined certain details which I considered as instructions and which you have selected to call suggestions.

30                    We proceeded ‘without prejudice’ to try and carry these out, with the following results:

                  (1) Placing an additional blanket of good material on river bed upstream. We have placed a large amount of fill where indicated, without any apparent results”.

A.—Correct.

40                    Q.—“(2) Excavating material between cofferdam. We have done a certain amount of this, but have discontinued on account of fine material found which may cause undermining and aggravation of present conditions under cofferdam.”

A.—Yes. There was a certain amount of fine material between the boulders.

                  Q.—“(3) Placing secondary cofferdam to enable more concrete to be placed. This was found impracticable, as under requirements of Streams Commission Engineers

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

the cost of these cofferdams would be prohibitive, and in any case there is not room to place them.”

A.—Right.

10 Q.—“(4) Core drilling to determine location of ledge and its probable character. Mr. Ferguson informed me over the telephone in New York that some sort of electrical exploration had been arranged for. Personally I very much doubt the value of this. It is imperative that this information be accurately determined.”

Was your suspicion as to the value of this electrical exploration justified?

20 A.—Yes.

Q.—“(5) Arbitration. We have written the owners about this matter, and have their reply naming their lawyers. Our lawyers are now in consultation with them drawing up an agreement. This will be a long, tedious and expensive process, and in the meantime we have been carrying along under protest at your request at a ruinous cost to ourselves.”

A.—That is correct.

30 Q.—“(6) Pumping. We carried along for a few days after blanketing started, at high cost, but were unable to get any worthwhile results.

On the 14th inst. I decided as a last resort to drive Lackawanna steel sheet piling across the deep channel of the river down to the bottom and as far into it as commercially possible.

40 The sheet piling was ordered the same day, and should arrive on the job next week. Meanwhile a driver is being built to handle this.

This work is being done under protest and without prejudice.”

That was the thing that finally enable you to meet the conditions?

A.—It did. And that shows I knew how to stop it.



*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—“We have spared no effort nor expense to meet the conditions caused mainly by the loose bottom, and secondly by the way the owners handled their logs.

10 We consider that we have been treated most unfairly throughout, and must hold the owners responsible for all direct and indirect costs.

When the steel sheeting is completed we shall immediately start the pumps, and in the meantime consider that we should not be asked to incur any additional expense.”

A.—Yes.

20 Q.—Will you produce, as Plaintiffs' Exhibit P-44, a letter sent you by Mr. D. W. O'Shea, Resident Engineer, which bears date October 8th, 1928?

A.—Yes.

Q.—I want to discuss with you two things in this letter. In the first place, you apparently took your instructions from Mr. Ferguson, and Mr. Ferguson apparently only suggested, but Mr. O'Shea, the Resident Engineer, had definite views about it. The letter reads:

30 “My observations on two trips to Cedar since your conference with Mr. Ferguson at High Falls, on October 2nd, lead me to conclude that you are not carrying on the work as Mr. Ferguson intended.”

Then he goes on to criticize some scheme of boxing off the water above the cofferdam.

Towards the end of the letter he says:

40 “Your pumps and boilers are in bad shape, with the result that their efficiency is low, it never was very high. This should be rectified at once.”

What have you to say about that?

A.—I have to say it is entirely unfair, and uncalled for.  
I answered that letter.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—Were the pumps and boilers in bad shape?

A.—The pumps had been run above their capacity in an effort to cope with the water, and naturally there would be more breakages than there would be under ordinary conditions.

10

The boilers were perfectly all right.

Q.—He says the efficiency was low, and never was very high.

A.—That is in the general line of loose remarks made by Mr. O'Shea.

Q.—What have you to say as to their efficiency when they started?

A.—I say it is not true.

20

Q.—“Mr. Ferguson's intent was that there should be no stoppage of work, and that everything should be done to carry on and stop the leaks in the cofferdam.

This, so far, has not been done,”

So far as practicable, had you followed the instructions or the suggestions?

A.—Yes.

30 Q.—You replied, on October 17th addressing your letter to Mr. Ferguson, attention of Mr. O'Shea?

A.—Yes.

Will you produce a copy of your letter as Plaintiffs' Exhibit P-45?

A.—Yes.

Mr. Forsyth:—This letter reads as follows:—

“October 17th, 1929.

40

Hardy S. Ferguson, Esq.,  
Maclaren Dam, Quebec.  
Attention Mr. O'Shea.

Dear Sir:—

CEDAR RAPID STORAGE DAM, MAIN  
CHANNEL COFFERDAM

Replying to yours of October 8th. Our letter to your Head Office, copy of which is attached hereto answers the first and last paragraphs of your letter.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

10 With regard to the second paragraph, you have been misinformed as to the carrying out of Mr. Steele's instructions. The flume is taking care of a small proportion of the leakage, but we find that at least 90% of this flow is coming through the bottom far below the level of the flume.

Your statement regarding the boilers and pumps is incorrect. The boilers were inspected quite recently, and any stoppages of the pumps were caused by over-driving them in an attempt to cope with the leakage.

20 We explained yesterday our programme for steel sheeting and are sure you must feel that we are doing everything commercially possible to meet the situation."

By Mr. Forsyth, continuing,

Q.—On October 18th, Mr. O'Shea wrote you?

A.—Yes.

Q.—Will you produce the letter as Exhibit P-46?

A.—Yes.

30 Q.—In this letter he says he has received your letter of October 17th to Mr. Ferguson, and was forwarding it to him. And, as the subject discussed was rather vital to the owners, he was sending them a copy of it?

A.—Yes.

Q.—On November 23rd, you wrote Hardy S. Ferguson, & Company?'

A.—Yes.

40 Will you produce a copy of your letter as Plaintiffs' Exhibit P-47?

A.—Yes.

Mr. Forsyth:—This letter reads:

**“RE UNWATERING AT CEDAR  
RAPIDS DAM**

After the cofferdams were built, it was found that the bed of the river was not ledge as shown on the con-

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

10 tract plans, but that it was made up of boulders, gravel, sand, etc., of some considerable depth. We have not yet been furnished with any dependable information regarding the depth of this comparatively loose material overlying the dam site.

Up to the present this material has been excavated to a depth of several feet without finding rock bottom, and it is quite possible that the rock surface at its lowest elevation may be considerably lower than anticipated.

20 In addition to any effect which this condition may have on the construction of the storage dam itself, it adds a greatly increased unwatering hazard to the work; and in case the loose material is very deep, the effect of water blowing through under the cofferdam might be disastrous.

It is even now necessary to use additional equipment, and if the depth is found to be much greater it may be necessary to use special methods of construction. There will also be increased difficulty in pumping due to increased lift, and probably also increased of water.

30 We hereby notify you and the owner that we disclaim all responsibility in connection with the increased risk, delay and expense due to the wrong information given by the contract plans, for all of which we hold the owner strictly responsible.”

A.—That is correct.

Q.—Will you produce, as Exhibit P-48, a copy of your letter of December 16th, 1929, to Mr. Ferguson?

A.—Yes.

40 Mr. Forsyth:—I think it will be convenient at this time to deal with claim No. 8, and claim No. 13, as well as claim No. 3.

By Mr. Forsyth, continuing,

Q.—Your claim No. 8 refers to additional cost of work performed under winter conditions. I would like to ask you, first, whether in your experience as a contractor you have done excavation and concrete work under both summer and winter conditions?

A.—I have.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—In the Province of Quebec?

A.—Yes.

Q.—Will you state whether, generally speaking, it is more  
expensive to operate in one season rather than the other, and, if,  
10 so, which one?

A.—It costs considerably more to place concrete work,  
and there is an additional cost on both excavation, forms, and  
every other class of work in connection with this kind of  
contract.

Q.—When does it cost more?

A.—In the winter.

Q.—Generally speaking, what causes this additional cost,  
for instance, in the concreting? What are the elements which  
20 make for additional cost in concreting, for instance?

A.—To begin with there is a great deal of snow and ice  
to handle upon the work. The carpenters and other laborers  
are less efficient in building the forms. There is an addition-  
al cost in quarrying and crushing rock, and handling the sand,  
and mixing and placing the concrete.

One of the largest items of cost is that all the sand and  
stone have to be thoroughly heated, and the resulting concrete  
placed in the forms in a warm condition. The work is then  
enclosed, and heat kept around it for periods (varying with the  
30 engineer running it) from one to three weeks. We have to  
maintain a summer temperature around the work, to allow the  
cement to set.

Q.—I note that in Paragraph 32 of the Declaration you have  
claimed for additional cost on the class 1 concrete, of \$3.21 per  
yard; and on the class 2 concrete, an additional cost of \$6.61; and  
on your structural steel you claim an extra of \$7.50 per ton?

A.—Yes.

Q.—Have you prepared any figures to substantiate those  
40 claims?

A.—Yes.

Q.—Will you take communication of the document I show  
you, and tell me if it covers the figures you prepared?

A.—These I believe to be a fair estimate of the additional  
cost.

Q.—Based upon the actual performance? What you actual-  
ly did there?

A.—Yes.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—Will you indicate to His Lordship the result of those figures?

10 A.—Class 1 concrete is the largest item. Extra labor cost of quarrying and crushing stone, 40 cents per yard; extra labor cost of handling and storing sand, 20 cents; extra cost of mixing and placing concrete, 25%—25 cents; fuel cost of heating materials and protecting concrete, 150 pounds of coal per cubic yard, at \$20 per ton—coal was very expensive there. It had to be hauled in thirty miles. Mixing and covering, labor and material, 30 cents. Men attending salamanders, 20 cents; extra fuel for boilers—that is, the hoisting boilers—25 cents; extra cost of plant maintenance, 10 cents:

20 A total of \$3.20 per yard.

Class 2, being very light work the fuel cost and the enclosing is higher; and the total is \$6.60 per yard.

Q.—At what figure did you estimate you increased form cost?

A.—13 cents per square foot for plain forms, and 22 cents for curved.

Q.—How did you arrive at the additional \$7.50 on the structural steel?

30 A.—I took 30% additional, to put up the steel in the winter. It is much more risky work, and you cannot get the same job from an erection gang.

30% of \$25.00 — \$7.50.

Q.—Will you file this Statement from which you have been quoting, as Plaintiffs Exhibit P-49?

A.—Yes.

40 Q.—Are you prepared to give evidence on the additional figures that are claimed under that head for fuel protecting the water lines, the steam lines to camps, and the extra lighting?

A.—No. This will be given by the accountants.

Q.—I notice in connection with this claim you add 37% to your cost?

A.—Yes.

Q.—Why do you do that?

A.—Because that is the percentage to be added to the works cost determined in the contract.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—That is the way the contract discusses extras: you take actual cost, plus 37%, when you are working force account?

A.—Yes.

10 Q.—And you concluded that that was a proper charge to make under the contract?

A.—I thought it was the proper thing to stick to the figure given in the contract.

Q.—It is found in Item B on page 9 of the contract?

A.—Yes.

Q.—Are you prepared to give evidence on the quantities of concrete Class 1, and Class 2, and the quantities of structural steel?

20 later. A.—No. Our Resident Engineer will give evidence on this

Q.—That is Mr. Reichenstein?

A.—Yes.

Q.—Why did you work in the winter time on this job? Why was it necessary to do that?

A.—We were obliged to work in the winter because we were delayed three months on the unwatering beyond the reasonable time we had allowed for constructing the cofferdam according to the plans we tendered on.

30 Q.—Claim No. 13 is the stand-by by overhead expense during delay and interruption of work because of wrong information regarding the nature of the river bottom. You have stated that the conditions which you encountered in doing the actual work, by their difference from those which were indicated to you on the plans on which you tendered, delayed you three months?

A.—On the unwatering, yes.

Q.—In the meantime, what was the position with respect to your organization there?

40 A.—Our entire programme was disorganized, and we were obliged to keep our organization and key men on the work, accomplishing very little productive result, expecting from week to week that we would be able to go ahead on our main programme.

Q.—If, for instance, you had had some core drilling done there, which told you where the ledge actually was, would you have been under the same necessity?

A.—No. The main delay was caused by the difficulties with the logs, and the presence of loose material under the cofferdam.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—If you had had the core drilling, and information as to where the ledge was (leaving out the question of the logs) could you have planned the work so as to avoid this stand by expense?

10 A.—With the loose material there would have been a certain additional expense and delay.

Q.—I do not think you just get my question. I will ask you again.

If you had had precise and accurate information as to where the ledge was located, could you have arranged your programme definitely so as to know when you would need your men?

20 A.—Yes.

Q.—The figures in connection with that are contained in Paragraph 41 of the Declaration. Are you in a position to testify about those figures?

A.—Yes.

That is something you cannot determine precisely from the books, except as to the total amount expended. The proportions and credits given were made up by myself, and I believe they are fair and correct.

30 Q.—That is to say, you take your average maintenance and overhead for July and August, at \$21,190.30; and applying the same rate for September, October and November (being the three months you delayed) you say you had \$63,570.90 of overhead and maintenance during that time?

A.—Yes.

Q.—The average of the Resident Engineers' estimates for July and August is \$84,580.10, and the proportion of stand-by and work done is 25% : \$21,190?

40 A.—Yes.

Q.—And, you give credit for the work done each month?

A.—Yes: according to the Engineer's estimates.

Q.—So that you attribute to the Engineer's estimates the correct proportion of overhead attributable to it?

A.—Yes.

Q.—And, give credit for that?

A.—Yes.



*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—And then charge the unused stand-by — being the difference — to the Defendant Company?

A.—Yes.

10 Q.—As resultant from the delay caused in the unwatering?

A.—Yes.

Q.—Then you ask them for 15% profit on that stand-by expense?

A.—Yes.

Q.—Why?

A.—The 37% includes overhead expenses, so, obviously, you cannot charge the same thing all over again. We allowed what we allowed in making up our tender.

20 Q.—You are charging on that overhead expense the same profit you had allowed for in your main tender?

A.—Right.

Q.—Then you add to the figure, \$43,955.94, a plant charge, determined in a somewhat similar way-by establishing proportions?

A.—Yes.

Q.—And that amounts to \$5,191.47. Making a total of \$49,147.91?

A.—Yes.

30 I might say that plant charge is a very moderate percentage charge: much lower than usually charged on that class of work.

Q.—The suggestion may be made that you should have discharged all those men, or let them go, when you were meeting those unwatering difficulties. Can you explain to His Lordship why you did not?

40 A.—In the first place, the summer of 1928 was a very busy season for that class of work, and leading men were very scarce. This work was situated thirty miles in one direction and fifty miles in another from the railway, and it was quite difficult to get men to go there at all. In the second place, we never anticipated at the outset of this unwatering that we were going to be shut down for three months. We went on from week to week expecting that something would happen and the water would be stopped. So that there was no feasible way to let all those men go, and get them back again.

Q.—Were those men loafing, so to speak, all the time those three months that you had them on the job?

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

A.—They were doing approximately the amount of work that is credited to the job in the estimate. They were doing something.

10 Q.—Although they were doing something, their work from your point of view was not as remunerative as when you were able to go ahead?

A.—Not at all, no.

Q.—Let us now come back to Claim No. 4, which relates to the cofferdam at the lower end of the by pass. I observe the contract plans B-2444 and B-2571 do not show any cofferdam at the downstream end of this by pass?

A.—That is right.

Q.—Was one constructed?

20 A.—Yes.

Q.—Why?

A.—It was found necessary to dig a very deep cut-off in the middle of the by pass channel underneath the stony sluices.

Q.—Where the line of the main dam crossed the by pass you found it necessary to excavate this cut-off trench?

A.—The engineers found it necessary.

Over 30 feet deep.

Q.—Was that shown on the plans?

30 A.—Not on the original plans, no.

The bottom of that trench extended down 35 feet.

Q.—The bottom of the dam is shown on B-2571 as the red line?

A.—Yes.

Under the contract down to elevation 71 the excavation was provided for by unit prices. Below that point the work was  
40 carried out according to contract on force account.

When we started here nobody knew how deep this had to go, and in order to keep out the spring flood and enable this bottom part to be taken out it was necessary to build the cofferdam shown in Claim No. 4.

Q.—In other words, reference to the contract fixes prices for rock excavation as far down as elevation 71?

A.—So much per yard.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—Below elevation 71 you go on force account, which is actual outlay plus 37% ?

A.—Yes.

10 Q.—And the position you take is that this cofferdam in the lower end of the by pass was a part of the actual outlay necessarily involved in the construction of this cut-off trench ?

A.—Yes.

Q.—You have not been compensated for that under the force account payment ?

20 A.—No. And I want to repeat that when we struck elevation 71 nobody knew whether we were going down another 16 feet, or another 60 feet; and it was imperative that this cut-off be put in so that we could divert the flow through the by pass, pass the logs, and go on with the rest of our work.

Nobody could tell us whether we were going down another 15 feet, or 30 feet, or 60 feet.

Q.—What reason did the engineers give you for going down that far ?

30 A.—They were not satisfied with the rock at that point, and excavated what they claimed was not good enough rock, on a width of 15 feet approximately, down to the depth shown. And I may say again that the prices paid down to elevation 71 were not fair prices for trench excavation.

By Mr. Geoffrion:—

Q.—Are you suing for that ?

A.—No, sir, I am not.

By Mr. Forsyth, continuing,

40 Q.—I suppose the figures as to the cost of this cofferdam will be proven by your office records ?

A.—Yes.

By the Court:—

Q.—You said you dug down there because the Engineers thought it was necessary. What Engineers were they ?

A.—The Engineers both of the Quebec Streams Commission and the owners', who acted jointly.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—Not your Engineers?

A.—No, sir.

10 Mr. Geoffrion:—We paid for that extra work.

Witness:—Yes.

Mr. Forsyth:—But, we claim you did not pay all you should.

Mr. Geoffrion:—But, there is no controversy about the trench having been needed.

20 By Mr. Forsyth, continuing,

Q.—Could you have delayed the work, in regard to Claim No. 4, so as to avoid the necessity of this cofferdam?

A.—If we had delayed the work until the river went down again, it would have dislocated the entire progress programme.

Q.—Claim No. 5 is additional cost of rock excavation. To what extent did the actual rock excavation over-run the quantities the contract indicated would exist?

30 A.—The total work done exceeded the contract quantities by 167% —  $2\frac{2}{3}$  times the original figures.

Q.—And, what was the over-run in the non-spilling section?

A.—In the non-spilling section the over-run was 1500%.

Q.—Can you tell us what was the reason for this over-run? Was there any change in the design of the dam?

A.—The reason for the over-run was that the Engineers of the owners did not properly explore the site of the work.

40 Mr. Geoffrion:—That is your opinion. We want the facts.

Witness:—That is what Mr. Forsyth is asking.

Mr.—Geoffrion:—Where was the duty to explore? You were there to explore it yourself.

By Mr. Forsyth, continuing,

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—My friend Mr. Geoffrion has asked for this. You have stated the Engineers of the owners did not properly explore?

A.—Yes.

10 Q.—What leads you to that conclusion?

A.—Because after the work was opened up, instead of going the depths to which they wanted to go they forced us to do the exploring by taking the rocks out in shallow lifts.

Q.—For instance, there were indications on the plan B-2444 with reference to the existence of ledge in the bottom of the river. Were they correct?

A.—They turned out to be absolutely incorrect.

Q.—Did they give any indication of proper exploration?

20 A.—I did not question them. I took the figures. They indicate it was not properly explored, and the plan was not correct.

By Mr. Geoffrion:—

Q.—For the bottom?

A.—Yes.

By Mr. Forsyth, continuing,

30 Q.—Mr. O'Shea said something about some test pits, and that he gave you some information when you went up to the site.

A.—Yes.

Q.—Did the information given coincide with what you found?

A.—In connection with the by pass excavation it was absolutely incorrect.

Q.—Did that indicate that it had been properly explored?

40 A.—It did not.

Q.—What did it indicate?

A.—It indicated either that it was incorrectly done, or that the material found was misrepresented to me.

Q.—What, in your opinion, would be the proper way to explore a site for such a work?

A.—The proper way would have been to dig test pits through any loose or overlying material, and then explore the rock underneath by means of core drilling. That provides a

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

continuous sample of the rock down to any depth. Ordinarily I would go down into the rock at least a depth corresponding to the future head on the dam, when the dam was built and the water raised. Those core drills would be put in at certain intervals  
10 along the line of the work.

Q.—Could tests such as those have been made after the contract was awarded to you?

A.—Yes. As a matter of fact, provision for such work is covered on Page 9 of the contract.

Q.—What expense would have been involved in making proper tests of this site?

A.—Allowing core drill holes at 20 foot intervals along the entire length of the dam, including the main channel of the river, 40 or 50 holes, of 50 feet, could have been put in for less  
20 than \$10,000.

Q.—You have a claim, under item 5, for extra handling of this rock excavation, \$35,100.74. On that item alone, would the expenditure of this sum you mention of \$10,000 have saved money, and, if so, how much?

Witness:—Saved money to whom?

Counsel:—You are asking the Defendant to pay for it, and we will assume it is going to do so. Would the expenditure  
30 of this sum of \$10,000 have saved anybody \$35,000, or any portion of the \$35,000?

A.—Yes.

Q.—How much of it?

A.—It is difficult to say. Probably to us almost the total amount of cost claimed. The \$35,000 includes a profit, of course.

Q.—That is to say, you could reduce it by how much?

A.—One third, roughly.  
40

By Mr. Geoffrion:—

Q.—In other words, if we had spent \$10,000, you would have saved \$12,000?

Mr. Forsyth:—No. You would have saved yourselves \$23,000.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Witness:—In addition to that, there is a very considerable indirect cost to us by never knowing where we were going to stop, and being unable to plan the placing of our concrete in orderly manner.

10

By Mr. Forsyth, continuing,

Q.—Would the proper exploration of this site have been of any utility on the unwatering claims we have discussed?

A.—It would have been, decidedly, in the main channel of the river.

Q.—Even supposing the exploration had been done after the awarding of the contract, would it have delayed the work to any extent?

20

A.—It need not have delayed it at all. It could have been started immediately, and carried through ahead of our excavation.

Q.—The suggestion may be made by my learned friends as to why you did not do it yourselves. Had you any reason to believe the existence of anything there?

Mr. Geoffrion:—Exactly the same reason as we had.

Mr. St. Laurent:—Except that you were the Engineer.

30

Witness:—If we had any idea of the extent to which those differences ran later we would probably have demanded that the site be core drilled.

