

In the Privy Council.

No. 27 of 1896.

UNIVERSITY OF LONDON  
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INSTITUTE OF ADVANCED  
LEGAL STUDIES

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ON APPEAL  
FROM THE SUPREME COURT OF CANADA.

BETWEEN

JOHN THEODORE ROSS, FRANCES ELLA ROSS,  
JOHN VESEY FOSTER VESEY-FITZGERALD,  
AND ANNIE ROSS - - - (*Suppliants*) *Appellants*,

AND

HER MAJESTY THE QUEEN - - - (*Respondent*) *Respondent*.

RECORD OF PROCEEDINGS.

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No. 27 of 1896.

## ON APPEAL FROM THE SUPREME COURT OF CANADA.

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BETWEEN

JOHN THEODORE ROSS, FRANCES ELLA ROSS,  
JOHN VESEY FOSTER VESEY-FITZGERALD,  
AND ANNIE ROSS - - - (*Suppliants*) *Appellants*,

AND

HER MAJESTY THE QUEEN - - - (*Respondent*) *Respondent*.

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## RECORD OF PROCEEDINGS.

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A.

CASE ON APPEAL TO THE SUPREME COURT OF CANADA.

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“*Let right be done to the Parties.*”—LORNE.

In the Exchequer Court of Canada.

Petition of Right.

To the Queen's most Excellent Majesty.

County of Carleton.

The humble Petition of John Ross, of the City of Quebec, in the Province of Quebec, merchant, by Auguste Réal Angers, of the City of Quebec, in the Province of Quebec, his attorney herein, and by amendment the humble  
10 Petition of John Theodore Ross, of the City of Quebec, merchant, Frances Ella Ross, of the same place, spinster, of lawful age, and Annie Ross, wife separated as to property of John Vesey Foster Vesey-Fitzgerald, of the City of London, in England, Barrister, and the said John Vesey Foster Vesey-Fitzgerald, for the purpose of authorizing and assisting his said wife, in their quality of sole heirs-at-law of the late John Ross, original suppliant herein, suppliants in continuance of suit, by Gustavus George Stuart, of the City of Quebec, Counsel for the said suppliants in continuance of suit, showeth :

RECORD.

No. 1.  
Petition of  
Right, 12th  
March 1894.

RECORD.

—  
 No. 1.  
 Petition of  
 Right, 12th  
 March 1894  
 —continued.

That Jean-Baptiste Bertrand and François-Xavier Bertrand, both of the City of Quebec, were Railway Contractors, doing business as co-partners under the name and style of J.-B. Bertrand & Co. That in or about the month of September one thousand eight hundred and sixty-nine the Intercolonial Railway Commissioners advertised for tenders for the building of Section 9 of the line of the said Intercolonial Railway, and that in or about the month of March one thousand eight hundred and seventy the said Commissioners advertised for tenders for the building of Section 15 of the said railway.

That certain plans and profiles of the said sections were exhibited in the Office of the Commissioners as a guidance to those who desired to tender for the said sections; that the said J.-B. Bertrand & Co. tendered for the building of the said two sections, and based their calculations upon the plans, the profiles and the bills of quantities prepared according to the instructions of the Chief Engineer; that the said Commissioners accepted the tenders of the said J.-B. Bertrand & Co. as contractors; that in the month of October one thousand eight hundred and sixty-nine the said J.-B. Bertrand & Co. were notified of the acceptance of their tender for Section 9, and the form and contract for the same was prepared and signed shortly afterwards, when the said J.-B. Bertrand & Co. immediately proceeded to build and construct said section, and to supply all proper and requisite materials therefor, for the consideration mentioned in their said tender; and that on or about the twelfth and fourteenth days of May one thousand eight hundred and seventy respectively, the said J.-B. Bertrand & Co. were notified of the acceptance of their tender for Section 15; that subsequently, to wit, on or about the twentieth day of May in the year last aforesaid, the Commissioners notified the said J.-B. Bertrand & Co. that the contract for Section 15 was not prepared or ready for the signature of the parties, and nevertheless instructed them to proceed with the execution of the works on said section, and that upon receipt of this communication the said J.-B. Bertrand & Co. did immediately proceed to the execution of the works on said Section 15.

That on or about the first of July one thousand eight hundred and seventy, by a certain printed paper entitled "Form of Contract," dated the 15th of June in the year aforesaid, the said J.-B. Bertrand & Co. were induced to undertake to continue to build, construct and complete the said Section 15 of the said railway, and to supply all proper and requisite materials therefor for the considerations mentioned in their tender.

That the contract of the said J.-B. Bertrand & Co. was for the lump sum of three hundred and fifty-four thousand eight hundred and ninety-seven dollars (\$354,897.00) for Section 9, and for the lump sum of three hundred and sixty-three thousand five hundred and twenty dollars and fifty cents (\$363,520.50) for Section 15.

That the said J.-B. Bertrand & Co. did well, truly and faithfully make, build and construct that portion of the said railway known as Section 9 and 15 described in the said printed papers or documents entitled "Form of Contract."

That the said J.-B. Bertrand & Co., during the progress of the work upon the said Sections 9 and 15, were obliged and required by the Engineer in charge of the works for the Commissioners to do a large quantity of work of a very expensive and laborious description, and which formed no portion of the contracts, nor was it referred to or mentioned in the specifications, profiles, plans and bills of quantities, exhibited and produced at the time of tenders being asked by the said Commissioners and made by the said J.-B. Bertrand & Co., and subsequently accepted and carried out by the signing of the contracts above referred to; and for which the said J.-B. Bertrand & Co. are  
 10 entitled to compensation in the amounts mentioned in the bills of particulars of claim annexed to the present Petition, which should be paid by the Government of Canada.

That the said J.-B. Bertrand & Co. were after the commencement of the work on said sections and during the progress thereof, put to large expense and compelled to do much extra work, in consequence of misrepresentations in the plans and profiles exhibited at the time of the letting, by reason of changes made in the line of location and in the grade of said sections, in the character and nature of the works under the orders of the Engineers in charge of the same, thereby imposing upon them a large increase of additional and  
 20 extra work not contemplated nor included in contracts and specifications, consisting in extra clearing, grubbing and close cutting, rock and earth excavation, hauling and barrowing, masonry, paving and overhead structures, coffer-dams and pumping, work outside of the line, draining and laying of iron pipes, rip-rap, &c., the quantities and value of which are set out in detail in bills of particulars of claim hereunto annexed, and which sums should be paid by the Government of Canada.

That the said J.-B. Bertrand & Co. were by the engineer in charge of the said Sections 9 and 15, after the commencement of the work and during the progress thereof, required, compelled and obliged to construct and build as  
 30 first-class masonry, a large portion of the second-class masonry, thereby imposing upon them a large increase of additional and extra work not contemplated nor included in the contracts and specifications, the value of which are set out in detail in bills of particulars of claim hereunto annexed, and which sums should be paid by the Government of Canada.

That the said J.-B. Bertrand & Co. were by the engineer in charge of the said Sections 9 and 15, after the commencement of the work and during the progress thereof, required, compelled, and obliged to construct and build a large portion of the masonry in granite instead of sandstone and limestone, receivable under contracts and specifications, the quantities and value of which are set  
 40 out in detail in bills of particulars of claim hereunto annexed, and which sums should be paid by the Government of Canada.

That the said J.-B. Bertrand & Co., by the specifications of the work on the said sections, were required to use and employ in the construction of part of the masonry hydraulic lime cement, and at the time of entering into the contract based their calculations upon the fact that no other cement than hydraulic lime cement would be used on the said masonry, which cement could be obtained in Canada; but the engineer in charge of said sections obliged the

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said J.-B. Bertrand & Co. to use English Portland cement, which could only be obtained in England and brought to the works at a far greater cost; in consequence of which the said J.-B. Bertrand & Co. were put to greater and additional expense over what they had calculated upon when entering upon the said contracts, thereby imposing upon the said J.-B. Bertrand & Co. a large amount of additional cost and extra expenditure for masonry.

That previously to the change ordered by the engineer in charge of hydraulic lime cement for English Portland cement, the said J.-B. Bertrand & Co. had procured and brought, ready for use, cement receivable under the contracts, which cement was wrongfully condemned and refused, to the great loss, damage, and expense of the said J.-B. Bertrand & Co. to the amount set forth in the bills of particulars of claim hereunto annexed; which sum should be paid by the Government of Canada. 10

That after the commencement of the work on Sections 9 and 15, and during the progress thereof, the engineer in charge wrongfully condemned and refused to accept stone from "Grande Anse Quarry," which stone had been purchased from the Government, who had accepted the same from a contractor of other sections who had abandoned his contract, and which was subsequently acknowledged to be good; the fact of condemning said quarry and refusing said stone caused the said J.-B. Bertrand & Co. enormous expense and damage and most prejudicial delays in the prosecution of their work, in the amount set forth in bills of particulars of claim hereunto annexed; which sums should be paid by the Government of Canada. 20

That after the commencement of the work on Sections 9 and 15, and during the progress thereof, the engineer in charge wrongfully condemned and refused to accept stone from "Bass River Quarry," which stone was subsequently acknowledged to be good by Mr. Schreiber on his inspection in winter of 1871; the fact of condemning said quarry and refusing said stone caused the said J.-B. Bertrand & Co. enormous expense and damage, and most prejudicial delays in the prosecution of their work, in the amount set forth in bills of particulars of claim hereunto annexed; which sums should be paid by the Government of Canada. 30

That the said J.-B. Bertrand & Co. in consequence of change in specification, fencing, by order of the engineer in charge, were required to build more expensive fences than designated by contracts, the value and extra cost of which are set forth in bills of particulars of claim hereunto annexed; which sums should be paid by the Government of Canada.

That the said J.-B. Bertrand & Co. were put to great expense and damage by the default of the Commissioners to deliver right of way to commence work as required by them, and also by the default to furnish an engineer to proceed with the work during the winter of 1869 and 1870, the amounts of which are set forth in bills of particulars of claim hereunto annexed; which sums should be paid by the Government of Canada. 40

That during the construction of the said works, the said J.-B. Bertrand & Co. were unnecessarily put to great expense by want of plans and delay in preparations by the said Commissioners and their Engineers in acquiring right of way, locating the line, laying out work, and furnishing specifications and

plans necessary to enable them to proceed and execute the said works, thus causing to the said J.-B. Bertrand & Co. great inconvenience, delay, and loss of labour and other consequent loss and damage detailed in bills of particulars of claim hereunto annexed; which sums should be paid by the Government of Canada.

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That the said J.-B. Bertrand & Co. have suffered great loss and damage by the progress estimates of the work done by them not being accurately and regularly made monthly, by delays in the payment of the monies due them for work done; these facts forcing the said J.-B. Bertrand & Co. to procure at  
10 great loss money elsewhere to pay workmen and proceed with the work, the amount of which loss and damage is detailed in bills of particulars of claim hereto annexed; which sums should be paid by the Government of Canada.

That the said Commissioners, at the time of the letting of the said contract misrepresented the work necessary and requisite to be done on the said sections, inasmuch as the plans exhibited at the time of tendering were withdrawn after the said J.-B. Bertrand & Co. entered into and executed the said contracts and had commenced operations upon the sections; and new plans of the works, different from the plans first exhibited and showing a much greater amount of work as necessary to be done, were substituted therefor, and the  
20 said J.-B. Bertrand & Co. were obliged to perform the work therein required and set forth by the Engineer in charge, which greatly increased the quantity of work done and the expense of performing the same, the different items of which are set out in bills of particulars of claim hereunto annexed, which sums should be paid by the Government of Canada.

In following the directions and instructions of the said Commissioners and Engineers employed by them and placed in charge of the said works given from time to time, and which directions and instructions the said J.-B. Bertrand & Co. were bound to follow and did follow, a large amount of extra work was performed which was not comprised in the schedule and specifications referred to in said contracts nor connected therewith, and not intended to be covered  
30 by the gross or lump sum for Section 9 or Section 15.

Another, but much smaller, portion of the said extra work so performed consisted of work resulting from changes made by the said Engineer, other than alterations in the grades or the line of location, but it was work which was not comprised in or contemplated by the schedule of works and quantities prepared and published by the Chief Engineer of the said railway prior to the letting of contracts for the construction of the said railway, and which contained the only information and data of that kind whereupon contractors or persons intending to tender for contracts for the construction of portions of the said  
40 railway, as by public advertisement, published by the Commissioners, they were invited to do, could make calculations on which to base their tenders. But the information and data furnished by the said schedules were extremely defective, insufficient and erroneous, and the said J.-B. Bertrand & Co. were thereby deceived and misled in making their calculations and estimates respecting the said works and in entering into the said contracts, and they would not have accepted the said contracts nor entered into the same for the price or consideration therein mentioned, had the information and data

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furnished by said schedules been so full, sufficient, correct and accurate as to enable them to see the full extent, nature, quality and quantity of the works required, as the same was afterwards directed and required by the Engineer in charge to be done and performed, and as the same was done and performed. As regards over work of the kind last mentioned, it is submitted that it was not the intention of the party to the said contracts nor has it been the usage in such cases to hold such contractors to the strict letter of such contracts, in so far as to compel such contractors to execute and perform a large quantity of work of which the schedules such as aforesaid gave defective, insufficient and erroneous information, and which, not being in the contemplation of the party thereto, was not intended to be performed under the said contracts, and which could be performed by such contractors, and which was in fact performed by them, only with ruinous consequence to themselves and others, and that a compensation is due and should be paid for said extra work of that kind last mentioned as detailed in bills and particulars of claim hereunto annexed. 10

That the said Commissioners have admitted the justice of the claim herein contained for extra and additional work and expense, loss and damage referred to in the present Petition, and on several occasions the Government of Canada have directed payments to be made on account of the same. 20

That the said J.-B. Bertrand & Co., under the aforesaid contract for Section 9, had undertaken to finish and complete the same on or about the first day of July one thousand eight hundred and seventy-one, and that they did virtually and faithfully complete the same, on or about the month of May one thousand eight hundred and seventy-three, and that if any delay occurred in the completion of the same, it is altogether attributable to the act of the Commissioners and Engineers under their directions to the alterations made in the grades and line of location, to changes in the works, and to the large quantity of extra and surplus work imposed upon the said J.-B. Bertrand & Co., and for which they cannot be held responsible. 30

That the said J.-B. Bertrand & Co., under the aforesaid contract for Section 15, had undertaken to finish and complete the same on or about the first day of July eighteen hundred and seventy-two (1872), and that they did virtually and faithfully complete the same on or about the month of May 1873, and that if any delay occurred in the completion of the same it is attributable to the fact of the Commissioners and Engineers under their direction, to the alterations made in the grades and line of location, to changes in the works, and to the large quantity of extra and surplus work imposed upon the said J.-B. Bertrand & Co., and for which they cannot be held responsible. 40

That the said Commissioners in the spring of the year one thousand eight hundred and seventy-three, under misapprehensions and without any reasonable cause, and at a time when a large amount of money was due, the said J.-B. Bertrand & Co. for work done, assumed control of the said works upon the said sections, and, without giving the said J.-B. Bertrand & Co. any notice of their intention of so doing in writing or otherwise, as required by the contract, paid out money so belonging to the said J.-B. Bertrand & Co. to some of the

workmen on the said works, which position the said J.-B. Bertrand & Co. were forcibly constrained to accept. **RECORD.**

That in consequence of this action of the Commissioners the said J.-B. Bertrand & Co. suffered great loss, from the fact that the said Commissioners, after assuming control of the works, expended unnecessarily large sums of money, which would not have been expended, and which the said J.-B. Bertrand & Co. were not bound to expend, and which were for works not contemplated nor included in the contracts; and it is submitted that no portion of the same can be charged in deduction of the lump sum mentioned in the contracts for Sections 9 and 15.

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That subsequently to the said Commissioners assuming control of the said works, they also took possession of the plant belonging to the said J.-B. Bertrand & Co., and inventory of which was made; that the value of the said plant was at the time well and duly fixed and determined at the sum of \$10,695.79, which said sum neither the said Commissioners nor the Government of Canada ever paid and is still due.

That heretofore to wit, on the first day of July, in the year of Our Lord, one thousand eight hundred and seventy-three, the Government of Canada was justly and truly indebted to the said J.-B. Bertrand & Co., in the sum of \$576,904.02 for goods, wares and merchandise by them before that time sold and delivered to the said Government at their special request, also for work and labour by them before that time done and performed, and for materials and other necessary things by them found and provided used and applied in and about the building and constructing of Sections No. 9 and No. 15 of the Intercolonial Railway for the Government of Canada, at their special instance and request, also for money due and payable from the Government of Canada to them for interest upon and for the forbearance of large sums of money due and payable by the Government of Canada to them, at the special request of the Government of Canada, also for money lent, advanced to, and expended for the Government of Canada by them, and for money before that time had and received by the Government of Canada to and for the use of them, and for money found to be due to them by the said Government on accounts stated between the latter and the said J.-B. Bertrand & Co.

That on the twenty-seventh day of September one thousand eight hundred and seventy-five, at Quebec, before J. B. Parkin, Notary Public, the said Jean Baptiste Bertrand and François-Xavier Bertrand, both of the City of Quebec, doing business as co-partners under the name of J.-B. Bertrand & Co., and Contractors for the Sections 9 and 15 of the Intercolonial Railway, transferred, made over and assigned to Thomas Glover, of the City of Quebec, Merchant, and to John S. Fry, of the City of Quebec, Merchant, all the rights, title, interest and demand of them the said J.-B. Bertrand & Co. in and to their claims against the Government of the Dominion of Canada arising out of and connected with the construction of the said Sections 9 and 15 of the said Intercolonial Railway, to have and to hold the said claims of money against the said Government of the Dominion of Canada, thereby sold and assigned as aforesaid, with all interest accrued and to accrue upon the same, thereby putting, substituting and subrogating the said Thomas Glover and John S. Fry,

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and each of them in the place and stead of them the said J.-B. Bertrand & Co., and in all their rights, title, interest, and demand respecting the premises.

That the said transfer and assignment was made for good and valuable consideration, and in order the better to secure the said Thomas Glover and John S. Fry, and each of them, the advances made by them respectively to the said J.-B. Bertrand & Co. in the construction of the said Sections 9 and 15, and which advances amounted to a sum exceeding six hundred thousand dollars.

That on the twenty-eighth day of September one thousand eight hundred and seventy-five, at Quebec, before J.-B. Parkin, Notary Public, the said Thomas Glover, of the City of Quebec, merchant, and John S. Fry, of the City of Quebec, merchant, transferred, made over and assigned to John Ross, of the City of Quebec, merchant, all the rights, title, interest, and demand of them the said Thomas Glover and John S. Fry, acquired of the said J.-B. Bertrand & Co., in and to their claims against the Government of the Dominion of Canada, arising out and connected with the construction of the Sections 9 and 15 of the said Intercolonial Railway, to have and to hold the said claims of money against the said Government of the Dominion of Canada, thereby sold and assigned as aforesaid with all interest accrued and to accrue upon the same, thereby putting, substituting, and subrogating the said John Ross in the place and stead of them the said Thomas Glover, John S. Fry and J.-B. Bertrand & Co., and all their rights, title, interest and demand respecting the premises.

That the said transfer and assignment was made for good and valuable consideration and in order the better to secure to the said John Ross the advances made by him to the said Thomas Glover and John S. Fry, for and in the construction of the said Sections 9 and 15 by the said J.-B. Bertrand & Co., and which advances amounted to a sum exceeding six hundred thousand dollars.

That on or about the twenty-second day of December, one thousand eight hundred and seventy-six, the said John Ross caused the aforesaid deeds of assignment to be duly served and signified to the Honourable the Minister of Public Works, and that the same were well and regularly entered and noted in his Department.

That by reason of the above and by reason of the constant departure from the aforesaid contracts by the said Commissioners, there is due and owing to your suppliant John Ross, for the several items mentioned in bills of particulars of claim hereunto annexed, and for balance remaining unpaid under contracts for Sections 9 and 15, the sum of \$576,904.02 (five hundred and seventy-six thousand nine hundred and four dollars and two cents) with interest thereon from the first of July 1878.

On the eighteenth day of July eighteen hundred and eighty-one the Chief Engineer of the said Intercolonial Railway granted a final and closing certificate, whereby he certified to the Minister of Railways and Canals that the extra and additional work and other matters claimed for in the foregoing paragraphs of the present petition had been executed and done as extra and

additional to the extent mentioned in Schedule No. 4, and that the amounts mentioned in said Schedule No. 4, forming a total sum of two hundred and thirty-one thousand and eight hundred and six dollars (\$231,806) should be paid in respect thereof by your Majesty; the said Chief Engineer further certified that the original contract work had been executed, and that the contractors were entitled to be paid in respect thereof the amount mentioned in said Schedule No. 4.

10 The Minister of Railways and Canals has not disapproved of said certificate, but has, as such Minister, unduly and improperly withheld his express approval thereof, notwithstanding that a reasonable time for such approval or disapproval has elapsed; in any event such approval or disapproval is not required by the contract or by law.

The Office of Commissioners of the Intercolonial Railway having been abolished by the Act 37 Vict., Chap. 15, it is not and has not been possible for the said contractors and your suppliant to obtain the decision of the Commissioners as to the allowance for increased work claimed by the present petition, and by reason of the foregoing your suppliant is entitled to be paid the amount certified by such final and closing certificate.

20 And the suppliants represent that in the event of the Crown pleading and this Court holding that the said certificate of the Chief Engineer of the eighteenth day of July eighteen hundred and eighty-one (1881) is not the final and closing certificate contemplated by the contract of the first of July eighteen hundred and seventy (1870) between the said J.-B. Bertrand and the Crown, that the contractors and the suppliant are by law discharged from the obligation of obtaining the certificate of the Chief Engineer referred to in the contract, or the approval of the Commissioners of the Intercolonial Railway or of the Minister of Railways and Canals, inasmuch as the several chief engineers who preceded and succeeded F. Shanley aforementioned have each of them been prohibited and prevented by the responsible Ministers, 30 agents, and duly authorised officers of the Crown from issuing a certificate in accordance with the terms of the contract, and that your suppliant is entitled to be paid the just and fair value of the extra and additional works so done and performed by the contractors, as set forth in the schedules filed with this Petition.

Your suppliant humbly prays that your Majesty may be pleased to grant your fiat that right be done in the premises.

40 That it be adjudged and declared that the suppliant is entitled to be paid the sum of two hundred and thirty-one thousand eight hundred and six dollars (\$231,806), amount certified by the final certificate of the Chief Engineer set forth in Schedule No. 4, with interest from the date thereof.

That if upon any defence pleaded herein it be held that the said certificate is not valid and binding upon your Majesty and the contractors, or is not the final and closing certificate contemplated by the contract, it be adjudged and declared that by reason of the abolition of the office of Commissioners of the Intercolonial Railway, and by the reason of the prohibition and refusal of your Majesty's duly authorised officers, agents, and servants to grant the final certificate contemplated by the contract, your suppliant is

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River, the said section number nine being of the length of 21 miles, more or less; Section 15 commencing at the easterly end of the section of the said railway number nine, and extending thence to station number 639 of the said railway, a point fully half a mile in an easterly direction from the point at which the said railway is intended to cross the River Nepissiquit, the said section number fifteen being wholly within the Province of New Brunswick, and being 12 miles and one-tenth of a mile in length, more or less; and all bridges, culverts, and other work appurtenant thereto to the satisfaction of the said Commissioners and according to the plans and specifications thereof signed by  
 10 the said Commissioners; the plans whereof so signed were deposited in the office of the said Commissioners in the City of Ottawa, and the specifications whereof so signed, were to the said contracts annexed and marked as Schedule "A" to each contract, which specifications were to be construed and read as if embodied in and forming part of the said contract.

5. It was further, in and by the second paragraphs of the said contracts amongst other things, also agreed and provided that the contractors should provide all proper tools, plant, and materials for the execution of the works, and should be responsible for the sufficiency of the same; that they should take upon themselves the entire responsibility of the centring, scaffolding, and  
 20 all other means used for the fulfilment of the contracts, whether such means might or might not be approved of or recommended by the Engineer; and the contractors should alone suffer loss, and should indemnify and hold harmless Her Majesty and the Commissioners from loss arising from, and should run all risks of accidents or damages from whatever cause they might arise, until the completion of the contracts; that the contractors should also be responsible for all damages claimable by the owners or occupants of land, arising from the loss of crops or cattle, or injury thereto respectively sustained by any cause or thing connected with the construction of the work, or through any of their agents or workmen, and should be responsible for all damages which might be  
 30 done to property or persons through the blasting of rocks, or other operations carried on by them, and should assume all risks and contingencies that might arise during the progress of the works, and should make good all defects or failures, whether from negligence on the part of themselves, their agents, or workmen, or bad workmanship, or the use of improper materials, and should hold harmless and indemnify Her Majesty from all claims, losses or damages in respect thereof; and that the contractors should perform and execute all the work required to be performed by the said contracts and the said specifications in a good, faithful, substantial, and workmanlike manner, and in strict accordance with the plans and specifications thereof, and with such instructions  
 40 as might be from time to time given by the Engineer, and should be under the direction and constant supervision of such district division and Assistant Engineers and Inspectors as might be appointed, and should any work, material or thing of any description whatever be omitted from the said specifications or contracts which, in the opinion of the Engineer, might be necessary or expedient to be executed or furnished, the contractors should notwithstanding such omission, upon receiving written directions to that effect from the Engineer, perform and furnish the same; and that all the works were to be executed

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and materials supplied to the entire satisfaction of the Commissioners and Engineer, and that the Commissioners should be the sole judges of the work and material, and their decision on all questions in dispute, with regard to the works or materials, or as to the meaning or interpretation of the specifications, or the plans, or upon points not provided for, or not sufficiently explained in the plans or specifications, should be final and binding upon all parties.