By Mr. Forsyth, continuing,

Q.—That is to say, if you had any idea that those plans did not disclose the conditions accurately and correctly?

A.—On the contrary: very much the opposite.

40

Q.—When you arrived at one point you did ask to have a core drill, and it was promised that it would be done?

A.—Yes.

Mr. Geoffrion:—We never promised to do it.

Mr. Forsyth:—You promised by Mr. Ferguson.

By Mr. Forsyth, continuing,

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—The method you had to follow in this excavation, by going down in those shallow lifts, increased the cost?

A.—Yes.

10 Q.—You have asked for an additional payment of \$35,100.74, which involves a total cost of excavation of \$89,355.76. Adding the 37%, \$33,061.63, makes your 21,565 cubic yards of rock excavation cost \$122,417.39, which, I am informed, works out mathematically to \$5.68 a cubic yard?

A.—Yes.

Q.—What have you to say in regard to that price, having in view the conditions under which you were compelled to operate?

20 A.—The average price we were paid was \$4.05, and the claim represents an advance of \$1.63 a cubic yard, which I consider a fair figure.

Q.—The actual figures involved in the make-up of the labor and material will be given by your accounting staff?

A.—Yes.

Q.—Claim No. 7 relates to additional payment for frozen materials in the river bed. Under the contract the unit price for additions to the schedule quantities in all other locations except that at the stony gate section is \$1.23, as disclosed by item "A" of page 15 of the contract. In the river bed there was no earth excavation contemplated by the contract?

30 A.—No earth excavation contemplated, and none provided for in the tender, at any price.

Q.—I understand that you excavated 811 cubic yards of material other than ledge rock in the river bed?

A.—Yes.

After the water was brought down sufficiently, we cleared off the loose material.

40 Q.—And, the owners paid you for those 811 yards, at this price of \$1.23 — the earth price?

A.—Yes.

Q.—What have you to say in regard to the material you removed there?

A.—By the time we had unwatered down, and started in there, the weather was very cold, and this froze up into a solid mass, so that it became at least as expensive to take out as solid rock.



*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—In your letter of December 16th, 1929, (Exhibit P-48) you pointed this out to Mr. Ferguson, and asked an adjustment on the next estimate to cover it?

A.—Yes.

10 Q.—And, in respect to this material, so excavated, you are asking to be paid at the rate of \$4.35?

A.—Yes. The same price as solid rock at that elevation.

Q.—And, giving credit, of course, for the amount you received at the rate of \$1.23?

A.—Yes.

Q.—And, this is found in Paragraph 30 of the Declaration?

A.—Yes.

20 And it being 12.30 o'clock, the further testimony of the witness is continued to 2.30 o'clock in the afternoon.

And further for the present deponent saith not.

---

30 And at 2.30 P.M. on this sixteenth day of February. One thousand nine hundred and thirty three, personally came and reappeared: William I. Bishop, and his examination in chief was continued by Mr. Forsyth, K.C., of counsel for Plaintiff as follows:

By Mr. Forsyth:—

Q.—When we adjourned for lunch we were taking up Claim No. 6 in the sequence of the declaration in relation to the rehandling of the work of excavation, hauling at the north end of the dam. Will you tell his Lordship in the first place what  
40 this pile of excavated rock above the north end of the dam was, and how it happened to be there?

A.—This consisted of material excavated from the base of the dam, both earth and rock.

Q.—In other words, this was a disposal pile of your material removed in order to obtain the foundation for the dam?

A.—Yes, and this pile was laid out to handle the estimated quantities plus a reasonable over-load.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—So far as you have been able to ascertain, is there anything in the contract itself which limits the elevation to which this pile should be taken?

A.—Not that I have been able to discover.

10 Q.—There is a letter written on the 7th, July 1929 which you received, signed by Mr. O'Shea, which I will ask you to take communication of, and which I am going to ask you to produce as exhibit P-50. You received that letter?

A.—Yes.

Q.—I think I asked you whether, so far as you have been able to ascertain if there was anything in the plans with regard to the disposal of the excavated material?

A.—Not to any given height.

20 Q.—Then, on the 27th March 1930, a letter was written from Mr. O'Shea to you which I will ask you to produce as P-51. Will you look at it and see whether you recognize it as having been received?

A.—Yes.

Q.—What did you do about this material?

A.—We proceeded finally to level them off to the elevation requested by the Engineers of the Streams Commission.

Q.—And Mr. O'Shea, I presume, because he wrote letters?

30 A.—May I refer to this first letter? There is something I would like to comment on, in this letter where it says: "It had been understood last winter that you were not to go above elevation 130 in this area." Now, I wish to say that if there was any such understanding, the enormous over-run at that point had not developed 1500 per cent at that point.

Q.—That is, the point at which 1500 per cent over-run occurred?

40 A.—Yes. If there was any understanding, it was based on the quantities originally contemplated, and certainly never contemplated in such enormous increase as afterwards developed.

Q.—At any rate, having been instructed by these letters to do this work, you did so.

A.—We did so, in order to make everybody happen.

Q.—Now you want to be made happy by being paid for it?

A.—Yes.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—And the amount that you have asked there is based upon the actual cost of doing this work, of \$1453.15, to which you add the percentage which the contract gives you for extra work?

10 A.—Yes.

Q.—Making a total of \$1998.02?

A.—Yes.

Q.—Are you in a position to verify the detail of the cost of this work?

A.—No.

Q.—Are you in a position to express an opinion as to the value of the work done?

A.—Well, as an opinion, the amount seems to me very small for what was done.

20 Q.—We have already dealt with Claim No. 8. Now, Claim No. 9, is overcharge by owners of logs sold to contractor?

A.—Yes.

Q.—Will you tell the Court the arrangements which you made with the Maclaren Company and the persons with whom you made them, as to the purchase of logs for this work at Cedar?

30 A.—The arrangement we made with Mr. T. F. Kenny, at that time Woods Manager of the Maclaren Company, was to the effect that they would sell us the quantity of logs that they had stored near McCabe's Mill at \$20.00 per thousand feet, Quebec scale, and we were told that Mr. McCabe would be ready to make an agreement with us to saw these logs into dimensions we required in boards, scantlings and timber, at the price of \$3.50 per thousand feet board measure.

Q.—That is to say, Mr. McCabe would be paid on the out-turn of \$3.50 per thousand feet?

A.—Yes. We afterwards made an agreement with Mr. McCabe for the sawing of this lumber, but he insisted on being paid \$4.00 per thousand, which we agreed to pay.

40

The agreement, as I understood it, was entirely separate as between Maclaren and McCabe. There was no tie in whatever. We bought the logs in the usual manner in which logs are bought, and that is on Quebec scale, and we paid for sawing as is usually done by the flat measure, board measure as boards.

Q.—Did you purchase any other logs from the Maclaren Company?

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

A.—We bought other logs further down the river at High Falls on Quebec Scale.

Q.—How did you pay for the other logs you bought?

10 A.—We paid for them by Quebec scale.

Mr. Geoffrion K.C. of counsel for Defendant objects to this question.

By Mr. Forsyth:—

Q.—What happened in the result? Let me ask you again so you will be definite about this. Just state again what was the arrangement that you made with Mr. Kenny for payment?

20 A.—The arrangement was that we should pay for these logs on Quebec scale, and the Maclaren Company decided to take that payment by deducting it from our monthly estimates, which they proceeded to do. They deducted from us on a basis of sawn lumber.

Q.—What do you say about the result financially to you, from the deduction on the basis of sawn lumber as against payment on a Quebec scale to which you had agreed?

30 A.—In the first place the first estimate that came in, Major McEwen, the Work Manager, immediately wrote a letter of protest pointing out this difference, and subsequently to that I had a trial run made on similar logs at our own saw mill at High Falls. We found that the sawn lumber exceeded the Quebec scale by 29.3 per cent. The scaler and the man who made those runs will appear later; so we put in our claim on a basis of what we found. I know for a fact that it is generally recognized that sawn lumber exceeds the log measure. In spite of the fact that Mr. R. M. Kenny wrote and told me that they never had any over-run in their logs.

Q.—I will ask you to produce this letter of Mr. McEwen's as exhibit P-52?

40 A.—Yes. If you would rather have him produced. I have referred to the letter. This is dated March 8th, 1929.

May I say here that we paid McCabe independently for the sawing. There is no connection whatever.

Q.—You received a letter dated March 13th, 1929 from the Maclaren Company over the signature of Mr. R. M. Kenny, which I will ask you to produce as exhibit P-53: you received that letter?

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

A.—Yes. That is addressed to William I. Bishop Limited.

Q.—I will ask you to produce a copy of the letter written by Mr. McEwen dated 18th March 1929 as exhibit P-54, and a letter dated 20th March 1929 from the Maclaren Company to William I. Bishop Limited as P-55?

A.—Yes.

Q.—On the total amount of logs delivered, I note that you claim a difference of \$5,790.59, in paragraph 35 of your declaration. Can you tell me how that is arrived at?

A.—No, I have not the figures. I will have to get somebody else to tell you that.

Q.—The next amount under this claim is the amount deducted by the owners for logs never received, \$1429.60. What about that?

A.—The same thing applies. I don't know the detail.

Q.—The next claim, No. 10 appears in paragraph 35 of the declaration, and it deals with the extra cost of hauling cement to the Apron in the bypass channel?

A.—Yes.

Q.—Will you state to the Court the facts in connection with that?

A.—Towards the end of the work in about March 1930, we were informed that the Quebec Streams Commission had decided to add an Apron below the discharge of the stoney sluices. At that time we had sufficient cement to complete our work which had been hauled in on the snow winter roads. We were obliged to take some of that cement and use it for building this Apron, and afterwards bring in cement to replace that which we had used.

Q.—If I understand correctly then, this Apron was an extra on the contract?

A.—Yes.

Q.—And your contention is that the fact that extra cement had to be brought in at addition cost really formed part of the cost of that extra?

A.—Yes.

Q.—And that you should be paid for that?

A.—Yes.

Q.—Was the Apron paid for on force account prices or was it paid for on unit prices?

A.—On account of the difficulty of placing it at that time it should have been paid for on force account, but it was actually paid for on unit prices.

*WILLIAM I. BISHOP (for Plaintiff) Examination in chief.*

Q.—At what time did you bring in this extra cement?

A.—I have not the exact dates here. I don't know. It was after the winter roads had broken up.

10 Q.—I note that you have charged up the sum of \$2,103.20 as being the actual cost of bringing this cement in?

A.—Yes.

Q.—That, I presume, will be proven by your accountant?

A.—Yes.

Q.—You have allowed \$468.58 as being the amount which it would have cost over winter roads?

A.—Yes.

Q.—How do you establish that figure?

20 A.—I believe that that is the price at which we were able to have the cement hauled in by contract.

Q.—That is, that you had a contract for hauling it in at \$8.50?

A.—Yes. At any rate, it checks out very closely with what we have allowed for hauling by Lynn Tractors.

Q.—And then you add the sum of \$1634.64, \$604.82, the 37% allowance which the contract allows for extra work?

A.—Yes.

Q.—Making a total of \$2,239.46?

A.—Yes.

30 Q.—Are you in a position from your experience to comment on the reasonableness of that price for the comparative cost of hauling over winter roads, and hauling over the roads as they were when this was taken in?

A.—I see no reason to question the figures actually put down here.

Q.—Do they seem to you to be reasonable and fair?

A.—Under the conditions, yes.

40 Q.—The next Claim is Claim No. 11, shortage in payment for class 1 concrete because of wrong estimate? In any event, I suppose you can say that you think your claim is in accordance with the contract?

A.—Absolutely, and then it becomes simply a matter of arithmetic.

Q.—I will just ask you to identify exhibit P-10 as being a copy of a letter addressed by you to H. S. Ferguson & Company, attention of Mr. O'Shea, dated 17th March 1930?

A.—Yes.

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

Q.—That is a copy of letter which you sent?

A.—Yes.

10 Q.—Up to the time that these ones you protested about had been made, how had they been made before?

A.—In accordance with the terms of the contract.

Q.—In in accordance with what you contend the contract says?

A.—That is right.

Q.—And in accordance with the interpretation upon which your present claim is based?

A.—Yes.

Q.—Was any reason given by Mr. O'Shea, Mr. Ferguson or Mr. Kenny for this new method?

20 A.—No.

Q.—And as to Claim No. 14, the interest claim, your office will deal with that?

A.—Yes.

Q.—Claim No. 12, addition cost of plant removal: you stated earlier in your evidence that due to the delays in the completion of the work, that is, due to the disruption of your progress schedule, you had to take your plant out at a different time from that which you had proposed to do?

A.—We had to take the amount mentioned out under summer conditions, instead of winter.

30 Q.—That is, when you say, the amount mentioned, you mean the various items of the plant?

A.—Number of tons and so on.

Q.—The particulars of which are given in paragraph 39 of the declaration?

A.—Yes.

Q.—The actual cost of that I believe can be established by Mr. Griffin of your office?

A.—I believe so.

40 Cross examined by Mr. Aime Geoffrion, K.C., of counsel for Defendant.

Q.—Mr. Bishop, you testified earlier in your evidence to your call on Mr. O'Shea before tendering. If I remember well what you said, it was, that he told you he had driven four or five test pits in the bypass region?

A.—You mean where we went up to the site with Mr. O'Shea. That is what I said.

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

Q.—It was the conversation you gave us with Mr. O'Shea?

A.—Yes.

10 Q.—And he told you that he had driven four or five test pits about five feet square?

A.—Well, he showed us where they were.

Q.—And apart from that, they were also indicated on the plan?

A.—Yes.

Q.—Of course, you had that plan in your possession?

A.—Yes.

Q.—Did he tell you the depth he drove them?

A.—It was indicated on the plan?

20 Q.—And in two (perhaps more, I forget) there is an indication that they reached rock?

A.—I forget.

Q.—In the others there are none. The plan says so?

A.—In the others they go down within a foot or two of the depth indicated at the bottom of the bypass.

Q.—At all events, the depth was indicated, and you don't remember whether there was any mention of anything wrong or not?

A.—There may have been at one point.

Q.—He told you that there was sand and loose gravel?

30 A.—He told me there were five feet of yellow sand and the balance was loose gravel with occasional boulders.

Q.—Are you very firm on the use of that word "Loose"?

A.—Yes.

Q.—It is very extraordinary that you did not think of telling your lawyers about it because your Particulars have not got the words "Loose gravel"?

A.—Maybe it is not necessary. Gravel is loose.

40 Q.—I am not concerned with whether you think it is loose or whether the word was not necessary. I am concerned with the question whether he used the word "Loose". Whatever the consequences, we will see. Anyhow, you persist in saying he used it. I am pointing out to you it is not mentioned in your Particulars. He referred to gravel?

A.—Yes.

Q.—Speaking of gravel then, forget the word "loose" I want to know whether that is your oversight or his?

A.—Gravel is always used.

Q.—I am not asking you that. We will be very long if you do not answer my question. Did you, yes or no, tell them it was gravel?



*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

Mr. Forsyth:—I object. My learned friend cannot ask the witness what he told his lawyers.

10 Mr. Geoffrion:—I want an explanation from the witness.

By Mr. Geoffrion:—

Q.—Do you refuse to tell me whether it was your lawyers' oversight or your own that resulted in our not getting in the Particulars the fact that it was not only gravel, but loose gravel? You can refuse to answer, I don't care. It is your affair.

20 A.—Well, as I have always understood, that gravel was loose. Anyway, I may not have told him that.

Q.—You have told us that several times already.

A.—Gravel to me is loose, your Lordship, and I may not have used the words, "Loose gravel" in discussing the matter with my lawyers.

Q.—But you are sure that Mr. O'Shea used it with you?

A.—The understanding I had was that that was loose material.

Q.—It is not, understanding. Did he use the word?

A.—I am not positive that he did. He said, gravel.

30 Q.—I will try to make you positive, because in addition to your conversation with your lawyers, which is privileged, fortunately for us, in your letter of February 27th 1929 to Mr. Ferguson, exhibit P-3, in making your complaint about the performance, you say in the second paragraph:—

40 "When tendering on the work we were informed that the test pits dug (which we refilled when we visited the work) indicated five to six feet of light sand on top, then gravel material to rock with occasional boulders".

All I am concerned with is that in those days you apparently did not remember the word which had been used. You only remembered it in the box yesterday?

A.—All right, what of it?

Q.—Do you persist in what you said yesterday and what you have repeated this afternoon that the word, "loose", had been used, or do you abandon that point?

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

A.—No. I still contend that I understood the material was of a loose character mixed with boulders.

10 Q.—I am not asking you what you understood. I am asking what was said to you. The Court will decide. I want to know from you if you persist in saying that Mr. O'Shea used the word "loose"?

A.—If he did not use the word, I had it by inference in that he told us it was not necessary to pick that material, so obviously it must have been loose.

Q.—But the first time you did not think of telling Mr. Forsyth that it was not necessary to pick the material. Did he tell you that too?

20 A.—No, he did not. I beg pardon, do you mean Mr. Forsyth?

Q.—Did Mr. O'Shea?

A.—I understood it was material that did not require to be picked.

Q.—Did he say it was loose or did he say it did not require to be picked?

A.—Whatever he told me led me to infer that it was loose and easily excavated.

Q.—And you cannot tell us what he said?

30 A.—I cannot now tell you the precise words. I wrote letters immediately afterwards, and that is probably more correct than three years after.

Q.—Apart from this conversation you have told us about everything of importance in that conversation?

A.—I don't remember exactly.

Q.—Apart from that conversation, you also had the plan, and this plan showed where the test pits had been driven?

A.—Yes.

40 Q.—Can you tell us whether there was anything as to these test pits? Bear in mind, that turned out to be wrong — I am not talking about the conversations with Mr. O'Shea but as regards the plans themselves, can you tell me anything in regard to these plans in respect to the test pits that turned out to be wrong. Can you point out to me on any of those plans that you have, or any of the plans you have in respect of these test pits, that turned out to be wrong?

A.—In those particular test pits, nothing more than that the material was not as we were informed.

Q.—That is not the point. I am dealing with the plan. I have dealt with the conversation?

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

A.—As far as the plan goes I merely looked at that with regard to the depth to which the pits were supposed to have been dug, and Mr. O'Shea gave me the information of what that consisted of. The pits had been refilled when I arrived there.

10 Q.—But what I mean to say is, you find nothing in the plans in respect of those test pits that turned out to be wrong?

A.—Nothing that I can remember now.

Q.—Well, nothing material to this case? I take it if there was anything material to this case you would remember it.

A.—Probably.

Q.—Leaving the river aside for the present, all the other indications on these plans were surface indications?

20 A.—With the exception of the test pits the surface indications everywhere except in the river.

Q.—I am leaving out the river and the test pits?

A.—Yes. Let me see the plan. You had better let me have a look at the plan B-2444.

Q.—I mean to say except the river which is a special problem, and the dry land, the indications on the plan are surface indications, is that right?

A.—Yes.

Q.—You did not find those surface indications wrong?

30 A.—I am not prepared to say. They might have varied two feet one way or the other. We have not claimed anything resulting from such.

Q.—If there had been something serious I suppose you would have claimed it?

A.—I hope so.

Q.—That brings me down to the river. I would like you to look at the information the plan gives you in the river that was so horribly misleading. Will you point out to me what are in detail the indications in the river that were given you? We start from station A. You are reading from the plan?

A.—B-2444.

40 Q.—Starting from station A, of what I call the left bank from the point of view of the one who looks at it — I am wrong; station 4 which, at all events, I locate as being on the left bank for the man who looks upstream, therefore, the right bank the other way. Is that 91.2?

A.—That is supposed to be the elevation of the bottom....

Q.—91.2, the elevation of the bottom form of "L" which means ledge?

A.—Yes.

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

Q.—And then further away you have another depth?

A.—Another elevation.

10 Q.—Which we can find there followed by “L”, a third one, a fourth, a fifth, sixth. You have therefore, six elevation marked “L”?

A.—Yes.

Q.—That was the site of your cofferdam?

A.—Yes.

Q.—Then, you have another line lower down?

A.—There is one here and one upstream.

Q.—The upstream line, that is, parallel to the plan, if I understand, contains six of these “L” levels with ledge?

A.—Yes.

20 Q.—And then a diagonal line that goes downwards from the same station contains five, but they have not all a ledge?

A.—Yes sir. They have all that “L”, seven more points. There is one there, but it is very faint.

Q.—What is the distance between those points. Take the one line, the upper line, what is the distance?

A.—Very close together at one end.

Q.—Take the upper line first, just on the same line?

A.—I will have to have a scale.

Q.—What is the width of the river?

A.—Approximately 140 to 150 feet.

30 Q.—We will put it roughly. You have 150 feet width of river and six soundings there?

A.—They are actually closer together than that.

Mr. Forsyth:—You are not suggesting, Mr. Geoffrion, there are only six soundings across that ledge. There are three lines of them.

40 Mr. Geoffrion:—Where is the third. I did not know. I am ready to be told.

By Mr. Geoffrion:—

Q.—You have a third line then?

A.—Yes.

Q.—Where did your trouble develop? Was it in the upper line or second line? Where were your cofferdams?

A.—Somewhere in between.

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

- Q.—Your cofferdams were somewhere in between the two upper lines, is that right?
- A.—No, they go across this line.
- 10 to it? Q.—A little lower than the upper line, and about parallel
- A.—There is your station 4.
- line? Q.—I say the front would be practically along the upper
- A.—Yes.
- Q.—The front of the cofferdam as intended would be practically or almost on the upper line, which is parallel to the upper line of the plan?
- A.—Yes.
- 20 Q.—Do you know personally how the real level of the rock, where these soundings were taken compared with the soundings —I am not speaking of the overburden but of the level of the rock itself?
- A.—Of the solid rock?
- Q.—Of the rock....
- A.—At that precise point?
- Q.—At those points on that line.
- A.—No, because the cofferdam was built almost on top of the line. There was no way to determine where the rock was right there.
- 30 Q.—So you do not know whether the rock was there?
- A.—We have certain indications on the steel sheet piling line. At any rate, we drove beyond that point with the steel sheeting.
- Q.—Are you quite sure, because I understand otherwise, that the level of the rock at that line differed substantially from the level shown there?
- A.—I do not see how anyone could find out.
- Q.—In other words you say the way you have put your work, prevented you investigating that point?
- 40 A.—Prevented clearing off the loose bottom and cleaning off the solid rock, yes.
- Q.—Your complaint in respect of this is, these indications of ledge in the river, and the statement of Mr. O'Shea as regards the test pits?
- A.—Yes, what is given about the test pits, and that there was no ledge whatever on any of this area.
- Q.—The bypass was optional with you; in other words, you were charged with the unwatering, and you had to choose the method of unwatering by your contract?