6. It was further, in and by the third paragraphs of said contracts, agreed and provided that the contractors should commence the works embraced in the contracts within thirty days from and after the date thereof, and should diligently and continuously prosecute and construct the same, and that the same respectively and every part thereof should be fully and entirely completed in every particular and given up under final certificates, and to the satisfaction of the said Commissioners and Engineer, in respect to Section 9 on or before the first day of July, in the year of Our Lord one thousand eight hundred and seventy-one, and in respect to Section 15 on the first day of July one thousand eight hundred and seventy-two, time being declared to be material and of the essence of the contracts, and in default of such completion as aforesaid on or before the last-mentioned day, the said contractors should forfeit all right claim or demand to the sums of money or percentages thereafter in para- 20 graph eleven of said contracts agreed to be retained by the said Commissioners, and any and every part thereof, as also to any moneys whatever that might be at the time of the failure of the completion as aforesaid due or owing to the said contractors, and that the said contractors should pay to Her Majesty as liquidated damages and not by way of fine or penalty, the sum of \$2,000.00 in respect to each contract, for each and every week and proportional fractional part of such sum for every part of a week during which the works embraced within the said contracts or any portion thereof should remain incomplete, or for which the certificates of the Engineer approved by the Commissioners should be withheld, and that the said Commissioners might deduct and retain 30 in their hands such sums as might become due or payable, or should become due or payable thereafter to the said contractors.

7. It was in and by paragraphs four of said contracts amongst other things further provided and agreed, that the Engineer should be at liberty at any time before the commencement of or during the construction of any portion of the work, to make changes or alterations which he might deem expedient in the grades, the line of location of the said railway, the width of cuttings or fillings, the dimensions or character of structures, or in any other thing connected with the works, whether or not such changes increased or diminished the work to be done or the expense of doing the same; and that the said contractors should 40 not be entitled to any allowance by reason of any such changes, unless such changes should consist in alterations in the grades or the line of location, in which case the contractors should be subject to such deductions for any diminution of work, or entitled to such allowances for increased work (as the case might be) as the Commissioners might deem reasonable, their decision being final in the matter.

8. It was further, in and by paragraphs five of said contracts also agreed

and provided, that the Contractors should by themselves, their agents and workmen, faithfully carry on the works until completion, and should not sell, assign or transfer the said contracts to any person or persons whomsoever, without the consent of the Commissioners first had and obtained.

9. It was further, in and by paragraphs six of said contracts, also agreed and provided that the Commissioners should have the right to suspend operations at any particular point or points, or upon the whole of the works ; and in event of such right being exercised so as to cause any delay to the contractors, then an extension of time equal to any such delay or detention  
 10 should be allowed them to complete the said contracts, but any such delay should not vitiate or avoid the said contracts or any part thereof, or the obligation thereby imposed or any concurrent or other bond or security for the performance of the said contracts, nor should the same entitle the contractors to any claim for damages unless the Commissioners should otherwise determine, and then only for such sums as they might think just and equitable. If at any time during the progress of the works it should appear that the force employed or the rate of progress then being made, or the general character of the work being performed, or the material supplied or furnished were not such as to ensure the completion of the said works within the time stipulated, or in  
 20 accordance with the contracts, the Commissioners should be at liberty to take any part of the whole works out of the hands of the contractors, and employ such means as they might see fit to complete the works at the expense of the contractors, and they should be liable for all extra expenditure incurred thereby, or the Commissioners should have power at their discretion to annul the said contracts. Whenever it might become necessary to take any portion or the whole work out of the hands of the contractors or to annul the said contracts, the Commissioners should give the contractors seven clear days' notice in writing, of their intention to do so, such notice being signed by the Chairman of the Board of Commissioners, or by any other person authorized  
 30 by the Commissioners; and the contractors should thereupon give up quiet and peaceable possession of all the works and materials as they then existed, and without any or further notice, or process, or suit at law, or other legal proceedings of any kind whatever, or without its being necessary to place the contractors *en demeure*, the Commissioners in the event of their annulling the said contracts, might forthwith, or at their discretion, proceed to re-let the work or any part thereof, or employ additional workmen, tools and materials, as the case might be, and complete the works at the expense of the contractors who should be liable for all extra expenditure which might be incurred thereby, and the contractors and their assigns or creditors should forfeit all right to the  
 40 percentage retained, and to all moneys which might be due on the works and they should not molest or hinder the men, agents or officers of the Commissioners from entering upon and completing the said works, as the Commissioners might deem expedient. If at any time it should appear to the Commissioners that the security of the works was endangered, or the peace of the neighbourhood was likely to be disturbed, or any other difficulty likely to arise by reason of the men being left unpaid, the Commissioners might pay any arrears of wages so far as they could ascertain the same to be due on the best

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10. It was further, in and by paragraphs seven of the said contracts, also agreed and provided, that any notice or other paper connected with the said contracts might be served on the contractors by being left at their usual domiciles, or by being directed to them through the post office at their last known place of business, and any notice or other papers so left or directed should to all intents and purposes be considered legally served.

11. It was further, in and by paragraphs 11 of said contracts, agreed and provided that cash payments should be made monthly, on the certificates of the Engineer, equal to eighty-five per cent. of the value of the work done, approximately made up from returns of progress estimates, and, on the completion of the works to the satisfaction of the Engineer, certificates to that effect should be given, but the final and closing certificates, including the fifteen per cent. retained, should not be granted for a period of two months thereafter; and further that the progress certificates should not in any respect be taken as an acceptance of the works, or release of the contractors from their responsibility in respect thereof, but that the said contractors, at the conclusion of the works, should deliver over the same in good order, according to the true intent and meaning of the said contracts, and of the said specifications. 20

12. It was further, in and by paragraphs 9 of said contracts, agreed and provided that it should be distinctly understood, intended, and agreed that the said prices or considerations of \$354,897.00 and \$363,520.00 respectively should be the prices of, and held to be full compensations for, all the works embraced in or contemplated by the said respective contracts, or which might be required in virtue of any of their provisions or by-laws; and that the said contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration, or addition made in or to such works, or in the said plans or specifications, or by reasons of the exercise of any of the powers vested in the Governor in Council by the said Act intituled, "An Act respecting the construction of the Intercolonial Railway," or in the Commissioners or Engineer by the said contracts, or by law to claim or demand any further or additional sums for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretension to all intents and purposes whatsoever except as provided in the fourth section of the said contracts. 30

13. It was also, in and by paragraphs 12 of the said contracts, agreed and provided that the said contracts and the said specifications should be in all respects subject to the provisions of the Act first cited in the said contracts, intituled "An Act respecting the construction of the Intercolonial Railway," and also in as far as they might be applicable to the provisions of "The Railway Act of 1868." 40

14. In and by the tenders of the contractors for the construction of Sections 9 and 15 of the said railway signed by them it was set forth that, having seen the plans and profiles of the said sections, they thereby tendered to construct said sections in accordance with the plans and profiles, and all

other detailed plans which might be supplied, and, in accordance with the general specifications signed by the Commissioners and dated Ottawa, 26th January 1870 (and to execute the contracts, forms of which were printed as thereby stated, and as the fact was at the end of the specification binding themselves not to demand any extras of any kind whatever) for the sums of \$354,897.00 and \$363,520.00 respectively, being at the rate of \$16,899.86 per mile of railway for Section 9 and \$30,001.66 per mile of railway for Section 15, and the contractors thereby bound themselves to complete such sections for the above-named sums to the satisfaction of the Chief Engineer and  
 10 Commissioners, such sums to be the full payment without extras of any kind for the entire completion of the sections.

15. In preparing the said plans and specifications, and in inviting tenders for the construction of the works of the said railway, it was contemplated by the Commissioners that the plans and specifications might have to be altered or varied, and that other works might be required for the due and proper construction of the line of railway, and Her Majesty's Attorney-General says that, before they entered into the contract, the contractors were well aware that the contract prices were intended to cover the cost of any such alterations or variations in the plans or specifications, and of any other or additional  
 20 works which might be required, unless such alterations and variations should arise from changes of grade or of the line of location.

16. At the time of the letting of the said Sections 9 and 15 the Commissioners exhibited bills of works, the contents of which were known to the contractors, which bills of works contain amongst other things the following statements and stipulations:—

“Those bills are abstracts of all the information in the possession of the Commissioners and the undersigned with regard to the quantities of work to be executed.

30 “The quantities herein given are ascertained from the best data obtained; they are as far as known (approximately) accurate; but at the same time they are not warranted as accurate, and no claim of any kind will be allowed though they may prove to be inaccurate.

“The quantities of excavations are for the most part ascertained from cross sections; the proportion of rock excavation is estimated from information furnished by test pits dug at intervals along the line of railway, the information thus ascertained, and the nature of the soil to be excavated, will generally be found written on the profiles, but the accuracy of this information is not guaranteed. Contractors must satisfy themselves on this as well as on  
 30 excavation turning out more than or different from what may be represented or supposed.

“A Schedule of Cuttings and Embankments is furnished showing the approximate quantities in each, and giving an estimate of the probable proportions of earth and rock which will require to be executed on the contract. The excavations are calculated net measurement, and the contractors will observe that a percentage allowance is added to embankments for waste, subsidence, wash beyond slope lines, &c. The contractors are required to

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make every allowance which they may deem necessary to cover the risk of any of the quantities of work being increased in execution.

“A Schedule of Structures proposed for the passage of streams and general surface drainage across the line of railway is also furnished. The structures proposed are, from all the information obtained, believed to be the most suitable, but should circumstances require any change in the number, position, waterway or dimensions, the contracts will provide that all changes shall be made by the contractors without any extra charge. This schedule gives the probable quantities in the structures now proposed and the date upon which these quantities are ascertained; much, however, depends on the 10' additional information to be obtained with regard to the freshet discharge of streams as well as the nature of the foundations, and with respect to the latter accurate information can only be had during the progress of the work.

“The prices put in the schedule to the tenders will be applied to this bill by the Commissioners to enable them to judge how the tenders are made up.”

17. The said bill of works also contained schedules giving approximate quantities of the work to be done to complete the said sections, and further called the attention of intending contractors to the work required to be done in connection with the foundation of structures on said sections, and to the allowances which intending contractors should make for omissions and con- 20' tingencies in the *schedules* of the approximate quantities of work to be performed in making up their tenders, and for greater certainty leave is craved to refer to the said bills of works, when the same shall be produced to this Honourable Court.

18. The contractors entered into the said contracts with full knowledge of the contents of the said bills of works, and that the estimates contained and referred to therein, and the said plans and specifications were merely approximate and were subject to be altered, varied and added to as aforesaid, as circumstances might require.

19. Her Majesty's Attorney-General denies that there were any mis- 30' representations in the profiles, plans, or bills of works as alleged in the seventh paragraph of the said petition; and further says that if there were any inaccuracies therein, the contractors were distinctly warned not to rely thereon, but to make such allowance therefor in their tenders as they thought fit.

20. Her Majesty's Attorney-General denies the suppliants' right to any relief by reason of any matter or thing antecedent to the said contracts, not arising strictly out of the terms thereof; and Her Majesty's Attorney-General objects to so much of the suppliants' claim and grounds of relief, as are based upon matters and work alleged to have been done outside of the express terms of the said contracts. 40'

21. The contractors failed to perform the said works within the time agreed upon in and by the said contracts, that is to say, with respect to Section 9 by the first day of July 1871, and with respect to Section 15 by the first day of July 1872, and by the actual default of the said contractors the said works on Section 9 were not finished until the end of November 1873, and on Section 15 the works were not completed until the end of the month of February 1874, and Her Majesty claims the benefit of the stipulations

contained in the third paragraph of the said contracts, under which the contractors forfeited all money then due and owing to them under the terms of the said contract, and also the further sum of \$2,000.00 per week in respect to each of the sections for all the time during which the said contracts remained incomplete, after the first day of July 1871 with respect to Section 9, and after the first day of July 1872 with respect to Section 15, by way of liquidated damages for such default; and leave is craved on behalf of Her Majesty to deduct, retain and set off the said sums of \$2,000.00 per week upon the respective sections, amounting on the whole to upwards of \$406,000.00, 10 from, out of, and against the claims of the suppliants in their said Petition, and, by way of cross relief, judgment is claimed for Her Majesty for the amount due to Her Majesty for such liquidated damages.

22. Her Majesty's Attorney-General denies the allegations contained in the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and 22nd paragraphs of the suppliants' Petition of Right; and further says, with regard to these allegations, that the work, services, matters and claims therein mentioned, were all provided for by the said contracts and embraced in the lump sums for which the total work upon the said sections of the railway was to be completed, and that none of the said 20 work, services and matters, or any of the claims referred to and set out in the said several paragraphs above mentioned, come within any provision of the said contracts, which would allow or permit the suppliants to maintain an action for or recover against Her Majesty.

23. Her Majesty's Attorney-General further states by way of defence to the said Petition of Right, that during the performance of the work upon the two sections of the railway above-mentioned, changes were made from time to time in the line of location and grade of said sections by direction and authority of the Engineer in charge, and that in consequence of such changes, the quantity of work to be performed and which was actually performed in 30 carrying out the requirements of the said contracts, was greatly diminished; and the said Attorney-General says that in pursuance of the said contracts, he is entitled on behalf of Her Majesty to deduct the sum of \$59,445.00, being, the amount which the diminutions in the said work exceeded the increases of the work upon the said sections as provided by the 4th clause of the said contracts.

24. Her Majesty's Attorney-General in answer to paragraphs 23, 24, 25, and 26 of the said Petition says, that the contractors having made default in the prosecution of their work required to be done under the said contracts, the said Commissioners in strict accordance with the provisions of the said contracts 40 and with the contractors' assent, finding the men employed by the contractors on the said sections of the said Railway unpaid, notwithstanding that up to that time the contractors had been paid more than they were entitled to under that contract, and finding the work upon the said sections stopped, took the work into their own hands and proceeded to complete the same in accordance with the terms of the said contracts; and the said Attorney-General denies that the default of the contractors in not proceeding with their work upon the said

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25. With reference to paragraph 27 of the suppliants' Petition of Right, Her Majesty's Attorney-General says that the value of all plant of the contractors, which was taken possession of by the Commissioners at the time the work upon the said sections was taken out of the hands of the contractors, was duly accounted for by the Commissioners and applied for the benefit of the contractors in carrying out and completing the work upon the said sections.

26. Her Majesty's Attorney-General denies that there is due to the 10  
suppliants, as is alleged in paragraphs 28 and 34 of their said Petition, for and in respect of work done by the contractors upon the said sections, the sum of \$576,904.02, or any sum whatever; but on the contrary it is claimed that the suppliants have been overpaid the sum of \$116,331.00, for which, under the terms of the said contracts, the said contractors or the suppliants as their assignees, should be ordered to pay to Her Majesty the said sum of \$116,331.00, justly due and owing by them under the terms of the said contract besides the sum due for delay.

27. Her Majesty's Attorney-General denies the allegations in paragraph 35 of the said Petition of Right, and further says that even if a certificate of the 20  
Engineer in Chief of the Intercolonial Railway was made to the Minister of Railways and Canals as in the said paragraph is alleged, the said paragraph and the following paragraph 36 admit that the alleged certificate never received the sanction and approval of the said Minister as required by the Acts respecting the construction of the Intercolonial Railway, being 31 Victoria, Chapter 13, and 37 Victoria, Chapter 15, by reason whereof the said alleged certificate has no effect to render Her Majesty liable to pay any sum or sums, which may be so certified by the said Engineer in Chief; and Her Majesty's Attorney-General claims the same benefit from this objection as if he had demurred.

28. Her Majesty's Attorney-General for a further defence says, that by 30  
the said contracts the contractors or the suppliants as their assignees are not entitled to make any claim for payment unless the amount of such payment is certified to by the Engineer therein mentioned; and the Attorney-General denies that the document referred to in the 35th paragraph of the Petition of Right was a certificate within the meaning of the contract, and that the contractors or the suppliants as their assignees are not entitled to be paid or to claim the amount mentioned in the said document or any part thereof.

29. In further answer to the said petition of right, Her Majesty's Attorney- 40  
General says, that subsequent to the filing of the original Petition of Right herein, the Government of Canada with the consent and approval of the contractors and of the said John Ross in the Petition mentioned, and with a view of finally settling the claim of the contractors, procured the said claims to be referred to three Commissioners to investigate, settle and adjust the same, and the contractors and the said John Ross having appeared before the said



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 No. 3.  
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presented a large claim for balance of contract price and extras, and the said other suppliants above named, as the sole heirs-at-law of the said late John Ross, who departed this life on or about 10th September 1887, became and are now entitled to the said rights, moneys, claims, remedies, contract price and extras of the said J.-B. Bertrand & Co. in respect of the matters aforesaid.

5. The said Fleming as such Chief Engineer during the progress of the work by the contractors furnished them with progress estimates of the work done under said contracts which were paid; but he gave no final certificate in respect of the said contracts for Sections 9 and 15 as required by the Statute. 19  
 The work was finished on Section 9 in November 1873, and on Section 15 in February 1874.

6. An Order in Council and report are herewith produced marked "D." The effect and admissibility of such papers and Mr. Shanly's appointment are to be discussed.

7. The claim of the said late John Ross as such assignee, with those of other contractors on the said railway, came before Shanly.

8. The said Shanly made and duly forwarded to the Minister of the Department of Railway and Canals the certificate or report, a true copy of which is produced by the Crown marked "E." 20

9. That the said certificate or report duly reached the Minister of the Department of Railways and Canals on or about its date.

10. Subsequently by Order in Council of the 28th July 1882, a copy of which is submitted herewith marked "F," the claim of the said late John Ross as such assignee, with other claims was referred to three Commissioners to inquire and report thereon.

11. The said late John Ross was called upon by the Commissioners to appear before the said Commission and give evidence; and witnesses were examined in reference to the said claim.

12. The Commissioners made their report herewith submitted and 30 marked "G."

13. The effect and admissibility of the said last-mentioned Order in Council, the Commission thereunder, and of what was done thereunder by the parties, as well as the said report are to be discussed.

14. The evidence taken in the case of Robert H. McGreevy *v.* The Queen may be used herein as far as it is applicable.

Dated at Ottawa, the 14th day of November 1894.

CARON, PENTLAND, AND STUART,  
 for Suppliants.

W. D. HOGG,  
 of Counsel for Crown. 40

## EXHIBITS.

Exhibit "A" referred to in Statement of Admissions.

Schedule "A."—Intercolonial Railway.

## General Specification.

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No. 4.  
 Exhibit  
 "A."  
 General  
 Specification,  
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 1869.

1. This specification refers to all works of construction and materials required in making and building the railway up to the formation level and preparing it for the permanent way. It comprises clearing, close cutting, grubbing, fencing, excavation, draining, ditching, foundation works, bridge and culvert masonry, the superstructure of the bridges, together with all other  
 10 works connected with the construction and completion of the line of the railway. The intention being that the contractors shall complete the road-bed of the railway and provide all materials of every kind except the ties or sleepers, iron rails and their fastenings, the ballasting and the laying of the track.

*Clearings, &c.*

2. Where the railway passes through wooded sections the land must be cleared to the width of fifty feet on each side of the centre line, or such greater or lesser width as the Engineer may direct.

3. The clearing is to be done so that all the brush, logs, and other loose  
 20 material, within its limits, will be burned. A sufficient quantity of fencing stuff may be reserved, cut into equal lengths and piled. In no case shall any of the brush or logs be cast back upon the adjacent timber lands; they must invariably be made into piles near the centre of the space to be cleared, and there entirely consumed. All brush or trees accidentally or otherwise thrown into the adjacent woods must be dragged out and burned. The land when cleared must be left in a clean condition.

4. Where embankments are to be formed less than four feet, and more than two feet, in height, all the standing timber and stumps must be chopped close to the ground within the limits of the embankment and burned.

5. Where excavations will not exceed three feet in depth, or embankments  
 30 two feet in height, all stumps must be grubbed out and, if possible, burnt; those that will not burn, must be carried beyond the limits of the cuttings and embankments where directed and there piled. Directions will be given at the proper time as to the extent of ground required to be cleared, close cut, and grubbed.

*Fencing.*

6. The fencing through cleared and settled sections of the country will be a straight panel fence. Each panel will be 10 feet long and 4 feet 6 inches high, it will be formed by placing posts in pairs and kept about 4 inches apart  
 40 by the insertion of a horizontal rail at top. The top rail will lap between the posts not less than 14 inches and will be secured in its position by a half-inch screw bolt passing through both posts. The top rail may either be a spruce board 2×6 inches or a cedar pole of corresponding strength, reduced at the ends to  
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two inches so as to form a proper lap between the posts. The posts will be sunk in the ground half their length, they will be of cedar 9 feet long and not less than five inches in diameter at the smallest end, they will be flattened at the top to allow of the proper lapping of the top rail and the insertion of the iron bolts to secure the whole firmly. The bolt will be eleven inches long one half inch diameter with suitable head screw, nut, and washer. At the option of the Contractor the posts may be made from a single cedar stick not less than 6 inches diameter at the small end, sawn through the middle and with the sawn faces placed on the lap of the top rail.

7. Each panel will be filled in from the ground to the under side of the top rail, with good strong common split fence poles, of the most suitable description of timber found in or near the locality, each rail will rest on the top of its fellow in each alternate panel. All holes or depressions under the lower rail that would admit small animals must be stopped up with earth, stones, or blocks of wood.

8. The farm gates will be light and strong, of an approved design similar to those on the Grand Trunk Railway east of Quebec, or the Nova Scotia Railway east of Truro, they will be furnished complete with proper fastenings, they will receive two coats of white paint or one coat of tar.

9. The fencing to be thoroughly completed through all the cleared lands and wherever it may be required by the Engineer.

#### *Grading.*

10. In woodland the grading will not be commenced until the clearing, close cutting, and grubbing required be completed to the satisfaction of the Engineer, and the Contractor will be held responsible for all damage to crops.

11. The width of embankments at sub-grade or formation level is intended to be 18 feet. The width of through cuttings will, as a general thing, be 22 feet, and of side cuttings 20 feet; but they may vary according to the section of the country and other circumstances as the Engineer may direct. The slopes of earth work will be made one and a half horizontal to one perpendicular. In rock cuttings the slopes will be as a rule, one horizontal to four perpendicular. In cuttings partly earth and partly rock a berm of 6 feet shall be left on the surface of the rock. The widths, slopes, and other dimensions above defined may be varied by the Engineer at any time to suit circumstances.

12. The material to be placed in the embankments must be approved by the Engineer, and in places where the natural surface of the ground upon which the embankment is to rest, is covered with vegetable matter, which cannot be burned off in the clearing and which would in the opinion of the Engineer impair the work, the same must be removed to his entire satisfaction. All sloping ground covered with pasture shall be deeply ploughed over the base of the embankments before the latter are commenced.

13. All side hill ground to be covered by embankments shall first be thoroughly underdrained as the Engineer may see expedient, and all cuttings after being

formed and all slopes likely to be affected by wet must be similarly underdrained longitudinally or transversely, or both, as circumstances may seem to him to require. These drains will be constructed in a similar way to that in which ordinary land drains are sometimes made, a trench will first be dug to a depth of four feet on an average, and barely wide enough for a man to stand. In the bottom of this trench, three or four cedar or spruce poles from 2 to 3 inches in diameter will first be laid by hand breaking joint, over the poles will then be placed two feet of coarse gravel or broken stone not larger than ordinary road metal, over which will be placed a coating of brush, and then the trench  
 10 will be filled up to the surface of the ground with such material convenient to the place as the Engineer may approve of. The contractor must find all the material required in those drains, do all the work described and remove the surplus earth. These drains must always be made with a sufficient longitudinal fall for the easy flow of the water, and therefore they may in level cuttings be deeper at one end than at the other, but the average depth will in all cases be considered 4 feet.

14. On the completion of the cuttings and the underdrains provided for in last clause, ditches for the removal of surface water shall be formed along each side at the bottom of the slopes according to directions to be given.  
 20 Catch-water ditches shall also be formed some distance back from the top of slopes to exclude from the excavation any water flowing from the adjoining lands; the Contractor shall also construct all other drains and ditches which the Engineer may deem necessary for the perfect drainage of the Railway and works.

15. All open ditches in cuttings and elsewhere, and all excavations required for turning, making or changing water-courses other than the underdrains above-mentioned, the formation of public roads, grading depôt grounds, branches or turn-outs and foundation pits for masonry, and the material deposited as directed by the Engineer, must be executed as may from time to time be directed.

30 16. The embankments must be made to such sufficient height and width as will allow for the subsidence of the same, and both cuttings and embankments shall be left at the completion of the contract at such heights, levels, widths, and forms as directed by the Engineer.

17. The whole of the grading shall be carefully formed to the levels given, and the roadway in cuttings shall invariably be rounded and left from 6 to 8 inches lower at the sides than on the centre line. In rock cuttings it will be sufficient to form a water channel about two feet wide and eight inches deep along each side. All materials found in excavations, whether in road-beds, cuttings, ditches, water-channels, road crossings, borrowing pits, or elsewhere,  
 40 must be deposited in such places as the Engineer may direct. In cases where the road-bed excavations are insufficient to form the embankments, the deficiency shall be supplied by widening the cuttings, or from the sides of the road, or from borrowing pits, but no material shall be so supplied without his concurrence, and not until the cuttings are completed, without his express directions. All borrowing pits shall, if required by the Engineer, be dressed to a good shape and properly drained; where material to make up

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18. Where the excavation in a cutting exceeds what may be required to make the embankments of the specified width, the Engineer may direct that the embankments be increased in width with the surplus material, and when this is done to his satisfaction, the remainder, if any, may be wasted; but in every case where either borrowing or wasting is resorted to, the materials must be taken and deposited as he may regulate and direct.

19. In cases where pitching or rip-raping will be required for the protection of embankments contiguous to streams, all stone suitable for this work found in excavations may be removed and deposited in some convenient place until required, and all good building stone which may be found in rock excavations may, with the approval of the Engineer, be preserved and used in masonry. 10

20. Rip-rap work, wherever required and ordered for the protection of slopes of embankments, must be well and carefully performed, in such manner and of such thickness as may be directed.

21. Roads constructed to and from any point on the line of railway for the convenience of the contractor, for the conveyance of material or otherwise, must be at its own risk, cost and charges, but the Contractor will not be required to purchase land for the railway track, for branches or for borrowing pits. 20

22. Wherever the line is intersected by public or private roads, the contractor must keep open at his own cost convenient passing places, and he shall be held responsible for keeping all crossings during the progress of the works in such condition as will enable the public to use them with perfect safety, and such as will give rise to no just ground of complaint. Contractors will be held liable for any damages resulting from negligence on their part or that of their men. At all public roads crossed on the level, the contractor will be required to put in two substantial cattle guards of wood of such dimensions as may be directed by the Engineer, and also provide the notice boards required by law. 30

23. Whenever any material is met with in the excavation which the Engineer shall consider suitable and required for ballast, the same shall, at his discretion, be reserved for that purpose.

24. When slips occur in cuttings, after they are properly formed, the material must be immediately removed by the contractor, the slopes reformed and such precautions adopted as the Engineer may deem necessary, the whole work being done at the expense of the contractor.

25. In forming embankments, great care must be taken to place against the backs of all walls exposed to the action of frost, three feet in thickness, or any greater thickness that the Engineer may direct, of rip-rap backing consisting of small stones blinded with spalls or coarse gravel, to prevent the retention of moisture and the action of frost thereon. And in forming embankments between wing walls, against abutments of bridges, viaducts, or culverts, and other arches, the earth filling must be carefully packed or pounded in 40

thin layers, and a proper quantity of material must be carefully placed equally against each other side by side and over all bridges, culverts or other work before the embankment approaches it, and in forming embankments the greatest care must be observed and every precaution must be taken to load the masonry of structure evenly.

26. In the event of earth excavation being proceeded with in winter, no snow or ice must be placed in embankments, or allowed to be covered up in them, and all frozen earth must be excluded from the heart of the embankments.

10 27. The contractor shall, at his own cost, before the work is finally accepted, finish up cuttings and embankments, dress and drain borrowing pits when required, dress slopes to the required angle, repair all damages by frost or other causes, and complete everything connected with the grading of the road bed, bridging, &c., in a creditable and workmanlike manner, in accordance with the directions and to the satisfaction of the Engineer.

#### *Foundations.*

20 28. Foundation pits must be sunk to such depths as the Engineer may deem proper, for the safety and permanency of the structure to be erected; they will in all cases be sunk to such depths as will prevent the masonry being acted on by the frost. The material excavated therefrom will be deposited in embankment, unless the Engineer direct otherwise. Wherever timber or other artificial foundations may be found expedient the pits will be made of sufficient dimensions to admit them without difficulty.

29. No masonry shall be commenced in any foundation pits before they have been inspected and approved by the Engineer, and they must be kept free from water during the progress of the work until the masonry is brought above the level of the surface.

30 30. Foundation timbers, when required, will be of such dimensions and of such kinds as the Engineer may direct. The timber employed will be Tamarac or Haemetic, Hemlock, Black Spruce or Pine, in plank, from 3 to 6 inches thick, or timber flattened on two sides only, and ranging from 6 inches to 12 inches thick. The faces of the flattened timber will, at least, measure as much as its thickness, and the bark will be removed from the sides not flattened.

31. All spikes, bolts, straps, or other ironwork found necessary to be used in timber foundations, must be of the best quality of iron usually employed for similar purposes.

40 32. Whenever the Engineer may direct piling to be done, the timber shall be in every respect sound and of such description as he may approve. Where he may think it necessary, trial piles shall first be driven.

33. The piles shall be carefully and truly pointed, shod and hooped with iron as may be directed. They shall be driven to any depth the Engineer may deem expedient, and the weight of ram as well as the fall shall be such as he

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may consider necessary. The greatest care must be taken to drive the piles plumb or battered, in such positions and distances apart as he may direct; any pile that may be damaged or too short or out of proper line when driven shall be taken up and replaced by another; the heads of piles must not be injured in driving.

34. Wherever concrete is employed, it will be composed of hydraulic lime, clean, sharp sand and good gravel of approved quality and proportions. The proportion of sand and lime will be about the same as in mortar, and in making the concrete, a sufficient quantity will be used with the gravel, to fill up every interstice, and render the mass when set perfectly solid and compact. 10

#### *Masonry.*

35. All the masonry must be of a substantial and permanent character, made of durable and suitable materials, and in every respect equal to the best description of masonry in railway works.

36. The masonry shall not be started at any point before the foundation has been properly prepared; nor until it has been examined and approved by the Engineer, nor until the Contractor has provided a sufficient quantity of proper materials and plant to enable the work to be proceeded with regularly and systematically. 20

37. Hydraulic lime mortar will be used, unless otherwise directed, in building all masonry, from the foundations up to a line two feet above the ordinary level of the stream. It will be used also in turning arches, in laying girder beds, coping, covering of walls generally, in lipping and in pointing. The Hydraulic lime or cement must be fresh ground, of the best brand, and it must be delivered on the ground, and kept till used, in good order. Before being used, satisfactory proof must be afforded to the Engineer of its hydraulic properties, as no inferior cement will be allowed.

38. Lime mortar must be made of the best common lime and will be employed in all masonry (except dry) where cement is not directed to be used. 30

39. Both cement and lime must be thoroughly incorporated with approved proportions of clean, large grained sharp sand. The general proportions may be one part of lime to two parts of sand, but this may be varied according to the quality of the lime or cement. Mortar will only be made as required, and it must be prepared and used under the immediate direction and to the satisfaction of an inspector by the contractor's men, failing which the Inspector may employ other men to prepare the mortar, and any expense incurred thereby shall be borne by the Contractor. Grout shall be formed by adding a sufficient quantity of water to well tempered and well proportioned mortar. 40

40. The stone used in all masonry on the line of railway must be of a durable character, large, well proportioned and well adapted for the construction of substantial and permanent structures; parties tendering must satisfy themselves as to where fitting material for the masonry can be most conveniently procured.

41. The masonry will be classified as follows :—

- 1st class masonry, in cement.  
 " " in common lime.  
 2nd class masonry, in cement.  
 " " in common lime.  
 " " dry.

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42. First-class masonry shall be in regular courses, of large, well shaped stone, laid in mortar on their natural beds, the beds and vertical joints will be hammer dressed, so as to form quarter inch joints. The vertical joints will be dressed back square 9 inches, the beds will be dressed perfectly parallel throughout. The work will be left with the "quarry face" except the outside arrises, strings, and coping, which will be chisel dressed.

43. The courses of first-class masonry will not be less than twelve inches, and they will be arranged in preparing the plans to suit the nature of the quarries, courses may range up to 24 inches and the thinnest courses invariably be placed towards the top of the work.

44. Headers will be built in every course not farther apart than 6 feet, they will have a length in line of wall of not less than 24 inches, and they must run back at least  $2\frac{1}{2}$  times their height, unless when the wall will not allow this proportion, in which case they will pass through from front to back. Stretchers will have a minimum length in line of wall of 30 inches, and their breadth of bed will at least be  $1\frac{1}{2}$  times their height. The vertical joints in each course must be arranged so as to overlap those in the course below 10 inches at least.

45. The quoins of abutments, piers, etc., shall be of the best and largest stones, and have chisel drafts properly tooled on the upright arrise, from two to six inches wide, according to the size and character of the structure.

46. Coping stones, string courses, and cut-waters shall be neatly dressed in accordance with plans and directions to be furnished during the progress of the work.

47. The bed stones for girders shall be the best description of sound stone, free from dries or flaws of any kind, they must not be less than 12 inches in depth for the smaller bridges, and eight feet superficial area on the bed. The larger bridges will require bed stones of proportionally greater weight; these stones shall be solidly and carefully placed in position, so that the bridge will sit fair on the middle of the stones.

48. The backing will consist of flat bedded stone, well shaped, having an area of bed equal to four superficial feet or more. Except in high piers or abutments two thicknesses of backing stone, but not more, will be allowed in each course, and their joints must not exceed that of the face work; in special cases where deemed necessary by the Engineer to insure stability the backing shall be in one thickness; the beds must, if necessary, be scabbled off, so as to give a solid bearing—no pinning will be admitted. Between the backing and face stones there must be a good square joint, not exceeding one inch in width, and the face stones must be scabbled off to allow this. In walls over three feet in thickness headers will be built in front and back alternately, and great

**RECORD.** care must be taken in the arrangement of the joints so as to give a perfect bond.

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49. Every stone must be set in a full bed of mortar and beaten solid, the vertical joints must be flushed up solid, and every course must be perfectly level and thoroughly grouted.

50. Second-class masonry shall be built of good, sound, large flat-headed stones laid in horizontal beds. It may be known as random work or broken coursed rubble. The stones employed in this class of masonry will generally be not less in area of bed than three superficial feet nor less in thickness than eight inches, and they must be hammer dressed so as to give good beds with half-inch joints. In smaller structures and in cases where stones of good size and thickness cannot be had, they may, if in other respects suitable, be admitted as thin as five inches. All stones must be laid on their natural beds. 10

51. Headers shall be built in the wall from front and back alternately at least one in every five feet in line of wall and frequently in the rise of the wall. In the smallest structures headers shall not be less than 24 inches in length and the minimum bed allowed for stretchers shall be 12 inches. In the larger structures all stones must be heavier in proper proportion. Every attention must be paid to produce a perfect bond and to give the whole a strong, neat, workmanlike finish. 20

52. Wing walls will generally be finished with steps formed of sound, durable stone, and not less than from 10 to 12 inches thick, and six feet superficial area; other walls will be covered with coping of a similar thickness, and of seven feet or upwards superficial area. Those coverings will be neatly dressed, when required, and as may be directed. The walls of the box culverts will be finished with stones the full thickness of wall, and the covers will be from 10 to 15 inches thick, according to the span; they must have a bearing of at least 12 inches on each wall, and they must be fitted sufficiently close together to prevent the earth from falling through.

53. In second-class masonry, each stone, except when dry work is intended, will be laid in full mortar, all joints flushed solid and each course regularly and thoroughly grouted. 30

54. In all walls built in common line, the exposed faces will have a four inch lipping of cement.

#### *Arches.*

55. A distinction will be made between arches of 10 feet span and upwards and those of 8 feet span and under. The former will be of first-class masonry although they may be constructed on walls of second-class work. Arches of 8 feet span and under will be second-class masonry. Arches of each class will be **semicircular**. 40

56. First-class arches will be constructed of stones cut, so that when laid, their beds will radiate truly from the centre of the circle, the depth of stones will of course vary with the span, but will never exceed 30 inches, they must not be less in length than 27 inches, and it must break joint 10 inches; their thickness on the soffit must be at least 9 inches, and it will be dressed to the circle. All the stones must be dressed to the full depth of bed so as to give

truly radiated joints from 3-16 to  $\frac{1}{4}$  inch, they must be set without pinning of any kind, and the end joints must be properly squared. Each stone to be full bedded in cement, and each course afterwards thoroughly grouted. The outer ring stones to be neatly worked with a chisel draft around their edges.

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57. Second-class arches shall be constructed of suitable flat bedded stones ranging according to the span from 16 to 24 inches deep and with a minimum length of from 16 to 24 inches, and 5 to 6 inches in thickness on the soffit, they must invariably extend through the entire thickness of the arch. Each stone is to be well and closely fitted so as to give half-inch joints and to break joint  
 10 with its fellow 7 to 9 inches. The whole must be laid in thin mortar and each course must be well grouted immediately after being laid. The outer arch stones to be as nearly uniform in thickness as possible, of large size and neatly incorporated with the perpendicular face of the masonry. The key stones to be 10 to 12 inches on the soffit, to have a chisel draft around their edges, and to project beyond the face of the wall 2 or 3 inches.

58. Arches of each class shall be built in cement, and before being covered with earth or the centering removed they must be thoroughly flushed on the back, levelled up and rounded to a moderately even and smooth surface with the same material.

59. Centres of arches must in all cases be wall formed, of ample strength,  
 20 securely placed in position, and in every respect to the satisfaction of the Engineer. The ribs must not be placed farther apart than three feet in any case. The laggings shall be cut to a scantling of three inches square. The supports of centres shall be substantial and well constructed and they must be provided with proper wedges for easing centres when required.

60. Structures having more than one arch shall be provided with as many centres as the Engineer may deem proper, and in no case shall the centres be struck without his sanction.

61. Centering and scaffolding of all kinds shall be provided by the  
 30 contractor.

62. All masonry must be neatly and skilfully pointed, but if done out of season, or if from any other cause it may require repointing before the expiration of the contract, the contractor must make good and complete the same at his own cost. Work left unfinished in the autumn must be properly protected during the winter by the contractor at his risk and cost.

#### *Miscellaneous Work.*

63. After the masonry of a structure has been completed for a period of four or five weeks, the formation of the embankment around it may be proceeded with. The earth must be carefully punned in thin layers around the walls, and  
 40 in this manner the filling must be carried up simultaneously on both sides. The contractor must be extremely careful in forming the embankments around culverts and bridges, as he will be held liable for any damages to the structures that may arise. The punning must be carefully attended to, and the whole filling must invariably be done in uniform courses from the bottom to the top

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64. The bottoms of culverts will be paved with stones set on edge, to a moderately even face, packed solid, and the interstices filled with grout formed of hydraulic cement. The paving will be from 12 to 16 inches deep.

65. All the works shall be executed in a thoroughly good, substantial and workmanlike manner, to the satisfaction of the Engineer, and upon their completion the contractor shall clear away all rubbish and unnecessary material.

### *Bridges.*

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66. To be of the most approved Howe Truss pattern, built of pine, with white oak keys, cast-iron prisms, and wrought-iron rods, the whole to be first-class material and workmanship, painted three coats. Detail drawings and specifications will be prepared during the progress of the work by the Engineer, to suit each span of the bridge, and to which the contractor must work.

A. WALSH,  
ED. B. CHANDLER,  
C. J. BRYDGES,  
W. F. COFFIN,  
Commissioners.

20

Sandford Fleming, Chief Engineer,  
Intercolonial Railway Office,  
Ottawa, 1869.

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### Form of Contract.

No. 5.  
Form of  
Contract,  
26th of  
Oct. 1869.

This Indenture, made this twenty-sixth day of October, in the year of our Lord one thousand eight hundred and sixty-nine, between Jean Baptiste Bertrand, of the city of Quebec, in the Province of Quebec, in the Dominion of Canada, Contractor, and François-Xavier Bertrand, of the same city of Quebec, Contractor, carrying on business as co-partners, under the name, style, and firm of "J.-B. Bertrand and Company," hereinafter designated as "the Contractors," of the first part; and Her Majesty Queen Victoria, represented herein by Aquila Walsh, Esquire, M.P., the Honourable Edward Barron Chandler, Charles John Brydges, Esquire, and the Honourable Archibald Woodbury McLelan, Commissioners appointed under and by virtue of an Act of the Parliament of Canada, passed in the Session held in the thirty-first year of Her Majesty's reign, intituled "An Act respecting the construction of the Intercolonial Railway," hereinafter designated as "the Commissioners," of the second part.

Whereas it was and is, in and by the said cited Act, amongst other things enacted and provided that there shall be a railway constructed connecting the port of Rivière du Loup, in the Province of Quebec, with the line of railway

leading from the City of Halifax, in the Province of Nova Scotia, at or near the town of Truro, and that such railway shall be styled and known as "the Intercolonial Railway"; that such railway shall be a public work belonging to the Dominion of Canada, and shall be made with a gauge of five feet six inches, and on such grades in such places, in such manner, with such materials, and on such specifications as the Governor in Council shall determine and appoint as best adapted to the general interests of the Dominion; and further, that the construction of the said Railway and its management until completed shall be under the charge of four Commissioners, with the powers and duties provided by the said Act; and whereas the said Aquila Walsh, Edward Barron Chandler, Charles John Brydges, and Archibald Woodbury McLelan have been duly appointed such Commissioners, and in the discharge of the duties imposed on them by the said Act, have duly advertised for tenders for the construction of certain portions of the said Railway, including the portion hereinafter described and designated as "Section number nine," and the tender of the Contractors for the construction of such Section number nine, in the manner hereinafter set forth, has been accepted, and the Contractors have in consequence agreed (by and with the sanction of the Governor in Council, as provided by the said Act) with the Commissioners to construct and complete the said Section number nine of the said Railway, and to supply all proper and requisite materials therefor upon the terms and subject to the conditions, stipulations, and agreements hereinafter contained.

Now this Indenture witnesseth that in consideration of the sum of three hundred and fifty-four thousand eight hundred and ninety-seven dollars (\$354,897.00) of lawful money of Canada, to be paid to the Contractors, their heirs, executors, administrators and assigns, by Her Majesty, her heirs or successors, in manner hereinafter mentioned, they, the Contractors, do and each and every of them doth hereby for themselves and himself, and for the heirs, executors, and administrators of themselves and himself respectively, jointly and severally covenant, promise, and agree to and with Her Majesty, her heirs and successors, in manner following, that is to say:—

1. They, the Contractors, shall and will well, truly, and faithfully make, build, construct, and complete that portion of the Railway known as "Section number nine," and more particularly described as follows, to wit,—

Commencing at the easterly end of the Section of the said Railway numbered six (6), and being within the Province of New Brunswick in the said Dominion of Canada, and extending in an easterly direction to the station of the said Railway numbered on the profile thereof one thousand one hundred and nine (1,109), and being on the easterly side of the Nigadoo River; the said Section number nine being of the length of twenty-one miles, be the same more or less, and all the bridges, culverts, and other works appurtenant thereto, to the entire satisfaction of the Commissioners and according to the plans and specification thereof, signed by the Commissioners and the Contractors, the plans whereof so signed are deposited in the office of the Commissioners in the City of Ottawa, and the specification whereof so signed is hereunto annexed and marked "Schedule A," which specification is to be

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construed and read as part hereof, and as if embodied in and forming part of this Contract. But nothing herein contained shall be construed to require the Contractors to provide the right of way for the construction of the Railway.

2. The Contractor shall be bound to provide all proper tools, plant and materials for the execution of the works, and shall be responsible for the sufficiency of the same: they shall take upon themselves the entire responsibility of the centring, scaffolding, and all other means used for the fulfilment of the Contract, whether such means may or may not be approved of or recommended by the Engineer; and the Contractors shall alone suffer loss, and shall indemnify and hold harmless Her Majesty and the Commissioners from loss arising from, and shall run all risks of accidents or damages from whatever cause they may arise, until the completion of the Contract. The Contractors shall also be responsible for all damages claimable by the owners or occupants of land, arising from loss of crops or cattle or injury thereto respectively, sustained by any cause or thing connected with the construction of the work, or through any of their agents or workmen; and they shall be responsible for all damage which may be done to property or persons through the blasting of rocks or other operations carried on by them; and they shall assume all risks and contingencies that may arise during the progress of the works, and shall make good all defects and failures, whether from negligence on the part of themselves or their agents or workmen, or from bad workmanship, or the use of improper materials; and they shall hold harmless and indemnify Her Majesty from all claims, losses or damages, in respect thereof. The Contractor shall, subject to the approval of the Engineer as to the same, make all necessary temporary provision during the progress of the works, for the owners or occupants of lands crossing the line of railway, and shall provide the necessary accommodation for the passage of the public at the intersection of roads or highways; and shall also make such provision until fences be erected, as may be necessary to prevent the straying of cattle upon the line of railway. In the event of any bad materials being delivered or worked up or any bad work being executed at any time, the same shall be immediately removed on notice being given by the Engineer, and the work shall be reconstructed at the expense of the Contractors in strict conformity with this Contract and the said specification, and to the entire satisfaction of the Engineer. The Contractor shall employ as many competent agents and foremen on the whole works as may be considered requisite by the Engineer, and the said agents and foremen shall be regularly and constantly present on the works for the purpose of effectually overseeing the same, and receiving instructions from the Engineer. The Contractors shall respect and preserve, in their true and original position, all bench marks, hubs, all centre slope, reference and all other stakes and marks placed or made by the Engineer on or near the line of work; and shall adopt every means in their power to prevent the same being burned in the clearing or altered, removed, or destroyed at any time, and whenever required by the Engineer, they shall furnish the necessary assistance to correct or replace any stake or marks, which, through any cause, may have been removed or destroyed. The Contractors shall not encourage, but shall take all lawful means in their power to

prevent the sale of spirituous liquors on or in the vicinity of the line of railway. The Contractors shall perform and execute all the works required to be performed by this Contract and the said specification, in a good, faithful, substantial and workmanlike manner, and in strict accordance with the plans and specifications thereof and with such instructions as may be from time to time given by the Engineer, and shall be under the direction and constant supervision of such district, division, and assistant engineers and inspectors as may be appointed. Should any work, material, or thing of any description whatsoever, be omitted from the said specification or the contract, which, in the  
 10 opinion of the Engineer is necessary or expedient to be executed or furnished, the Contractor shall, notwithstanding such omission, upon receiving written directions to that effect from the Engineer, perform and furnish the same. All the works are to be executed and materials supplied, to the entire satisfaction of the Commissioners and Engineer; and the Commissioners shall be the sole judges of the work and material, and their decision on all questions in dispute with regard to the works or materials, or as to the meaning or interpretation of the specification or plans, or from points not provided for, or not sufficiently explained in the plans or specifications, is to be final and binding on all parties.

20 3. The Contractors shall commence the works embraced in this Contract within 30 days from and after the date hereof, and shall diligently and continuously prosecute and continue the same, and the same respectively and every part thereof shall be fully and entirely completed in every particular, and given up, under final certificate and to the satisfaction of the Commissioners and Engineer, on or before the first day of July in the year of our Lord one thousand eight hundred and seventy-one, time being declared to be material and of the essence of this Contract, and in default of such completion as aforesaid on or before the last-mentioned day, the Contractors shall forfeit  
 30 all right, claim or demand to the sum of money or percentage hereinafter agreed to be retained by the Commissioners and any and every part thereof, as also to any moneys whatever which may be at the time of the failure of the completion as aforesaid due or owing to the Contractors, and the Contractors shall also pay to Her Majesty as liquidated damages, and not by way of fine or penalty, the sum of two thousand dollars (\$2,000.00) for each and every week, and the proportionate fractional part of such sum for every part of a week, during which the works embraced within this contract, or any portion thereof, shall remain incomplete, or for which the certificate of the Engineer approved by the Commissioners shall be withheld, and the Commissioners may deduct and retain in their hands such sums as may become due as liquidated damages  
 40 from any sum of money then due or payable or to become due or payable thereafter to the Contractors.