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

A.—We had the choice which consisted in the fact that there was no other practical method of doing it.

Q.—You suggest there was no other way of unwatering except by the bypass?

10 A.—I suggest that that was the only practical way to complete the work in the manner set forth.

Q.—You did not have to be very careful in your methods from the point of view of speed; your operations were finishing six months ahead of your contract time?

A.—Well, the six months being taken up in taking out our plant and getting away.

Q.—At all events, you were quite free to do your unwatering as you preferred?

20 A.—Within that limitation.

Q.—Within the limitation of time?

A.—Yes.

Q.—You chose the bypass because you thought it was the best way?

A.—I agreed with Mr. Ferguson that that was the proper way to unwater that river.

Q.—You did not need to take orders from Mr. Ferguson on that point?

A.—No.

30 Q.—You have sufficient experience as a contractor to know that the way a contractor carries on his work is the contractor's affair?

A.—Not always.

Q.—But the Engineer can object if it endangers the result?

A.—Yes.

Q.—You were not to be paid for the bypass? The bypass was included in your tender?

A.—I beg pardon, we were to be paid for it. It was included in the amount of unwatering.

40 Q.—In making your lump sum tender you included in your calculation a sum for unwatering, and tendered a lump sum?

A.—To do the unwatering and excavate the bypass.

Q.—In your tender there was a lump sum for the work and that work included unwatering, whichever way you did it?

A.—Yes.

Q.—Then, of course, that did not include excess excavation where the dam is to cross the bypass?

A.—That was understood to be kept separate?

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

Q.—When you made your tender, the period for finishing the work was much shorter, was it not?

10 A.—When it was first discussed there was a shorter period, yes.

Q.—I say when you made your tender, it was a shorter period?

A.—I am not positive about the date at which the change was made.

Q.—What was the original period of the contract?

A.—I don't remember.

Q.—You cannot tell us even when the change was made?

A.—I am not positive. The preliminary negotiations of that were conducted by Major McEwen.

20 Q.—Major McEwen could give us information on that point?

A.—Probably.

Q.—I will leave to Major McEwen any question I have to put in respect of any question bearing on the original time and the circumstances of the change. There must have been some discussion between the parties as to that changed period, I suppose, because it came like a bolt from the blue?

A.—Probably. I don't remember any discussion on that point, except I know the time was extended.

Q.—But you cannot remember the circumstances?

30 A.—I can remember this much, that on account of the delay, in being able to award the contract, it was understood that a longer period would be allowed for carrying it out. The completion date was put forward.

Q.—I am speaking now of what comes back to your memory; there was delay. You told us yesterday there was delay in accepting your tender?

A.—Yes.

40 Q.—And that that was, or may have been (it is for you to say) the reason, or one of reasons why the time for completion was extended?

A.—It was through no request on my part.

Q.—It would have been on somebody's part, surely. I never knew of a thing happening otherwise. It must have been yourself or somebody else?

A.—It must have been the somebody else.

Q.—Somebody else in your employ?

A.—No, I do not think so.

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

Q.—Why? If it was on account of the fact that it took some time in accepting your tender....

A.—They probably thought of it themselves.

10 Q.—Then you say that it came to you as a sort of gift from the Gods?

A.—Absolutely.

Q.—Did you not alter your price in consequence?

A.—No.

Q.—Not at all?

A.—No.

Q.—I am instructed you knowked off something?

20 A.—We did, because we were told our price was a little high. This is what Major McEwen will prove to you. It was in order to meet somebody else's price. It had nothing to do with the additional time; I am positive of that.

Q.—Who negotiated that question? I thought it was Major McEwen?

A.—Which question?

Q.—This question of extension of time and the question of the change of price, who discussed those two questions?

A.—Major McEwen and Mr. A. W. Thwing. I was still...

Q.—You were still what?

A.—I was in Newfoundland or on the way back.

30 Q.—We will get the original source of the information from these gentlemen?

A.—Yes.

Q.—You filed a plan of operation as P-24. When was this actually prepared?

A.—The basis of that was actually prepared shortly after we started on the job. The actual drawing is made on the date indicated.

Q.—You had started in October 1928?

A.—Yes.

Q.—Have you the original?

40 A.—No. It would just be very roughly drawn out in pencil.

Q.—You were allowing for twenty per cent over-run. What do you mean by that?

A.—The figures given here are the contract figures.

Q.—The pencil figures given in the first column are the contract figures?

A.—Yes. In making those, and allowance was made on all these quantities of approximately twenty per cent.



*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

Q.—You stated that in the diameter you indicate by the lines there, we can find any allowance of twenty-per cent on those quantities?

A.—Yes.

10 Q.—That involves our knowing (I think we have it) the plant, description and capacity of the plant you were to employ to investigate that thing?

A.—Yes.

Q.—I think you have filed that?

A.—Yes.

Q.—Apart from the preparatory work of the moving away, your principal work is earth excavation, rock excavation, concrete and steel, is that right?

A.—Yes.

20 Q.—Not unwatering?

A.—Yes.

Q.—Unwatering, earth excavation, rock excavation, concrete and supplying steel: of course, you did not buy the steel. They gave you the steel?

A.—Yes.

Q.—The steel goes in the gates?

A.—Yes.

Q.—The slides in concrete?

A.—Yes.

30 Q.—The gates are partly concrete and partly steel?

A.—All steel.

Q.—You told us your principal (you called them disappointments) in the increase of quantities were in rock and concrete?

A.—I have not called them disappointments.

Q.—As you describe them first, in the quantity of rock and concrete?

A.—I don't call them disappointments.

Q.—I thought you were complaining about them?

40 A.—Yes, we are.

Q.—As to the earth excavation, apart from the hardpan question, I understand you have no serious complaint?

A.—We have not made any complaint.

Q.—Were the quantities closely adhered to as regards excavation?

A.—I am not sure, but there was no serious difference. It depends what you call earth. What your Engineers have classified as earth, we claim as hardpan.

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

Q.—I told you in the beginning of my questions that I was leaving out the question of hardpan?

A.—Outside of that.

10 Q.—There are two difficulties, what we pay you for as earth as I remember, is the hardpan and the over burden of the river where you are to be paid for as earth?

A.—The frozen material.

Q.—I understand there are two items there of earth, namely, the hardpan and the over-burden excavation, which are your two complaints that have any significance as regards earth excavation?

A.—Yes.

Q.—You state the rock excavation was 167 per cent?

20 A.—Those are the figures given by our own Engineer.

Q.—I am speaking of your reference to the average of 115 per cent: is that a big item?

A.—It amounted eight or nine thousand yards.

Q.—In what was that?

A.—In the non-spilling section.

Q.—Was that rock excavation or concrete?

A.—Rock excavation.

Q.—Which was the increase? The rock excavation?

A.—It is from the edge of the stoney sluices to the abutment.

30 Q.—Is that that deep cut?

A.—Not that section. There is a deep cut in it.

Q.—What is the class of work that was increased 115 per cent?

A.—The class of work is what you classify as rock in that section. Each of those squares represents ten feet.

Q.—That is for the north side?

A.—Yes.

40 Q.—You claim 167 per cent, in other words, if you include that \$1500 in the 167 per cent of rock increase?

A.—That is part of the total.

Q.—In other words, it is absorbing it?

A.—Yes.

Q.—It helps to raise the 167 up to that figure?

A.—Yes.

Q.—You were paid that of course on your contract unit price?

A.—We were paid at the contract prices for that material.

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

Q.—In other words, according to depth a certain stated price when you were above the 171 level, and below a cost plus?

A.—Yes.

10 Q.—It is on that principle whether you like the calculation or not?

A.—That principle was not applied to the non-spilling section. It was paid just a straight price all the way down.

Q.—At all events, leaving aside the question whether you are satisfied with the classification or not, mainly for that work you were paid on the contract basis?

A.—We were paid for the number of yards as determined by the owners' Engineers, the contract prices.

Q.—You say the concrete was increased only 46 per cent?

20 A.—Approximately.

Q.—Have you ever figured any performance based on that increase?

A.—I have not, but I can prepare one for you in a very short time and file it.

Q.—As things happened there, if your plan had been lived up to, you were finishing four or five months ahead of your contract date?

A.—Yes, and getting away over the snow.

Q.—Have you often heard of contractors who finished earlier than the contract date. I have heard the other way.

30 A.—I have frequently done it myself.

Q.—Earlier?

A.—Yes.

Q.—Early, but never late?

A.—I would not say that, but I have often been early.

Q.—You were never disappointed in your plans and performance?

A.—I am never satisfied myself.

Q.—I am not speaking of that — of your progress plans.

40 By Mr. Forsyth:—

Q.—You had been able to live up to your progress charts?

A.—Yes.

By Mr. Geoffrion:—

Q.—As a matter of fact, in this case you were how long? You finished your contract two months after the contract date, is that it?

*WILLIAM I. BISHOP (for Plaintiff) Cross-examination.*

A.—I don't remember. I cannot tell you off hand. I can find it here — March 31st, 1930.

Q.—Was the contract date?

A.—Yes.

10 Q.—And when did you finish?

A.—Do you mean completely finish?

Q.—Yes.

A.—Sometime in May, as I remember. I have a plan that indicates that.

Q.—I will ask you to give us a sketch of your performance as prepared from your plan?

A.—The completion was some time in May.

20 By Mr. St. Laurent:—

Q.—That is, the actual dates on which the concreting was done, showing the places where it was done on each different days?

A.—I will make that for you.

Mr. Geoffrion:—It would be an easier way to compare them.

30 His Lordship:—He can take the performance chart and then make an actual chart of how far the work had gone. That is what would show what was actually done.

Witness:—Do you want the date on there with the anticipated quantities?

By Mr. Geoffrion:—I am asking your performance, with the quantities you got. We are entitled to give you the excess quantities under the contract, therefore, I want you to work that out with what you were called upon to do, and did do?

40 A.—It will be on the same thing, yes.

Q.—The additional rock excavation is the big cause of delay?

A.—No — you mean the additional rock outside.

Q.—Of additional excavation.

A.—The big cause of delay was the unwatering and cofferdam.

*ADHEMAR MAILHIOT (for Plaintiff) Examination in chief.*

Q.—Then, the rock excavation was not the big cause of delay?

A.—Rock excavation interfered with out programme to some extent. When you ask me the big cause of delay, it is the cofferdam.

10 Q.—I would like you to tell me if really the rock excavation did not cause you trouble?

A.—The claim for rock excavation is made up on the additional cost of rock excavation, and there is no mention in that of delay.

Q.—So you do not claim any serious delay for the rock excavation?

A.—We had delays, but we never made any claim in this case.

20 Q.—I want to know whether there was any delay?

A.—It interfered with the work considerably, yes.

Q.—Can you estimate the delay in the rock excavation?

A.—Not off hand.

Q.—Can you do it for me after?

A.—I might, yes.

And at this point the witness' cross examination was suspended to allow of the examination of Professor Mailhiot.

And further for the present deponent saith not.

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### DEPOSITION OF ADHEMAR MAILHIOT

A witness produced on behalf of Plaintiff.

On this sixteenth day of February, in the year of Our Lord, one thousand nine hundred and thirty-three, personally came and appeared: Adhemar Mailhiot of the city of Montreal, 40 Professor of Geology at the Ecole Polytechnique, aged 48 years, a witness produced on behalf of Plaintiff, who being duly sworn doth depose and say as follows:—

Examined by Mr. Louis St. Laurent, K.C., of counsel for Plaintiff.

Q.—How long have you been a professor of Geology?

A.—I have been a professor for, I guess, twenty-two years.

*ADHEMAR MAILHIOT (for Plaintiff) Examination in chief.*

Q.—What are your professional qualifications? What studies have you made?

10 A.—I am a graduate of the Ecole Polytechnique. I graduated in 1910 and then I studied during 1911 and 1912 at the High School of Mines in Paris where I studied specially geology and mineralogy.

Q.—And what degrees have you taken in that branch?

A.—I have the graduation degrees from those schools.

Q.—And have you been engaged in your professional capacity since that time?

A.—I have, several times.

Q.—Both teaching and consulting?

A.—Yes.

20 Q.—Were you requested at any time while work is being carried out by the Bishop Company on the Lièvre River, to visit the site, and make a report thereon?

A.—Yes. In the month of February 1929 I was asked by the Chief Engineer of the Quebec Streams Commission to inspect the rock formations at the site of the dam of Notre Dame de l'Eau.

Q.—That is, the dam that was being erected for the creation of the reservoir on the Lièvre River?

A.—That is what I understood.

30 Q.—That work was being carried on by the Bishop Construction Company?

A.—That is what I understood.

Q.—Did you not come in contact with officers of the Bishop Construction Company when you made your visit?

A.—I met Mr. Bishop there.

Q.—This you had been requested to do by the chief Engineer of the Quebec Streams Commission, Mr. Lefebvre?

A.—Yes.

40 Q.—And it was at his request that you proceeded, and made an inspection of the rock formation there?

A.—Yes.

Q.—Did you make a report to Mr. Lefebvre?

A.—Yes.

Q.—On the occasion of that visit you said you did meet Mr. Bishop?

A.—Yes.

Q.—Did he, when he saw you were there, ask you to make any examination of some other part of the work for his purposes?

A.—Yes.

*ADHEMAR MAILHIOT (for Plaintiff) Cross-examination.*

Q.—What did he asked you to examine?

A.—They were excavating with steam shovel on a part of the foundation there, and Mr. Bishop asked me to go and look at the material they were excavating, and he asked me what  
10 I thought of the material, so I proceeded to the point he showed me, and I looked at the material, and gave my opinion that the material was boulder clay.

Q.—Is there any name by which this boulder clay formation is commonly called in the trade?

A.—They generally call it hard pan. We have a similar formation here in the district of Montreal, and it is called hard-pan.

Q.—Had there been much excavation the day you were there? Were you able to see the walls of portions that had been  
20 excavated?

A.—Yes, the opening was quite large.

Q.—Do you recall how far down from the surface this boulder clay formation commenced?

A.—There was a layer on top of the formation for about four or five feet, which was a stratified sand; we call it river sand. The boulder clay commenced from that.

Q.—Four or five feet from the surface this formation of boulder clay commenced?

A.—Commenced, yes.

30 Cross-examined by Mr. Geoffrion, K.C., of Counsel for Defendant.

Q.—Professor, your experience apart from your studies has been exclusively as professor and teacher?

A.—Yes.

Q.—In other words, you have never been a contractor nor have you worked with a contractor?

A.—No.

40 Q.—Nor an Engineer, superintending contracting works?

A.—No.

Q.—Would you say that this material that was shown you, was earth or rock?

A.—Well, I think myself it is not earth and it is not rock.

Q.—You think there is something between earth and rock?

*ADHEMAR MAILHIOT (for Plaintiff) Cross-examination.*

A.—Well, it something intermediate between earth and rock.

Q.—What is not rock is earth, is it not?

A.—No, not exactly.

10 Q.—You won't say it is either earth or rock? You then suggest that boulder clay, as you call it, is not clay?

A.—Well, there are two kinds of clays. There are some clays deposited under water that we call marine clay, and there is another clay which we call boulder clay which is of glacial origin.

Q.—Do you mean to say that according to you clay is not earth, whether glacial, marine, or under water?

20 A.—What I mean by saying that boulder clay is not earth, it is not as loose.

Q.—There is earth that is more loose than that?

A.—Yes.

Q.—You say that this was of glacial origin or water origin?

A.—Glacial origin.

Q.—Do you call that clay of glacial origin boulder clay?

A.—Yes. That is the name which applies to clays deposited by glaciers.

30 Q.—What convinces you from the geological evidence that the origin was glacial?

A.—Well, a boulder clay is of glacial origin.

Q.—The fact that this was geologically showing evidence of being of glacial origin leads you to say it was boulder clay, and therefore hardpan?

A.—I do not understand you.

Q.—I will put it this way: your definition of hardpan therefore, is clay of glacial origin?

A.—No, not exactly. I say that that clay, this material is hardpan.

40 Q.—That is the difficulty. We are not all of the same opinion in this case unfortunately. What I want to know is, what is your definition of hardpan? You told me there were two sorts of clay, clay of marine origin, water origin and clay of glacial origin?

A.—Yes.

Q.—You say the latter is boulder clay and boulder clay is hardpan. I suggest, if I understand your reasoning, therefore, your definition of hardpan is clay of glacial origin?



*ADHEMAR MAILHIOT (for Plaintiff) Cross-examination.*

A.—No, not exactly. I do not imply that.

Q.—Can you give me a definition of hardpan then?

A.—There are half a dozen definitions for hardpan.

10 Q.—It should be easy for you to give me a definition if there are so many?

A.—I just recall one which, as far as I remember comes in railway contracts where they define hardpan, any material which is hard to plow with a team of two horses.

Q.—Well, does that coincide with clay of glacial origin, or might it be different? Might we have clay of glacial origin easy to plow with two horses and clay hard to plow and nevertheless of glacial origin? Will that coincide?

20 A.—They call that hard pan because it coincides with this definition. This material here is called hardpan.

Q.—I want to get your view; you say you looked at it and you say it is hardpan. I want to know whether you stand by your two definitions, or if you refer one to the other — is it because you consider it of glacial origin, or is it because you are convinced that two horses would have trouble to plow it that you say it is hardpan? Which of the two is it?

A.—I made my statement on the field there that it was a boulder clay. That is all a geologist can say, but Mr. St. Laurent asked me what I called this material here. I say it is called hardpan.

30 Q.—You cannot answer my two last questions?

A.—That is all I have to say. I say the material is boulder clay.

Q.—I want you to say what you can. If you cannot answer my question then, it is all right. If you can I want to give you an opportunity to answer?

A.—As a geologist I cannot say anything further than that the material is boulder clay.

Q.—Is boulder clay classified in geology?

A.—Yes.

40 Q.—In the science of geology, is there such a thing as boulder clay?

A.—Oh yes.

Q.—There is something in practical construction, but in geology?

A.—It is a geological term.

Q.—And it is clay of glacial origin.?

A.—Glacial origin.

*ADHEMAR MAILHIOT (for Plaintiff) Cross-examination.*

Q.—Coming back to the other test. You looked at it, that is all?

A.—Yes, I looked at it.

Q.—Is that all you did?

10 A.—And besides that I took a pick, and I tried to demolish the material with the pick, and I did not succeed.

Q.—I do not want to criticise you, but I suppose you are not a very strong laborer?

A.—No, but I can handle a pick pretty well.

Q.—You do not look as though you would be paid the wages of an ordinary laborer with a pick and shovel?

A.—Yes, I think I could.

Q.—That was in the winter?

20 A.—Yes.

Q.—And therefore, the season had something to do with the hardness?

A.—I do not think in this material.

Q.—Did you notice that that was a very damp place?

A.—No, I did not notice.

Q.—There was lots of water coming through?

A.—No. I personally noticed the reverse.

Q.—You think it was very dry there?

A.—It was dry when I saw it.

30 Q.—Of course, the water was frozen, but did you not see evidence of its being a place that would be damp in a season where they would be thawing? Did you pay any attention to that aspect of it?

A.—No, I did not pay any attention to that.

Q.—Of course, I take it that any sort of material which is affected by dampness is much harder to handle with a pick in the winter than in summer?

A.—Very likely.

Q.—Where exactly were you brought? Where was this cut at the time?

40 A.—The cut where they were working?

Q.—Yes.

A.—I understood they were cutting a piece in the bank there to make the derivation canal.

Q.—Could you indicate on the plan the place where they showed you?

A.—I do not think I could.

Q.—But somewhere in the bypass?

A.—Somewhere in the bypass.

*ADHEMAR MAILHIOT (for Plaintiff) Cross-examination.*

Q.—Was it near the upstream opening or near the lower?  
How far was it?

A.—I could not tell you.

Q.—Was it going up or down?

10 A.—Well, it depends what you mean by up and down.

Q.—Were they working from the lower part of the river  
to the upper part?

A.—I do not remember which particular point.

Q.—You could not tell that at all?

A.—No.

Q.—Did you examine only at one place?

A.—Yes, as far as I remember I looked at only one  
place.

20 Q.—You did not make a general inspection of all the  
territory? You cannot tell us therefore, how far that thing extend-  
ed?

A.—No, I did not make any inspection of that.

Q.—Was the cut deep below? Was there a wall of  
earth?

A.—Yes.

Q.—How high was the wall?

A.—About fifteen feet.

Q.—The layer of soft sand, or sand, was five feet or  
about?

30 A.—Yes.

Q.—And you saw about ten feet of that?

A.—Well, I don't know really.

Q.—I say approximately. You said fifteen feet. The  
layer of hard material might have been ten feet?

A.—If it was fifteen feet.

Q.—And they were working up against the wall of that  
material?

A.—Yes.

Q.—What was operating that?

40 A.—They had a steam shovel.

Q.—Was it working while you were there?

A.—Yes. Well, there were lots of men there in the ex-  
cavation. I think they were working.

Q.—Of course, your report to Mr. Lefebvre does not con-  
tain any mention of that?

A.—No, I was not concerned with that.

Q.—In other words, you were sent by Mr. Lefebvre to look  
for rock?

A.—That is all.

*ADHEMAR MAILHIOT (for Plaintiff) Re-examination.*

Q.—And in your report to Mr. Lefebvre, you only reported what he had asked you to find?

A.—Yes, it was just casual that Mr. Bishop asked me to visit that material.

10 Q.—About how long were you there?

A.—I guess I was a whole day on the water.

Q.—But you were doing Mr. Lefebvre's work as well, but that particular job for Mr. Bishop?

A.—I might have been in the excavation for half an hour.

Re-examined by Mr. St. Laurent, K.C., of counsel for Plaintiff.

20 Q.—Was the hardness of this material dig with a pick due to its natural condition, or due to the fact that it was frozen?

A.—I think really it was due to the consistency of the material.

Q.—The natural consistency of the material?

A.—Yes.

Q.—My learned friend has asked you if that would be earth or rock? Is not rock earth too?

A.—Well, of course, in geology.

30 By Mr. Geoffrion:—

Q.—And rock is earth also in geology?

A.—Sure.

By Mr. St. Laurent:—

Q.—The term earth could apply to all natural material that is not organic?