4. The Engineer shall be at liberty, at any time before the commencement or during the construction of any portion of the work, to make any changes or alterations which he may deem expedient in the grades, the line of location of the Railway, the width of cuttings or fillings, the dimensions or character of structures or in any other thing connected with the works, whether or not such changes increase or diminish the work to be done or the expense

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 Oct. 1869—  
*continued.*

of doing the same, and the Contractors shall not be entitled to any allowance by reason of such changes, unless such changes consist in alterations in the grades or the line of location, in which case the Contractors shall be subject to such deductions for any diminution of work or entitled to such allowance for increased work (as the case may be) as the Commissioners may deem reasonable, their decision being final in the matter. The Engineer shall have full power to dismiss any foreman, workman or other person employed, whom he may deem unfit for the duties assigned him, or who may, in the opinion of the Engineer, be guilty of slighting the work, or of wilful disobedience of orders, or improper, intemperate, or disorderly conduct, and the Contractors shall forthwith supply the places of all such men so dismissed, and shall not employ them again on the works. 10

5. The Contractors shall, by themselves, their agents and workmen, faithfully carry on the works until completion, and shall not sell, assign, or transfer this Contract to any person or persons whomsoever, without the consent of the Commissioners first had and obtained.

6. The Commissioners shall have the right to suspend operations at any particular point or points or upon the whole of the works, and in the event of such right being exercised so as to cause any delay to the Contractors, then an extension of time equal to such delay or detention shall be allowed them to complete the Contract, but any such delay shall not vitiate or void this Contract, or any part thereof, or the obligation hereby imposed on any concurrent or other bond or security for the performance of this Contract, nor shall the same entitle the Contractors to any claim for damages unless the Commissioners shall otherwise determine, and then only for such sum as they may think just and equitable. If at any time during the progress of the works it should appear that the force employed, or the rate of progress then being made, or the general character of the work being performed, or the material supplied or furnished are not such as to ensure the completion of the said works within the time stipulated or in accordance with this Contract, the Commissioners shall be at liberty to take any part or the whole works out of the hands of the Contractors, and employ such means as they may see fit to complete the works at the expense of the Contractors, and they shall be liable for all extra expenditure incurred thereby; or the Commissioners shall have power at their discretion to annul this Contract. Whenever it may become necessary to take any portion or the whole work out of the hands of the Contractors or to annul this Contract, the Commissioners shall give the Contractors seven clear days' notice in writing of their intention to do so, such notice being signed by the Chairman of the Board of Commissioners, or by any other person authorised by the Commissioners, and the Contractors shall thereupon give up quiet and peaceable possession of all the works and materials as they then exist, and without any other or further notice or process or suit at law or other legal proceedings of any kind whatever, or without its being necessary to place the Contractors *en demeure*. The Commissioners, in the event of their annulling the Contract, may forthwith or at their discretion proceed to re-let the same or any part thereof or employ additional workmen, tools and materials, as the case may be, and complete the works at the expense 30 40

of the Contractors, who shall be liable for all extra expenditure which may be incurred thereby, and the Contractors and their assigns or creditors shall forfeit all right to the percentage retained and to all money which may be due on the works, and they shall not molest or hinder the men, agents or officers of the Commissioners from entering upon and completing the said works as the Commissioners may deem expedient. If at any time it shall appear to the Commissioners that the security of the works is endangered or the peace of the neighbourhood is likely to be disturbed, or any other difficulty likely to arise by reason of the men being left unpaid, the Commissioners may pay any  
 10 arrears of wages so far as they can ascertain the same to be due on the best information they can obtain, and charge the same as a payment on account of this Contract.

7. Any notice or other paper connected with this Contract may be served on the Contractors by being left at his or their usual domicile or by being directed to them or either of them through the Post Office, at their or his last known place of business, and any notice or paper so left or directed shall to all intents and purposes be considered legally served.

8. It shall be in the power of the Commissioners to make payments or advances on materials, tools or plant of any description, procured for the  
 20 works or used or intended to be used about the same, in such cases and upon such terms and conditions as to the Commissioners may seem proper, and whenever any advance or payment shall be made to the Contractors as aforesaid, the materials, tools or plant upon which such advance or payment shall be made shall thenceforth be vested in and held as collateral security by Her Majesty, for the due fulfilment by the Contractors of the present Contract, it being, however, well understood that all such materials, tools or plant shall remain and be at the risk of the Contractors, who shall be responsible for the same until finally used and accepted or given up by the Commissioners; but  
 30 the Contractors shall not exercise any act of ownership or control whatever over any materials, tools or plant, upon which any advance or payment has  
 been so made, without the permission in writing of the Commissioners, and the Commissioners may retain and deduct any such payment from the amount payable to the Contractors upon the next or any succeeding certificate thereafter.

9. It is distinctly understood, intended and agreed, that the said price or consideration of three hundred and fifty-four thousand eight hundred and ninety-seven dollars (\$354,897.00) shall be the price of, and be held to be full compensation for all the works embraced in or contemplated by this Contract or which may be required in virtue of any of its provisions or by law, and that  
 40 the Contractors shall not upon any pretext whatever be entitled by reason of any change, alteration or addition made in or to such works, or in the said plans and specification, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act, intituled "An Act respecting the construction of the Intercolonial Railway," or in the Commissioners or Engineer by this Contract or by law to claim or demand any further or additional sum for extra work or as damages or otherwise, the

**RECORD.** Contractors hereby expressly waiving and abandoning all and any such claim or pretension to all intents and purposes whatsoever, except as provided in the fourth Section of this Contract.

No. 5.  
Form of  
Contract,  
26th of  
Oct. 1869—  
*continued.*

10. In this Contract and in the said Specification, the words "Her Majesty" shall mean Her Majesty Queen Victoria, her heirs and successors. The words "the Commissioners" shall mean the Commissioners for the time being, appointed under the herein cited Act, intituled "An Act respecting the construction of the Intercolonial Railway." The words "the Contractors" shall mean the hereinbefore mentioned Jean-Baptiste Bertrand and François-Xavier Bertrand, and the heirs, executors and administrators of them and each of them, and each and every of them jointly and severally. The words "the work" or "the works" shall, unless the Contract require a different meaning, mean the whole of the work and materials, matters and things required to be done, furnished and performed by the Contractors under this Contract. The words "the Engineer," shall mean the Chief Engineer for the time being, appointed under the said Act intituled "An Act respecting the construction of the Intercolonial Railway," and shall extend to and include any of his assistants, acting under his instructions, and all instructions or directions given by those acting for the Chief Engineer will be subject to his approval. The word "Railway" shall mean the said Intercolonial Railway. 10

The construction of the words given in this clause shall not control any more extended signification or construction which may be given to any such words in this Contract or the said specifications. 20

11. And it is further mutually agreed upon by the parties hereto, that cash payments equal to 85 per cent. of the value of the work done, approximately made up from the returns of progress measurements, will be made monthly, on the certificate of the Engineer, that the work for or on account of which the sum shall be certified, has been duly executed, and upon approval of such certificate by the Commissioners. On the completion of the whole work to the satisfaction of the Engineer, a certificate to that effect will be given, but the final and closing certificate including the 15 per cent. retained will not be granted for a period of two months thereafter. The progress certificates shall not in any respect be taken as an acceptance of the work or release of the Contractor from his responsibility in respect thereof, but he shall at the conclusion of the work deliver over the same in good order, according to the true intent and meaning of this Contract and of the said specification. 30

12. This Contract and the said specification shall be in all respects subject to the provisions of the herein first cited Act intituled "An Act respecting the construction of the Intercolonial Railway," and also in so far as they may be applicable to the provisions of "the Railway Act of 1868." 40

In witness whereof, the Contractors have hereunto respectively set their hands and affixed their seals, and the Commissioners, acting herein on behalf of Her Majesty have hereunto respectively set their hands and affixed their seals the day and year first above written.

Signed, sealed, and delivered,

The name of the Honourable Archibald Woodbury McLelan having been first substituted for that of William Foster Coffin, on the first page.

By the two Contractors in the presence of John McNulty, of the City of Quebec, Bailiff.

10 And by the four Commissioners in the presence of John Stewart.

J. B. BERTRAND.  
F. X. BERTRAND.

A. WALSH.  
E. B. CHANDLER.  
C. J. BRYDGES.  
A. W. McLELAN.

RECORD.  
No. 5.  
Form of Contract,  
26th of Oct. 1869—  
*continued.*

INTERCOLONIAL RAILWAY.

FORM OF TENDER.

Section No. \_\_\_\_\_.

No. 6.  
Form of Tender.

20 The undersigned having seen the plans and profiles of Section No. \_\_\_\_\_ of the Intercolonial Railway, hereby tender to construct said section in accordance with the plans and profiles, and all other detailed plans which may be supplied, and in accordance with the general specifications signed by the Commissioners, and dated Ottawa, 26th January 1870, and to execute the contract, a form of which is printed at the end of the specifications binding \_\_\_\_\_ not to demand any extras whatever for the sum of \_\_\_\_\_ dollars \_\_\_\_\_ cents, being at the rate of \$16,899.86 (sixteen thousand eight hundred and ninety-nine dollars and eighty-six cents) per mile of railway.

And bind \_\_\_\_\_ to complete such section for the above-named sum to the satisfaction of the Chief Engineer and the Commissioners, such sum to be the full payment, without extras of any kind, for the entire completion of the section.

30 And propose \_\_\_\_\_ and \_\_\_\_\_ as sureties for the due fulfilment of this tender.

\_\_\_\_\_  
Name.

\_\_\_\_\_  
Address.

\_\_\_\_\_  
Date.

\_\_\_\_\_  
Witness.

We, the abovenamed, tendered as sureties, hereby agree to execute such bond or other document as may be required by the Commissioners for the due p. 4887. F

RECORD. performance of the contract attached to the specifications, &c., upon which the above tender is made.

No. 6.  
Form of  
Tender—  
*continued.*

\_\_\_\_\_  
Name.  
\_\_\_\_\_  
Address.  
\_\_\_\_\_  
Name.  
\_\_\_\_\_  
Address.

\_\_\_\_\_  
Witness.

And \_\_\_\_\_ hereby further supply, solely for the purpose of informing the Commissioners, and not in any way to affect the contract, the following schedule of prices for some of the principal items of construction :— 10

SCHEDULE.

	Canadian Currency.
	\$ c.
1. Clearing and close cutting, per acre - - -	16 20
2. Grubbing, per acre - - - - -	18 00
3. Fencing, per specification, per 100 lineal feet - -	5 40
4. „ best stake and rider snake fence, per 100 lineal feet - - - - -	4 50
5. Rock excavation, per cubic yard - - - - -	0 90
6. Earth excavation (including average haul), per cubic yard	0 27 20
7. Under drains, per 100 lineal feet - - - - -	4 50
8. Riprap, per cubic yard - - - - -	5 40
9. Concrete, per cubic yard - - - - -	4 50
10. First-class masonry, per cubic yard - - - - -	9 00
11. Second-class masonry, per cubic yard - - - - -	7 20
12. Paving, per cubic yard - - - - -	6 30
13. Iron cylinders, exclusive or concrete ( <i>see</i> Bill of Works) per lineal foot in place - - - - -	
(In the event of iron cylinders being employed, the contractor will be allowed for them, as well as for the concrete used, at the price in schedule, and a deduction will be made for the saving effected in masonry and other work.)	30
14. Foundations, embracing all service referred to under this heading in Bill of Works - - - - -	2,700 00
15. Bridge superstructure—Howe Truss Bridge, complete in place, each 100 feet clear span - - - - -	
16. Ditto, each 80 feet clear span - - - - -	1,296 00
17. Ditto, each 60 feet clear span - - - - -	864 00
18. Ditto, each 40 feet clear span - - - - -	
19. Superstructure for beam culverts, 6 to 12 feet span, per lineal foot of clear span - - - - -	40

20. Superstructure for beam culverts, 6 to 12 feet span, per lineal foot of clear span	\$	c.	RECORD.
21. Road crossings—each public crossing, with cattle guards, &c., complete	10	80	No. 6.
22. Each double farm crossing, with gates, &c., complete	22	50	Form of Tender—
23. Each single " " " " " "	18	00	continued.
24. Omissions and contingencies, embracing all services referred to under this heading in Bill of Works	7,200	00	
Special works (a lump sum for each)			

10 ON SECTION No. 13.

- Tunnel No. 1, complete, with approaches at station, 439 × 80
- Tunnel No. 2, complete, with approaches at station, 450 × 56
- Tunnel No. 3, complete, with approaches at station, 660
- Tunnel No. 4, complete, with approaches at station, 755

ON SECTION No. 3.

- Completion of road diversion between stations 105 and 260 about 3 miles
- Crib work protection to embankments at Mill Creek

ON SECTION No. 4.

20 An aboideau in place of a masonry structure at each of the following stations, the aboideau to be formed in the best possible manner and provided with heavy brass hinged sluice gates; the contractor to settle all damages with owners or occupants of lands for the sums mentioned:

- At station 201
- At station 237
- At station 288
- At station 355
- At station 400
- At station 418

30

ON SECTION No. 4.

Protection work on Macan River, near station 300 (see note to schedule of structure)

In the event of aboideau, iron cylinders, or other structures, being substituted at any points for the masonry structures mentioned in the schedule, a deduction to be made for the saving in quantities effected thereby, and an allowance made for the substituted structure at prices in the schedule.

\_\_\_\_\_  
Name.

\_\_\_\_\_  
Address.

\_\_\_\_\_  
Date.

40

\_\_\_\_\_  
Witness.

RECORD.

Exhibit "B" referred to in Statement of Admissions.

No. 7.  
Exhibit "B" is in same wording as Schedule "A" printed at pages 26 to 37 of case. Extract from Tender of Contract, Section 15.

Schedule "A."—"General Specification for construction of the Works" Contract made the 15th June 1870 "between Jean-Baptiste Bertrand and François Xavier Bertrand, carrying on the business of contractors as co-partners in the City of Quebec, in the Province of Quebec, in the Dominion of Canada, under the name, style, and firm of 'J.-B. Bertrand and Company,' of the first part, and Her Majesty Queen Victoria of the second part." In consideration of the sum of \$363,520.00 the parties of the first part agreed to "build, construct, and complete that portion of the Railway (the Intercolonial) known as Section No. 15." 10

The remainder of the Contract is in the same wording as that to be found printed at pages 38 to 45 of case.

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## INTERCOLONIAL RAILWAY.

### FORM OF TENDER.

#### Section No 15.

No. 8.  
Tender of Contract for Construction of Section 15, 29th of March 1870.

The undersigned having seen the plans and profiles of Section No. 15 of the Intercolonial Railway, hereby tender to construct said section in accordance with the plans and profiles, and all other detailed plans which may be supplied, and in accordance with the general specifications signed by the Commissioners, and dated Ottawa, 26th January 1870, and to execute the contract, a form of which is printed at the end of the specifications binding ourselves not to demand any extras of any kind whatever, for the sum of three hundred and sixty thousand and twenty dollars, being at the rate of thirty thousand and one dollars and sixty-six cents per mile of railway. 20

And we bind ourselves to complete such section for the above-named sum to the satisfaction of the Chief Engineer and the Commissioners, such sum to be the full payment, without extras of any kind, for the entire completion of the section.

And we propose Messrs. Thomas Glover and John S. Fry as our sureties for the due fulfilment of this tender. 30

J.-B. BERTRAND & Co.,  
Quebec, 29th March 1870.

W. E. Blumhart, Witness.

We, the abovenamed, tendered as sureties, hereby agree to execute such bond or other document as may be required by the Commissioners for the due performance of the contract attached to the specifications, &c., upon which the above tender is made.

THOMAS GLOVER,  
per Pro. John S. Fry, Quebec. 40  
JOHN S. FRY, Quebec.

W. E. Blumhart, Witness.

And we hereby further supply, solely for the purpose of informing the Commissioners, and not in any way to affect the Contract, the following schedule of prices for some of the principal items of construction.

RECORD.  
 No. 8.  
 Tender of  
 Contract  
 for Con-  
 struction of  
 Section 15,  
 29th of  
 March 1870  
 —continued.

Section No. 15.

In Bill of Works the rock excavation was called	-	7,600	cubic yards.
The corrected quantities are	-	6,500	
		<u>1,100</u>	yds. less.

In Bill of Works the earth excavation was called	-	607,000	cubic yards.
The corrected quantities are	-	630,000	

10	Difference	-	-	-	<u>23,000</u>	c. yds. inc.
----	------------	---	---	---	---------------	--------------

						\$
Amount in tender	-	-	-	-	-	360,020
Add for 23,000 c. yds. more earth excavation at 20 cts.	-	-	-	-	-	4,600
						<u>364,620</u>
Deduct for 1,100 c. yds. less rock excavation at \$1	-	-	-	-	-	1,100
						<u>363,520</u>
	Sum in contract	-	-	-	-	

The correct quantity of earth excavation on Section No. 15 is accepted as (630,000) six hundred and thirty thousand cubic yards, and the correct quantity of rock excavation as (6,500) six thousand five hundred cubic yards.

20 SCHEDULE.

				Canadian
				Currency.
				<u>\$ c.</u>
1.	Clearing and close cutting, per acre	-	-	14 00
2.	Grubbing, per acre	-	-	30 00
3.	Fencing, per specification, per 100 lineal feet	-	-	5 40
4.	„ best stake and rider snake fence per lineal foot	-	-	5 40
5.	Rock excavation, per cubic yard	-	-	1 00
6.	Earth excavation (including average haul), per lineal foot	-	-	0 20
7.	Under drains, per 100 lineal feet	-	-	12 00
8.	Riprap, per cubic yard	-	-	2 00
9.	Concrete, per cubic yard	-	-	10 00
10.	First-class masonry, per cubic yard	-	-	10 00
11.	Second-class masonry, per cubic yard	-	-	7 50
12.	Paving, per cubic yard	-	-	5 00



sluice gates; the contractor to settle all damages with owners or occupants of lands for the sums mentioned :

At station 201	-	-	-	-	-
At station 237	-	-	-	-	-
At station 288	-	-	-	-	-
At station 355	-	-	-	-	-
At station 400	-	-	-	-	-
At station 418	-	-	-	-	-

**RECORD.**  
 No. 8.  
 Tender of  
 Contract  
 for Con-  
 struction of  
 Section 15,  
 29th of  
 March 1870  
 —continued.

**ON SECTION No. 4.**

10 Protection work on Macan River, near station 300 (see note to schedule of structure) - - - -

In the event of aboideau, iron cylinders, or other structures, being substituted at any points for the masonry structures mentioned in the Schedule, a deduction to be made for the saving in quantities effected thereby, and an allowance made for the substituted structure at the prices in the Schedule.

(Signed) J.-B. BERTRAND & Co.,  
 Quebec, 29th March 1870.

W. E. Blumhart, Witness.

20 Exhibit "C" referred to in Statement of Admissions.

Copy of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council, on the 22nd May 1880.

No. 9.  
 Exhibit "C"  
 Report of a  
 Committee,  
 &c.

30 On a memorandum dated 11th May 1880 the Honourable the Minister of Railways and Canals, having referred to the Intercolonial Railway, stating that a considerable number of suits brought against the Government by the contractors have been left undecided, that it would be a very difficult matter for any one except the Engineer who was connected with the work from its inception to satisfactorily perform the service of adjusting and settling such claims, and recommending that Mr. Sandford Fleming, formerly Chief Engineer on said railway, be relieved from the duties and responsibilities connected with the office of Engineer in Chief of the Pacific Railway, and be reappointed Chief Engineer of the Intercolonial Railway, to investigate the unsettled claims which have arisen in connection with the undertaking upon which no judicial decision has been given, and report on each case to the Department of Railways and Canals.

The Minister considers it important that he should continue to have the benefit of Mr. Fleming's professional skill and judgment in important matters connected with the construction of the Pacific Railway; he therefore 40 recommends that that gentleman be retained as Consulting Engineer for that

**RECORD.** work, for the purpose of affording advice and assistance in that capacity to the Minister and officers of the Department.

**No. 9.**  
**Exhibit "C"**  
**Report of a**  
**Committee,**  
**&c.—con-**  
**tinued.**

The Minister further recommends that Mr. Fleming be paid a salary of \$6,000 per annum while discharging the combined duties of Consulting Engineer of the Canadian Pacific Railway and Chief Engineer of the Intercolonial Railway. The Committee submit the above recommendation for Your Excellency's approval.

(Signed) JOHN MCGEE, C. P. C.

**No. 10.**  
**Exhibit "D"**  
**Memo-**  
**randum**  
**dated 21st**  
**June 1880.**

Exhibit "D" referred to in Statement of Admissions.

Ottawa, 21st June 1880. 10

**Memorandum.**

The undersigned has the honour to report that a letter has been received from Mr. Sandford Fleming, wherein he states that, for reasons given, he is under the necessity of declining the position of Chief Engineer of the Intercolonial Railway, and Consulting Engineer of the Canadian Pacific Railway, to which, by Order in Council of the 22nd May last, he has been appointed.

The undersigned accordingly recommends that authority be given for the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of the Intercolonial Railway, for the purpose of investigating and reporting upon all 20 unsettled claims in connection with the construction of the line, and that his salary while so engaged be fixed at \$541.66 a month, the engagement to be understood to be of temporary character.

Respectfully submitted,  
(Signed) CHARLES TUPPER,  
Minister of Railways and Canals.

Copy of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council on the 23rd June 1880.

On a report dated 21st June 1880, from the Honourable the Minister 30 of Railways and Canals, stating that a letter has been received from Mr. Sandford Fleming, wherein he states that, for reasons given, he is under the necessity of declining the position of Chief Engineer of the Intercolonial Railway and Consulting Engineer of the Canadian Pacific Railway, to which, by Order in Council of the 22nd May last, he had been appointed.

The Minister accordingly recommends that authority be given for the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of the

Intercolonial Railway, and that his salary while so engaged be fixed at \$541.66 a month, the engagement being understood to be of a temporary character.

The Committee submit the above recommendation for your Excellency's approval.

(Certified)

J. O. COTÉ, C. P. C.

RECORD.  
No. 10.  
Exhibit "D"  
Memo-  
randum,  
dated 21st  
June 1880  
—continued.

Exhibit "E" referred to in Statement of Admissions.

No. 11.  
Exhibit  
"E"  
Report by  
Shanly,  
Chief Engi-  
neer, 18th  
July 1881.

10  
Sir,

Intercolonial Railway,  
Chief Engineer's Office, Ottawa,  
18th July 1881.

*Re* John Ross, Sections 9 and 15.

This case arises out of the contracts for the grading, masonry, etc., etc., on these sections entered into by Messrs. J. B. Bertrand & Co., in 1869 and 1870 respectively, and now represented by Mr. John Ross, of Quebec.

The original amounts tendered and contracted for, were :—

		\$
For Section 9	- - - - -	354,897
For Section 15	- - - - -	363,520

20 Or a total of - - - - - \$718,417

The contracts were signed as follows :—

For Section 9 on 28th October 1869.

For Section 15 on 1st July 1870.

And the periods for completion fixed,—

For Section 9 on 1st July 1871.

For Section 15 on 1st July 1872.

30 In May 1873, neither of the Sections were completed and the Commissioners took the works into their own hands and finished them. Subsequently the contracts were transferred to Mr. John Ross, the gentleman above referred to, and he filed a Petition of Right placing his claim—

		\$
For Section 9 at	- - - - -	239,817
For Section 15 at	- - - - -	337,468

Total amount - - - - - \$577,285

over and above original contract price, for particulars see Sheets A and B hereto attached.

p. 4887.

G

RECORD.

—  
 No. 11.  
 Exhibit  
 " E "  
 Report by  
 Shanly,  
 Chief Engi-  
 neer, 18th  
 July 1881  
 — continued.

These claims having been referred to me by the Minister of Railways and Canals for investigation, I have now the honour to lay before you for his information the following Report :

In September 1880, I proceeded to make a personal examination of the works as constructed, in as far as such an examination was possible, and having done so, heard testimony in support of and against the claims, counsel representing both sides being present, a great many witnesses were examined, and full reports of their evidence taken down in shorthand, herewith submitted marked G 1, 2, 3 and 4 respectively, after much time and thought given to the sifting of this evidence, the conditions of the contract and the various circum- 10  
 stances attending the carrying of them out, I have come to the conclusion that the lump sums of these contracts should remain intact, and in addition, that certain items hereinafter detailed, and outside the contract proper, to be found in Sheets A and B should be allowed, as well as an increase in some of the principal item prices as shown below.

## Section 9.

Referring to Sheet A and the evidence for and against, bearing upon it, and the several items, Nos. 1 to 28 inclusive, I confess I can find nothing to warrant, in the strict legal point of view, a departure from the terms of the contract, which provides for all contingencies arising out of the increase a 20  
 decrease of quantities shown in the Bill of Works, Sheet "C," upon which, and the schedule of prices, Sheet "D," the contract was based, it does not appear by the evidence that the quantities were increased in the aggregate, but that on the whole they were rather decreased as shown on Sheet "C," being a comparative statement of the quantities in the Bill of Works of 1869 and the quantities as revised in 1872, when the work was nearly completed.

The items of the Bill of Particulars (Sheet A) which I consider proved as being extra to the contract, and which I recommend should be paid, are :—

	\$	30
No. 1 - - - - -	7,640	
No. 11 - - - - -	1,170	
No. 12 - - - - -	387	
No. 16 - - - - -	3,080	
	<u>\$12,277</u>	

Note, on 16 I allow 120 c. yds. masonry at \$9 instead of \$18 as in claim.

The items in the Bill of Works and schedule on which I would recommend an advance in price, are—

Rock excavation and borrowing, cubic yards, 25 cubic yards extra.  
 First-class masonry \$10 per cubic yard.  
 Second-class masonry \$7 per cubic yard.

40

## Quantities actually done.

		\$	
125,000	c. yds. rock and borrowing @ 25 c. yds.	-	31,250
3,516	„ 1st class masonry \$10 -	-	35,160
3,700	„ 2nd class masonry \$7 -	-	25,900
	Recommended to be paid -	-	<u>\$104,587</u>

RECORD.

No. 11.  
Exhibit  
"E"  
Report by  
Shanly,  
Chief Engi-  
neer, 18th  
July 1881  
—continued.

## Section 15.

Referring to Sheet B and the evidence aforesaid, as well as to the several items 1 to 14 inclusive, the same remarks as made in Section 9 will apply here, only in a less degree as regards the decrease of the work actually done, as compared with the bill of works (1869) Sheet E. The only item in Sheet B bill of Particulars of Claim which I consider proved, as forming no part of the original contract, and which I recommend for payment, is No. 4, \$1,875.

And I further recommend that the following items be increased:—

Rock excavation, 15 cts. per c. yd.  
1st class masonry, \$10 per c. yd.  
2nd class masonry, \$7.50 per c. yd.

Brought forward - - - \$1,875

20

## Actual Quantities done.

		\$	
	Rock, 6,500 c. yds. @ 15 cts. per c. yd. -	-	975
	1st class masonry, 9,700 c. yds. @ \$10 -	-	97,000
	2nd class masonry, 3,700 c. yds. @ \$7.50 -	-	27,750
	Total recommended -	-	<u>\$127,600</u>

## Summary.

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		\$	\$
	Section No. 9, contract price -	-	354,897
	Extras recommended -	-	104,587
			<u>459,484</u>
	Paid at sundry times on account -	-	346,658
			<u>\$112,816</u>

RECORD.  
 No. 11.  
 Exhibit  
 "E"  
 Report by  
 Shanly,  
 Chief Engi-  
 neer, 18th  
 July 1881  
 —continued.

	\$	\$
Section No. 15, contract prices -	-	363,520
Extras recommended -	-	127,600
	-	491,120
Paid on account at sundry times -	-	372,130
		<u>\$118,990</u>

Amounts recommended :

	\$
Section No. 9 - - - - -	112,816
Section No. 15 - - - - -	118,990
	<u>\$231,806</u>

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In explanation of the above finding I may say that I have founded my recommendations upon the evidence furnished to me as to the great difficulties and cost of carrying out the heaviest portions of the work. The rock as shown on Sheets C and B taken from printed book, Exhibit E, Appendix 2, pages 3 and 4, actually moved amounted to 131,047 c. yds., the average schedule price was little more than 90 cts. per cubic yard, a sum entirely too low for such work, it was difficult of displacement and some of the hauls were long. I have therefore recommended that 25 cts. per cubic yard be added to Section 9 and 15 cts. to Section 15.

First and second class masonry.—In both these cases great difficulty was 2 experienced in procuring suitable stone, several quarries were opened at a large expense and afterwards abandoned, so that finally the contractors had to fall back on the granite found in the neighbourhood of the line, the result was the finest masonry on any railroad on the Continent; but also from the extreme hardness of the material, perhaps the most expensive, I have therefore recommended an addition of \$10 per cubic yard to the 1st class and \$7.50 per cubic yard to the 2nd class, making up the price of the masonry actually built to \$20 and \$15 per cubic yard respectively. The evidence of the Engineers taken from notes carefully compiled goes to show that the actual cost was from \$18 to \$24 per cubic yard, without any profit; but as there is a margin of excess 30 in quantity I calculate that the prices allowed are fairly remunerative and equitable to both parties. The Government will get full value for its money and I think the contractors will have a reasonable profit.

I therefore recommend that the petitioner, Mr. John Ross, be paid the above-named sum of two hundred and thirty-one thousand eight hundred and six dollars in liquidation of his claim. The following witnesses were examined during the course of investigation :—

For the Petitioner.

- 1. J. B. Bertrand - - - G No. 1 and 2
- 2. Charles Odell - - - G No. 2
- 3. W. M. Buck - - - G No. 2
- 4. J. S. Fry - - - G No. 2
- 5. William Home - - - G No. 2
- 6. F. X. Berlinguet - - - G No. 2

RECORD.

No. 11.  
 Exhibit  
 "E"  
 Report by  
 Shanly,  
 Chief Engi-  
 neer 18th  
 July 1881  
 —continued.

For the Crown.

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- 1. L. G. Bell, C.E. - - - G No. 2
- 2. P. A. Petersen, C.E. - - - G No. 3
- 3. W. G. Thompson, C.E. - - - G No. 3
- 4. Marcus Smith, C.E. - - - G No. 3
- 5. C. Schreiber, C.E. - - - G No. 3
- 6. Sandford Fleming, C.E. - - - G No. 4
- 7. C. J. Brydges - - - G No. 4

Documents attached hereto.

20

- A. Bill of Particulars of Claim - - Section 9
- B. " " " " - - " 15
- C. Comparative Statement of Quantities - - " 9
- D. " " " " - - " 15
- E. Schedule of Prices as Tendered - - " 9
- F. " " " " - - " 15

Documents accompanying Reports.

- G. 1, 2, 2, 4, Reports of Evidence, Sections 9 and 15.

I am, Sir,  
 Your obedient servant,  
 (Signed) F. SHANLY, Chief Engineer.



RECORD.

SCHEDULE No. 4.

(Sheet A.)

No. 12.  
Bill of  
Particulars  
of Claim,  
Section 9.

INTERCOLONIAL RAILWAY.

Bill of Particulars of Claim.—Section 9.

Station.		Description.	—	Rate.		Cost.	
—	From. To.			—	—	—	—
1	1,150			\$	c.	\$	c.
		Changes made which occasioned extra work, not included in Contract Specification - -				7,670	00
2	61 98	Earth excavation, extra cubic yards - -	3,000	30		900	00
3	118 140	Rock instead of earth, extra cubic yds. - -	7,500	1 20		9,000	00
4	149 171	Do. do. cubic yds. - -	6,800	1 40		9,520	00
5	228 260	Do. do. do. - -	2,350	1 00		2,350	00
6	440 490	Do. do. do. - -	3,200	1 25		4,000	00
7	519 596	Do. do. do. - -	13,400	1 50		20,100	00
8	800 819	Do. do. do. - -	3,500	1 00		3,500	00
9	602 642	Rock borrowing, cubic yards - -	4,600	1 60		7,360	00
10	651 684	Borrowing, extra - - - -	8,200	1 60		13,120	00
11	1,050 1,100	Earth work on open drain outside of railway line, extra cubic yds. - -	1,300	90		1,170	00
12	222 30	Granite covering to this culvert, lineal ft. -	126			387	00
13	226	Great change at bridge which occasioned extra work - -				1,000	00
14	590 50	Change of an arch culvert to a bridge of 600 cubic yards, extra cost of which and extra work occasioned thereby - -				4,580	00
15	780 808	Change of 1,051 cubic yards of 2nd class masonry to 700 c. yds. 1st class, extra cost and value - -		8 00		5,600	00
16	805 807	Extra work to divert course of the river, excavation in cubic yards - -	3,200	50		1,600	00
		Extra saving required, cubic yards - -	80	5 00		400	00
		807 Building and demolishing one of the abutments of bridge after completion, necessitated by change at Section 807, ordered in works, cubic yards - -	120	18 00		2,160	00
17		Expenses and damage occasioned by default of the Government to deliver right of way to commence clearing - -				3,000	00
		31,000 fence rails lost by Contractor on account of fault of Government to deliver right of way - -		8 00		2,480	00
18		Expenses and loss and delay during seven months occasioned by Government not furnishing an Engineer to proceed with work during winter of 1869-70 - -				19,000	00
						\$118,897	00

## SCHEDULE No. 4.

(Sheet A—*continued.*)

RECORD.

No. 12.  
Bill of  
Particulars  
of Claim,  
Section 9—  
*continued.*

## INTERCOLONIAL RAILWAY.

## Bill of Particulars of Claim.—Section 9.

Station.		Description.	—	Rate.	Cost.
—	From. To.				
		Amount brought forward - - -		\$ c.	\$ c.
					118,897 00
19		Extra grubbing, per acre - - -	20	96 00	1,920 00
20		Close grubbing, extra, per acre - - -	15	30	450 00
21		Clearing, extra, per acre - - -	156	20 00	3,120 00
22		Expenses and damages by cement wrongfully condemned and refused by Engineer, loss of cement and freight - - -			5,000 00
		Expenses and damages incurred by being improperly prevented to continue quarrying stone of Grande Anse, 50 men at \$1 per day for 100 days - - -			5,000 00
		30 horses at \$1 per day for 100 days - -			3,000 00
		Steam towing above stone, 130 days at \$67.00 - - -			8,710 00
23		Expenses and damages occasioned by refusal of Engineer to accept stone of Grande Anse Quarry, delay occasioned thereby—60 men at \$2.50 per day for 50 days, which stone was afterwards acknowledged to be good - - -			7,500 00
		2 large scows, 130 days at \$5.00 each -			1,300 00
		4 small " 130 " at \$2.00 " -			1,040 00
		Opening of 20 quarries at Grande Anse in a space of 8 miles - - -			10,000 00
		Stone paid to proprietors, left at Grande Anse and lost - - - yards	1,800	4 00	7,200 00
24		Superintendence, clerks and sundries -			2,000 00
		Extra value of masonry executed in granite as ordered by Engineer, instead of sandstone, and lime stone, receivable under Contract and Specifications - c. yards	700	15 00	10,500 00
25		Expense, damage, and cost of opening of road, building material necessary for opening Bass River Quarry, improperly condemned by District Engineer, and subsequently found good by Mr. Schrieber on his inspection in winter 1871 - - -			3,000 00
					<u>\$188,637 00</u>

RECORD.

SCHEDULE No. 4.

(Sheet A—continued.)

No. 12.  
Bill of  
Particulars  
of Claim,  
Section 9—  
continued.

INTERCOLONIAL RAILWAY.

Bill of Particulars of Claim.—Section 9.

Station.			Description.	—	Rate.	Cost.	
—	From.	To.				\$	c.
			Amount brought forward - - -			\$	c.
						188,637	00
26	775	835	Fence made twice on account of widening of right of way, ordered by Commissioners, per 100 lineal feet - - -	12,000	1 50	180	00
27			Change in Specification of fencing rendered more expensive - - -			6,000	00
28			2nd class masonry replaced by 1st class, extra cost and value thereof - c. yds.	6,000	7 50	45,000	00
						<u>239,817</u>	<u>00</u>
			Summary.				
			Amount of Contract - - - -			354,897	00
			Amount of extras, damages, and expenditure as above - - - - Total			239,817	00
						<u>594,714</u>	<u>00</u>
			Received on account of Contract and on account of extra work, damages, and expenditure as above - - - -			346,668	09
						<u>\$248,045</u>	<u>91</u>
			And interest since 1st July 1873.				

INTERCOLONIAL RAILWAY.

Bill of Particulars of Claim—Section 15.

Station.		Description.	—	Rate.		Cost.	
From.	To.						
				\$	c.	\$	c.
		Changes which made occasioned extra work not included in Contract and Specification					
1	175	185	Rock instead of earth - - - extra c. yds.	1,300	1	60	2,080 00
2	197	280	Earth excavation - - - " "	15,000		40	6,000 00
3	277	295	Change of grade, extra excavation - - "	10,000		20	2,000 00
4	285		Bridge overhead, extra— 22,000 ft. B. M. timber, workmanship included @ \$50.00 \$ c. per M. - - - - - 1,100 0 850 lbs. iron nails @ 15 c. - 127 50 36 c. yds. masonry @ \$18.00 - 648 00				1,875 50
5	325	20	Change of 12 feet arch replaced by a box culvert and a tram bridge, not included in bill of works and Contract				12,673 20
6	572	588	Rock excavation, extra, instead of earth, cubic yds. - - - - -	900	1	25	1,125 00
			Earth excavation - - - - - extra c. yds.	22,000		55	12,100 00
			Masonry, 2nd class, made 1st class - - -	3,872	2	50	9,600 00
			Grubbing, extra - - - - - acres	5	104	00	520 00
			Close cutting, extra - - - - - "	4	25	00	100 00
			Clearing, extra - - - - - "	31	20	00	620 00
			1,000 c. yds. at Nipissiguit Bridge and 900 c. yds. at Tête à Gauche, of backing made as facing masonry, 1st class, extra cost - - - - - cubic yards	1,900	6	00	11,400 00
10			720 sup. ft. of cutting in granite for steps to be used as foundation to abutment of Nipissiguit Bridge, extra work - - -	720		30	216 00
			820 ft. granite stone cut and prepared to suit steps, extra work - - - - -	820		75	615 00
			To amount of expenses and damages caused by the above changes and extra work at Nipissiguit Bridge, which prevented the completion of the same in fall of 1871 - - -				3,000 00
11			Extra value of masonry executed in granite, as ordered by Engineer, instead of sandstone and lime receivable under Contract and Specification, c. yds. - - - - -	16,100	15	00	241,500 00
							<u>\$305,424 70</u>

## RECORD.

No. 13.  
Bill of  
Particulars  
of Claim,  
Section 15—  
*continued.*

## SCHEDULE No. 4.

(Sheet B—*continued.*)

## INTERCOLONIAL RAILWAY.

## Bill of Particulars of Claim.—Section 15.

Station.		Description.	—	Rate.	Cost.			
—	From.				To.	\$	c.	
13					\$	c.	\$	c.
			Amount brought forward - -				305,424	70
			105 c. yds. extra excavation in foundation of 2 piers at Tête à Gauche Bridge, c. yds. -	105	0	50	52	50
			1st class masonry added to foundation of the two piers - - - - c. yds.	37	20	00	740	00
			Pumping and making coffer-dams occasioned by above change - - - -				475	00
			To loss sustained in not receiving payment in warrants promptly, in years 1870- 71-72 and 1873, causing frequent visits to Ottawa, and forcing contractors to procure money at a heavy rate of interest. This matter was on several occasions brought to the notice of the Commissioners, loss sustained, at least for Sections 9 and 15, and also by delay caused in execution of work, by plans not being made and finished in time - - - -				20,000	00
			To plant as per inventory, Sections 9 and 15				10,695	79
							<u>337,467</u>	<u>99</u>
			Summary.					
			Amount of Contract - - -				363,520	50
			Amount of extras, damages, and expenditure as above - - - - Total				337,467	99
							<u>700,988</u>	<u>49</u>
			Received on account of Contract and on account of extra work, damages, and expen- diture above - - - -				372,130	38
						<u>\$328,858</u>	<u>11</u>	
		And interest since 1st July 1873.						

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**INTERCOLONIAL RAILWAY.**


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## APPENDIX Q.—Pages 1 and 3, Exhibit E.

## Comparison of Quantities as estimated and executed.

## Section 9.

No.	Quantities in Bill of Works, 1869.	Quantities as revised July 1872.	Description of Work.
1	238	500	Acres clearing and close cutting.
2	26	—	„ grubbing.
3	227,500	255,000	Lineal feet fencing.
4	82,000	66,960	Cubic yards rock excavation.
5	60,000	57,615	„ borrowing, Station 580 to 790.
6	422,000	403,305	„ earth excavation.
7	54,000	6,500	Lineal feet, under drains.
8	800	1,200	Cubic yards rip-rap.
9	300	100	„ concrete.
10	6,300	3,516	„ first-class masonry }
11	6,700	3,684	„ second-class masonry.
12	880	896	„ paving.

*Foundations.*—Embracing all excavations and concrete, &c. (see Schedule), not included in the above, and all timber, plant, piles, draining, pumping, blasting, levelling, and everything else that may be found necessary.

*Bridge Superstructure.*—Including three Howe truss timber bridges, complete, with three coats anti-corrosive paint and properly protected, two of 80 feet clear spans, equals 160 feet lineal—one of 60 feet clear span, equals 60 feet lineal—including also timber in stringers and wall plates in 23 feet beam culverts, ranging from 6 to 20 feet clear spans, and all bolts, rods, spikes, and plates required, total 213 feet clear, and everything else required to complete this service.

*Road Crossings and Diversions.*—Including 25 public crossings with cattle guards, stringers, and sign boards complete; also all farm crossings with suitable gates, hinges, and fastenings, embracing 14 single crossings and 36 double crossings. Also all excavations in approaches not included in common excavation, and everything else required to complete all road crossings and road diversions.

RECORD.

No. 15.  
Comparison  
of Quantities,  
&c.,  
Section 15.

SCHEDULE No. 4.

(Sheet D.)

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**INTERCOLONIAL RAILWAY.**


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APPENDIX Q.—Pages 2 and 4, Exhibit E.

Comparison of Quantities as estimated and executed.

Section 15.

No.	Quantities in Bill of Works.	Quantities as revised July 1872.	Description of Work.
1	102	152	Acres and close cutting.
2	6	—	" grubbing.
3	122,000	} 128,500	Lineal feet fencing—(special).
	6,500		" fencing—(snake).
4	6,500	6,472	Cubic yards rock excavation.
5	630,000	628,000	" earth excavation.
6	15,000	13,500	Lineal feet, under drains.
7	750	730	Cubic yards, rip-rap.
8	600	500	" concrete.
9	12,100	9,646	" first-class masonry.
10	4,000	3,423	" second-class masonry.
11	700	588	" paving.

*Foundations.*—Embracing all excavations and concrete, &c. (*see Schedules*), not already included in above, and all timber, plank, piles, draining, pumping, blasting, levelling, and everything else that may be found necessary.

*Bridge Superstructure.*—Including Howe truss timber bridges, complete, with three coats anti-corrosive paint and properly protected—11 spans of 100 feet each, four spans of 80 feet each, one span of 60 feet, including also four beam culverts ranging from 6 to 8 feet clear spans, and all bolts, rods, spikes, and plates required, and everything else required to complete the service.

*Road Crossings and Diversions.*—Including seven public road crossings with cattle guards, stringers, and sign boards complete. Also 38 single and 31 double farm crossings, with suitable gates, hinges, and fastenings; also all excavations in approaches, not already included in common excavations, and everything else required to complete all road crossings and road diversions.

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## SCHEDULE No. 4.

(Sheet E.)

RECORD.  
No. 16.  
Schedule  
of Prices, &c.,  
Section 9.

## INTERCOLONIAL RAILWAY.

Schedule of Prices upon which the Tender was based.

## Section 9.

No.	Items.	Rate.
1	Clearing and grubbing, per acre - - - - -	16 20
2	Fencing per specification, per 100 lineal feet - - - - -	18 00
3	Fencing stake and rider, per 100 lineal feet - - - - -	5 40
4	Rock excavation, per cubic yard - - - - -	0 90
5	Rock excavation, boring, per cubic yard - - - - -	0 90
6	Earth excavation, per cubic yard - - - - -	0 27
7	Under drains, per 100 lineal feet - - - - -	4 50
8	Rip-rap, per cubic yard - - - - -	5 40
9	Concrete " - - - - -	4 50
10	Masonry, first-class, per cubic yard - - - - -	9 00
11	Masonry, second-class - - - - -	7 20
12	Foundations, embracing all services referred under this heading in bill of works - - - - -	2,700 00
13	Bridge superstructure, Howe Truss Bridge, complete in place, each 100 feet clear span - - - - -	
14	Ditto, each 80 feet clear span - - - - -	1,296 00
15	Ditto, each 60 " - - - - -	864 00
16	Ditto, each 40 " - - - - -	
17	- - - - -	10 80
18	Railway crossings, &c., every public crossing with cattle guards - - - - -	22 50
19	Every double crossing on private property with cattle guards complete - - - - -	18 00
20	Every single crossing on private property with cattle guards complete - - - - -	5 00
21	Omissions and contingencies, embracing all services referred to under this heading in bill of works - - - - -	7,200 00
	Special Works.	
A	Material for filling in the Stations 580—790 - - - - -	0 36

RECORD.

SCHEDULE No. 4.

(Sheet F.)

No. 17.  
Schedule  
of Prices, &c.,  
Section 15.

INTERCOLONIAL RAILWAY.

Bill of Prices upon which the Tender was based.

Section 15.

No.	Items.	Rate.
1	Clearing and close cutting, per acre	14 00
2	Grubbing, per acre	30 00
3	Fencing, per specification, per 100 lineal feet	5 40
4	Fencing, best stake and rider snake fence, per 100 lineal feet	5 40
5	Rock excavation, per cubic yard	1 00
6	Earth excavation, including average haul per cubic yard	0 20
7	Under drains, per 100 lineal feet	12 00
8	Rip-rap, per cubic yard	2 00
9	Concrete	5 00
10	Masonry, 1st class, per cubic yard	10 00
11	Masonry, 2nd class, per cubic yard	7 50
12	Paving, per cubic yard	5 00
13	Iron cylinders exclusive of concrete ( <i>see bills of works</i> ), per lineal feet in place	21 00
14	Foundations, embracing all services referred under this heading in bill of works	0 30
15	Bridge superstructure, Howe Trust Bridge, complete in place, each 100 feet clear span	30 00
16	Ditto, each 80 feet clear span	25 00
17	Ditto, each 60 "	25 00
18	Ditto, each 40 "	20 00
21	Road crossings, each public crossing with gates, &c., complete	75 00
22	Ditto, each double farm crossing with gates, &c., complete	15 00
23	Ditto, each single farm crossing with gates, &c., complete	10 00
24	Omissions and contingencies, embracing all services referred to under this heading in bill of works percentage on all other works	17,142 00
19	Superstructure for beam culverts, 6 to 12 feet span per lineal foot of clear span	2 00
20	Ditto, 15 to 20 feet of clear span	10 00

Exhibit " F " referred to in Statement of Admissions.

Certified Copy of a Report of the Honourable the Privy Council, approved by His Excellency the Governor General in Council, on the 28th July 1882.

RECORD.

No. 18.  
Exhibit " F " Copy of Report, &c., 26th July 1882.

On a Report, dated 26th July 1882, from the Minister of Railways and Canals submitting that certain claims arising out of, or connected directly or indirectly with the constructing of the Intercolonial Railway, have been pressed upon his attention from time to time.

That some of the claims have been before the Courts and some have been reported upon by Frank Shanley, Esq., C.E., and others, no action has been taken with regard to the rest of them.

That it is advisable that three Commissioners be appointed to make inquiry into the matter of these claims, and upon consideration of the evidence already taken, and upon such further investigation as to them shall seem necessary, shall report thereon to your Excellency in Council for the information of Council, that they may be well advised as to the liability of Her Majesty in regard to these claims.

That the Commissioners shall first, and as preliminary to the investigation of the several claims, upon being satisfied as to the facts, exclude from their consideration all claims coming within any of the six following classes:—

1. Any claim made by a person between whom and Her Majesty there is no privity of contract.

2. Any claim that has been before a Court of Justice, and decided adversely to the claimant, except where the adverse decision was given on the following grounds only, viz., that the Chief Engineer has not certified that the work has been duly executed.

3. Any claim which by agreement between the parties or their attorneys or counsel, and the persons then acting for Her Majesty, was to abide the result of a case before the Courts, where the latter was decided adversely to the claim, and with the same exceptions as set out in the last class of cases.

4. Any claim arising out of or connected with a contract, the performance of the work under which was legally taken out of the hands of the contractors, and in regard to which the work was completely at a loss to Her Majesty.

5. Any claim which has been settled and adjusted by the Commissioners of the Intercolonial Railway, or by the Public Works Department, or by the Department of Railways and Canals.

6. Any claim in regard to which the claimant has given a receipt in full.

The Minister therefore recommends that three Commissioners be appointed for the purpose of investigating the said claims, and reporting to the Governor in Council their opinions as to Her Majesty's liability in regard to each of the said claims, first excluding all such as come within any of the six classes herein enumerated.

That they may use evidence taken by any Court, person or persons, who have had or may have to do with the examination or investigation of the said

RECORD. claims, and may, if they deem it desirable, make further investigation and inquiry in regard to the said claims.

No. 18.  
Exhibit "F"  
Copy of  
Report, &c.,  
26th July  
1882—con-  
tinued.