40 A.—Well, I would rather apply the term rock to all material.

Q.—And some of it is softer than others?

A.—Yes.

Q.—In this boulder clay, was it all fine ground stuff, or were there boulders?

A.—Oh yes, that is why I call it boulder clay, because there are lots of boulders in it.

Q.—Boulders cemented together by this clay?

*ADHEMAR MAILHIOT (for Plaintiff) Re-cross examination.*

A.—Yes, boulders of different sizes and cemented with finer material, either small boulders of clay.

Q.—The clay would be the powdered rock?

A.—Yes.

10 Q.—And to the best of your recollection the wall you saw was about fifteen feet high? The depth of the excavation would be about fifteen feet at that time?

A.—I suppose so, yes. I have no exact recollection of the height at all.

Q.—There were a large number of men in that excavation?

A.—Yes, I saw lots of people there apparently working in that material.

20 Q.—How would the material you saw compare with material which could be described as, “Any strongly coherent mixture of clay or other cementing material with sand, gravel or boulders”?

A.—Well, the boulder clay is a material which is partly cemented.

Q.—Part of which is the boulders, and part of which the fine powdered stuff that is holding it together, is that it?

30 A.—Well, but I do not say it is cemented, it is just partly cemented. I mean, that it is not like a concrete. That is what I meant to say. A concrete will be totally wholly cemented material, but this is only partly cemented.

Q.—But still sufficiently resistant to resist a pick?

A.—Yes.

Re-cross examined by Mr. Geoffrion, K.C., of counsel for Defendant.

Q.—Do I understand you had actual boulders, stones as we call them?

A.—Yes.

40 Q.—We all know that earth is minute rocks, but we are talking in layman’s language; but you had boulders there that were stone?

A.—Yes.

Q.—Big or small boulders?

A.—Yes.

Q.—And that is probably what makes you say they were of glacial origin, because the boulders had been carried on the ice glacier?

A.—Yes.

*ADHEMAR MAILHIOT (for Plaintiff) Re-cross-examination.*

Q.—And you say these boulders that had been carried by the ice, the interstices were filled with clay?

A.—Yes.

Q.—What sort of clay was it?

10 A.—It is of glacial origin too. It is fine rock powdered by the glacier, which forms the little particles in between.

Q.—Between, there was clay composed of little particles of clay, disintegrated rock?

A.—Yes.

Q.—Little particles of clay filled in the spaces between the boulders? The boulders were of course much larger than the clay?

By the Court:—

20

Q.—That is why they did not get powdered up too?

A.—Yes.

By the Court:—

Q.—As I understand it, the edge of the clay had been powdered up by the formation of the stones?

A.—Yes.

30

By the Court:—

Q.—The hardest pieces that resisted, they are still stones?

A.—Yes.

By Mr. Geoffrion:—

Q.—Did you try your pick?

40

A.—Not my pick.

And further for the present deponent saith not.

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*W. I. BISHOP (for Plaintiff) Cross-examination.*

DEPOSITION OF WILLIAM I. BISHOP (continued)

And on this seventeenth day of February, in the year of  
10 Our Lord, One thousand nine hundred and thirty three, personally came and reappeared: William I. Bishop, and his cross examination was continued by Mr. Geoffrion, K.C., of counsel for Defendant as follows:

By Mr. Geoffrion:—

Q.—Could you tell us what the thickness of what you call the hardpan layer in the bypass was?

A.—It varied in thickness. The top was approximately  
20 the same, four or five feet, and due to the elevation of the ground, and the different depths to which we had to go over across the dam, the depth of the hardpan was different. It varied with the location.

Q.—Did you reach rock?

A.—We did not have to reach rock.

Q.—Did you, as a matter of fact?

A.—At the site of the dam, yes.

Q.—That is where you could go down to rock?

A.—You did not have to.  
30

Q.—As a matter of fact, I want to know if you did?

A.—That is right.

Q.—Therefore, I might say according to your view, and your claim, you are entitled to be paid as hardpan for all the bypass excavation except the softer layer top?

A.—That is correct.

Q.—How many feet was that softer layer?

A.—Approximately four or five feet. I don't remember exactly. Our Engineers will know that.

Q.—I can get the exact details of the hardpan from your  
40 Engineers?

A.—Yes.

Q.—How far down the river did the over-burden extend from your crib?

A.—In the bed of the river?

Q.—Yes.

A.—It continued to our lower cofferdam. I don't know how far beyond.

*W. I. BISHOP (for Plaintiff) Cross-examination.*

Q.—At least, to that part?

A.—Yes.

Q.—I understand you removed it?

10 A.—We removed it where it was necessary to place the concrete for the dam.

Q.—Only for the concrete for the dam?

A.—At a place where the concrete had to be put in.

Q.—Only at that place?

A.—Yes.

Q.—Who can tell us exactly what thickness you removed there?

A.—The Engineers.

Q.—Do you know what the depth of that over-burden was at the lower end, where you drove your steel sheeting?

20 A.—Where it was visible — wait a moment, there was one line of steel sheeting, one above the cofferdam and the interior one. There was an interior line, if you will get the plan you will see it.

Q.—You drove some sheeting to hold it up?

A.—Downstream, lighter sheeting.

Q.—Can you tell us what the width of the over-burden was there?

A.—I cannot tell you.

30 Q.—You have told us the conversations you had with Mr. O'Shea. Was there any statement to you about the levels in the river bed, how they had been taken, whether by soundings or otherwise?

A.—No, no particular conversation on that point.

Q.—Were you told by Mr. O'Shea that they had taken soundings at those places?

A.—We had the plan which indicated. He told me at that time they had been taken by somebody else?

40 Q.—Did he indicate in what manner they had been taken?

A.—No.

Q.—Soundings were the only thing?

A.—Soundings and borings.

Q.—To find the level of the bottom?

A.—The soundings give the depth of the water, whatever that may be, and from that point on it is proper to bore into that and see what it is.



*W. I. BISHOP (for Plaintiff) Cross-examination.*

Q.—You said nothing was said to you about giving details?

A.—No. We accepted them as correct.

10 Q.—I think you stated yesterday that your sheet piling had shown at a certain place that the soundings were wrong as regards depth?

A.—Which shetting?

Q.—You said that.

A.—Perhaps you might refer to it.

20 Q.—I may be mistaken, but I was under the impression that when I questioned you in my cross examination I questioned you about the correctness of the actual depth as found. Whether correct or not, you gave me an answer that you had had some evidence by some work you did, and I thought it was sheet piling, to the effect that the depths were not correct. Do you remember that?

A.—I was informed of that by Mr. Allison, and he would give evidence. I have no direct knowledge myself.

Q.—Do you know if your own people took soundings before starting the work?

A.—Not that I am aware of. I might qualify that. They may have taken soundings just to get the depth, to check up the depth to which they would build the cribs, but no organized soundings or borings.

30 Q.—You do not know yourself whether they did or not?

A.—No.

Q.—I take it that until January 1929 you were very little on the works? I am looking at you exhibit P-40. You have July 20th, that was a tender; October 10th the work was not started; the 16th, 17th and 18th it was just started — what happened?

40 A.—We were just getting a certain amount of plant in and getting going. They were fixing up the road as much as possible. There was very little going on.

Q.—November 11th and 12th, do you remember anything particular in connection with that visit?

A.—Not particularly, no.

Q.—January 21st, 22nd and 23rd, was there any trouble then, and what was it?

A.—Trouble?

Q.—Can you connect any particular difficulty going on at the time of your visit, or your early visit of inspection?

A.—It depends what you call trouble.

*W. I. BISHOP (for Plaintiff) Cross-examination.*

Q.—It is for you to say. Do you recollect anything particular in connection with that visit of January 21st, 22nd and 23rd, because the correspondence might show?

10 A.—I am afraid I will have to ask you to refer to the correspondence.

Q.—I want to know if you can add anything to the correspondence from memory?

A.—No.

Q.—As regards the particular events with which these visits were connected, whenever they were connected with events material to this case, you say the correspondence would show it?

20 A.—I tried to keep everything covered by correspondence.

Q.—I understand that you were away between Newfoundland and the hospital for nearly two months, July and August? The last visit here is July 3rd, and the next visit if August 6th?

A.—About eight weeks.

Q.—It is not exactly two months, but nearly so?

A.—Yes.

Q.—When you came back, what was the state of the work as regards locating the place of the upper cribs?

30 A.—I have already described that in my evidence. The cribs were all placed at that time.

Q.—So personally you know nothing as to what happened, of the difficulties in placing them?

A.—I was not present.

Q.—You have not had time yet to prepare your sheet of actual performance?

A.—No. I have started it. If you do not mind I will present that on Monday.

40 Q.—You also told us you would tell us what delays the additional rock excavation would have caused you?

A.—I do not remember telling you that, but that will show on this chart which I am preparing.

Q.—As to the additional quantity of cement, would that also show the additional time due to that?

A.—It will show the time taken.

Q.—We can compare by that?

A.—Yes.

Q.—And the same thing for the hardpan?

A.—Yes.

*W. I. BISHOP (for Plaintiff) Cross-examination.*

Q.—Could you differentiate, if possible, to make the distinction between delays in the unwatering work which, according to you, is due to the over-burden in the river not being hard ledge, and to the logs that came into your cribs? Is it possible  
10 for you to do so?

A.—It is very difficult.

Q.—It is very difficult to say which is which?

A.—Yes.

Q.—Which is the most important?

A.—I would consider the question of the logs.

Q.—The more important?

A.—Yes. We might have contended with the bottom, but the logs were the most important factor.

Q.—I don't want any misunderstanding. I was asking you  
20 whether you could differentiate between the log trouble on one side and the over-burden on the other. You understood me?

A.—Not with any precision.

Q.—I asked you which is the most important and you mentioned to me the logs?

A.—Yes.

Q.—Do you not remember that the idea of steel sheet piling was mentioned, at least, as a possible remedy by Mr. Ferguson?

A.—I have no distinct recollection of his suggesting it.  
30 It certainly was never mentioned in any of those notes.

Q.—When did you first send a superintendent on the job?

A.—Major McEwen was keeping in close touch with the work. I have it here, January 16th.

Q.—1929? Until then Major McEwen looked after the job?

A.—Yes. He was a competent foreman.

Q.—He was at what distance about?

A.—Twenty-five miles.  
40

Q.—By road?

A.—Yes.

Q.—And there was no permanent superintendent on that job until that date?

A.—No.

Q.—Can you give us the names of your foremen? You had four or five competent foremen?

A.—No, I cannot give them to you. Major McEwen will give you that.

*W. I. BISHOP (for Plaintiff) Cross-examination.*

Q.—Personally you know absolutely nothing, of course, of the log trouble. You have told me that already. You came when that was over?

10 A.—Yes. I knew to a certain extent as covered by correspondence, but I was not there when the worst of the trouble occurred.

Q.—As regards the log trouble you were not present? All you know is by reports of your people?

A.—Wait a moment. I knew that trouble had commenced to occur before I left for Newfoundland and wrote to the Company.

Q.—How did you know it? Did you see it? What I want to know simply is, whether I must rely for detailed information on yourself or somebody else?

20 A.—On detailed information I am not prepared to give it.

Q.—So as to the log trouble, if I want to go into detail, I will have to go into it with somebody else?

A.—What actually happened with the logs in the matter of the principle of the thing, I was conversant with it from the start.

Q.—Were you conversant by reports or by personal inspection?

30 A.—I saw some of it on the last visit.

Q.—When was that?

A.—July 3rd, or whatever it is here, but we had not commenced to go out into the river, so it was not bothering us materially at that time.

Q.—As regards the over-burden trouble, when you came, the cribs were mostly placed, and the trouble was going on and you followed that fairly carefully, I suppose?

A.—Yes.

40 Q.—Did you follow the hardpan trouble very carefully?

A.—Everytime I went up there I saw them.

Q.—Wrestling with the trouble?

A.—Yes.

Q.—But all the figures are to be given by others?

A.—The figures as to quantities, yes.

Q.—You spoke about winter work being more expensive. That applies to earth excavation and to concrete?

A.—It applies on work of that kind, to practically everything that happened in the winter time.

*W. I. BISHOP (for Plaintiff) Cross-examination.*

D.—Do you think that rock excavation is more expensive in the winter than in the summer?

A.—In some cases not ; in a comparatively small job, yes, and also depending if it is the low water level where water  
10 is coming in frozen. On big open canal work there is practically no difference in the dry.

Q.—In this particular case your chief over-run in rock was on the dry land?

A.—Yes, but we are not making any claim for rock excavation in winter time.

Q.—Therefore, as far as you are concerned, the postponement of winter work does not apply to rock excavation?

A.—No.

Q.—As regards concrete, I have been requested to ask you  
20 why you charge forty cents for the extra cost of quarrying rock when the concrete is the more expensive?

A.—It is the quarrying and the crushing, because you have the storms and all sort of thing to contend with.

Q.—The snow storms interfere with the crushing?

A.—They interfere with the operation of the quarrying and the crushing and delivery to the bins on the mixer.

Q.—You complain of having had to erect your steel in winter also?

A.—Yes.

Q.—Were you not perfectly free to erect your steel earlier?  
30

A.—The steel could not be erected until the concrete work was completed right across.

Q.—Are you quite sure of that?

A.—I am sure. It would not have fitted in otherwise with the programme of the work.

Q.—You are sure of that?

A.—Yes.

Q.—Because I am instructed your steel might have been  
40 put in at any time?

A.—I do not agree with that.

Q.—Was there anything to delay your concrete work excepting the river bed till winter?

A.—Not materially.

Q.—That means, therefore, your complaint about damage caused you by the winter could only apply?

A.—To the amount of work done after we started work on that section in winter.

*W. I. BISHOP (for Plaintiff) Cross-examination.*

Q.—It would only apply to the work in the river?

A.—In the river, and also to fill in the spaces in the bypass; a certain amount of concrete rollways between the piers was left out past the river. We could not put that in until the  
10 main dam part was completed in the lower sluices. When that was completed we then filled in the rollway.

Q.—The postponement of the work to the winter, according to you, is as respects concrete in the bypass for the openings left for the water to pass, and concrete in the river and the steel erection; is that all?

A.—That is practically all.

Q.—Plus (that is charged specially) the excavating of the over-burden?

A.—Yes.

20 Q.—You say the over-burden was excavated in the winter, but there is a special charge for that?

A.—Yes.

Q.—The hardpan was taken the previous winter?

A.—The previous winter and along into the spring.

Q.—The hardpan was taken the previous winter and you are charging for that item separately?

A.—Yes.

30 Q.—Therefore, we come to this. You say the general delay particularly threw you into winter work as regards concrete, both in the river bed and concrete to fill the openings temporarily left in the bypass to let water pass?

A.—And the gate house.

Q.—Do you state that the hardpan was uniform throughout the whole of the bypass?

A.—No. I have already told you it was varying depths. It was not always exactly the same. Some parts were worse than others. More boulders.

40 Q.—The number of boulders on which you rely, that you complain of?

A.—No, the fact that the boulders were cemented together; some places are harder than others to excavate.

Q.—I am not speaking of the degree of hardness. Was there an overload or stratum of hardpan or were there places where there was none?

A.—Practically everywhere.

Q.—There again I can get the information more accurately from your Engineers?

A.—Yes.

*W. I. BISHOP (for Plaintiff) Cross-examination.*

Q.—Of course, you were there every day?

A.—Yes.

Q.—You say that in some places there were more boulders than in others?

10 A.—Some parts were worse than others

Q.—On account of more boulders?

A.—On account of more boulders, and still more firmly cemented together.

Q.—And the thickness varied also?

A.—Yes.

By Mr. St. Laurent:—

Q.—The thickness that was excavated?

20 A.—Yes.

By Mr. Geoffrion:—

Q.—Do you know personally whether any part of it was removed during the summer?

A.—By the summer the river was flowing through.

Q.—I mean the autumn previous to the winter?

A.—There was a small amount moved in the late fall of 1928.

30 Q.—You were not there then? You could not tell us? I see there is a gap in your visits?

A.—I was not actually on the work, but I may have been telephoning.

Q.—Would you call November 11th and 12th late fall?

A.—Yes.

Q.—They were moving some of the hardpan?

A.—Yes.

Q.—With the orange peel bucket?

40 A.—Yes, and after blasting.

Q.—Were you blasting then?

A.—Yes, they had started above.

Q.—You are quite sure there was no removal without blasting?

A.—There was a certain amount we attempted to move without blasting, and perhaps succeeded in getting a little.

I might explain, to make it perfectly clear, that this big orange peel bucket, that goes down, weighs considerably over a

*W. I. BISHOP (for Plaintiff) Cross-examination.*

ton; it comes down with four sharp points; and even that thing dropped, and pulled up; it closes when it comes up — it just scratched over the top of the material.

- 10 Q.—You did not try a steam shovel?  
A.—From what we could see at that time, the cost of bringing in a steam shovel and taking it out again and charging the proper rental was not warranted by what was in sight at the time we started. Neither we nor Mr. Ferguson knew how far this would extend.
- 20 Q.—And nobody could?  
A.—Yes, they could.  
Q.—By excavating the whole thing for you?  
A.—By digging out those test pits again you could have told.
- Q.—Five test pits?  
A.—Yes.  
Q.—You could not find out yourself, but it could be found out by giving five test pits?  
A.—How do you mean?  
Q.—You say by digging five test pits. You could not find out yourself?  
A.—I could not find out by starting in at one end and digging a face.
- 30 Q.—Why not?  
A.—How could I see what was back twenty feet. You could not see every bit, but it would give a general indication of the conditions.  
Q.—You did not try to dig any test pits yourself?  
A.—No.  
Q.—You were referring to the order for the deep cut in the part of the bypass section to be occupied by the dam?  
A.—Under the stoney gate section?
- 40 Q.—Yes.  
A.—Yes.  
Q.—It was ordered by Mr. Dubreuil?  
A.—I am not positive. We had to go down. I presume it was by him.  
Q.—Mr. Dubreuil of the Quebec Streams Commission?  
A.—We started down, and I presume it was the Engineer of the Quebec Streams Commission who just told us to keep on going, and we stopped when they were satisfied.



*W. I. BISHOP (for Plaintiff) Cross-examination.*

Q.—Do you remember when that order was given?

A.—I cannot remember. It must have been very shortly before we started, and it was not necessarily in writing.

10 Q.—I know it was not in writing. It was after you had started your cofferdam.

A.—It might be.

Q.—If it was given after you started your cofferdam....

A.—I do not admit it was.

Q.—The lower cofferdam; I am suggesting to you that the order was given to you after you had started, and in fact, finished building your cofferdam lower down. Do you deny that?

20 A.—I am not sure.

Mr. St. Laurent:—The bypass cofferdam?

Mr. Geoffrion:—The bypass cofferdam.

By Mr. Geoffrion:—

Q.—You are not sure?

30 A.—But at any rate it was required, and this trench could not have been dug over.

Q.—I would suggest to you that if you had built your lower and bypass cofferdam previously to receiving the order to make any trench, while it may have been useful to the trench, it was not made on account of the trench?

A.—As I remember it, there was a small very inexpensive cofferdam, and that had to be raised to the height that was finally used.

40 Q.—You complain about the way you had to remove rock with the result you have an over-run of 167 per cent and in one section of 1500 per cent?

A.—I am not complaining about the amount. What we claim is on account of the additional cost from the way we were obliged to carry it out, not as to the amount.

Q.—Your complaint is not about the amount, but about the manner in which you were compelled to carry it out?

A.—Yes.

Q.—It was Mr. Lefebvre's orders?

A.—No, I never received orders from Mr. Lefebvre.

*W. I. BISHOP (for Plaintiff) Cross-examination.*

Q.—But somebody of your people received the orders. You may not have been there?

A.—It may have been conveyed by Mr. Dubreuil to our superintendent.

10 Q.—Your complaint is that Mr. Lefebvre or Mr. Dubreuil, or whoever it was, make you take it in what you call the layers?

A.—Shallow layers.

Q.—Instead of letting you blast a tremendous hole and smash those places?

A.—I beg pardon, not that, but at any rate to have some idea where we were going to take it out, and take it out in lifts of reasonable height.

20 Q.—You wanted him to be satisfied with ten feet? So you could go ahead with those ten feet, is that it?

A.—In effect.

Q.—In other words, what was the thickness of the layers you were allowed to take out at that time, do you know?

A.—I have seen them as shallow as two feet.

Q.—I don't want you to take a freak?

A.—All I saw would vary from two to four feet.

Q.—Two to four feet thick?

A.—Yes.

30 Q.—Your complaint (I am giving it to you at random) is that Mr. Dubreuil, on whoever gave the order, should have allowed you to say, "Now, I want you to take off ten feet"?

A.—I claim they should have given us some idea within reason of the depth to which they wanted to go.

Q.—In order to make you approach by layers of two to four feet?

A.—Instead of taking it out in shallow layers.

Q.—That is your complaint?

A.—Yes.

40 Q.—Have I got there the gist of your complaint as to the rock claim?

A.—Yes.

Q.—That is it?

A.—Yes.

Q.—You filed as exhibit P-50 and P-51 two letters, of the 7th July and March 27th written by Mr. O'Shea to your Company entitled "Disposal of waste material, cleaning up", dealing with the lowering of what we claim was a necessarily high

*W. I. BISHOP (for Plaintiff) Cross-examination.*

pile of stone. There was no other correspondence at the time in respect to that?

A.—Not that I know.

10 Q.—Was there any subsequent correspondence in respect of that? Was there any later correspondence in respect of this thing?

A.—Not that I remember.

Mr. St. Laurent:—There was when we commenced to ask for arbitration. That has been filed.

By Mr. Geoffrion:—

20 Q.—We will shorten the evidence this way. It may or may not be in the letter exhibit P-11. We have not the time to verify it — which is the letter where your lawyer, Mr. Ker, asks for arbitration, but apart possibly from that letter and the two letters, P-50 and P-51, you know of no other correspondence on this point?

A.—No.

Q.—I understand it is not in P-11 and there is no criticism of yourself in not putting it in P-11. My learned friend says the work was subsequent to P-11, therefore, we know of no other correspondence than this?

30 A.—No, not that I remember.

Q.—Can you tell us how many feet your present claim is for the logs purchased which you say were not properly delivered?

A.—It is mentioned in the claim.

Q.—Your claim does not say that. Your claim is for \$5,079.57. I want to know how much that represents?

A.—I cannot tell you now, but I will have that given to you by our office.