That an officer of the Department of Railways and Canals be appointed secretary to the said Commissioners, and that his duty be to assist the said Commissioners, and in that connection to investigate the said claims.

The Committee submit the above recommendation for your Excellency's approval, but they recommend that the duties of the secretary be not defined as herein stated.

(Signed) JOHN J. MCGEE.

To the Honourable  
The Minister of Railways and Canals.

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Exhibit 1 at Trial.

No. 19.  
Evidence  
of A. P.  
Macdonald  
in McGreevy  
v. The  
Queen, 9th  
April 1888.

Evidence taken in the Exchequer Court of Canada in the Case of  
Robert H. McGreevy *versus* The Queen.

The examination of Angus P. Macdonald, of the City of Toronto, contractor, taken before me, Charles Egerton Ryerson, of the City of Toronto, barrister-at-law, on the 9th day April 1888, at the residence of the said Angus P. Macdonald, No. 1 Rusholme Road, Toronto, being his examination as a witness herein in pursuance of the order of this Court, dated the 5th day of April 1888.

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Mr. Alex Ferguson, Counsel for Suppliant.  
Mr. W. D. Hogg, Counsel for Defendant.

The said Angus P. Macdonald, having been duly sworn and examined, deposed as follows :—

*By Mr. Ferguson.*—1. *Question.* You have a contract on Section 13 of Intercolonial Railway?—*Answer.* Yes.

2. *Q.* You had a claim against the Government of Canada arising out of that, which was referred to Mr. Frank Shanly?—*A.* Yes.

3. *Q.* He made a report recommending payment of \$49,000 odd to you?—*A.* Yes.

4. *Q.* That amount was never paid you?—*A.* No.

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5. *Q.* Had you any conversation with Sir Charles Tupper with reference to what action the Government was going to take in reference to your claim and other claims of other contractors on the Intercolonial with which Mr. Shanly dealt?

Mr. Hogg objected to any evidence on this question unless it relates specifically to the Report in the McGreevy case.

*A.* Yes.

6. *Q.* Do you remember when it was?—*A.* A short time after the report of Mr. Shanly was made.

7. *Q.* Where did this conversation take place?—*A.* In Sir Charles Tupper's office at Ottawa in presence of Mr. Stewart Tupper.

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8. Q. What was the substance of this conversation?—A. He, Sir Charles Tupper, congratulated me on the award made by Mr. Shanly in my case and told me it would be paid before long, and said he supposed I knew that no interest would be paid by the Government.

9. Q. Did he say anything with reference to the awards on contractors' claims generally reported on by Mr. Shanly?—A. Yes, Sir Charles Tupper said that all the awards would be paid.

10. Q. Was there anything further said at that time?—A. Yes, Sir Charles Tupper said that he was sorry that they were kept out of their money so long.

11. Q. Had you any other conversations with Sir Charles Tupper about that award?—A. Yes, frequently, and he always told me that it would be paid.

*Cross-examined by Mr. Hogg.*—1. Q. When was the first conversation you had with Sir Charles Tupper about your award?—A. I think in the year 1881.

2. Q. When was your last conversation with Sir Charles Tupper about your award?—A. About the time the Government were appointing a Royal Commission to investigate these Intercolonial claims.

30 3. Q. What was said by Sir Charles Tupper then—did he express himself in favour of a Commission?—A. He said it would be more satisfactory to the people to have the Commission of three go over the claims.

4. Q. Did he say anything else about your claim then?—A. He wanted to know if I would go before the Commission and I said I would not.

5. Q. Your conversations with Sir Charles Tupper were also with reference to your own award?—A. Yes, and he always led me to believe that the award in my favour would be paid.

30 6. Q. Did he ever say anything to you in reference to the payment of the award in favour of Mr. McGreevy in particular?—A. No, but he spoke of the awards generally and said that they would all be paid.

7. Q. Did he say they would be paid or did you gather from the tenor of his conversation that they would be paid?—A. He said they would be paid when the money was provided by Parliament.

8. Q. Did you go before the Commission?—A. I only appeared before the Commission as a witness at the request of the Chairman, Judge Clark.

By consent of Counsel, Mr. Macdonald's signature to the deposition was dispensed with.

40 I hereby certify the foregoing to be the depositions of the said Angus P. Macdonald, given by him and taken by me on his said examination before me and certified to by me pursuant to the Statute.

C. EGERTON RYERSON.

RECORD.

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Evidence  
of A. P.  
Macdonald  
in McGreevy  
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—continued.

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Evidence of  
Sir Charles  
Tupper, in  
McGreevy v.  
The Queen,  
5th April  
1888.

In the Exchequer Court of Canada.

McGreevy *versus* The Queen.

Before His Lordship Justice Fournier.

Ottawa, Thursday, 5th April 1888.

D. Girouard, Esq., and } Counsel for the Suppliant.  
A. Ferguson, Esq., }  
W. D. Hogg, Esq., Counsel for the Crown.

Sir Charles Tupper called and sworn and examined by Mr. Hogg.

*Question.* You were a member of the Government of Canada in 1880 and 1881?—*Answer.* Yes. 10

*Q.* At that time the Intercolonial Railway had been finished?—*A.* Yes.

*Q.* Do you remember the claims that were presented to the Government in connection with those works on the Intercolonial Railway?—*A.* Yes.

*Q.* Do you remember a claim of the suppliant in this case, Mr. Robert H. McGreevy, with others?—*A.* Yes.

*Q.* Do you remember of an Order in Council being passed, dated as mentioned in Exhibit "A" of the stated case?—*A.* Yes, I have no doubt that that is correct.

*Q.* And an Order in Council also based on that report?—*A.* Yes.

*Q.* That is for the appointment of Mr. Frank Shanly, C.E., of the 20 Intercolonial Eailway? (Objected to.)

*Q.* Is that an Order in Council for the appointment of Mr. Frank Shanly?—*A.* Yes, I think so.

*Q.* Do you remember the claim of the suppliant here being referred to Mr. Shanly amongst others?—*A.* Yes.

*Q.* For what purpose was it referred?—*A.* It was referred for the purpose of—

*Mr. Girouard.* I must enter an objection here. This is a civil matter, and I do not think we are going to prove by oral testimony how this came to be referred to Mr. Shanly. 30

*Mr. Hogg.* I know of no paper in respect of this. The question is what was this referred for?

The question allowed, subject to the objection.

*Q.* For what purpose was the claim of the suppliant here referred to Mr. Shanly?—*A.* For the purpose of being investigated by the Chief Engineer and a report upon it.

*Q.* Was there a report made upon it by Mr. Shanly?—*A.* I think so.

*Q.* Would you look at Exhibit "C." Do you recognise that as a copy of the report that came to you?—*A.* I do not think it is in my power to say that. It is a long time ago, and unless I saw the actual report I could not 40 say that this is a copy.

*Q.* What is the paper? Does it purport to be a copy?—*A.* It purports to be a copy.

Q. A copy of the report of Mr. Shanly?—A. Yes.

Q. I may say that on both sides we have admitted that this is a copy?—  
A. It would be impossible for me to say, because it is years ago since I saw the report. I have no doubt that it is a copy, as it purports to be, but I could not say so positively without having an opportunity to compare it with the original.

Q. A report of Mr. Shanly was handed to you or sent to you in the usual course?—A. Yes.

Q. Do you remember about what time that was?—A. No, I could not  
10 say that.

Q. This is dated the 22nd June 1881?—A. I suppose it would be about that time, but I am not able to say, because this was one of a number of reports, and it might have been dated and a considerable time elapsed before the rest were made, and they may all have been handed in together.

Q. But you think it was sometime in that neighbourhood?—A. Yes, about that time.

Q. What was done with that report?

Mr. Girouard.—I object to that. Whatever action was taken on the report should appear in writing.

20 *The Court.*—He may add, was any action taken on it, and arrive at the decision, and you call for the writing.

Q. Was any action taken on the report made by Mr. Shanly?—A. Not that I am aware of.

Q. Did you, as Minister of Railways and Canals, take any action on the report, or in respect to the report?—A. The only action that I could have taken on the report, as Minister of Railways, would have been to refer it to the Governor-General in Council. That action, I think, was not taken.

Q. Was it referred for advice to the Justice Department?—A. I am not  
30 able to say that. I do not at this moment remember whether it was sent to the Department of Justice for advice or not.

Q. How was the report treated by you as Minister of Railways and Canals?

Mr. Girouard.—I object to the question.

*The Court.*—First establish the existence of the report, then produce it.

Mr. Hogg.—It is produced.

Mr. Girouard.—I think it should appear in writing how the report was treated.

*The Court.*—Yes. This is no evidence of departmental action. If any action was taken you must have an entry; otherwise you must presume that no action was taken.

40 *Mr. Hogg.*—I am not asking for the action of the Department; I am asking how, under the statute, the Minister of Railways and Canals treated it, as a report or certificate, or what he did with it.

*The Court.*—Show it by his action.

Mr. Girouard.—He says in his evidence that he took no action on it.

Q. As I understand you, there was no action of the Department, through the Minister, taken on that report?—A. Not that I am aware of. It is possible that that report may have been sent by the Department of Railways and

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*Q.* Subsequent to the date of the report, was any action or any statement made by you with reference to the acts of the Department bearing upon the reports of Mr. Shanly?

*Mr. Girouard.*—There is the same objection to that. The statement should be in writing.

*Q.* I have the statement which was made by the witness. I am asking whether it was made by him or not. Look at page 1628 of the Debates of the House of Commons of 1884. Will you kindly read a portion of the statement 10 marked there that you made at that time.

Objected to as illegal.

Objection reserved.

*A.* "Claims were made for over four millions on various grounds by the contractors who had been engaged in the construction of this work, and the Committee will recollect that Mr. Frank Shanly was appointed for the purpose of investigating and reporting upon these claims, making a careful examination, taking testimony, giving the parties an opportunity of establishing, as far as they were able the justice of their claims, and making a report, not for payment but for the information of the Government. Mr. Shanly discharged that duty, 20 but although he was an engineer of very considerable ability the Government felt that, a matter involving such a very large sum of money, it was necessary to take still greater precautions in regard to the expenditure likely to be involved, and it was finally decided to appoint a Commission, consisting of parties who were thoroughly qualified to investigate with great care and attention, claims of such magnitude, and possessing a thorough knowledge of and acquaintance with railway work."

*Q.* Was the Commission which is referred to there the one that was appointed in 1882? Just look at the Order in Council marked Exhibit "B"; that is a certified copy of a report as to the three Commissioners?—*A.* Yes. 30

*Q.* Was the report which was made by Mr. Shanly approved of by you under the statute?

*Mr. Girouard.*—I have the strongest objection to this question. This should be shown in writing. This is not the time to establish whether the Department of Railways and Canals did or did not approve of the report of Mr. Shanly.

*Mr. Hogg.*—If the reply of the witness is that it was not approved it would not be in writing. If his answer, No, he would have a right to show it. It is only in case some action was taken on it that a report could be produced. 40

*The Court.*—If you simply ask him if there was any action taken on it, then you must ask what the action was?

*Mr. Hogg.*—The witness has already said that there was no action. I simply ask further, and I will be guided whether his answer is yes or no, and if the witness says no, subject to the objection, I think the objection should be waived.

*The Court.*—You cannot establish by oral evidence the action taken on the report. RECORD.

*Mr. Hogg.*—I submit that the question has already been allowed and the witness has replied that no action was taken. Now I have a right to ask was it approved or not approved.

*Mr. Girouard.*—There is a very strong objection to that. Under the Intercolonial Railway Act it is provided that no money shall be paid except on the certificate of the Chief Engineer and on the approval of the Minister of Railways and Canals. The duty of the Minister under the Statute is to approve  
10 or disapprove, and if he has done either it must be shown in writing and not by verbal evidence.

*Mr. Hogg.*—The Statute requires that no money shall be paid to any contractor until the Engineer shall have certified that it is executed and the Minister approves of the certificate. There is nothing here by which it is shown or by which it is required that the Minister or the Commissioners should give any reasons whatever. It is simply a question whether they approve or do not approve of it. The question I put was whether the report was approved or disapproved.

*Mr. Girouard.*—That should be shown in writing.

*Mr. Hogg.*—There is nothing in the Statute which requires that it should  
20 be shown in writing. I simply ask the question of the responsible Minister of the Department at that time, was the report approved or disapproved of. Surely the Minister of the Department is the one who should answer that question.

*The Court.*—We will take the answer subject to the objection. The objection is a very strong one.

*Q.* Was the report approved or disapproved of by you as Minister of Railways and Canals?—*A.* The report was not approved of.

*Cross-examined by Mr. Girouard under reserve of objections.*—*Q.* Will you mention to the Court the reasons why you did not approve of the report?—

*A.* I thought Mr. Shanly had misapprehended the nature of the work that he  
30 was called upon to perform.

*Q.* In what manner?—*A.* Of course I am speaking now from memory of events that occurred a good while ago, but so far as I recollect, he appeared—instead of confining himself to reporting the circumstances and facts bearing upon the case, and his general opinion based on that—he appeared, so far as my memory serves me, to have gone outside of that instruction and to have altered prices contained in the contracts because he thought the prices contained in the schedules were too low to remunerate the parties for doing the work and he changed them—he recommended that an increased price be paid.

*Q.* I may say that I never considered Mr. Shanly's duties and his report to be of  
40 a character that would enable him to recommend it for payment. The terms, I think, of the Order in Council appointing him, show that it was for the purpose of making a report for the consideration of the Government—at all events that was my apprehension of what his duties were—that it did not come before me in the shape of an ordinary certificate of the Chief Engineer for payment, and that all that was required preliminary to payment of it was my

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approval. That would be an additional reason for the document not having on it the action of the Minister. If I had approved of the report it would have been my duty to submit it for consideration of the Governor in Council with a recommendation for its adoption.

Q. Then you consider that Mr. Shanly had exceeded his authority?—A. Exceeded his powers.

Q. That he appeared to take the powers of an arbitrator?—A. Yes.

Q. And you objected to that?—A. So far as my memory serves me that was the principal ground for not recommending his report for adoption.

Q. I believe that this claim of Mr. McGreevy was only one of several similar claims?—A. A large number, amounting in all, I believe, to some four millions of dollars.

Q. Submitted to Mr. Shanly under the same instructions?—A. Yes, under the same instructions.

Q. I believe that during these years, during the time that Mr. Shanly was acting and some time afterwards, you were away or absent from your department in 1880, 1881 and 1882?—A. Yes, frequently.

Q. And the duties of your department were performed by some members of the Cabinet?—A. By one of my colleagues.

Q. You referred a moment ago to a statement made by you in 1884. This statement I believe was made in the House of Commons in a speech there?—A. Yes.

Q. And you have read from the Hansard of that year?—A. Yes.

Q. That statement was made, I believe, in connection with a discussion on the result of this Commission to which you have made reference—The Clarke Commission?—A. That was made on the occasion of my asking a vote from the House of Commons to carry out the award of the Commission.

Q. What was known as the Clarke Commission?—A. Yes.

Q. Are you aware of the debate which took place in 1881 as to the powers of Mr. Shanly under the Order in Council that you have referred to—speeches made by Sir John Macdonald and Mr. Pope as to those powers?—A. I do not know that I am particularly.

Q. The facts connected with these claims are not exactly very fresh in your memory?—A. Of course it is a long time ago.

Q. Did you not have a conversation in fact with Mr. Schreiber to refresh your memory on the facts connected with this case?—A. Yes.

Q. Not long ago?—A. Not long ago.

Q. Otherwise you would not have been able to give testimony yourself?—A. I would not have had as clear a recollection of the circumstances as I have.

Q. Is it not a fact that during the years 1880, 1881 and 1882, Mr. Pope acted in your place and that Sir John Macdonald acted?—A. I do not know of Sir John Macdonald having acted as Minister of Railways, but he may have done so in Mr. Pope's absence. Mr. Pope generally acted in my absence.

Q. Please look at the sessional papers filed during the session of 1880-81—the sessional paper marked "A"—and say whether you do not find a report from Sir John Macdonald recommending the payment of a claim to Mr. Girouard,

member for Kent, N. B., reported favourably by Mr. Shanly under the same powers and instructions?—*A.* I see that. I see from this that he undoubtedly did act.

*Q.* Then Sir John Macdonald did sometimes act?—*A.* He did on that occasion. I suppose Mr. Pope was absent. Mr. Pope usually acted in my absence.

*Q.* Will you take communication of what Sir John Macdonald is reported to have stated in a debate on the 9th of March 1881, as reported in Hansard, page 1279, in the following words :

10 “As to Mr. Shanly’s duty, it is easily understood. Mr. Fleming has ceased to be Chief Engineer of the Intercolonial; Mr. Schreiber never was Chief Engineer of the Intercolonial, but Chief Engineer of the works of construction and manager of the road afterward. That took up all his time, because there must be an officer holding the rank and position of Chief Engineer of the Intercolonial Railway. It was thought that Mr. Shanly being a disinterested party and a competent engineer, in whom the public had confidence, should be gazetted and appointed chief engineer, in order to enquire into the contracts and wind them up, just as Mr Fleming would have been obliged to do—in fact to step into Mr. Fleming’s shoes, and give the necessary certificates  
20 under which Government would be authorized to pay the money due. This is simply the way the matter stands.”

Do you understand thereby—

*Mr. Hogg.*—Surely the learned counsel cannot ask of the witness what Sir John Macdonald understood by what he stated there. Sir John Macdonald ought to be the proper person to answer the question.

*Mr. Girouard.*—Sir Charles says he understands that Mr. Shanly was not to report for payment. That it is what he said in the Hansard of 1884—that Mr. Shanly was to report only for the information of the Government. That statement was made some four years after Mr. Shanly was appointed, and  
30 the duties of Mr. Shanly might have escaped his memory. In fact when we look at the debate of 1881, Sir John Macdonald, who was acting as Minister of Railways and Canals, says Mr. Shanly was there to wind up the claims.

*The Court.*—You have a right to obtain the statement, and you can comment upon it afterwards.

*Mr. Hogg.*—That very statement is in already in the evidence of Sir John Macdonald.

*The Court.*—The evidence and documents will speak for themselves.

*Q.* Look at Hansard of the same session, page 1282, where Sir John  
40 Macdonald says :—

“I contend that the principle involved in the General Board of Works Act and the Railway Act, is that of arbitration, and an official Court of Arbitrators was established. And why? Because the legislature thought, and thought justly, that the fairest way of deciding between the two Departments and the contractors would be to leave it to a Board of Arbitrators, not bound by technical points. Sir, the honourable gentleman does not venture to say that the arbitrators appointed—either Mr. Frank Shanly or Mr. Keefer

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were not men that any Government might justly select as arbitrators to decide between contractors and themselves. They are competent and honest men; engineers who know the value of work, the cost of construction, and who have been in the habit of dealing in contracts. What can a Government do more fair or honest than to take honest and competent men to decide between contractors and the Crown, and not insert technical objections to destroy the real, honest or asserted claim of men who, having a full confidence in the honesty of a Government, had involved themselves and their friends into contracts for large amounts, believing that they would be treated as one honest man would treat another honest man, and that technical objections would not be thrown in their 10 faces in order to ruin them and save, out of the starving treasury of the people of Canada sums of money by filching them out of the pockets of contractors."

Do you understand that Sir John Macdonald was looking upon the duties of Mr. Shanly as those of an arbitrator?

*Mr. Hogg.*—I object to that question.

*The Court.*—That cannot be the subject of a question, the objection is well taken.

*Q.* Mr. Shanly, I believe, made several reports which were paid by the Government under these instructions, did he not?—*A.* Yes.

*Q.* One to Mr. Girouard, member for Kent?—*A.* Yes.

*Q.* That was paid, I believe, under an appropriation voted in the session of 1880–81?—*A.* Yes, that is so.

*Q.* Did you not also pay a report of Mr. Shanly under the same instructions in favour of one George Moffat?—*A.* Yes, I think so.

*Q.* For four thousand seven hundred and seventy-seven dollars?—*A.* If you ask me if I paid.

*Q.* I mean your department?—*A.* Were not those paid by Order in Council.

*Q.* They were paid by Order in Council?—*A.* On the recommendation of the Minister on Mr. Shanly's report.

*Q.* On the recommendation of the Minister and by a vote of Parliament?—*A.* Yes, there were several of them.

*Q.* Another one in favour of Nolin?—*A.* Yes.

*Q.* I think you will find that sometime during the session, in February 1882, a demand was made for a list of the reports of Mr. Shanly up to that date, 28th February 1882?—*A.* Yes.

*Q.* I think you have said in your examination in chief that the report of Mr. Shanly in the case of Mr. McGreevy was dated the 22nd of June 1881?—*A.* I think so.

*Q.* Does that report of Mr. Shanly in the case of Mr. McGreevy appear 40 in this list?—*A.* No.

*Q.* Although it had been made some months before, can you tell the Court why it does not appear in the list?—*A.* This list is headed "Statement of cases reported on by F. Shanly, showing the nature of claims, amount claimed, amount recommended and action." This seems to be confined to the cases in which action had been taken of some kind.

Q. The order of the House was to give a list of all the reports of Mr. Shanly up to that time, the 28th February 1882?—A. It says that a statement showing the nature of the claim and the amount claimed in each case, also showing what action, if any, was taken by the Department, should be furnished. That order would seem to have covered the entire cases, but the list includes only those on which action was taken.

Q. Then clearly up to that time no action was taken in the case of McGreevy?—A. No.

Q. And that is the reason you suppose the case is not enumerated in the list?—A. That is the reason I presume. No action had been taken on it, and although the order of the House seems to go further, the list seems to cover only the cases in which action was taken.

Q. If you refer to the terms of the report of the Privy Council, based on your own report appointing the Clark Commission, do you find any disapprobation of the reports of Mr. Shanly in that report of yours. If so, please point it out to the Court?—A. No.

Q. Is it not referred to in terms of approbation when you say that some cases have been reported on by Mr. Shanly?—A. The intention, so far as I can judge from this report, was to make all the testimony taken by Mr. Shanly and his reports available for these Commissioners.

Q. Are not the reports of Mr. Shanly referred to rather in terms of approbation?—A. I will say the other way, I do not see anything there to reflect on Mr. Shanly.

Q. One way or the other?—A. No.

Q. You said a moment ago that you objected to Mr. Shanly's report because he had departed from the schedule of prices; do you know, as a matter of fact, whether Mr. Shanly had done so in this case of Mr. McGreevy's?—A. What I said was that so far as my recollections went, the reason I did not, as Minister of Railways, take any action on Mr. Shanly's report was because I thought he had gone beyond his instructions in the report which he had made.

Q. But about the schedule prices, do you insist any more upon that portion of your former answer?—A. I say that is my recollection, that I thought he had misapprehended the nature of his duties and gone beyond what was entrusted to him.

Q. Do you know, as a matter of fact, whether your general objections to the reports of Mr. Shanly actually applied to this case of Mr. McGreevy's?—A. No, it applied to his reports generally. I had his reports, as far as my memory serves me, covering the whole of the cases and it was not specially with reference to this report, but it was in reference to his general reports that I thought he had misapprehended his duties and gone beyond his authority.

Q. Can you tell whether, in dealing with this case, he did actually exceed his authority?—A. I would not be able at this date to say so without carefully going over the report.

Q. Did you have some conversations about these reports, especially the report of Mr. Shanly on Mr. McGreevy's claim, with Thos. McGreevy, a member of Parliament?—A. I think that is very likely.

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*Q.* Did you say to the Hon. Thomas McGreevy, M.P., for Quebec west, during the session of 1882, when we were on the eve of a general election, that the Government had decided on including Mr. Shanly's reports in the supplementary estimates to be brought down to the House, and suggested to Mr. McGreevy whether it would not be better in view of the approaching general election to wait until after the elections.

*Mr. Hogg.*—I think my learned friend should be more particular ; he should direct the witness's attention to the time, the place, and the circumstances surrounding this alleged conversation.

*Mr. Girouard.*—I refer to a conversation which took place during the session of 1882 in Ottawa here between Sir Charles Tupper and the Hon. Thos. McGreevy. (To witness).—I ask you whether you did not say to the Hon. Thos. McGreevy that the Government had decided upon including Mr. Shanly's reports in the supplementary estimates to be brought down to the House (that was of course that session), but you had also suggested to Mr. McGreevy whether it would not have been better, in view of the approaching general elections, not to bring them down until after the general elections.

*A.* I have no recollection of ever making such a statement to Mr. McGreevy.

*Q.* Could you say to the Court that it did not take place?—*A.* I think I would be obliged to say to the Court I do not believe it possible that I ever made such a statement. It is entirely at variance with the action I took.

*Q.* Do you recollect in 1884 that you paid some \$84,000 to Robert McGreevy under the award of the Clark Commission, as per receipt exhibit "G"? Do you recollect in a conversation which took place during the session of 1884—

*Mr. Hogg.*—I must object to a question of this character that is put for the purpose of contradiction.