40 Mr. St. Laurent:—We will have a statement of account made showing so many feet at such a price.

By Mr. Geoffrion:—

Q.—You told us in your testimony that when you purchased, it was agreed that it would be paid for on the Quebec Log scale?

A.—I bought logs on the Quebec Log scale, yes sir.

W. I. BISHOP (for Plaintiff) Cross-examination.

Q.—Do you say that was the agreement?

A.—Yes.

Q.—Will you look at exhibits P-53, P-54 and P-52. In P-53 you have made your claim on the 13th March. Maclaren  
10 Company say, “We do not know of any mention being made with regard to how measurements would be obtained”?

A.—I presume that is written by Major McEwen.

Q.—That is our letter.

A.—Oh, I beg your pardon.

Q.—The letter states, “We do not know of any mention  
being made with regard to how measurements would be obtained. We charged you for the actual lumber purchased and accepted by you, made from the logs”. Then, it goes to another part of the claim which does not concern my question. The  
20 answer on your behalf contains this:

30 “We believe it is customary when logs are being sold in this Province that they are measured according to the Quebec Log scale. As no special mention was made as to how measurement was to be made and since all other logs purchased from you, both at Cedar Rapids and High Falls, have been paid for according to the Quebec Log scale and furthermore, as we are paying the same price for logs in the River at Cedars and at High Falls, we naturally assumed that measurement would be made in the same way”.

I would infer from that there was no mention of how it would be measured?

A.—I do not agree with that. There is no mention made where the logs were to be scaled or how. We assumed that they would do that themselves, but it does not vary the claim that we were buying on Quebec Log scale. Major McEwen can explain  
40 his own letter.

Q.—Coming to the cement for the apron in the bypass, that was an order of the Quebec Streams Commission?

A.—Yes, it was ordered by the Quebec Streams Commission.

Q.—And you were paid on the basis of the prices mentioned by you for extra concrete?

A.—Yes.

*W. I. BISHOP (for Plaintiff) Cross-examination.*

Q.—Of course, the hauling of cement is needed for the concrete?

A.—Yes.

10 Q.—Normally, you would say, the hauling of the cement would be something included in the concrete price?

A.—Yes, with the cement hauled under normal conditions.

Q.—Do you mean to say normal conditions are winter conditions?

A.—Yes, the way our tender was made.

Q.—Your theory is that there was no power to order additional quantities of concrete unless notice was given you in ample time in advance to allow you to haul in your cement in winter: that is your claim?

A.—Yes.

20 Q.—And of course, as you do not think you should be compelled to build the concrete in winter, your theory is more complicated than that. Your tender must have stated that you must be give your order for concrete in winter, but you complain when you make your hauls of cement in summer?

A.—Not in summer, just between seasons, neither winter nor summer

30 Q.—Your point is this, that between seasons, and not in the spring or autumn — in other words, the contract according to you must be as it is provided, that when you tender for a certain price per yard for extra concrete, the order for extras must be given you, so that the work will be given in the summer and not in the winter, and the hauling will be done either in mid-summer or mid-winter?

A.—Not necessarily; when the roads are in proper condition, either winter roads or summer roads.

Q.—So the thermometer and weather will decide when the weather is fit?

A.—No, that is going too far.

40 Q.—Your claim is also going too far?

A.—May be.

Q.—You knew long before that about this, did you not? It was discussed between your people and the Quebec Stream Commission's representatives?

A.—What do you mean by long ahead?

Q.—Well, long enough ahead to allow you to work safely the winter you are complaining of?

A.—The point was that we had just enough cement stored to finish the top of the gate house, and we were obliged to take

*W. I. BISHOP (for Plaintiff) Re-examination*

some of that cement, rob the cement in storage and replace it with other material.

10 Q.—You knew a long time before this contemplated order by discussion with the Quebec Stream Commission's representatives, if you were able to haul more cement?

A.—I do not agree with that. There was nothing positively decided, and we could not bring any cement on chance.

Q.—Did you warn the Engineers and say, "Gentlemen, if you want it get it right off, because if the weather breaks it will cost you more"?

A.—I am not sure. I do not believe I ever did that.

Q.—Are you quite positive that at that time even you had enough cement for your own finishing?

A.—I am informed so, yes.

20 Q.—You told us at the beginning of your examination that you had many big contracts and you gave a list of them. The bulk of these contracts were cost plus, were they not?

A.—A great many of them were, yes sir.

Re-examined by Mr. Forsyth, K.C., of counsel for Plaintiff.

30 Q.—Dealing with the question of this apron on the dam, would you tell us whether that represented an over-run in concrete quantities, or something entirely separate from the dam as designed?

A.—It is entirely separate, and added to the general plan.

Q.—Is there any indication of such thing on the plan?

A.—None whatever.

40 Q.—You have stated to my learned friend Mr. Geoffrion that you thought that somebody should have been able to indicate to you within reasonable limits of accuracy the depth to which they expected you to go in this rock, instead of obliging you to take it out by shallow lifts. Will you tell us whether it was a feasible thing for them to do to ascertain these depths?

Mr. Geoffrion:— I object to this question.

The Court reserves the objection.

A.—I have already given that in evidence yesterday about core drilling, by means of core drilling as described yesterday.

*W. I. BISHOP (for Plaintiff) Re-examination*

By Mr. Geoffrion:—

Q.—Apart from the occasion, which appears in the correspondence with Mr. Ferguson, about a meeting where you disagree, did you ever ask anybody for core drilling? On that occasion you did, but otherwise did you?

A.—Not in writing. I do not remember any conversations.

Q.—If you did verbally, to whom, and when?

A.—I think you had better make the answer that I did not discuss that.

Q.—I know you did once with Ferguson?

A.—Well, but afterwards.

20 By Mr. Forsyth:—

Q.—This hardpan that you excavated in the winter of 1928-1929 and the spring of 1929, have you asked for any additional remuneration because you took it out in the winter time?

A.—No.

Q.—I would like you just to look at the plan B-2444. I want you to tell me whether, in the line parallel running from station 4 in a northerly direction, what the elevations show in the river bed with respect to the existence of ledge?

30 A.—There are seven indications giving the elevation, all marked "L" indicating ledge. Now, the soundings are apparently taken at 18 to 20 feet intervals.

Q.—There is a line on the plan from station 4, which is at an angle of about  $22\frac{1}{2}$  degrees I would say to that line you spoke of before, running to station 5. Along that line, will you tell me what the indications are with respect to ledge?

A.—There are seven points.

40 Q.—Between the river banks?

A.—Between the river banks, again marked "L" indicating ledge, and at about the same distance apart.

Q.—From station 4 again, making an angle of approximately 45 degrees with the first line of soundings, we see some other elevation with this small line as prolonged. I will put a red circle around two apparent elevations, one of which is 94.5, and I am going to mark the letter "S" just outside that, and from station 4 to "S", what soundings appear, and what do they show?

*W. I. BISHOP (for Plaintiff) Re-examination*

A.—The first level proceeding north east, indicates “L” for ledge; the second one is marked “G and B” meaning gravel and boulders. The third one is apparently an “L”, and all of the other soundings on that line are marked “L” indicating ledge.

10 Q.—So that the only place where there is on the lines that we have taken so far any indication other than ledge....

A.—One point near the south shore of the river.

Q.—The next line that we have is the base line of dam which runs from a point which I will mark “X” with a pencil straight across to “Y”. I call to your attention a sounding near the south shore of the river where we have the figures 94.7 “L”, and I will ask you to scale that and tell me how far it is east of the base line of the dam as laid down?

20 A.—Five or six feet.

Q.—That is the center line, I suppose, of the base of the dam?

A.—I am not sure whether that is the final line. It is marked, “Base line of the dam”.

Q.—Then, I call your attention to another sounding which occurs in the third line that we have discussed in this present examination, elevation 82.3 “L”, and would ask you to scale that and tell us how far it is from the base line of the dam?

A.—It is eight feet.

30 Q.—And then I ask you, going south and to the west of the base line of the dam, to look at a sounding approximately in the center of the river which shows 81.7 “L”?

A.—That is about three feet west of the line.

Q.—Then, if you take the point “S”, will you tell me whether is a line of soundings running from “S” parallel to the dam, and how far below it?

A.—About 45 feet east of the line marked “Base of dam”.

40 Q.—What does that line of soundings show? There are ten soundings there?

A.—“L” indicating ledge is marked opposite every one of those elevations.

Q.—Where was your downstream cofferdam located?

A.—That shows approximately about one hundred feet.

Q.—Approximately one hundred feet from the base line of the dam?

A.—Yes.



*W. I. BISHOP (for Plaintiff) Re-examination*

Q.—What do these soundings show?

A.—The first five starting from the south and are marked “B and G”.

10 Q.—I am going to mark this line at the south, and “P” at the north.

A.—There is one right on the shore marked “S”.

Q.—Which is sand?

A.—Yes. Then, there are four marked “B and G”, boulders and gravel, and the following three are marked “L”.

Q.—Have you in your claim made any claim which relates to excavation, or to difficulties encountered by any plan, where this plan shows other than ledge?

A.—No.

20 Q.—While we are at it, will you just look at the test pits? Test pit No 1. What information is given there about test pit No. 1?

A.—It gives the elevation of the bottom of the test pit as elevation 98.

Q.—From the plan then, you could deduce that somebody had carried a test pit down from the surface to elevation 98?

A.—That is what is indicated here.

Q.—Is there anything else indicated there?

A.—No.

30 Q.—And when you went up there, was the test pit filled up?

A.—Yes.

Q.—Test pit No. 2. Does that give you any more information than is given for No. 1?

A.—It is the bottom elevation as elevation 97.

Q.—Is there any indication of what is in the bottom?

A.—No.

Q.—Look at No. 3 just up at the top. What does that say?

A.—102.5 bottom.

40 Q.—Is there an “L” or anything there?

make A.—“Bottom of test pit”. It is very confused. I cannot out what that is. I cannot decipher what these marks are.

Q.—Is there an “L” there?

A.—There is an “L” but I don’t know what it is opposite.

Q.—No. 4, what does that give you?

A.—Bottom of pit, elevation 93.2. That is all it says.

*W. I. BISHOP (for Plaintiff) Re-examination*

Q.—And what was the elevation of the bottom of the bypass?

A.—96.3 at the downstream end and 97 at the upper end, the upstream end.

10 Q.—And then, the last one No. 5, gives the bottom of the pit elevation at 101?

A.—Yes.

Q.—I suppose when you stated to Mr. Geoffrion in cross examination yesterday, that these plans were not erroneous with respect to the test pit information that they gave, that not having seen them you could not tell whether they went down that far or not?

A.—No.

20 Mr. Geoffrion:—He does not claim that. He does not know. He does not say they are erroneous.

Witness:—The bottom of those pits was within a foot or two of the grade given for the excavation, so that is all that interested me.

By Mr. Forsyth:—

30 Q.—And you therefore assumed when they went within a foot or two given you for the grade of the excavation, that the man did not know what he had been through?

A.—I took that for granted, yes.

Q.—Do any of the elevations on B-2444 on shore, or from the river, purport to establish the existence of ledge, or any depth at elevation, whether surface or otherwise?

A.—There are no letters on any of the other elevations along the river bottom.

40 Q.—In your unwatering programme, in the first place you proceeded with the programme which was indicated by the plan B-2571?

A.—Yes.

Q.—Did you then discuss with the engineers, Ferguson and O'Shea and the Quebec Streams Commission people?

A.—I probably told them they were coming. I may have given them an outline, but I have no definite recollection of date.

Q.—I note from the statement which you filed as to the visits which you made to the Cedar Rapids, that they were in-

*W. I. BISHOP (for Plaintiff) Re-examination*

frequent until January of 1929, that is to say, you spent only five days on the work, in October of 1928 until January of 1929 when you began to go there more frequently. Is there any particular explanation of that fact?

10 A.—Well, there was nothing of any great importance going on at that time, and I was receiving reports daily from the works, so I could follow the progress, in addition to which I was able to telephone on other occasions from High Falls.

Q.—And were there useful things you could do in Montreal in connection with this contract?

A.—Probably.

Q.—When you wrote the letter P-21 which is dated November 21st 1928, you said to Mr. Ferguson, in paragraph No. 3:—

20

“We find up the work that the lower ten feet of the bypass cut is practically hardpan, and is very much more difficult to excavate than the material described to us as having been found in the test pits. If this condition continues throughout the cut we shall ask you for an adjustment to cover the difference in costs”.

Q.—Had you actually seen the existence of this?

30

A.—What is the date?

Q.—21st November?

A.—Well, I had seen it on November 11th and 12th and I hoped at that time that they might get through that, but as it continued, I wrote the letter.

Q.—Before you left for Newfoundland in July of 1929, was there any apparent trouble about these logs?

40

A.—The logs had commenced coming down, and I wrote a letter and interviewed the Maclarens in Buckingham with some idea of cooperation — with some hope of cooperation I would like to say.

Q.—When did you question Coyle, the river foreman, about this?

A.—I have given the date in my evidence. I am not positive. It was on one or two visits. Perhaps I can look it up again — either on June 26th or July 3rd. At any rate I went to Newfoundland expecting the log troubles would be all over in two or three weeks.

Q.—And if I remember correctly, you left for Newfoundland on July 10th?

A.—Yes.

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

Q.—You were in the hospital when you came back from Newfoundland?

A.—I had to go right into the hospital two days after.

10 Q.—Did you keep in touch with the work while you were there?

A.—Yes. Mr. Lindskog came to see me at least once, and I interviewed other men several times

And further for the present deponent saith not.

20

DEPOSITION OF ALAN B. McEWEN

A witness produced on behalf of Plaintiff.

On this seventeenth day of February, in the year of Our Lord, one thousand nine hundred and thirty three, personally came and appeared: Alan B. McEwen, of Cote des Neiges, P.Q., Civil Engineer, aged 42 years, a witness produced on behalf of Plaintiff, who being duly sworn doth depose and say as follows:

30

Examined by Mr. Forsyth, K.C., of counsel for Plaintiff.

Q.—Major McEwen, you are an Engineer?

A.—Yes sir.

Q.—How long have you been practicing your profession?

A.—Since 1912, except for the duration of the war.

40 Q.—Have you prepared a summary of your experience?

A.—Yes.

Q.—Would you just tell the Court the nature of your experience with such details as you think would be of interest?

A.—In 1910 I graduated with honours from the Royal Military College, Kingston, Ontario.

In 1912 I graduated from McGill University, B. Sc (civil).

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

In 1912-1913 I was with R.S. and W.S. Lea, Consulting Engineers on Reinforced concrete design. Also on municipal work, design and inspection.

- 10 In 1913-1914 I was Ambursen Hydraulic Construction Company Limited on Reinforced concrete and Hydraulic design. Also resident Engineer for two months on construction of dam at Eugenia Falls for H. E. P. Company of Ontario.

In 1914-17 I was with Canadian Expeditionary Force, Major, D. S. O.

- 20 In 1918-1919 I was with R. S. & W. S. Lea, Consulting Engineers, on design of reinforced concrete, hydraulic and municipal work.

In 1920 I was with Bremner Norris Limited as superintendent of Construction of the Canadian Safety Fuse Company plant at Brownsburg, P.Q.

In 1920-1922 I was with the Canadian Explosives Limited in charge of civil engineering designs and construction.

- 30 In 1922-1929 I was with William I. Bishop Limited Chief Engineer and Construction Manager, during which time the under mentioned work was carried out:

10,000 H.P. Hydro Electric development for Price Brothers & Company Limited at Chicoutimi, P.Q. Large reinforced concrete dam for Newfoundland Power & Paper Company, Limited at Main Dam, Newfoundland.

- 40 200 ton paper mill for Price Brothers & Company, Limited at Riverbend, P.Q.

200 ton extension to Belgo Paper Company, plant at Shawinigan Falls, P.Q.

200 ton paper mill at Beaupré, P.Q. for St. Anne Paper Company, Limited.

500 ton paper mill for Anglo Canadian Pulp & Paper Company, Limited at Limoilou, P.Q.

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

High Falls and Cedar Rapids dams for James Maclaren Company, Limited.

50,000 H.P. Extension to power plant at Deer Lake,  
10 Newfoundland, for International Power & Paper Company,  
Limited. Also extension to their Sulphite and Ground wood mill  
and log storage facilities at Corner Brook, Nfld.

From 1929 to date I have been with the Canadian Industries Limited in charge of Civil Engineering design and all construction work.

Q.—That brings us to this point, that in July of 1928 you  
20 were the Chief Engineer of the William I. Bishop Limited?

A.—Yes.

Q.—Will you tell us what you did with reference to the preparation of the tender, the preliminary activities with respect to the contract at Cedar Rapids?

A.—Including what was done prior to the tender being submitted?

Q.—Yes.

A.—On July 12th I went to Buckingham with Mr. A. W. Thwing, and obtained from the James Maclaren Company the  
30 plans and specifications covering the work both at Cedar Rapids and High Falls.

Q.—The plans you obtained are the plans which were filed as P-2, that is the plan B-2444 and B-2571?

A.—Yes, I understand so. I have not checked in detail.

Q.—And other detailed construction plans?

A.—Yes, a roll of plans.

Q.—And the specifications in a general way, at any rate, are those which are annexed to the contract as actually signed?

A.—Yes, apart from alterations which have been made.

40 Q.—Then, during the week following that date?

A.—On July 14th I called Mr. T. F. Kenny and asked for additional time on the tender, because the time we were allowed was so short, we were not able to prepare our tender on July 19th, and I went to Buckingham with Mr. Bishop and then proceeded from there by Notre Dame de l'Eau to Gracefield.

Q.—Did anybody else go with you?

A.—Mr. O'Shea went with us. We picked him up at Buckingham.

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

Q.—You, Mr. O'Shea and Mr. Bishop went to Gracefield? Did you go into the site of the work that day?

A.—No. As I remember we just passed by the site that day

10 Q.—Did you have any conversation with Mr. O'Shea or was there any conversation with him there about the nature of the work to be done?

A.—Well, we discussed generally the work that had to be carried out. We asked him about plans and various points connected with the specifications.

Q.—On the 20th July you visited the site in question?

A.—Yes.

20 Q.—Will you tell us what conversation, if any, you had with Mr. O'Shea, or was had with Mr. O'Shea when you were present, relative to the material to be dealt with?

A.—The principal conversation, the one that stands out quite clearly in my mind, was in connection with the test pits, and the materials which would be encountered.

Q.—Were the test pits open when you were there?

A.—No. The test pits had been built completely.

Q.—What was said about them, and who said it?

30 A.—We naturally asked for a description of the material that would be encountered in excavating the by-pass, and were told by Mr. O'Shea that it consisted of about five feet of yellow sand and loam, underneath which was gravel for the remainder of the depth that the test pits were dug.

On enquiry he also advised that this material all the way down was easy to dig, and that there was not much picking necessary.

Q.—When you speak of picking what do you just mean by that?

40 A.—When you strike material that is at all hard, the man excavating uses a pick in order to loosen it, to get at it with his shovel.

Q.—In the light of your experience as an Engineer, what do you understand by gravel?

A.—Gravel is material which occurs in pits and deposits and consisting of grains of various sizes in the loose form.

Q.—What about boulders? Are they present in formations of that kind?

ALAN B. McEWEN (for Plaintiff) Examination in chief.

A.—Ordinarily you would not find what are termed boulders in a gravel deposit.

Q.—Did Mr. O'Shea refer to boulders in his conversation to you?

10 A.—He said that there were some small boulders.

Q.—Did you have any discussion with any officials of the Maclaren Company with respect to the purchase of logs?

A.—Yes.

Q.—Who were present at that meeting.

A.—Mr. Bishop and Mr. T. F. Kenny.

Q.—And yourself?

A.—Yes, I was there.

Q.—Was Mr. O'Shea there?

A.—Not as I remember it.

20 Q.—What was said about these logs. I am speaking now of the logs for Cedar, and who said it?

A.—Mr. T. F. Kenny advised that logs would be delivered to Mr. McCabe's saw mill for our account at a prices of \$20.00 per thousand.

Q.—What measurement?

A.—I would not be certain, but as I remember it, it was stated that it was Quebec log scale.

30 Q.—In connection with that, Mr. Geoffrion read a letter this morning, (exhibit P-54) which purports to have been signed by you. Will you just read that over. Perhaps if you would read P-53 with it. The reason I ask you to read those letters is, because Mr. Geoffrion seemed to suggest in his cross examination of Mr. Bishop that you were confirming or accentuating a statement of Mr. Kenny's, that no mention was made of the measurement, and I would just like to have an explanation of that. What have you to say to that?

40 A.—As I say, I am not certain that it was definitely specified Quebec log scale, but we were purchasing logs from the James Maclaren Company. The customary way of measuring logs is by Quebec log scale.

By Mr. Geoffrion:—

Q.—The only or customary method?

A.—The customary method.



*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

By Mr. Forsyth:—

Q.—You said you were purchasing logs from the James Maclaren Company, and that the customary way of measurement is by the Quebec log scale?

10 A.—Yes.

Q.—And what happened with reference to the logs purchased elsewhere?

A.—The logs purchased at High Falls were paid for according to the log scale.

Mr. Geoffrion:—I object to this evidence.

By Mr. Forsyth:—

20 Q.—Were the arrangements for buying logs for Cedars and High Falls made at the same time?

A.—I believe so.

Q.—How were the logs measured at High Falls?

A.—According to the Quebec log scale.

Q.—And if any stipulation was made as to how logs were to be measured, or if any stipulation was not made — was there any distinction at any rate in your interview between logs for Cedar and logs for High Falls?

A.—No.

30 Q.—After your visit to the site with Mr. O'Shea and Mr. Bishop, and the interviews that you had with Mr. Kenny, you delivered a tender to certain representatives of the Defendant Company on the 31st July 1928?

A.—Yes.

Q.—What happened then?

A.—We delivered tender to Messrs. Albert Maclaren, R. M. and T. F. Kenny.

40 Q.—Mr. Bishop I believe was out of town at the time the tender was actually submitted on July 31st?

A.—Mr. Bishop was away at the time.

Q.—Would you look at this letter dated the 29th July 1928, and tell me whether that is the original letter of tender, so to speak?

A.—Yes, I would say so.

Q.—I will ask you to produce that as exhibit P-56?

A.—Yes, I do.

Q.—Then, I understand, there were some discussions about the figures?

ALAN B. McEWEN (for Plaintiff) Examination in chief.