*The Court.*—What is your object Mr. Girouard?

*Mr. Girouard.*—Sir Charles said that he did not approve of this report of Mr. Shanly's : I am going to prove by conversations with Sir Charles that he said that he approved of these reports.

*The Court.*—Oral evidence of this kind will not help you. The Government cannot be bound by a conversation or a declaration of an individual minister unless there is an official action taken. That has been decided in all these cases.

*Mr. Girouard.*—This is a different case. The statute says that no money shall be paid except on the certificate of the Engineer, approved by the minister, that is the individual act of the minister, not the action of the Government. Let us suppose, for instance, that we have the certificate of the Engineer in this case and also the approval of the minister, and the Privy Council disapprove, we could of course not get the money, but we would have a right to come to this Court and say that we have the certificate of the engineer and the approval of the minister, and it matters very little whether the Privy Council sanctions the report or not. Now I am going to ask the witness whether he did not say that he approved of the report.

*The Court.*—I will allow the question subject to the objection.

*Mr. Hogg.*—My learned friend proposes to come in with a statement that sometime in general conversation, some way or other, an approval was given. The object of the question, and of the answer if it is opposed to his theory is to contradict the witness by the evidence of the person or persons to whom the conversation was addressed. Now, my learned friend must specifically state the time, the place, and the circumstances under which this conversation took place, and give the exact words as near as possible.

*The Court.*—That must be done; otherwise the evidence will be value-

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*Q.* Did you have this conversation in 1884, during the session, in the City of Ottawa.

*Mr. Hogg.*—I submit that the witness should not be asked to answer this question unless it is made with all the requirements of such a question, because a gentlemen occupying his position may have had hundreds of conversations, and the question should be put specifically.

*Q.* Did you have the following conversation in the House of Commons, during the session of 1885, at the time the \$84,000 was included in the supplementary estimates under the award of the Clark Commission—a conversation  
20 with the Hon. Thomas McGreevy—in which you said that you would at once take means to see that the balance of the claim of Mr. R. H. McGreevy would be paid or settled in some way. Did you not have that conversation with the Hon. Thomas McGreevy in the House of Commons or in your office here in Ottawa?—*A.* I have no recollection at any time or place of having any such conversation with the Hon. Thomas McGreevy.

*Mr. Hogg.*—I want all this taken, subject to my objection—the question is too general.

*Mr. Girouard.*—I have particularised the conversation sufficiently.

*Q.* If Mr. McGreevy were to come here and say that you had that  
30 conversation with him and that you made that promise, what would you say?—*A.* I would say I was satisfied that he was mistaken.

*Q.* Did you not at the end of that very session, in the City of Ottawa, have a conversation with Mr. Robert McGreevy?

*Mr. Hogg.*—What does “the end of the session” mean. Cannot my learned friend give a particular time?

*Q.* Did you not have a conversation at the end of the session with Mr. Robert McGreevy, the suppliant, and did you not promise to him that you would see that the balance of his claim was settled?

*Mr. Hogg.*—I object to the question most decidedly, and I ask the Court  
40 to rule it out.

*The Court.*—Since questions of that kind have been admitted I will allow it.

*A.* I have no recollection of any such conversation with Mr. Robert McGreevy.

*Q.* Did you have a conversation with Mr. Angus P. McDonald, one of the contractors of the Intercolonial Railway, who had a claim also before Mr. Shanly in the year 1881, a few days after the report on his claim was

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 The Queen,  
 5th April  
 1888—con-  
 tinued.

put in your hands. Did you not congratulate him then upon the report of Mr. Shanly in his favour, and tell him then and there, in the City of Ottawa, about June 1881, that this report of Mr. Shanly in his favour would be paid by the Government?—*A.* I have no recollection of making any such statement.

*Mr. Hogg.*—This is surely getting evidence in another case, if there is such a case in Court.

*The Court.*—Unless this is for the purpose of establishing the interpretation of the powers of Mr. Shanly, I will not allow it; but if it tends to establish what interpretation the Government put themselves upon the instructions to Mr. Shanly, then I will allow it. 10-

*Mr. Girouard.*—That is why I ask the question. Mr. Shanly said he acted in all these cases under the same powers.

*The Court.*—It will not affect this case at all whether Mr. Macdonald's report was approved or not.

*Q.* On or about the 11th May 1884, in the City of Montreal, did you not have a conversation with the Hon. Thomas McGreevy, in which you told him very distinctly that you would see that the balance of the claim of his brother, as reported on, would be settled?

*Mr. Hogg.*—I object to the question on the same ground.

*A.* I am quite certain that I had no such conversation with the Hon. 20  
 Thomas McGreevy. No, it was quite impossible.

*Re-examined.*—*Q.* You have stated on cross-examination that in several cases money was paid by the Government under the reports of Mr. Shanly. Will you explain to the Court—because I think it is of great value here—how it comes that in some of the cases they were paid. You said that you did not consider the reports in some of the cases as bearing out the instructions and duty of Mr. Shanly; now, how did you consider those that were paid?—*A.* As I understand it, these reports were approved by the Minister of Railways, or the acting Minister of Railways, and referred to the Privy Council for decision, and being approved by the Privy Council were put in the estimates and submitted 30  
 to Parliament and paid.

*Q.* They were not paid then on the certificate of the Minister?—*A.* I do not understand it so.

*Q.* The Order in Council would show that?—*A.* Yes.

*By Mr. Girouard.*—*Q.* These reports that have been paid, have been paid for reasons which I suppose the sessional papers for the years 1880–81 will show?—*A.* I suppose so.

*Q.* There are no other reasons than those which appear in the official papers?—*A.* I do not know whether all the official papers are embodied there, but I assume that they are, for the reasons stated there. 40

*Q.* You do not suppose that they would be paid for any other reason?—*A.* I do not suppose so.

Thomas McGreevy called and sworn and examined by Mr. Girouard.

*Question.*—You are a member of the House of Commons for the Western Division of the City of Quebec?—*Answer.* Yes

*Q.* And you have been for a great many years?—*A.* Since Confederation.

*Q.* You heard the testimony which has just been given by Sir Charles Tupper?—*A.* Yes.

*Q.* During the session of 1882 did you have a conversation with Sir Charles Tupper in the City of Ottawa, and what was the purport of that conversation?—*A.* I had many of them.

10 *Q.* With reference to this claim?

*Mr. Hogg.*—The question was only allowed subject to the objection. It is of a broad character as it is, and surely my learned friend cannot now extend it to all the conversations that may have taken place.

*The Court.*—Do you object to the evidence at all?

*Mr. Hogg.*—I do not say that I object to the evidence, but the foundation of this question was laid when Sir Charles Tupper was examined. It was laid improperly, but my learned friend asked him about several conversations.

*Mr. Girouard.*—Even if I had not put the question to Sir Charles Tupper, I could ask the question of this witness.

20 *Q.* Did you have a conversation with Sir Charles Tupper with regard to the payment of Mr. Shanly's award upon the claim of your brother in this case?—*A.* Yes.

*Q.* When was it?—*A.* In the City of Ottawa, in the Parliament House, in his own office.

*Q.* During the session of 1882?—*A.* Yes.

*Q.* What was the purport of that conversation?—*A.* He told me it was the intention to pay the award of Mr. Shanly.

*Q.* Did he tell you that he intended to bring them down in the supplementary estimates?—*A.* He stated that they would not put them in the estimates  
30 that session.

*Q.* Did he mention the reason?

*Mr. Hogg.*—I object to the evidence going any further, because this is an attempt, by direct examination, to imply an official action from a general conversation. I do not think that is evidence that should be allowed at all.

*The Court.*—It is no evidence at all. You may take it down if you wish, but it will establish no fact of approval or disapproval.

*Mr. Girouard.*—I quite admit that, but I ask the question because the evidence of Sir Charles Tupper was admitted illegally.

40 *Q.* Did Sir Charles Tupper tell you that the Government had decided on including Mr. Shanly's reports in the supplementary estimates, but that he had also suggested to yourself that it would be better, in view of the approaching general elections, not to bring them down that session but to wait till after the elections?—*A.* He stated you had better not.

*Q.* Better not what?—*A.* Better not put them in the estimates that session.

RECORD.

No. 21.

Evidence of  
Thomas  
McGreevy in  
McGreevy v.  
The Queen  
—continued.

Q. He lead you to understand that it would be done the session after?  
Objected to.

A. I will not say that.

Q. Did he say that he approved of the report of Mr. Shanly?—A. He told me more than once that it was the intention to pay it—to have it recommended for payment.

Q. During the session of 1884, about the end of April or beginning of May, at the time the \$84,000 was included in the supplementary estimates brought down that session, did he promise you that means would be taken at once to settle the balance of the claim of your brother, the suppliant in this case?—A. He stated that this commission was simply for the examination of the whole of the cases, to go over them all there were such large amounts involved, but this particular one he said there was no particular objection to, the one of my brother, because the contract was completed,—that the extras, whatever were allowed, were in accordance with the contract,—that there were no extras beyond what the contract stated. 10

Q. Did he tell you on that occasion that he would see that the balance of your brother's claim would be settled?—A. He said some means would be found of meeting the balance.

Q. Do you recollect whether that conversation took place about the 15th or 16th of April 1884?—A. It was after the session of 1884. 20

Q. Did you have another conversation with Sir Charles Tupper in Montreal after the session of 1884?—A. Yes, on the night he left to go below.

*Mr. Hogg.*—I want it understood that this is being taken subject to my objection.

Q. Did Sir Charles Tupper tell you in Montreal that the claim of your brother would be settled?—A. No, he did not say that it would be settled, but that they would take such means as would bring about a settlement. 30

Q. Had you a conversation with Sir John Macdonald in May or June, 1882, on the subject of the award of Mr. Shanly on the claim of your brother?

*Mr. Hogg.*—I object to this altogether. This was a conversation with another minister who had not charge of the Department of Railways.

*Mr. Girouard.*—In one instance he was the acting minister.

*Mr. Hogg.*—Any conversation taking place with a minister of the Crown not in charge of this department should not be allowed. He was not the acting minister in this case.

*The Court.*—I will allow the evidence since we have entered into that kind of oral evidence. Such testimony has been given, and the most positive evidence has been given in several of these cases by the most respectable and honourable witnesses. Of course you cannot establish the fact by this evidence. 40

*Mr. Girouard.*—I admit that, but it is because the evidence of Sir Charles Tupper was admitted illegally.

*The Court.*—It is because the door has been opened to you by your adversary, but I allow you to follow it to the end, so long as it is closely connected with the case.

*Mr. Hogg.*—That is what I object to; it is not closely connected with the case. What Sir John Macdonald said cannot be evidence.

*Q.* Did Sir John Macdonald tell you in May or June 1882, that the certificate of Mr. Shanly upon the claim of your brother would be paid after the general election?—*A.* He did not tell me so, but he wrote me so.

10 *Q.* Have you got the letter?—*A.* No, I have not.

*Q.* Do you know where it is?—*A.* No.

*Q.* Are you sure that it was not written by some one else in his name?—*A.* It was his own handwriting.

*Q.* The letter is lost?—*A.* I cannot produce it.

*Mr. Hogg.*—I object to this evidence.

*Cross-examined.*—*Q.* As I understand the evidence that you have given, it amounts to this: That Sir Charles Tupper said that some means would be taken to effect a settlement—that is about it?—*A.* Yes.

20 *Q.* Did he say that he would endeavour to take some means to effect a settlement?—*A.* It is just as I have stated it, as well as I can recollect it.

*Q.* That he would endeavour to take some means to effect a settlement of your brother's claim?—*A.* Yes.

*Q.* Then you judge from what he said that he was friendly to you or to your claim?—*A.* My brother being in Quebec, he would communicate to me about his claim, and I, being in Ottawa, used to see the minister about it.

30 *Q.* At another time, in 1882, you say you had a conversation in which he suggested that it would be better not to put these in the estimates at all until the next session?—*A.* Until after that general election was over.

*Q.* Did he say then, or was it you that suggested the propriety of putting them in the estimates of 1882?—*A.* No, I was speaking about the payment. My brother used to write me occasionally about his claim, and I used to speak to him about it, and it was by that means the conversation came around.

*Q.* So this was a conversation you had with the minister?—*A.* I had numbers of conversations. I want you to understand, that I had not a dollar's interest in it myself.

40 *Q.* This was one of several conversations that you had with the minister on this and other subjects?—*A.* Exactly.

## RECORD

No. 22.  
Evidence of  
Robert H.  
McGreevy in  
*McGreevy v.*  
*The Queen.*

Robert H. McGreevy called and sworn and examined by Mr. Girouard.

*Q.* On or about the 9th or 11th of May 1884, did you have an interview with Sir Charles Tupper in the City of Ottawa?—*A.* No.

*Q.* Did you have one in the City of Montreal?—*A.* No. The interview I had was on the 17th of April 1884.

*Q.* On the subject of your claim against the Government?—*A.* Yes.

*Q.* Was it after the \$84,000 was paid, or before?—*A.* It was immediately at the time the estimates were passed.

*Q.* The amount awarded to you was voted by Parliament, and before it was paid to you?—*A.* Yes. 10

*Q.* Did Sir Charles Tupper tell you on that occasion that he would see that the balance of your claim would be settled or paid by the Government?—*A.* I had better tell you in a very few words how it occurred. I received a despatch from my brother on the 16th April 1884.

*Q.* In Quebec?—*A.* Yes, I received a despatch telling me to come up at once; that Sir Charles Tupper would close the case.

*By Mr. Hogg.—Q.* I would like to see that despatch; have you got it?—*A.* No, I have not. It was on the 16th April 1884. I met Sir Charles Tupper—he had made an appointment for me. I met him in the Library of Parliament. I stated to him the injustice of having received only \$84,000 on the certificate, and said I should be entitled to at least the balance of the certificate. After about fifteen minutes conversation with him he said, “Put that in a letter, and as far as I am personally concerned I will see that you receive the balance. I will put the matter before my colleagues.” I wrote the letter of the 18th April from that conversation. 20

*By Mr. Girouard.—Q.* As the result of it?—*A.* Yes; exactly what I told him I wrote.

*Q.* Look at Exhibit “H.” Is that it?—*A.* Yes, that is the outcome of the conversation we had.

*Cross-examined.—Q.* Will you just state what the words were that Sir Charles Tupper used at that time?—*A.* He said, “Put in writing exactly the statement you have made to me now, and from what I see now I am personally in favour of giving you what you asked, and I will lay the matter before my colleagues.” 30

*Q.* He said from what he then saw he was in favour of it?—*A.* Yes.

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Evidence of Sir John A. Macdonald.

No. 23.  
Evidence of  
Sir John A.  
Macdonald in  
*McGreevy v.*  
*The Queen.*

*Examined by Mr. Girouard, Q.C.—Question.* Will you please look at the following report of the debates of the House of Commons for the 9th March 1881, where there was a discussion on the Intercolonial claims, and the appointment of Mr. Schreiber, and see if you are correctly reported in that Hansard? 40

Mr. Robinson objects. In the first place, that nothing said by any one in Parliament affects this case in any manner, and in the second place, that it is not open to the learned Counsel to appeal to the report.

*The Court* admits the evidence subject to the objections.

*Answer.* (Witness examines the report of the Hansard.) I cannot vouch for the accuracy of the report of what I stated, for I have never corrected this or any other speeches of mine. I cannot speak of its verbal accuracy, but I have no doubt that in substance at least I am correctly reported.

RECORD.

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No. 23.Evidence of  
Sir John A.  
Macdonald in  
McGreedy v.  
The Queen  
—continued.

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Hansard, 1881—Page 1278.

10 *Sir John A. Macdonald.*—That case stands in quite a different position from the general run of cases which came before Mr. Shanly. The honourable gentleman must remember that in the case he mentioned the party brought an action in the Court of Exchequer, and that in due course it was to be referred to the Registrar of that Court. It was obvious that that officer knew nothing about railway matters, and, in the exercise of a wise discretion, Mr. Keefer, an experienced engineer, was appointed instead of the Registrar to go down and report upon the case just as the latter would have had to do. The honourable gentleman knows that all the railway contracts provide that money must be paid on the certificate of the Chief Engineer.

20 All the money to be paid under a contract must be paid on the certificate of the Chief Engineer.

Mr. Fleming ceased to be Chief Engineer and could not certify. Mr. Schreiber was appointed Chief Engineer, but as he knew nothing of what was done beforehand he could not well certify to Mr. Fleming's work. It was of great importance to have all these matters settled, and Mr. Shanly was specially appointed as a person in no way connected with the road or the contractors, and who had never been on the spot before in any special capacity, to go down and act in the capacity of Chief Engineer. My honourable friend asks how could Mr. Schreiber be the Chief Engineer of the Intercolonial, and at the same time be occupied on the Pacific Railway. Mr. Schreiber is Chief Engineer of the Intercolonial Railway. That is his permanent appointment. In consequence of his proved skill in expediting work, it was deemed by the Government of the greatest importance that the unfinished portion of the Canadian Pacific Railway under contract should be superintended by him, and he was sent there *pro tem.* specially for the purpose of pressing on all the work under way at Red River. While absent Mr. Archibald filled his place on the Intercolonial.

No. 24.  
Extract from  
Hansard,  
1881,  
page 1278.

RECORD.

Page 1279.

No. 25.  
Extract from  
Hansard,  
page 1279.

*Sir John Macdonald.*—The hon. gentleman went out of the range of his discretion, and I think of his duty, when asking for this information, to use such strong language. How could it be a most scandalous thing for us to appoint an engineer of high standing, of certain honesty and perfectly disinterested, to examine into and report on a claim which the hon. gentleman says the registrar would have had to get an assessor to examine into? The registrar would have to get such a man as Mr. Shanly to act as assessor, because the registrar himself knows nothing about such matters. If there was an error it was simply in not having gone through the form of appointing Mr. Keefer as assessor. 10  
Mr. Keefer would then have handed his report to the registrar, who would have handed it to Judge Fournier, who would have ordered payment to be made. As to Mr. Shanly's duty, it is easily understood. Mr. Fleming has ceased to be Chief Engineer of the Intercolonial; Mr. Schreiber never was Chief Engineer of the Intercolonial, but Chief Engineer of the works of construction and manager of the road afterwards. That took up all his time, because there must be an officer holding the rank and position of Chief Engineer of the Intercolonial Railway. It was thought that Mr. Shanly, being a disinterested party and a competent engineer in whom the public had confidence, should be gazetted and appointed Chief Engineer in order to enquire into the contracts and wind them 20  
up, just as Mr. Fleming would have been obliged to do—in fact, to step into Mr. Fleming's shoes and give the necessary certificates under which Government would be authorized to pay the money due. That is simply the way the matter stands. I am not at all aware there are any suits in court, any petitions of right filed which have been referred to Mr. Shanly; but I should not be surprised if that were the case. I do not, however, believe it is the case. I believe that whenever a party files a petition of right he is left to his legal remedy. We considered in the other case that that arrangement was carried out, that the assessors found the Dominion owed so much and the money was paid. I believe that Mr. Shanly is simply performing the duty that Mr. Fleming 30  
declined to perform since 1874, inasmuch as he considered he had ceased to be the Chief Engineer of the Intercolonial railway.

*Sir John A. Macdonald.*—On the ground that he was such Chief Engineer.

No. 26.  
Extract from  
Hansard,  
page 1281.

Page 1281.

*Sir John A. Macdonald.*—Since we have gone astray from the item under consideration we may as well have out this discussion. In the first place, the hon. gentleman says that he never heard before that there was a technical difficulty on account of there being no engineer in chief to sign certificates.

In that case the hon. gentleman must have been absent from this House because last session the Minister of Railways stated in his place again and again that that was one of the technical difficulties.

RECORD.

No. 26.

Extract from  
Hansard,  
page 1281—  
*continued.*

*Sir John A. Macdonald.*—The hon. gentleman has got a short memory, and if he will bring me the Hansard I will undertake to find where the Minister of Railways stated that in his place. I think the hon. gentleman should admit that Mr. Fleming as Chief Engineer ought to know every thing that was done, as long as he held that position, and therefore that his certificate was binding, so long as it was given while he held that position. Yet the moment he ceased to  
10 be Chief Engineer he was *post officio*, and his certificate was of no more value than would be the certificate of the hon. gentleman himself. I say that Mr. Schreiber never was appointed Chief Engineer of the Intercolonial under the statute. The hon. member for Lambton who was at the head of the department asked him to act, and he did act, I suppose, as Chief Engineer, but he had no appointment under the statute. Unless he was appointed according to law his certificate was of no more value than the certificate of Mr. Fleming after he resigned, and could not be received in evidence. Mr. Fleming had resigned and therefore his certificate was of no value. Mr. Schreiber was not  
20 appointed and therefore his certificate was of no value. And the contractor was asking for a certificate and had a right to get a final certificate either to say that there was a balance due him or the reverse. He never had a certificate; and the Government held, in the absence of the certificate of the Chief Engineer, that the technical objection, no matter what might be the justice and righteousness of the claim, was fatal to the claim.

This whole proceeding was simply to get rid of the technical objection and the appointment of Mr. Shanly by Order in Council to be Chief Engineer that he might do that which had not been done before.

The hon. gentleman's argument if it amounts to anything, is to exact the pound of flesh, to declare that this country cannot afford to be honest,  
30 that it must take advantage of all technical objections, and no matter whether the contractor might be ruined by not having money for money's worth on his contract, yet the Government should simply say to the Court that there is no certificate of the Chief Engineer, that they will not appoint one, and therefore the contractor cannot receive what is justly due. That is a dishonest and pettifogging way of acting, one unworthy of a nation and of Canada; and I am quite sure the people of Canada will not thank honourable gentlemen opposite or a Government if they took advantage of any miserable technical objection in order to cheat contractors. That is the simple argument of the honourable gentleman (Mr. Blake). It is always said that a man has a very bad case if he  
40 dare not refer it to arbitration for settlement. I contend that the principle involved in the General Board of Works Act and the Railway Act is that of arbitration, and an official court of arbitrators was established. And why? Because the legislature thought, and thought justly, that the fairest way of deciding between the two departments and the contractors would be to leave it to a board of arbitrators not bound by technical points. Sir, the honourable gentleman does not venture to say that the arbitrators appointed—either

**RECORD.** Mr. Frank Shanly or Mr. Keefer—were not men that any Government might justly select as arbitrators to decide between contractors and themselves. They are competent and honest men; engineers who know the value of work, the cost of construction, and who have been in the habit of dealing with contracts. What can a Government do more fair or honest than to take honest and competent men to decide between contractors and the Crown and not insert technical objections to destroy the real, honest or asserted claim of men who, having a full confidence in the honesty of the Government, had involved themselves and their friends in contracts for large amounts, believing that they would be treated as one honest man would treat another honest man, and that technical objections would not be thrown in their faces in order to ruin them and save out of the starving treasury of the people of Canada sums of money by filching them out of pockets of contractors. 10

No. 26.  
Extract from  
Hansard,  
page 1281—  
*continued.*

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**Page 1277.**

No. 27.  
Extract from  
Hansard,  
page 1277.

*Mr. Pope.*—The honourable gentleman knows that the law provides that there shall be a Chief Engineer, upon whose certificate the balances of the settlement may be made. Mr. Shanly was appointed Chief Engineer, and is now engaged in reporting on several matters brought before him respecting the Intercolonial Railway.

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**Exhibit 2 at Trial.**

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No. 28.  
Extract from  
Report in  
Ross v.  
The Queen.

**Extract from Report of Proceedings before Commissioners in  
Ross versus The Queen.**

*Mr. Girouard.*—"Before closing the case I wish to make a reservation of the rights of the claimants as was done in the case of Mr. McGreevy, and it is to this effect, that while the claimants have appeared before this Commission and have endeavoured to give the Commissioners all the information in their power, still they do not intend thereby to admit the constitutionality of this Commission, nor to waive any right which they may have arising out of their contract with Her Majesty, or arising from the report of Mr. Frank Shanly upon the claim made by the contractors against the Government, which report has been as they have already submitted illegally withheld from the information of this Commission." 30

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## Exhibit 3 at Trial.

Statement of Amounts paid on Estimates 1st July 1871, on Section 9,  
and after 1st July 1872, on Section 15.

RECORD.

No 29.  
Amounts  
paid on  
Estimates,  
&c.

Section 9.				Section 15.					
				§					
July 1871	-	-	-	21,600	July 1872	-	-	-	16,000
August	-	-	-	11,700	August	-	-	-	4,500
September	-	-	-	15,300	September	-	-	-	21,000
October	-	-	-	15,300	October	-	-	-	18,000
10 November	-	-	-	11,700	November	-	-	-	15,000
December	-	-	-	4,500	December	-	-	-	3,000
Jan. and Feb. 1872	-	-	-	16,720	January 1873	-	-	-	3,000
March	-	-	-	17,380	February	-	-	-	5,000
April	-	-	-	6,000	March	-	-	-	3,000
May	-	-	-	5,000					
June	-	-	-	10,000					<u>88,500</u>
July	-	-	-	11,000					
August	-	-	-	19,000					
September	-	-	-	11,500	April 1873 to January 1874, progress				
20 October	-	-	-	9,000	returns only from Engineer in				
November	-	-	-	7,000	charge.				
February 1873	-	-	-	1,000					
March	-	-	-	3,000					
				<u>196,700</u>					

May to September 1883, progress  
returns only from Engineer in  
charge.