A.—Yes. Mr. Kenny looked over our tender, and there was no comment on the High Falls work, as far as I remember no definite comment, but they did advise that our tender on the Cedar work was a little high.

10 Q.—When you say a little high, in comparison with something else?

A.—I assumed with other tenders they had received.

Q.—Then, what did you do after that, you personally?

A.—We left the tenders.

Q.—With reference to your figures what did you do?

A.—We later went over our figures carefully to see if there was a possibility of making any reduction in the tender.

Q.—And did you reduce the figure?

20 A.—The figure was finally reduced by \$10,000.00 as I remember it.

Q.—There is a letter dated August 10th, 1928 signed by yourself and directed to the Defendant?

A.—Yes.

Q.—That is the final tender letter so to speak?

A.—Yes.

Q.—Will you file it as exhibit P-57?

A.—Yes.

30 Q.—After your firm was awarded the contract, did you take charge of that work?

A.—Yes.

Q.—Where did you establish your headquarters?

A.—At High Falls.

Q.—At High Falls where the larger contract was being done?

A.—Yes.

Q.—But with reference to Cedars, were you looking after that as well?

A.—Yes.

40 Q.—And what was the nature of the supervision that you exercised over the Cedars work? What did you do?

A.—I visited the site as often as I considered necessary, to see that the work was being carried out as economically as possible.

Q.—You have told us Mr. O'Shea gave you certain information with respect to the material to be excavated in the bypass channel. When the excavation in the bypass channel was undertaken, how did you find the information given by Mr. O'Shea check up with the actual material which was excavated there?

ALAN B. McEWEN (for Plaintiff) Examination in chief.

A.—The first five feet coincided with the information given us, the first five feet down from the surface. Below that point it was entirely different from what I, at least, had anticipated.

10 Q.—You told me a moment ago that Mr. O'Shea had advised there were five feet of yellow sand and loam first, and that the balance would be gravel with some small boulders?

A.—Yes.

Q.—And I think you said, easy to dig?

A.—Yes.

Q.—What was the material after you passed the first five feet?

A.—It was a cemented material containing clay, gravel and boulders, commonly called hardpan.

20 Q.—Was it easy to dig?

A.—Extremely difficult to dig.

Q.—In comparison with solid rock, ledge rock, what would you say about the relative ease with which this material could be removed?

A.—Sixty to seventy-five per cent.

Q.—In your opinion it would cost sixty to seventy-five per cent of what rock would cost?

A.—Yes.

Q.—What method was used to remove that?

30 A.—We attempted to dig it with the equipment provided, namely, a derrick with heavy orange peel.

Q.—With a heavy orange peel. That was the apparatus Mr. Bishop was describing?

A.—Yes, which equipment was quite suitable for the material anticipated.

Q.—That is, if the material had been sand and loam and gravel with occasional boulders, the orange peel would have been adequate for the removal?

40 A.—Yes, I would consider it the ideal equipment.

Q.—When you tried to remove the material you actually found with the orange peel, how did it work? Was it ideal?

A.—No. It made no impression on the surface of the hardpan at all, even dropping the orange peel from a distance you could hardly pick up any material at all with the orange peel, and finally almost ruined two buckets in attempting to take it.

Q.—Then, what did you do?

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

A.—We drilled holes and shot the material, used dynamite to loose it. Some of it was excavated by hand that is it was in carts with men to fill them, and part of it was taken out with the derrick after being loosened by explosives.

10 Q.—Was this a more expensive operation?

A.—Very much so.

Q.—I mean in comparison with removing loose gravel and occasional boulders?

A.—Well, that is what I thought you understood from my answer.

Q.—Are you in a position to say whether the presence of this hardpan obtained all over the bypass channel?

20 A.—It obtained all over the bypass channel, certainly as far up as the front of the dam. I did not see the excavation beyond that point.

Q.—That is, from the lower end, the downstream end of the bypass channel up to the upstream face of the location of the dam where it crossed the bypass channel this hardpan existed?

A.—Yes.

Q.—You say you did not see the excavation beyond that?

A.—No. There was a section left in front of that to act as a cofferdam while the remainder of the excavation was being taken out.

30 Q.—What was the appearance at the point where this section was left. Did it appear to continue?

A.—The hardpan appeared to continue.

Q.—Could you during the luncheon recess plot on the plan B-2444 the bypass channel, that is, line showing the bypass channel as indicated on B-2571?

A.—Yes, I think I can plot that quite closely. I can plot that so it would represent it very closely.

Q.—You will do that during the lunch hour?

A.—Yes.

40 Q.—Did you have any discussion in 1928 before the work was actually entered upon, with respect to the driving of logs through the work? I would suggest if you would look at your diary under date of August 28th, 1928 you could find it?

A.—Well, I was just checking that date. Yes, on August 28th.

Q.—Who were present at the conference held on that date?

A.—Mr. A. W. Thwing and myself representing the William I. Bishop Limited.

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

Q.—And who were the other side?

A.—Mr. H. S. Ferguson and Mr. T. F. Kenny were present.

Q.—What was said at that conference about the driving  
10 of logs?

Mr. Geoffrion:—I object to this question. There is no allegation or misrepresentation or guarantee as to that.

The Court reserves the objection.

A.—The principal discussion with regard to the driving of logs was in connection with the other contract at High Falls, but as I remember it the same conditions with regard to the  
20 tractor's responsibilities, as we understood them at that time, existed for Cedars as for High Falls.

Q.—At that conference?

A.—Well, in other words as I understood it, then we had nothing to do with regard to logs other than provide the necessary openings in the dams for them to pass.

Q.—I understand what you are telling me is not what you understand of the contract, but what you understand of the discussion?

30 Mr. Geoffrion:—I object absolutely to any suggested evidence that there was any conversation defining any other words than those of the contract. the agreement of the parties.

His Lordship:—I will take it under reserve and see how far it goes. Of course, Mr. Forsyth, you cannot contradict the contract.

A.—That is my understanding of the discussion.

40 By Mr. Forsyth:—

Q.—When you were at Cedars on the 20th July 1928 with Mr. O'Shea, I suppose you had the plan B-2444 with you?

A.—Yes.

Q.—The elevation plan?

A.—Yes.

Q.—Did you discuss the rock elevations of the profile and contour plans with Mr. O'Shea at that time?

A.—Yes.

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

Mr. Geoffrion:—I object. We are drifting away from the contract. My learned friend is building his case on conversations.

Mr. Forsyth:—I think my learned friend's objection is  
10 well founded and I will withdraw the question.

By Mr. Forsyth:—

Q.—I understand that on October 22nd 1929, after the cofferdam cribs had been placed, you visited the site of the dam at Cedar Rapids?

A.—Yes.

And it is now being 12.30 P.M. the further testimony of  
20 the witness was adjourned until 2.30 P.M.

And further deponent saith not.

---

And at 2.30 o'clock in the afternoon, on this seventeenth day of February, in the year of Our Lord One thousand nine hundred and thirty three personally came and reappeared the said witness Alan B. McEwen and his testimony was continued  
30 as follows:

By Mr. Forsyth, K.C.—

Q.—I asked you to plot the location of the by pass on the plan Exhibit B-2444, and I understand the lines which run from 1 to 2, and from 3 to 4 (the figures being in red) represent the south and the north banks of the by pass channel respectively, as plotted on the plan B-2444?

A.—Yes.

40 Q.—I think the last question I asked you before adjournment was with reference to the condition of the cofferdam as you found it on October 22nd, 1929. Will you tell His Lordship what it looked like?

A.—The cribs has been placed.

Q.—Exhibit P-37 is a plan which shows the location of the cofferdam. Perhaps you might speak from it. You say the cribs had been placed when you visited the place in October, 1929?

A.—Yes.

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

Q.—That would be all the cribs shown on the plan Exhibit P-37?

A.—Yes.

10 I am speaking now of the upstream cofferdam shown on Exhibit P-37.

Contrary to the usual appearance of a cofferdam, those cribs were very irregular. One of them I remember distinctly being considerably farther downstream than the others.

Q.—Would that be No. 3, as shown on the plan Exhibit P-37?

20 A.—That would be about the location, as I remember it.

Also there was a tremendous bank of material out in front of the cofferdam, which appeared to me at the time to be far more than would be necessary with a cofferdam built on a rock bottom. Also the sheeting which one would expect to find on the face of the cribs was a certain distance in front of the cribs, held out in place by braces from the cribs.

30 Q.—What have you to say about the space in front of the sheeting? Was that where the tremendous bank of material was, or was it between the sheeting and the cribs?

A.—There was a great deal of the material in front of the wood sheeting. There was also some material between the sheeting and the cribs.

Q.—That is where the line X-0'' shows?

A.—Yes.

Q.—Was there anything else peculiar about it, that you can think of at the moment?

40 Q.—The area behind the cofferdam had not been unwatered.

Q.—Was there any pumping being done?

A.—The pumping had been stopped at that time.

Q.—Did you notice how much equipment there was in the way of pumps at the time?

A.—I could not say definitely the exact number of pumps at that time, but I noticed there were several pumps set up to be used for unwatering.

Q.—Of course, if the pumping had been stopped the area downstream from the cofferdam was in water?

A.—Yes.

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

Q.—Could you tell whether water was working through the cofferdam at that time?

A.—No, it was almost impossible to tell from my observations of the cofferdam.

10 Q.—Did you make any investigation to see why the cofferdam presented this unusual appearance? I mean, not being in alignment, and the sheeting being out in front instead of on the face of it, and so on. Did you make any investigation to ascertain why that condition of affairs existed?

A.—Yes: I asked the Superintendent, Mr. Lindskog.

Q.—Did you make any personal investigation of the matter? Did you get out on the cofferdam itself and have a look?

A.—Yes, I walked across the cofferdam, and looked at the back of it, and I did notice what appeared to be some logs that  
20 appeared to interfere with the proper location of the cribs.

Q.—Did this cofferdam present the appearance that you would have expected to find where a cofferdam was being placed on a ledge rock?

A.—Far from it.

Q.—Did you form any conclusions, from your own observations, as to why it presented the appearance it did present?

Mr. Geoffrion:—I think it would be better if the witness were to give his observations, because otherwise he might con-  
30 fuse his observations with the reports made to him.

Mr. Forsyth:—Of course, the witness is an expert engineer, and he is entitled to give an opinion based upon his observation.

His Lordship:—I think the evidence may be permitted.

By Mr. Forsyth, continuing,—

40 Q.—What opinion did you form as to why this cofferdam presented this appearance? Why was it done in that way?

Mr. Geoffrion: From the observations of the witness: not from hearsay.

Mr. Forsyth: From his observations.

Witness: I could only draw one conclusion as far as the location of the cribs was concerned, and that was that the logs must seriously have interfered with the placing of said cribs.



ALAN B. McEWEN (*for Plaintiff*) *Examination in chief.*

Q.—When you say the placing of the cribs, you are referring to the alignment of them.

A.—Yes.

10 Q.—Were you able to form any conclusion as to why the sheeting was upstream from the face of the cribs, and why there was fill in between them?

A.—Yes. I would conclude the sheeting had been placed there because of obstructions on the face of the cribs.

Q.—Did you personally see some obstructions there.

A.—I did see logs at one point.

Q.—Are you able to say now which point it was? I notice on the plan there are some places where the sheeting is closer than others to the face of the cribs, and I would like to know whether you made an observation as to the places you saw the logs?

20 A.—Those were the places where the fill had not all been put in between the cribs and the sheeting.

Q.—Can you tell us where those with reference to the plan Exhibit P-37?

A.—My recollection is it would be about in the area in front of crib No. 2, or No. 5, or about the junction of those two cribs.

Q.—That is, upstream from the junction, and between the wooden sheeting and the face of the cribs?

A.—Yes.

30 Q.—Speaking of the amount of fill that was in place on that date, upstream from the sheeting; was that the fill you spoke of as being more than you would have anticipated seeing there if a rock bottom had existed?

A.—Yes.

Q.—When you saw the quantity of fill that was there, did you form any opinion as to why it was there?

A.—I believed the large quantity of fill...

40 Mr. Geoffrion:—(interrupting) We are getting testimony of opinion from a gentleman to whom a story was told by his assistants.

His Lordship:—He is supposed to be giving it from his own observation.

Mr. Forsyth:—Any expert witness called to give an opinion cannot be restricted absolutely to his own observation. A doctor, for instance, may come into Court and base his opinion

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

partly on what his patient has told him in regard to his symptoms, and upon his observations. From the relation of the symptoms and the observations made by the doctor, he gives his diagnosis. An expert engineer diagnosing a patient (such as this  
10 cofferdam was) sees things that are patent abnormalities, he asks questions — in other words, finds out what the symptoms were — and he sees what was done, then he is entitled to say “I formed the opinion that such and such a state of affairs existed”.

Mr. Geoffrion:—The opinion is not, however, a matter of repeating simply what the patient said.

Mr. Forsyth:—All I am asking the witness to do is to give  
20 his opinion as to the state of affairs that existed, from what he saw there.

Mr. Geoffrion:—That being so, I withdraw my objection.

By Mr. Forsyth, continuing,—

Q.—When you saw the quantity of fill that was there, did you form any opinion as to why it was there?

A.—I concluded the enormous quantity of toe fill, as it is  
30 commonly called, would only be required for either one of two reasons, or possibly a combination of those two : the first one being, an extremely porous layer of material beneath the fill, in the bed of the river ; the other one being, the presence of logs beneath and in the fill, which would cause holes through the fill, and consequent leakage.

Q.—Can you tell me whether if the condition of the river bed had been as represented by the plan B-2444, directing your attention particularly to the elevations from station 4 in a line  
40 parallel to the top of the plan, and from station 4 to station 5, and in the absence of any logs coming down there, the condition of affairs that you saw would have been necessary?

Witness:—I am afraid I do not quite follow your question.

Counsel:—Had the indications of the plan in the river channel from station 4 in the line parallel to the top of the plan, and from station 4 to station 5, been accurate, and there being

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

no logs there, would those conditions you saw in the cofferdam have been necessary, or have necessarily resulted?

A.—No.

10 Q.—Would you have expected to find those cribs out of line, for instance, or the sheeting placed anywhere from 5 to 15 feet upstream from them?

A.—No, I certainly would not.

Q.—Or, the enormous quantity of toe fill you found there?

A.—No.

Q.—What would you have expected to find in a cofferdam built on the ledge rock at the location this cofferdam was, assuming the indications of the plan B-2444 to be correct?

20 Mr. Geoffrion: Perfect work. The Bishop Company being infallible therefore it would be perfect work.

By. Mr. Forsyth, continuing:—

Q.—Would you have expected to find the cribs in the alignment you see them there?

A.—No. I would expect to find the faces of the cribs in approximately a straight line.

Q.—Where would you expect to find the sheeting?

30 A.—The sheeting would be along the face of the cribs.

Q.—And, what have you to say in regard to the quantity of toe fill? Would there be filling between the cribs and the sheeting?

A.—No, none whatever.

Q.—Would the quantity of toe fill you saw there have been necessary?

A.—I do not think so.

40 Q.—Had those conditions you have mentioned been existent, namely, cribs in line, no fill between them and the sheeting, the sheeting along the face of them, and lesser toe fill, would the work have cost less, or more, to do, as compared with the condition you actually found on October 22nd?

A.—The work would have cost considerably less.

Q.—Looking at the plan B-2444, and looking at the indications as to ledge on the two lines I mentioned, namely from station 4 on the line parallel with the top of the plan, and from station 4 to station 5, is there anything there to indicate any difficult unwatering problem? I ask you this in the light of your experience as an engineer on hydraulic work?

*ALAN B. McEWEN (for Plaintiff) Examination in chief.*

A.—No, there is nothing there to indicate any trouble at all.

Q.—Were you present when the site of the dam at Cedars Rapids, in the river section, was unwatered?

10 A.—No.

Q.—Do you know personally of any engineering method by which accurate information could have been obtained as to where the ledge was in the bed of that river?

A.—Yes. It could have been obtained by test broings.

Q.—Mr. Bishop has given evidence the rock excavated being taken out in shallow lifts, and he stated that increased the cost to the Plaintiff Company. Did you have any conversations with any of the men on the job in regard to this method of excavation?

20

Mr. Geoffrion: I object to this, as not being alleged. My learned friend is apparently building up his case on conversations, and not on the contract.

Mr. Forsyth: The conversation I propose to ask about is in regard to complaints made by Major McEwen to the engineers Mr. O'Shea and Mr. McIntosh, as to the methods they were pursuing.

30 Mr. Geoffrion: If it is only a complaint, I have no objection.

Witness: Yes, I complained both to Mr. McIntosh and to Mr. O'Shea.

By Mr. Forsyth, continuing:—

Q.—Who is Mr. McIntosh?

40 A.—He was Mr. O'Shea's representative at the Cedar Rapids work.

Q.—You complained to both those gentlemen?

A.—Yes.

Q.—What did you say to them?

A.—I maintained it was not in accordance with the contracts, or with common practice, to expect a contractor to take out rock in the manner they were insisting on this work being done.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—Did you tell them what was your view of the common practice?

A.—Yes.

Q.—Just what did you tell them?

10 A.—As I remember it, I told them we could not be expected to take out rock in lifts of two or three feet, as they were expecting us to do, and that five or six feet at least would be considered a reasonable depth, and that, of course, would be a minimum.

Q.—Was there any way in which they could have ascertained how far they had to go?

A.—Yes: they could have made test borings with a core drill, and determined approximately what quantity of rock would have to be removed.

20 Q.—Did you mention that fact to Mr. McIntosh, or Mr. O'Shea?

A.—I believe so, but I would not be absolutely definite on the point.

Q.—You have not a definite recollection of it?

A.—No.

Cross-examined by Mr. Geoffrion, K. C., of Counsel for Defendant.—

30 Q.—Taking the list of your experience, from which you read this morning; in 1912-13 I see you were with R. S. & W. S. Lea, on designing reinforced concrete. That was not an operation?

A.—No, that was in the office.

Q.—And, you were on municipal work, designing and inspecting? What was the nature of that work?

A.—Both design and inspection work in the field.

Q.—On what work? Roads?

A.—Roads, sewers, and water systems.

40 Q.—In 1913-14 your experience with the Ambursen Company was designing also?

A.—And field experience. I was also Resident Engineer on the works.

Q.—For the same work?

A.—Yes.

Q.—That was a dam?

A.—Hydroelectric work, yes.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—In 1918-19 your work was again designing, and you did hydraulic and municipal work?

A.—Yes.

Q.—Was that in the field too?

10 A.—A certain amount of it in the field.

Q.—What was it?

A.—Inspection of actual contracting work.

Q.—What sort of work?

A.—Filter plants and hydraulic work.

Q.—What do you mean by hydraulic work?

A.—Some of it was in connection with Mr. Lea's report on the Montreal Aqueduct.

Q.—It was not construction work?

A.—I was not actually in charge of construction work.

20 Q.—Apparently in 1922 you were in charge of construction with Bremner-Norris?

A.—Yes.

Q.—Was that the first time you were in charge of construction?

Mr. Forsyth: He was Resident Engineer on the Ambursen work.

By Mr. Geoffrion, continuing:—

30

Q.—My friend Mr. Forsyth tells me you were Resident Engineer on the Ambursen work?

A.—Yes.

Q.—In 1920 you were Superintendent of Construction of the Canadian Safety Fuse plant. That was a manufacturing plant?

A.—Yes.

Q.—And, you were in charge of construction of the Canadian Explosives, Limited, plant. That was a manufacturing plant?

40

A.—Manufacturing plants of all sorts, and generally for construction work.

Q.—Then you were with the William I Bishop Company?

A.—Yes.

Q.—Canadian Industries, Limited, in charge of designing and construction work. What did they construct?

A.—They just recently completed a cellophane plant. I was in entire charge of the construction, and a good deal of the design of that plant.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—You also mentioned the Price Brothers hydro-electric development. There was a dam built there?

A.—Yes.

Q.—And, High Falls, and Cedar Rapids?

10 A.—Two dams.

Q.—And, since then?

A.—There was also a dam in Newfoundland.

Q.—Were you in charge of that?

A.—I was in charge of both the design and construction of that dam.

Q.—You also mentioned the extension of the Belgo plant, the three papers mills: Price Brothers, Beaupre, and Anglo Canadian. Those were buildings?

A.—Yes, those were buildings.

20 Q.—If I am not mistaken, you stated in your testimony in respect to the tender that when you presented your tender you were told it was a little high?

A.—Yes.

Q.—And, on that account you deducted \$10,000, and got the contract?

A.—That is partly correct.

Q.—Is not that all you said about it?

A.—I said the \$10,000 was deducted, but I am afraid you are inferring that I meant the other.

30 Q.—You stated that they objected to the price on the ground that it was a little high, and you came back with a tender \$10,000 lower?

A.—I think I said we were advised when we submitted our tender that our price was a little high.

Q.—And, you revised your figures?

A.—I said later we deducted \$10,000 from our figures, but I did not say why.

40 Q.—Your suggestion is that the Court, or anybody, reading your testimony of this morning would be left with the impression by the way you gave it that there was absolutely no connection whatever between the remark that the tender was a little high and your reducing it by \$10,000?

Mr. Forsyth:—I really think that is a most unfair question to put to the witness. Your Lordship will remember the testimony the witness gave this morning consisted of very concise answers to the questions asked him. I asked him what was said in regard to the tender, and I placed before him a letter, which he

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

looked over. I then asked him: "You simply reduced the figure \$10,000?" and he answered: "Yes, and here is the letter that goes with it".

10 I do not think it is fair to the witness to say he suggests anything.

Mr. Geoffrion: If my learned friend's statement is correct, the witness can easily say so, and if it is apparent on the face of the deposition, your Lordship will see it. I do not see why my learned friend needs to come to the assistance of the witness.

If the question is legal, there is nothing more to be said about it.

20 Mr. Forsyth: In the light of what my friend had previously said to the witness, and his answer, I submit the last question is illegal.

His Lordship: I think the question may be allowed.

By Mr. Geoffrion, continuing:—

30 Q.—Your suggestion is that the Court, or anybody, reading your testimony of this morning would be left with the impression by the way you gave it that there was absolutely no connection whatever between the remark that the tender was a little high and your reducing it by \$10,000?

His Lordship: I took it to mean the tender was reduced because he was told it was high.

40 Mr. Geoffrion: They checked the figures, and the witness said they reduced them by \$10,000.

His Lordship: They checked the figures to see whether they could take off something.

Witness: May I answer the question?

Mr. Geoffrion: Please.

Witness: We were also told on July 31st, when the tender was submitted, that we could have some additional time to carry out the work.



*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

By Mr. Geoffrion, continuing:—

Q.—You did not tell us that this morning?

A.—I was not asked.

10 Q.—Were you not asked to tell the story about the reduction of \$10,000?

A.—I was asked if we had reduced our tender by \$10,000.

Q.—Did the fact that you were being given some more time have anything to do with the reduction of the price?

A.—It did have some influence on it.

Q.—Did the fact that they told you the price was too high have something to do with the reduction of price?

A.—Yes, I would say so.

Q.—Which was the more important of the two?

20 A.—I would hesitate to say, without a complete check of our original tender.

Q.—The two statements were made at the same conversation?

A.—At the same conference.

Q.—You were asked to relate what happened at that conference, and you related only half of it.

Were you not asked to relate what happened at that conference?

30

A.—No, sir.

Q.—In any event, we have it now that the combination of your having been told that the price was too high, and the suggestion that you might be given more time, were the elements (in what proportion you cannot say) that led you to reduce your price?

A.—That is correct.

Q.—What was the period originally fixed for which you tendered at the higher price?

40

A.—I do not remember it exactly.

Q.—Then, approximately?

A.—I would hesitate to say at this time what the approximate date was.

Q.—I am informed that the original time was March 31st, 1929, and that the extension offered you was one year?

A.—I cannot say.

Q.—When you had that discussion at which they complained of the price, did you complain of the time?

A.—No, not to my knowledge.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—Did the suggestion of extending the time come all of a sudden, like a bolt from the blue, or was there any indication that an extension of time might help matters?

10 A.—My recollection is that we were told directly by the James Maclaren Company without our having brought the question up at all — we were told there would be an increase allowed in the time to construct the Cedar Dam.

Q.—Merely as a generous gift, and no question at all as to whether it would cheaper that way?

A.—It would suggest to my mind that the additional time might enable some economies to be made.

20 Q.—Surely the discussion must have been a little more definite than that. Either they asked you whether money could be saved if a longer time were allowed, or you suggested it. Otherwise, it was a very extraordinary discussion. Did you suggest that money could be saved if more time were allowed, or did they ask if that would be the case — and you were the ones who could answer — or, did neither of you speak of it?

30 A.—My recollection is that they suggested—that they told us, at least (it was not a suggestion) that our tender was a little high. They also told us that the time at which the work would have to be completed had been extended, giving us a longer period; and my recollection is that they asked, in view of this, if we would agree to go over our tender and see if any modifications could be made.

Q.—And, you went over your prices?

A.—Yes.

Q.—You cannot tell us if the extension of time was of any importance?

A.—I could not say now definitely.

Q.—I suppose your letter would refresh your memory. Your letter of August 10th, Exhibit P-57, says:

40 “We wish to confirm the writer’s conversation with you yesterday, to the effect that the prices quoted in the above mentioned proposal can be reduced by \$10,000 each. This deduction is being made on the understanding that the work is now only to be completed in time to catch the spring flood of 1930.”

So, that apparently must have been of some importance, because it was the only reason you mentioned?

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

A.—I think there would be another reason for mentioning it, and that was our confirmation of the fact that the time had been increased.

10 Q.—Apparently this reduction of \$10,000 applied to both contracts?

A.—Yes.

Q.—I think you told us this morning they said they were quite pleased with your contract for the upper reach, and only displeased with your price for the lower reach; and you made them a generous present of a reduction where they were satisfied with the prices. Am I correct in my recollection of what you said this morning, that they stated they were satisfied with the prices of the High Falls works, but slightly dissatisfied with the prices of the lower works at Cedar?

20

How is it you came to deduct \$10,000 off each?

A.—I believe our understanding was the work was being awarded on a basis of the total contract price for the two jobs.

Q.—In other words they were adverse to having two independent contractors working on the job, even if one man had been lower on one job and the other was lower on the other job. They would not take the lower on each job, because they wanted to have the same contractor on both. Is that your view?

30

A.—My impression is at that time it was not desirable to do that.

Q.—Why?

A.—Because it is much more convenient for the owners to be dealing only with one contractor.

Q.—To the extent of paying a higher price possibly for one development?

A.—Or, if the contractor's bid on the two jobs was satisfactory, I assume.

40

Q.—Did they tell you that, or are you simply guessing?

A.—I am simply stating what my assumptions would be.

Q.—At all events, we have this fact (which, without being disrespectful, I would qualify as unusual) that they told you they were satisfied with your price on one of the jobs, but that your price on the other job was a little high, and you came back and took off \$10,000 on each of them?

A.—To the best of my knowledge that deduction was made in that way, and we considered it the same thing as giving the whole deduction on the one job.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—Therefore, it was really a deduction of \$20,000 you were making on the lower job, and you were calling it a deduction of \$10,000 on each of the two jobs? It would have been much simpler to say “We will deduct \$20,000 on the lower job”?

10 A.—On the upper job—the Cedar job.

Q.—It would have been simpler to say: “You are satisfied with the price on the lower job, therefore we will deduct \$20,000 on the upper job”. That did not occur to you at all?

A.—It may have occurred to us, but I do not think I could see at the time, and I do not see now, it makes any difference.

Q.—At all events, when you offered a reduction of \$10,000 on each job, nothing was mentioned except that the reduction was made on the understanding that the work on both jobs would be extended for one year. I, therefore, suggest to you that  
20 the only question was \$10,000 off on each job for one year more. I say one year more, but let us say to the spring flood of 1930; and I suggest that the reason, and the only reason, for those two reductions was that you were getting one year more?

A.—There was another reason, I believe.

Q.—It is curious you gave that one, but not the other.

A.—There is always the reason that we were anxious to get the contract.

Q.—Is that the only other reason? That you were anxious to get the contract? I put it to you that, as the correspondence  
30 clearly shows, (and I suggest it is a fact) that you did agree to take off \$10,000 from each job because you were getting an additional period. We will not discuss the time. You were getting the additional period mentioned in your letter, in which you say the reduction is made on both contracts on the understanding you would get that additional period. I put it to you that was the reason, and the price question had nothing to do with it. It was the extension of time that was the reason; and I suggest that is what your letter says.

40 Witness: May I see the letter?

(The witness takes communication of the letter Exhibit P-57).

Q.—Having read the letter have you anything to add?

A.—I am trying to remember what your question was.

Q.—Was the only other reason the fact that you were anxious to get the contract? I put it to you that, as the correspon-

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

dence clearly shows (and I suggest it is the fact) that you did agree to take off \$10,000 from each job because you were getting an additional period. We will not discuss the time. You were getting the additional period mentioned in your letter, in which you  
10 say the reduction is made on both contracts on the understanding you were to get that additional period. I put it to you that was the reason and the price question had nothing to do with it; it was the extension of time that was the reason, and I suggest that is what your letter says.

A.—I maintain the additional time probably had some influence on our tendered figures, but I do maintain that is not the only reason for the reduction of the \$10,000.

Q.—In fact, you are not quite sure if it had anything to do with it, because I noticed you say “probably”. In other words,  
20 you are doubtful if the extension of time had anything to do with it?

I put it to you there was no criticism whatever of your prices at that meeting, neither for the upstream development or the lower development. Would you deny that?

A.—I do.

Q.—You are sure there was?

A.—I am certain there was.

30 Q.—But, only as to the upper development?

A.—For the upper development.

Q.—And, as a result you offered a diminution on both?

A.—Yes.

Q.—Let us now deal for a moment with your meeting with Mr. O’Shea. According to your testimony you were told that there were 5 feet of yellow sand or loam?

A.—Yes.

Q.—Were those his words, as far as you remember them?

A.—As far as I remember them.

40 Q.—And then gravel for the remainder of the test pit depth. Do you say Mr. O’Shea added “it is easy to pick, and not much digging is required”?

A.—Yes.

Q.—Are you sure of that?

A.—I am practically certain he said that.

Q.—In the letter of your Company, Exhibit P-3, under date February 22nd, 1929, when you were putting your case in the best way you could to get an allowance . . .

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Mr. Forsyth: (interrupting) Did the witness write the letter?

Mr. Geoffrion: His Company wrote the letter.

10 I am challenging on a question of fact, and I submit I should have full opportunity to cross-examine the witness.

Mr. Forsyth: I concede my friend must have full opportunity, but I submit he is not entitled to ask this witness to explain a conversation that happened before this letter, by a letter written by someone else. Major McEwen was not examined at all on this matter, and I submit a letter written by someone else has nothing to do with his testimony.

20 Mr. Geoffrion: He is the Chief Engineer of the Company. He was present at the conversation. I am challenging him on that conversation, and I am putting before him a letter written by his Company, and asking him what he has to say about it.

His Lordship: Who wrote the letter? Will the writer of the letter be examined as a witness?

Mr. Forsyth: It was written by Mr. Bishop.

30 Mr. Geoffrion: They were together at the meeting, and the witness was the Chief Engineer of the Company Plaintiff. I have no objection to his saying the letter is mistaken, if he likes to do so.

Mr. Forsyth: But, my friend cannot ask the witness to interpret what somebody else has written.

By Mr. Geoffrion, continuing:—

40 Q.—Do you see any reference in this letter to “easy to handle”?

His Lordship: Of course, the point might be explainable by the fact that Mr. Bishop was not present at the conversation between Mr. O’Shea and the witness.

Mr. Geoffrion: Mr. Bishop and Mr. McEwen were together.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Your Lordship will remember I cross-examined Mr. Bishop yesterday on the point, and I had some difficulty in eliciting the conversation. There were two views about it in his testimony. Now Mr. McEwen comes and fits in with Mr. Bishop's second view—not the view he gave in his examination in chief, but the view he gave me in cross-examination. I want to know which of the two views of Mr. Bishop he adopts.

Witness: Just as I tried to tell you.

By Mr. Geoffrion, continuing:—

Q.—You say the letter I show you, Exhibit P-3 (whether it was written by you, or by Mr. Bishop) does not completely state the part of the conversation?

A.—It states it to the extent that gravelly material is considered loose material.

Q.—You say the letter states it to the extent that gravelly material is considered loose material. Where do you find that phrase in the letter? Where in the letter do you find the statement that gravelly material is considered loose material?

A.—It states it to the extent . . .

Q.—(interrupting) On the assumption that “gravelly” means “loose”, but I want to know whether you insist, notwithstanding this letter, that the reference to pick and shovel was in the conversation? Do you still insist it was mentioned?

A.—Yes. I gave you my version of the conversation.

Q.—Was there any reference to the material being loose?

A.—I could not state definitely that the word “loose” was used.

Q.—Was there any reference to boulders?

A.—Yes.

Q.—What was the word used for boulders?

A.—That there were some boulders.

Q.—In your examination-in-chief you said “some small boulders”. Do you drop the word “small”, or do you persist in it?

A.—I persist in it.

Q.—Did you take any notes of that meeting?

A.—I did, but unfortunately I have not been able to find them. I did make a number of notes of the whole trip.

Q.—And, they are all lost?

A.—I have not been able to find them.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—You were reading from notes this morning in giving your testimony. When were those notes prepared?

Witness: The notes I have here?

10

Counsel: Yes.

A.—They were prepared recently, from my diary.

Q.—What do you mean by recently?

A.—Within the last month.

Q.—Where is your diary?

A.—I think I have my diary here.

Q.—I mean the book, or paper, or document, from which you prepared those notes?

20

A.—It is a personal diary which I keep continuously.

Q.—But, I would like to know to what extent your diary justifies your evidence. Since you read from notes you prepared, if there are any parts of the diary that do not bear on those notes. I do not want to see them, but I would like to see the parts of your diary which bear on those notes. I would like to see the notes in your diary that support your evidence.

By Mr. Forsyth:—

30

Q.—Is the diary here?

A.—Yes. It took me four nights to look through the diary and pick out the points.

By Mr. Geoffrion, continuing:—

Q.—You picked out what you expected to be asked, but I may want further information from your diary, and if it bears on the case I would like to see it. While you were there your diary only dealt with this contract, or the other contract?

40

A.—Also the personal acts I did.

Q.—While you were at High Falls?

A.—Yes. It is a personal diary I keep, and I enter various observations about the work that is going on.

Q.—Do you mean to say those notes you have are a complete transcript of your diary?

A.—They are, partially.

Q.—May I see the notes?

(Witness exhibits to counsel the document in question).



*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—Were those the only notes you used this morning?

A.—And just a copy of this other information.

10 Q.—The notes you show me are entitled “Extracts of Diary”. I do not find anything in your notes dealing with that conversation with Mr. O’Shea about the pits.

A.—No. As I said before, I wrote a separate memorandum on that, which has since been lost.

Q.—I understand the date was July 20th?

A.—Yes.

Q.—All I find noted here is: “Returned to Notre Dame du Laus. Visited dam site, also stopped at High Falls site. Mr. O’Shea gave us information re possible sand pits.” And you have nothing else in your diary?

20 A.—No, there was no special note made in my diary of all the details we discussed.

Q.—Apart from that there is nothing in your diary about the conversation?

A.—I did not keep in my diary details of all that goes on. If there is anything special I write a separate memo of it.

Q.—And, you have lost that memo?

A.—Yes.

Q.—How long did you lose it?

30 A.—I have not seen the memo since. I remember seeing it on file after it had been written.

Q.—How long ago?

A.—That was during the course of the work.

Q.—According to you did Mr. O’Shea use the expression that the gravel was easy to dig, or is that your contribution?

A.—I would not be sure those were the exact words he used.

Q.—But, you are sure about the “pick”?

A.—I am sure he said we would have to use the pick very little in excavating the pits.

40 Q.—You stated in your testimony this morning, in reference to the conversation about the purchase of logs, that you were not sure but you thought it was stated they would be measured by the Quebec Log Scale?

A.—Yes.

Q.—You have seen by Exhibits P-53 and P-54, that on March 13th, 1929, the MacLaren Company wrote the Bishop Company: “We do not know of any mention being made with regard to how measurement would be obtained”, and on March 18th (Exhibit P-54) the Bishop Company replied: “We believe

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

10 it is customary when logs are being sold in this Province that they are measured according to the Quebec Log Scale. As no special mention was made as to how measurement was to be made, and since all other logs purchased of you both at Cedar Rapids and High Falls had been paid for according to the Quebec Log Scale . . . ” etc.

Does not that convince you it was not mentioned?

A.—It was not mentioned specially with respect to Cedar Rapids.

20 Q.—Your explanation of it is that it might have been mentioned in this form: “We will measure Quebec Log Scale for the High Falls, but we do not suggest how we will measure for Cedar Rapids”. Is that your statement of the conversation ?

A.—No.

Q.—You say it was not mentioned specially for Cedar Rapids ; and that is what you consider a fair meaning of your letter ?

A.—I think so.

Q.—Was there a special agreement for High Falls, and another special agreement for the others ?

30 A.—No. It was a general agreement. We were buying logs from the James Maclaren Company for both jobs.

Q.—The same terms as to both ?

A.—It was not specially mentioned, it would be Quebec Log Scale at High Falls.

Q.—Your explanation of this letter of yours is that while it had been mentioned generally it had not been mentioned specially in respect to High Falls ?

40 A.—No, I would not say that, because my recollection is we discussed generally the purchase of logs for both jobs, and the Quebec Log Scale was mentioned. I could not state definitely now from memory of the conversation—it is quite a long time ago — that it referred directly to one or the other.

Q.—There was either no mention at all as to how the measurement was to be made, or there was some mention as to both, or there was some mention as to one of them. Which was it ?

A.—It is rather difficult to remember all the exact details of the conversation.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—But, if you do not remember you should say so. I am asking you not to say what you do not remember.

I show you a letter in which you positively state no special  
10 mention was made, and I suggest to you that your memory was better then than it is now, and that this letter is conclusive evidence that nothing was mentioned. If you want to stick to the other story, you are at liberty to do so.

A.—Any answer I give would, of course, be based on memory of what happened at that time.

I mention here : “Since all other logs purchased from  
20 you at Cedar Rapid and at High Falls had been paid for according to Quebec Log Scale”, and I infer what I meant in this letter was that no special mention was made as regards the logs delivered from McCabe’s Mill.

Q.—There was a general mention as to all logs?

A.—Yes.

Q.—In other words, your explanation is what you meant there was that there was a general mention in the conversation, applicable to all logs measured according to the Quebec Scale, but no particular mention as to McCabe’s Mills?

30 A.—Yes.

Q.—You were residing at High Falls?

A.—Most of the time.

Q.—In fact, that was your regular post?

A.—That my regular abode.

Q.—And, during the earlier period there was no Superintendent at Cedar?

A.—There was a man fully qualified to act as Superintendent.

40 Q.—Please do not plead Mr. Bishop’s case. Just answer my question. If you persist in pleading Mr. Bishop’s case, and will not answer my questions, we are simply losing time. Was there a Superintendent at Cedar at the beginning?

A.—I consider the man who was there capable of carrying out the job of Superintendent.

Q.—Was he a Superintendent?

A.—He was Superintendent of the work being carried out at that time.

Q.—Who was that man?

A.—Mr. Crawford.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

- Q.—Was he in charge of all the work at Cedar and at High Falls, or was he in charge of part of the work?  
A.—He was in charge of the excavation work at Cedar.
- 10 time? Q.—Was there only excavation work going on there at that time?  
A.—At first.  
Q.—Crawford was a foreman?  
A.—He had been foreman and assistant night superintendent on other work.
- Q.—Was he ever called a superintendent in your Company?  
A.—No.  
Q.—He was paid as a foreman. He may have been a genius, but I am not discussing that with you. I am asking you  
20 what he was employed as? What was the name of his job?  
A.—I never applied a name to him at Cedar.  
Q.—Was he not simply a foreman there?  
A.—He was in charge of the work being carried out. He was in charge of the excavation work being carried out.  
Q.—Not more than any other foreman?  
A.—Oh, yes. He had complete responsibility for the work being carried out there, under my direction.
- Q.—Crawford was the man in whom you had such faith, and having great faith in him you gave him a good deal of latitude?  
30 titude?  
A.—No, sir. I checked up frequently.  
Q.—I thought you had faith in him?  
A.—I had.  
Q.—How many times did you go down there to check up?  
A.—You have the dates before you now.  
Q.—The excavation began in early October, and I see by your notes that on the 12th you took Crawford to Notre Dame du Laus?  
40 A.—Yes.  
Q.—And, went over the work with him?  
A.—Yes.  
Q.—That is the Crawford you are speaking of?  
A.—Yes.  
Q.—On the 16th you drove to Notre Dame du Laus at night?  
A.—Yes.  
Q.—On the 18th you went over the work with Ian Crawford?  
A.—Yes.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—On the 22nd you took Mactaggart to Notre Dame du Laus and layout of camp and tentative plan layout. That was in connection with the camp ?

A.—Yes.

10 Q.—Crawford had nothing to do with that?

A.—No.

By Mr. St. Laurent:—

Q.—Where is Point Comfort?

A.—Half way between Gracefield.

Q.—Was that something in connection with Cedar, or High Falls ?

20 A.—It is in connection with Cedar. In connection with hauling from Gracefield to Cedar.

By Mr. Geoffrion, continuing,—

Q.—On October 12th you took Ian Crawford to Notre Dame du Laus. That is Cedar?

A.—Yes.

Q.—On the 16th you went there at night?

A.—Yes.

30 Q.—On the 18th you went over the excavation with Crawford ?

A.—Yes.

Q.—On the 22nd you were there with MacTaggart, in connection with the camps ?

A.—Yes. MacTaggart is an engineer.

Q.—At the same place ?

A.—Yes.

Q.—On the 23rd you drove to Point Comfort, which is apparently half way between two points?

40 A.—Yes. That was in connection with hauling.

Q.—On the 24th you drove to Notre Dame du Laus?

A.—Yes.

Crawford was then setting up the plant.

Q.—November 1st : “Told Crawford to put on night shift”. Was that by telephone, or did you go down ?

A.—I was at Cedar then.

Q.—Was Mr. Reichenstein there ?

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

A.—No. He arrived at High Falls, to go to the Cedar job.

I might state these are only extracts, and I would not be  
10 sure they were copied down verbatim from my diary. I simply  
put down the notes.

Q.—On the 22nd “Took McArthur, Carpenter foreman,  
to Cedar”. That was in connection with the camps ?

A.—Yes.

Q.—On the 22nd “Orange-peel broken due to handling  
hardpan”.

A.—Yes.

Q.—On the 23rd : “Went to Point Comfort with Mill  
20 and Williams, and discussed hauling with them ”.

A.—That was in connection with the hauling of mate-  
rials.

Q.—On the 23rd: “Crawley and McCracken moved stuff  
off road to Cedar Camp”.

“December 12th: went to Cedar. Hardpan excavation  
being taken out by hand. Had to shoot.”

A.—Meaning explosives had to be used.

30 Q.—December 20th : “Drove to Cedar. Derrick moved  
back to take out Hardpan. Located cableway powers. Wired for  
Harry Lindskog.” That was to get him to come back ?

A.—Yes. We thought it was about time to have a Resi-  
dent man there ; a man who had more experience than some of  
the others.

Q.—When did he come ?

A.—I think January 13th.

40 Q.—As far as I can judge (and you will correct me if I  
am wrong) those are the entries you have in your notes of visits  
to Cedar, until the coming of Mr. Lindskog ?

A.—Yes. I think you have covered most of them.

Q.—I did my best to read them all, and you checked me  
as I went along ?

A.—I think so.

Q.—As a rule, how long were those visits ?

A.—Sometimes just for a day, and sometimes longer than  
that — two or three days.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—I do not see any in your notes of two or three days. When were you there more than a day?

A.—The 16th, 17th, and 18th. I was not directly at Notre Dame du Laus all the time, but I was around there.

10 Q.—The 16th, 17th and 18th October are the entries you have mentioned before, and you say you were away from High Falls for those three days, in connection with the Cedar job?

A.—Yes.

Also on the 23rd and 24th.

Q.—The same remarks would apply to those dates?

A.—Yes.

20 Q.—And on those occasions you were, of course, part of the time at Point Comfort?

A.—Just over and back. I was not directly on the site of the dam.

I was there on the 21st, 22nd and 23rd of November.

Q.—Were you there when the orange-peel broke ? The note for the 22nd does not show you were there.

30 A.—I think the orange-peel had broken previously to my arrival on the work. I simply made a note that it was broken.

Q.—How many times did you see them work on the hardpan? Three or four times?

A.—More than that. I saw them working at all times, every time I was at the site.

Q.—Can you estimate how many yards of what you call hardpan had been removed by your orange-peel bucket before you started dynamiting ? Could you indicate that with any degree of certainty?

A.—I would say practically none of it.

40 Q.—I ask you, because we were told some of it had been

A.—I would say practically none of it, because when the removed?

derrick struck this hardpan it could not excavate it, and it went on and continued taking the top five feet off.

Q.—When you met that formation of material your orange-peel bucket continued digging the upper layer ?

A.—Yes.

Q.—You left the hardpan?

A.—Yes.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—When did it finish the upper layer?

A.—It just did part of that, and then came back when they started to shoot.

Q.—When did it come back?

10 A.—I could not give you the exact dates from memory.

Q.—Was it after Mr. Lindskog was there?

Mr. St. Laurent:—December 12th : “Derrick working in bunch of boulders”. December 20th : “Derrick moved to take out hardpan”.

By Mr. Geoffrion, continuing,—

20 Q.—Your note is that on the 12th hardpan excavation was being taken out by hand, and had to be shot, and on the 20th the derrick was moved back to take out the hardpan?

A.—Yes.

Q.—As an engineer, what would be your definition of hardpan?

A.—Hardpan is a mixture of gravel and boulders cemented with clay or other cementing material.

Q.—What do you mean by cemented?

A.—Cementing means joined or held together.

30 Q.—I suppose you cannot give us an idea of what extent of holding together would make it hardpan? Because every earth is held together to some extent.

A.—That is so, but hardpan is cemented together in such a way that it is extremely difficult to loose it with a pick.

Q.—Had you ever handled hardpan before?

A.—Yes.

Q.—Was that in contracts where you were paid on a cost plus basis?

40 A.—No, sir. We were paid so much a yard. We were paid by the yard.

Q.—It was not a railway contract? You never had any railway contracts?

A.—No, it was not a railway contract.

Q.—It is not true you never, or hardly ever, see a hardpan clause in a contract except in a railway contract?

A.—No, sir. I believe I have seen hardpan clause in other contracts.

Q.—You could not state definitely what contract it was?



*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

A.—I cannot state definitely. I have seen a great many contracts.

Q.—I mean contracts you have carried out yourself. Have you ever had any hardpan clause?

10 A.—The one particular instance I can remember at the moment, we did not have a hardpan clause, but the material was classified as hardpan in spite of that.

Q.—But, there was no hardpan clause in the contract?

A.—No.

Q.—Were you paid cost plus, or contract price?

A.—A special price on account of hardpan.

Q.—What was that contract?

A.—That was a contract in Newfoundland.

20 Q.—Was that the International Paper contract?

A.—The Newfoundland Power & Paper.

Q.—There was no hardpan clause in the contract?

A.—No.

Q.—What was the clause, and what were you paid for?

A.—Rock, and earth.

Q.—Was that your only experience with hardpan?

A.—I had encountered it in other places, but that was my only direct experience with a contract.

Q.—That was your only experience in which the question arose under the contract?

30 A.—Yes.

Q.—In the other contracts there was no hardpan clause at all?

A.—The other contracts the carrying out of which I have been directly connected with, we did not encounter hardpan.

Q.—Then, the only time you encountered hardpan was in the Newfoundland contract?

A.—On a contract job. Of course, I have seen hardpan in numerous other places.

40 Q.—By a contract job you mean any work you had anything to do with?

A.—Any work I had control of.

Q.—You referred to a discussion you had on August 28th, about the driving of logs, and I understood you to say — “As far as I remember”, I think you said — there was a statement that all your responsibility was to leave open spaces?

A.—That is my recollection of the discussion. I could not hope to tell you the exact words that were used.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—He may have used the very words of the contract, I suppose. My learned friends say that is what they mean.

A.—He might have used the very words of the contract, yes, although I would rather doubt it, as the particular clause  
10 in the contract was written some time afterwards I believe.

Q.—Your first visit in connection with the unwatering and the placing of the cribs was on October 22nd, 1929?

A.—Yes.

Q.—Everything that happened up to that date, as far as your knowledge of it is concerned, was only hearsay?

A.—I was in Newfoundland.

Q.—How long were you in Newfoundland?

A.—I left for Newfoundland on May 29th.

Q.—When did you come back?

20 A.—Some time in October. I have not the date here, and I do not remember the exact date.

By Mr. Forsyth:—

Q.—Was your last connection with the High Falls and the Cedar work in May, 1929?

A.—Yes.

Q.—And, you did not go back to that work after that?

A.—I just went up and saw the work on October 22nd,  
30 but not in an official capacity.

By Mr. Geoffrion:—

Q.—From the time of the arrival of Mr. Lindskog to the time of your departure for Newfoundland did you frequently go to Cedar, or was he in charge?

A.—I went to Cedar, yes.

Q.—I have no doubt when you saw the very bad condition  
40 of that cofferdam you discussed the question with Mr. Lindskog ?

A.—Yes.

Q.—And, he gave you a story?

A.—I asked him what had happened.

Q.—My point now is as to what extent the testimony you gave this morning in regard to the causes or the probable causes for it is influenced by what Mr. Lindskog told you?

A.—I tried to tell you, or to answer the questions, stating what I actually saw myself.

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

Q.—But, I am not speaking of what you saw. I am speaking of the inferences you were asked to draw — and no doubt they will entirely fit in with what Mr. Lindskog will tell us. So, you draw inferences exactly in accordance with what Mr. Lindskog had told you.

10 A.—In order to draw inferences I had to ask him what had caused the cribs or the cofferdams to be in that position.

Q.—And, he told you the cause?

A.—Yes.

Q.—And you drew your inferences as to what had happened exactly in accordance with what he had told you?

A.—I drew my inferences, based on my judgment in the matter.

20 Q.—Which happens to coincide exactly with what he told you ?

A.—Perhaps they do. I believe they do.

Q.—In other words he told you what had happened and you looked over the job and you thought that must have been the way it happened?

A.—I asked him for details of what had happened.

Q.—You stated you saw logs at one point?

A.—Yes.

Q.—How many logs ?

30 A.—I saw the ends of two or three logs, as I remember.

Q.—Sticking out of the mud?

A.—Yes.

Q.—In the fill?

A.—Between the cribs and the sheeting.

Q.—In the fill ?

A.—There was some fill in the place, and they were projecting above the water.

Q.—The logs were partly in the fill?

A.—Yes.

40 Q.—And, partly protruding?

A.—Yes.

Q.—Two or three logs?

A.—Yes.

Q.—At what distance were they from the cribs?

A.—As I remember it, I think one of them was almost directly against the crib, and the other two projected out and were a little farther out, on an angle.

Q.—You do not know how many feet ?

*ALAN B. McEWEN (for Plaintiff) Cross-examination.*

A.—I would hesitate to say whether it was 4 feet or 8 feet.

Q.—How much did they exceed the level of the fill, or how much did they project out of the fill?

10 A.—Varying lengths.

Q.—But, there were only three of them. You have passed an opinion on those logs, and that is why I am questioning you. If you had not said anything about them I would not be questioning you on them.

A.—I think I said there were three or four. I would not state definitely whether there were three, or whether there were five, but I remember distinctly seeing some logs there.

Q.—How much did they protrude out of the earth? 6 inches, 1 foot, 2 feet, or what?

20 A.—Varying amounts. I think there was one that was sticking out 3 or 4 feet.

Q.—And, the others less?

A.—The others probably less. As I remember them the others were running out at an angle : they did not stick out of the fill very much.

Q.—That is the reason why you say that in your opinion logs must have caused the misplacement of the cribs? In other words, the basis for your opinion is not what Mr. Lindskog told you, but the fact that you saw those three logs?

30 A.—The combination of both.

Q.—You mean you do not base your opinion on the mere fact that you saw the logs?

A.—Oh, no.

Q.—We have dealt with the misplacement of the cribs. The second point my learned friend questioned you on was the tremendous quantity of fill above the sheeting?

A.—Yes.

Q.—Was there any fill between the sheeting and the crib?

40 A.—As I remember it, there was some fill between the sheeting and the crib.

Q.—How high?

A.—I do not remember the exact elevations of it.

Q.—Were those logs between the sheeting and the crib, or in front of the sheeting?

A.—The logs I remember were between the sheeting and the crib.

Q.—You were asked your opinion as to why such a quantity of fill had been required, and you gave either one or a com-

*ALAN B. McEWEN (for Plaintiff) Re-examination.*

ination of two reasons: a porous layer of material beneath, or the logs. Would you say the three logs you saw would have anything to do with a tremendous amount of filling?

10 A.—They were an indication that there were logs in the fill, and bore out the story of Mr. Lindskog.

Q.—In other words, you were helped considerably by the story told you by Mr. Lindskog in forming your opinion?

A.—I had to base my opinion partly on what was told me at the site of the job.

Q.—You have no evidence whatever of your own as to there being a porous material below?

A.—No, I did not see the material at all.

20 Q.—So, we have it that your opinion is based on the bad position in which the cribs were, on those three or four or five logs, and on the quantity of filling ahead of the cribs?

A.—Yes.

Q.—On what date was that?

A.—October 22nd, I think it was.

Q.—What does your diary say for October 22nd?

A.—“Drove to Cedar with MacTaggart. No particular comment.” I might mention that this “not particular comment” was not in my diary. It is a note I added to show I had not commented on it.

30 Q.—It is a negative in the diary. There is nothing in the diary in regard to that?

A.—Except that I visited the site.

Re-examined by Mr. Forsyth, K.C., of counsel for Plaintiff.

Q.—My learned friend has questioned you on the contents of the memorandum of extracts from your diary. I would like you to produce this memorandum as Exhibit P-58.

A.—Yes, I would be glad to do so.

40 Q.—We have noticed the name Denise in this memorandum. Who is that?

A.—He has been Superintendent on a great many jobs for Mr. Bishop.

Q.—What was he doing around there?

A.—He was on the High Falls work.

Q.—As Superintendent?

A.—As Outside Superintendent.

*JOHN McGURN (for Plaintiff) Examination in chief.*

Q.—There are also some references to Point Comfort. What was happening there?

A.—That happened to be one of the points on the road between Gracefield and Cedars, where there were a few houses. It  
10 was a possible place where tractor drivers and so on could stop overnight.

And it being 4.15 o'clock, the further testimony of the witness is continued to Monday next, February 20th, at 10.30 o'clock in the forenoon.

20

DEPOSITION OF JOHN MCGURN

A witness examined on behalf of the Plaintiffs.

On this twentieth day of February, in the year of Our Lord one thousand nine hundred and thirty three personally came and appeared John McGurn of the Town of Buckingham, in the Province of Quebec, Log Scaler, aged 55 years, a witness produced and examined on behalf of the Plaintiff, who, being duly sworn, deposes as follows:—

30

Examined by Mr. St. Laurent, K.C., of counsel for Plaintiff.

Q.—How long have you been a log scaler?

A.—Some thirty years, or more.

Q.—Have you a Provincial License in connection with that?

A.—Yes.

40

Q.—How long have you had such a license?

A.—I think since about 1899.

Q.—Thirty years, or more?

A.—Yes.

Q.—Were you employed by the Bishop Company to scale a certain quantity of lumber sawn out of logs which had been supplied to that Company by the Maclaren Company?

A.—I was .

Q.—That was in the month of July, 1929?

A.—Yes: I was employed during July and part of August.

*JOHN McGURN (for Plaintiff) Examination in chief.*

Q.—Will you look at the tally sheet I show you, and which I file as Exhibit P-59, and will you say if the signature on it is your signature?

A.—Yes, that is my signature.

10 Q.—I understand this is the tally sheet which was kept by you on July 6th, 1929, at the sawmill, on which you entered by a dot each piece that was sawn on that day?

A.—Yes.

Q.—The tally sheet is divided in two parts: the left hand part being the lumber that was sawn one inch in thickness, and the right hand part being the lumber that was sawn two inches in thickness?

A.—Yes.

20 Q.—And, the printed figures to the extreme left show the number of feet in each piece sawn in one inch thickness?

A.—Yes.

Q.—And, you have to multiply the result by two to get the number of feet when it is in two inch thickness?

A.—Yes.

Q.—Then, there is a note on the back. Does that also bear your signature?

A.—Yes.

30 Q.—The note reads: “Tally on opposite side of this sheet contains the lumber made from 105 logs sawn by J. A. Campbell on July 6th, 1929”?

A.—Yes.

Q.—Is that a true statement?

A.—Yes, it is.

Q.—Who was J. A. Campbell?

A.—He was the James Maclaren Company’s log scaler.

Q.—Where was this work done?

A.—At High Falls.

Q.—At a sawmill at High Falls?

40 A.—Yes. It was sawn at High Falls.

Q.—Was the lumber scaled there by Mr. Campbell?

A.—The logs.

Q.—Will you file, as Exhibit P-60, the tally sheet bearing date July 6th, 1929, signed “J. A. Campbell” and will you say if that is the detail of the scale according to the Quebec Scale of the 105 logs for which the lumber was tallied by you?

A.—Yes. That is a copy Mr. Campbell gave me.

Q.—Which he gave you at that time?

A.—Yes. Of that many logs.

*JOHN McGURN (for Plaintiff) Examination in chief.*

- Q.—This contains, on the left hand side, 103 logs 16 feet in length?
- A.—Yes.
- 10 Q.—And, in the next column the detail of 2 logs 12 feet in length?
- A.—Yes.
- Q.—Was that lumber put through the sawmill in your presence?
- A.—Yes.
- Q.—And scaled in each individual piece as it came from the saws?
- A.—It was.
- Q.—I understand the first column of figures represents the diameter of the log?
- 20 A.—Yes.
- Q.—And, the second column represents the number of pieces according to the Quebec Scale?
- A.—Yes.
- Q.—And, the third column, the number of feet, according to Quebec Scale, there is in a log of the diameter opposite?
- A.—Yes: the contents of that diameter.
- Q.—So, you multiply the third by the second column, and you get the content of the total number of pieces of that diameter?
- 30 A.—Yes.
- Q.—Those added together give you 5973 feet for the 103 16 foot logs?
- A.—Yes.
- Q.—And, 88 feet for the two 12 foot logs?
- A.—Yes.
- Q.—Those two 12 foot logs were 10 inches in diameter?
- A.—Yes.
- Q.—On Exhibit P-59 you have 1979 feet for the one inch lumber, and you have 6168 feet for the two inch lumber?
- 40 A.—Yes.
- Q.—Making 8147 feet total sawn out of what according to Mr. Campbell's scale under the Quebec Rule was 6061?
- A.—Yes.
- Q.—Will you file, as Exhibit P-61, the tally, in two sheets, of the lumber you scaled on July 13th, 1929; and will you say if those two sheets also bear your signature?
- A.—Yes. They do.



*JOHN McGURN (for Plaintiff) Examination in chief.*

Q.—Is the note on the back of one of those sheets, reading : “The tally on the opposite side of these two sheets contain the average content of 114 logs scaled by Mr. Campbell on July 13th, 1929 — J. McG” in your handwriting, and are the  
10 initials underneath it your initials?

A.—Yes.

Q.—Was that made at the time?

A.—Yes.

Q.—Did you get from Mr. Campbell a copy of his measurement of 146 pieces from which the 114 tallied by you were taken?

A.—Yes.

Q.—Will you file Mr. Campbell’s sheet as Exhibit P-62?

A.—Yes.

20 Q.—Was that work done in the same way?

A.—Yes.

Q.—I understand on July 13th you did not see the whole of the 146 logs that are on Exhibit P-62?

A.—No. I did not get the scale of some thirty logs — the difference between 146 and 114.

Q.—You got the scale of 114, out of 146?

A.—Yes.

Q.—How did it happen you did not get the scale of the lumber that was sawn out of the other thirty or so?

30 A.—I do not just recollect, but I think possibly the mill may have stopped for a day or two, as she usually did, and that those logs were sawn before I got them.

Q.—Did you intentionally leave any out?

A.—No.

Q.—Did you take everything that was sawn in your presence that day?

A.—I did.

Q.—You only got 114?

40 A.—Yes; and I got the average of 146 logs, and applied it to my scale.

Q.—So that Exhibit P-61 and Exhibit P-62 are not necessarily as accurate as the one of July 6th?

A.—No.

Q.—On July 6th you got everything, so there was no averaging about it?

A.—No.

Q.—It was actual measurement of the whole thing?

A.—Yes.

*JOHN McGURN (for Plaintiff) Examination in chief.*

Q.—Whereas, on July 13th you only got the actual measurement of 114?

A.—Yes.

Q.—Out of 146?

10 A.—Yes.

Q.—Will you look at the five tally sheets, dated respectively July 22nd, July 24th, July 25th, July 26th, July 27th, and July 29th, and will you say if they are the actual tallies of the measurement made by you of the logs described therein?

A.—They are.

Q.—Will you look at the sheet of paper which was annexed to those tally sheets (and which I will again annex) and will you file the five tally sheets and the note as Exhibit P-63?

A.—Yes.

20 Q.—Will you say if that note is in your handwriting, and if it is signed by you?

A.—Yes, it is.

Q.—The note reads:

“The summary of the attached sheets is 41,822 feet board measure, and shows contents of 557 logs, which is 32,345 feet board measure scaled by J. A. Campbell from July 22nd until July 29th, 9477 feet over-run. July 30th, 1929.”

30

A.—Yes.

Q.—Is that in accordance with the facts you found?

A.—Yes.

Q.—And, you file those five tally sheets, and your summary describing what you did, and what they are, as Exhibit P-63?

A.—Yes.

40 Q.—Will you file, as Exhibit P-64, the pink sheet signed “J. A. Campbell, culler”, and will you say if that is Mr. Campbell’s scale according to the Quebec Rule of the 557 pieces the lumber from which is tallied in Exhibit P-63?

A.—Yes.

Q.—Did you get that from Mr. Campbell?

A.—Yes.

Q.—Will you now look at the sheet I show you, and say if it bears your signature?

A.—Yes, it does.

*JOHN MCGURN (for Plaintiff) Cross-examination.*

Q.—It reads :

10           “‘The total scale of lumber made on trial test in High Falls Mill was 56,548 feet board measure. This would come from 776 logs, which scaled 44,047 feet board measure Quebec Log Rule. An over-run of 12,901 feet board measure. John McGurn’”.

Is that a summary of the test you made at that time at High Falls?

A.—Yes.

Q.—And, is it a true statement of the result you found?

A.—Yes.

20           Q.—Will you file this as Exhibit P-65?

A.—Yes.

Q.—Was Mr. Campbell there while this work was going on ?

A.—Yes.

Q.—And, he was giving you the scale of the logs according to the Quebec Rule, while you were waiting until the logs went through the mill, and took the tally of the lumber sawn as it actually came out of the mill?

A.—Yes.

30

Cross-examined by Mr. Geoffrion, K. C., of Counsel for Defendant.—

Q.—How did that all happen ? Did you tell Mr. Campbell you wanted to check the over-run measure after out-turn of the mill ?

A.—No, I did not tell him that.

Q.—You are a scaler for the Bishop Company?

A.—Yes.

40

Q.—Are you still in that occupation?

A.—No.

Q.—When did you leave?

Witness:—You mean when did I leave the Bishop Company ?

Counsel:—Yes

A.—In August, 1929.

*JOHN McGURN (for Plaintiff) Cross-examination.*

Q.—Were you only at High Falls, or were you at both places ?

A.—Just at High Falls.

Q.—You were there for the whole High Falls contract?

10 A.—No. I was there possibly a couple of months, or thereabouts.

Q.—Did you tell Mr. Campbell you wanted to see the difference between the measuring in the log and the measuring in the board?

A.—I do not recollect if I told him what I wanted it for, but I asked him for a copy of the logs, and when he would start his tally, and finish it, I would get a copy. There are certain scales made over certain periods.

20 Q.—You asked him for a copy of his scales during certain periods?

A.—Yes.

Q.—Did you get them before doing your own measuring, or after?

A.—After.

Q.—You took the out-turn of the mill on certain dates?

A.—Yes. Possibly several days at a time.

Q.—Let us begin by Exhibit P-59, dated July 6th. How many days out-turn of the mill would that cover?

30 A.—I would not say how many days it covered.

I might explain to you the way it was done. They were pulling those logs out of the river, and taking them up into the mill, and I would start on a certain date, when Mr. Campbell was starting his tally — the tally on a certain day. I would follow him for several days, as the case might be, until he changed his tally, then I would get a copy of that, and make up my tally of the total number of logs.

40 Q.—What do you mean by “change his tally”?

A.—He tallied for probably several days on the same tally. It might cover a couple of hundred logs, and that might be over more than one day.

Q.—What do you mean by changing his tally?

A.—He would change, and then go on with a new tally.

Q.—A new sheet?

A.—Yes.

Q.—Then you would ask him for a copy of the tally he had finished?

A.—A copy of the logs during that period.

*JOHN MCGURN (for Plaintiff) Cross-examination.*

Q.—And those papers you have filed were given to you by him ?

A.—Yes.

Q.—Then you would measure the logs coming out of the mill that day ?

10 A.—Measure the lumber sawn from those logs.

Q.—The lumber coming from the mill on the same day ?

A.—Yes.

Q.—Did they always turn out the lumber on the same day as the log went in ?

A.—They were hauling into the mill, and sawing as it came in.

Q.—What I have in mind is to know how sure you are that they must have been the same logs ?

20 A.—I would not say every log that was brought in on a certain day was sawn on that day, because there might be some left over at six o'clock at night on the rollway.

Q.—Are you sure they are the same logs ?

A.—I am positive. I saw the logs, and I was working among them.

Q.—But, you could not recognize the logs when they came out as lumber. Are you sure the boards you measured fit in with the logs on those certificates in every case ?

A.—Absolutely.

30 Q.—How could you know that, if they did not come out the same day ?

A.—They would not change the logs during the night from the rollway.

Q.—There would be no other logs in the mill ?

A.—No.

Q.—Whose mill was that ?

A.—Bishop's Mill at High Falls.

Q.—Whose mill was it ?

A.—The Bishop Construction Company's.

40 Q.—Your own mill ?

A.—I am not the Bishop Construction Company.

Q.—A mill of the Bishop Construction Company ?

A.—Yes.

Q.—They had a sawmill there ?

A.—Yes.

Q.—For their own work at High Falls — erected for those works ?

A.—Yes.

Q.—This was all in connection with High Falls lumber ?

A.—Yes.

And further deponent saith not.