In the Exchequer Court of Canada.

Wednesday, the 22nd day of May, A.D. 1895.

30

Present:—The Honourable Mr. Justice Burbidge.

In the Matter of the Petition of Right of

John Theodore Ross, Frances Ella Ross, John Vesey  
Foster-Vesey Fitzgerald, and Annie Ross - - - - - Suppliants,

and

Her Majesty the Queen - - - - - Respondent.

Judgment at Trial.

The Petition of Right of the above-named Suppliants having come on for  
trial before this Court, at the City of Ottawa, on the 26th day of January,

No. 30.  
Judgment  
of the  
Exchequer  
Court, 22nd  
May 1895.

**RECORD.** A.D. 1895, in presence of counsel for the Suppliants and for the Respondent, upon opening of the matter and upon hearing read the pleadings herein, and the special case agreed upon by the parties, and what was alleged by counsel as well for the Suppliants as for the Respondent, this Court was pleased to direct that this matter should stand over for judgment and the same coming on for judgment this day,

No. 30.  
Judgment  
of the  
Exchequer  
Court, 22nd  
May 1895—  
*continued.*

This Court doth order and adjudge that the Suppliants are not entitled to any portion of the relief sought by their Petition of Right herein.

And this Court doth further order and adjudge that the Suppliants do pay to the Respondent her costs of suit after taxation thereof.

10

By the Court,

L. A. AUDETTE, Registrar.

### Mr. Justice Burbidge's Reasons for Judgment.

No. 31.  
Mr. Justice  
Burbidge's  
Reasons for  
Judgment.

The present Suppliants are the legal representatives of the late John Ross of the city of Quebec, who in 1876 became entitled by assignment to all the rights of Messrs. J.-B. Bertrand & Co., in or incident to, two contracts into which that firm had entered with the Crown for the construction of Sections 9 and 15 of the Intercolonial Railway; and the only question to be now determined, is as to whether or not the suppliants are entitled to recover against the Crown on a certificate or report made by Mr. Frank Shanly, Civil 20 Engineer, on certain claims made by Mr. Ross in respect of the construction of the two sections of the Railway referred to.

By an Act of the Parliament of Canada, 31st Victoria, Chapter 13, provision was made for the construction of the Intercolonial Railway. By the third section of the Act, it was provided that the construction of the Railway and its management, until completed, should be under the charge of four Commissioners to be appointed by the Governor-General. By the fourth section provision was made for the appointment of a Chief Engineer, who, under instructions he might receive from the Commissioners should have the general superintendence of the works to be constructed under the Act. The Railway was to be built by tender and contract, and it was provided that no contract involving an expenditure of ten thousand dollars or more should be concluded by the Commissioners until sanctioned by the Governor-in-General (Section 16). By the eighteenth section it was enacted that no money should be paid to any contractor until the Chief Engineer should have certified that the work, for or on account of which the same should be claimed had been duly executed, nor until such certificate should have been approved by the Commissioners.

The contracts made between Bertrand & Co., and the Crown, as represented by the Commissioners appointed under the Act 31st Victoria, Chapter 13, were entered into on the 26th day of October 1869, and the 15th day of June 1870, respectively, the former for the construction of Section 9 of the Railway, 49

and the latter for the construction of Section 15. By the second clause of the contract for the construction of Section 9, it was among other things agreed that all the works were to be executed and materials supplied to the entire satisfaction of the Commissioners and Engineer, and that the Commissioners should be the sole judges of the work and material, and their decision on all questions in dispute with regard to the works or materials, or as to the meaning or interpretation of the specifications or the plans, or upon points not provided for or not sufficiently explained in the plans or specifications should be final and binding upon all parties. By the fourth clause of the contract the Engineer

10 was given authority at any time before the commencement, or during the construction of any portion of the work, to make any changes or alterations which he may deem expedient in the grades, the line of location of the Railway, the width of cuttings or fillings, the dimensions or character of structures or in any other thing connected with the works whether or not such changes should increase or diminish the work to be done or the expense of doing the same, and it was agreed that the contractors shall not be entitled to any allowance by reason of such changes, unless such changes consisted in alterations in the grades or the line of location, in which case the contractors shall be

20 subject to such deductions for any diminution of work or entitled to such allowance for increased work (as the case might be) as the Commissioners might deem reasonable, their decision to be final in the matter.

By the ninth clause of the contract it was further agreed that the sum of \$354,897, for which the work was to be done, should be the price of and be held to be full compensation for all the works embraced in or contemplated by the contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not upon any pretext whatever be entitled by reason of any change, alteration, or addition made in or to such works, or in the said plans and specification, or by reason of any of the powers vested in the Governor in Council by the said Act intituled "An Act respecting

30 the construction of the Intercolonial Railway," or in the Commissioners or Engineer, by this contract or by law, to claim or demand any further or additional sum for extra work or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretension to all intents and purposes whatsoever, except as provided in the fourth section of the contract.

By the eleventh clause of the contract it was further agreed that cash

40 payments equal to eighty-five per cent. of the work done, approximately made up from return of progress measurements, should be made monthly on the certificate of the Engineer that the work for or on account of which the sum should be certified had been duly executed and upon approval of such certificate by the Commissioners. On the completion of the whole work to the satisfaction of the Engineer, a certificate to that effect was to be given, but the final and closing certificate, including the fifteen per cent. retained, was not to be granted for a period of two months thereafter. The progress certificates, it was agreed, should not in any respect be taken as an acceptance of the work or release of the contractors from their responsibility in respect thereof, but they should at the conclusion of the work deliver over the same in good

RECORD.

—  
No. 31.  
Mr. Justice  
Burbidge's  
Reasons for  
Judgment—  
*continued.*

RECORD. order according to the true intent and meaning of the contract and of the said specifications.

No. 31.  
Mr. Justice  
Burbidge's  
Reasons for  
Judgment—  
*continued.*

And by the twelfth clause of the contract the parties stipulated that the contract and the specifications should be in all respects subject to the provisions of the Act 31st Victoria, Chapter 13, and also to the provisions of "The Railway Act, 1868," in so far as the latter might be applicable.

The contract for the construction of Section 15 of the railway was in like terms, except as to twelfth paragraph, which provided for the substitution, at the option of the Commissioners, of iron bridges for wooden bridges, the superstructure of such iron bridges to be procured at the cost of Her Majesty, but in every such case the value of the wooden superstructure and the reduction in quantity and value of masonry (if any) consequent upon such substitution was to be deducted at the prices named for such description of work in the schedule annexed to the contract from the full amount mentioned in the contract as payable and to be paid for the performance of the work under said contract. 10

Bertrand & Co. did not complete the work embraced in either of the two contracts. In both cases the work was taken out of their hands and completed by the Crown. That on Section 9 was finished in November 1873, and that on Section 15 in February 1874. 20

In the latter year, by the Act 37th Victoria, Chapter 15, the 3rd Section of 31st Victoria, Chapter 13, respecting the appointment of Commissioners, was repealed from the first of June 1874, and it was provided that thereafter the railway should be a public work under the control of the Minister of Public Works, to whom was transferred the powers and duties which had been previously vested in the Commissioners or assigned to them. In 1879 the Department of Public Works was divided and the Department of Railways and Canals created. By the fifth section of the Act (42 Vict., Chapter 7), by which this change was effected, the Minister of Railways and Canals became in respect of railways and canals the successor in office of the Minister of Public Works, with all his powers and duties incident thereto. 30

During the progress of the work covered by the two contracts to which reference has been made, Mr. Sandford Fleming was Chief Engineer of the Intercolonial Railway. He furnished the contractors with progress estimates of the work done under such contracts, the amount of which was paid, but he gave no final certificate in respect of either contract.

In December 1876, as has been stated, Mr. Ross became entitled, by assignment from Bertrand & Co., to their rights and interests in the two contracts, and in any moneys that might be due to them thereunder. In December 1879 he filed in this Court a petition in which, in respect of such contracts and the work done by Bertrand & Co. on Sections 9 and 15, he claimed a sum of \$576,904.02. 40

There were at the time claims by other contractors for work done on the Intercolonial Railway, and in May 1880 an Order in Council was passed, by which Mr. Fleming was "reappointed" Chief Engineer of the railway "to investigate the unsettled claims which had arisen in connection with the "undertaking upon which no judicial decision had been given, and to report

“ on each case to the Department of Railways and Canals.” Mr. Fleming declined the position, and on the 23rd of June 1880 Mr. Frank Shanly was appointed thereto.

On the 18th of July 1881 Mr. Shanly, in a letter to the Secretary of the Department of Railways and Canals, made, for the information of the Minister of that Department, his report on the claims put forward by Mr. Ross.

10 With reference to Section 9 of the Railway, he recommended the payment of four items, amounting to \$12,277, “ as being extra to the contract,” and three sums, amounting to \$92,310, as “ advance in price ” in “ rock excavation and borrowing,” and on “ first-class and second-class masonry.”

20 With respect to Section 15 he recommended the payment of one item of \$1,875, which he considered formed “ no part of the original contract,” and as before he recommended that the rate or price for rock excavation and masonry should be increased. In all he recommended that the claimant should be paid \$231,806 in excess of the lump sum agreed upon. Mr. Shanly’s report or recommendation was never acted upon, but in July 1882 a commission was appointed to investigate these Intercolonial Railway claims and to report thereon to His Excellency in Council, to the end that he might be well advised as to the liability of Her Majesty in regard to such claims. The Order in  
30 Council under which the commission was constituted and the proceedings thereon, so far as the present claim is affected, are before the Court, but it is not, I think, necessary for the disposition of the only question now to be disposed of to make any further reference thereto. The only question to be now decided as has been stated is—Are the suppliants entitled to recover against the Crown on Mr. Shanly’s certificate or report? It is admitted that in this Court the question is answered by the decision of the Supreme Court of Canada in the case of *The Queen v. McGreevy* (18 S. C. R. 371), in which a like question arose. The certificates or reports in question in that case and this are not, it will be seen, in the same terms. They were, however, made by the same  
40 officer under the same statutes and like contracts and under similar circumstances, and gave rise to like questions. There is some difference of opinion between the parties to this petition as to what was decided in McGreevy’s case, but there is no contention that the report or certificate on which the present suppliants rely can be distinguished to their advantage from the certificate upon which the decision turned in the case to which I have referred. If the latter was not sufficient to sustain the petition in that case, the suppliants in this case and before this Court must also fail.

McGreevy’s case came first before Mr. Justice Fournier sitting in this Court, upon a statement of admissions by both parties similar to that now submitted,  
40 and for the determination, as I have already mentioned, of a like question, namely, Whether the suppliant was entitled to recover on Mr. Shanly’s certificate or report?

To answer that question in the affirmative it was necessary to come to conclusion—

1. That Mr. Shanly was the Chief Engineer of the Intercolonial Railway within the meaning of the Statutes and contract under which the Intercolonial Railway was built.

RECORD.  
 —  
 No. 31.  
 Mr. Justice  
 Burbidge's  
 Reasons for  
 Judgment—  
*continued.*

2. That his report constituted a good and sufficient certificate under such statutes and contracts.

3. That the approval of the certificate by the Minister of Railways and Canals was not a condition precedent to the right of the suppliants to recover thereon, or that such approval had been given. In the Exchequer Court, Mr. Justice Fournier held that Mr. Shanly was the Chief Engineer of the railway and competent to give a certificate; that his report constituted thus a good certificate, and that if the approval of the certificate by the Minister of Railways and Canals as representing the Commissioners were necessary, such approval had been given by acquiescence. On appeal to the Supreme Court, 10  
 Mr. Justice Strong and Mr. Justice Taschereau were of opinion to answer the question submitted in the affirmative and to dismiss the appeal. They agreed that Mr. Shanly was the Chief Engineer of the railway; that he had authority to make the report in question, that it constituted a good, final and closing certificate, and that the approval of the Minister was not necessary. Chief Justice Sir William J. Ritchie and Mr. Justice Gwynne took a different view. They thought that Mr. Shanly's report was not such a certificate as was contemplated by the Statutes and contracts to which I have referred. Mr. Justice Patterson agreed with Mr. Justice Strong and Mr. Justice Taschereau that Mr. Shanly was Chief Engineer and competent to give a 20  
 certificate, and that the approval of the certificate by the Minister of Railways and Canals was not necessary. He agreed, however, with the Chief Justice and Mr. Justice Gwynne, but on a different ground, that the suppliant could not recover on the certificate. In his opinion the Chief Engineer had no power or authority to determine the amount or price to be paid for the work done. In the result the question submitted was answered in the negative and the appeal was allowed.

Whatever my own view might be, it would, it seems to me, be incumbent on me, under these circumstances, to follow that decision and declare that the suppliants in this case are not entitled to the relief prayed for. But even if it 30  
 were thought that the difference of opinion that existed in that case between the learned Judges who constituted the majority of the Court, left it open for me to form and express my own view as to whether the Crown is liable on Mr. Shanly's report or not, I should still be of opinion that it is not liable.

In submitting a single question for the decision of the Court the suppliants reserve the right, if the Court decided against them on that question "to proceed on other clauses of the petition for the general claim." In order, however, that a judgment might be entered on the answer to the question submitted from which an appeal could be taken, it was agreed by counsel that 40  
 as the question was answered, so judgment on the petition should be entered, reserving to the suppliants the right to come before this Court and ask to have that judgment set aside.

There will be judgment for the Respondent with costs.

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In the Exchequer Court of Canada.  
 Friday, the 28th day of June, A.D. 1895.  
 Before the Honourable Mr. Justice Burbidge in Chambers.  
 Order extending Time for Appealing.

RECORD.

No. 32.  
 Order  
 extending  
 Time for  
 Appealing,  
 28th June  
 1895.

Upon the application of Counsel for the Suppliants, and Counsel for the Attorney-General appearing, and upon hearing what was alleged by Counsel aforesaid,

10 I do order that the Suppliants have until the twenty-second day of July next within which to make the deposit necessary for the purpose of an appeal in this matter to the Supreme Court of Canada under Section 51 of the Exchequer Court Act.

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Notice of Hearing of Appeal.

No. 33.  
 Notice of  
 Hearing of  
 Appeal,  
 28th June  
 1895.

Take notice that the appeal of the above-named (Suppliants) Appellants herein from the judgment rendered in this cause in the Exchequer Court of Canada by the Honourable Mr. Justice Burbidge, on the twenty-second day of May, A.D. 1895, has been set down to be heard pursuant to the Statute before this Honourable Court at its next Session to be held at the City of Ottawa on the first day of October, A.D. 1895.

Dated this 28th day of June, A.D. 1895.

20

A. FERGUSON,  
 Agent for Gustavus G. Stuart,  
 Attorney for the Appellants.

To the above-named Respondent,  
 and to O'Connor and Hogg, Solicitors  
 for the Attorney-General.

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Appeal from the Exchequer Court of Canada.

No. 34.  
 Agreement  
 as to Con-  
 tents of Case  
 on Appeal.

Between

John T. Ross *et al.* - - - (Suppliants) Appellants,

and

30 Her Majesty the Queen - - - (Defendant) Respondent.

Agreement as to contents of Case in Appeal.

We hereby consent that the printed case in appeal herein to the Supreme Court of Canada shall be composed and consist of the following documents:—

1. Petition of Right.
2. Statement in Defence.
3. Statement of Admissions by both parties.

## RECORD.

No. 34.  
Agreement  
as to Con-  
tents of Case  
on Appeal—  
*continued.*

*Exhibits referred to in Statement of Admissions.*

4. Contract and Specification for construction of Section nine made between J.-B. Bertrand & Co. and the Queen, dated 26th October 1869.
5. Extracts from Contract for construction of Section fifteen made between same parties and dated 15th June 1870.
6. Order in Council of 22nd May 1880.
7. Report to Council of 21st June 1880, and Order in Council thereon of 23rd June 1880.
8. Certificate or Report of Frank Shanly, C.E., 18th July 1881.
9. Order in Council of 28th July 1882. 10

*Exhibits filed at Trial in Ross v. The Queen.*

10. Evidence taken in the Exchequer Court of Canada in the case of *Robert H. McGreevy v. the Queen*, and filed in this case as Exhibit No. 1.
11. Extract from Report of Proceedings before Commissioners in *Ross v. the Queen*, Exhibit No. 2.
12. Statements of Amounts paid on estimates on Sections 9 and 15 Exhibit No. 3.
13. Judgment of Exchequer Court, 22nd May 1895.
14. Reasons for Judgment. 20
15. Order extending time for appealing, 28th June 1895.
16. Notice of Hearing, 28th June 1895.
17. Agreement as to contents of case in appeal.
18. Certificate of Registrar of Exchequer Court, as to case as agreed upon.  
Dated this 8th day of July 1895.

(Signed) A. FERGUSON,  
Agent for Pentland and Stuart,  
Solicitors for the Appellants.

(Signed) W. D. HOGG,  
of Counsel for the Respondent. 30

## In the Exchequer Court of Canada.

Between

John Theodore Ross, Frances Ella Ross, John Vesey  
Foster-Vesey Fitzgerald, and Annie Ross - Suppliants,

and

Her Majesty the Queen - - - Defendant.

I, the undersigned, Registrar of the Exchequer Court of Canada, do hereby certify that the foregoing printed documents from page 1 to page 110 inclusive, is the case stated by the parties pursuant to Section 44 of the Supreme and Exchequer Court Act, and the rules of the Supreme Court of Canada, in a 40

No. 35.  
Certificate of  
Registrar of  
Exchequer  
Court of  
Canada as to  
Case as  
agreed upon.

certain cause pending in the said Exchequer Court of Canada between John Theodore Ross *et al.*, Suppliants (Appellants), and Her Majesty the Queen, Defendant (Respondent).

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Exchequer Court of Canada, this 2nd day of September, A.D. 1895.

(Signed) L. A. AUDETTE,  
Registrar of the Exchequer Court of Canada.

RECORD,  
—  
No. 35.  
Certificate of  
Registrar of  
Exchequer  
Court of  
Canada as to  
Case as  
agreed upon  
—*continued.*

---

B.

APPELLANTS' FACTUM.

No. 36.  
Appellants'  
Factum.

19

In the Supreme Court of Canada.

John T. Ross *et al.*,  
(Suppliants in the Exchequer Court) Appellants,  
and

Her Majesty the Queen,  
(Respondent in the Exchequer Court) Respondent.

The present appeal is asserted from a judgment of the Exchequer Court of Canada of the 22nd May 1895, dismissing a Petition of Right, originally filed by the late John Ross and continued by the now Appellant.

20 The claim is founded upon the contract between the Commissioners for the construction of the Intercolonial Railway and J.-B. Bertrand & Co. for the building of Sections 9 and 15 of the Railway. The Petition of Right was begun before what are known as the Shanly certificates were made and was amended so as to enable the petitioners to avail themselves of the certificate.

The only question submitted by the parties for the decision of the Court was whether the suppliants could recover on Shanly's certificate.

30 The learned Judge of the Exchequer Court held that he was bound by the decision of this Court in the case of *The Queen and McGreevy*, 18 Canada Sup. Ct. Reports p. 371,—but added (Case p. 107 l. 14) that even without that decision he would be of opinion that the Crown was not liable, without, however, giving any reasons for this opinion. We are thus left in the dark as to whether he shared the views of the late Chief Justice and Mr. Justice Gwynne or those of Mr. Justice Patterson.

The contract for the construction of Section 9 of the Railway between J.-B. Bertrand & Co., and the Commissioners appointed under the Act 31 Victoria, Chapter 13, was signed on the 26th October 1869 (Case p. 38) and that for the building of Section 15 of the road on the 15th June 1870—(Case p. 49).

RECORD.

No. 36.  
Appellants'  
Factum—  
continued.

The clauses which bear principally upon the question in litigation are numbers 4, 9 and 11, and they are identical in wording with the clauses numbered similarly in the McGreevy contract, which were the subject of lengthy comment in that case. They are to be found at pages 41, 44 and 45 of the Case.

Section 9 was completed in the month of November 1873, and Section 15 in February 1874.

During the whole of the work, Sandford Fleming was Chief Engineer; but he issued no final certificate with respect to either contract.

On the 22nd May 1880, an Order in Council was passed which recited that 10  
whereas a considerable number of suits had been brought against the Government with respect to the Intercolonial Railway which had remained undecided, and that it would be very difficult for any one, except the Engineer who was connected with the work from its inception, to satisfactorily perform the service of settling and adjusting such claims and authorizing the reappointment of Mr. Fleming as Chief Engineer—(Case p. 54). Mr. Fleming having refused the office, on the 23rd June 1880, an Order in Council was passed authorizing the appointment of Frank Shanly as Chief Engineer—(Case p. 55).

Mr. Shanly having accepted this office, issued a final certificate or report 20  
in favour of the late John Ross, for the total sum of \$231,806.00 of which \$112,816.00 was certified as being due in respect of work on Section 9 and \$118, 990.00 in respect of work on Section 15—(Case p. 56 and seq.).

In December 1876, the late John Ross had become entitled by assignment duly signified to the Crown, to all moneys payable to the contractors and presented a large claim for extras and balance of contract price—(Case p. 24 l. 22).

The petitioner, John Ross, having died intestate, the suit was continued by the present Appellants, his sole heirs at law, and the petition was amended so as to allege the Shanly certificate. 30

The defence of the Crown denies that the certificate relied on is that contemplated by the contract, and alleges that even if it were, not having been approved by the Minister of Railways it is inoperative, and finally, that the suppliants' claim was, after the making of the certificate, referred to three Commissioners who investigated the matter and before whom the late John Ross appeared and who reported that there was nothing due to the Contractors. This investigation and report are relied on as being a bar to the Petition of Right.

The case was tried upon the following admission and the exhibits referred to therein—(Case p. 24). 40

It is admitted—

1. That the contracts mentioned and referred to in paragraphs 2 and 3 of the Petition of Right were entered into by the said J. B. Bertrand & Co., for the construction of Sections 9 and 15 of the Intercolonial Railway, copies of which contracts are produced marked "A" and "B."

2. That the said contractors began and prosecuted the works, and executed a large amount of work in respect of the contracts and of the said sections of the Intercolonial Railway.

3. That Sandford Fleming was Chief Engineer of the Intercolonial Railway when the contracts were entered into, and up to the month of May 1880, when an Order in Council was passed on the 22nd of May 1880, which is herewith submitted marked "C."

10 4. That the late John Ross, the original suppliant herein, duly became by assignment, in or about December 1876, the assignee of and entitled to all the rights, moneys, claims, remedies, contract price, and extras of the said original contractors, J.-B. Bertrand & Co., in respect of or arising out of the said contracts and works, which assignment was, on the 22nd of December 1876, duly signified to the Crown; and the said late John Ross, as such assignee, presented a large claim for balance of contract price and extras, and the said other suppliants above named as the sole heirs at law of the said late John Ross, who departed this life on or about the 10th September 1887, became and are now entitled to the said rights, moneys, claims, remedies, contract price, and extras of the said J.-B. Bertrand & Co., in respect of the matters aforesaid.

20 5. The said Fleming, as such Chief Engineer during the progress of the work by the contractors, furnished them with progress estimates of the work done under said contracts, which were paid, but he gave no final certificate in respect to the said contracts for Sections 9 and 15 as required by the statute. The work was finished on Section 9 in November 1873, and on Section 15 in February 1874.

6. An Order in Council and report are herewith produced marked "D." The effect and admissibility of such papers and Mr. Shanly's appointment are to be discussed.

30 7. The claim of the said late John Ross as such assignee with those of other contractors on the said railway came before Shanly.

8. The said Shanly made and duly forwarded to the Minister of the Department of Railways and Canals the certificate or report, a true copy of which is produced by the Crown marked "E."

9. That the said certificate or report duly reached the Minister of the Department of Railways and Canals on or about its date.

10. Subsequently, by Order in Council of the 28th July 1882, a copy of which is submitted herewith marked "F," the claim of the said late John Ross as such assignee, with other claims, was referred to three Commissioners to inquire and report thereon.

40 11. The said late John Ross was called upon by the Commissioners to appear before the said Commission and give evidence, and witnesses were examined in reference to the said claim.

12. The Commissioners made their report herewith submitted and marked "G."

13. The effect and admissibility of the said last-mentioned Order in Council, the Commissioners thereunder, and of what was done thereunder by the parties, as well as the said report are to be discussed.

RECORD.

No. 36.  
Appellants'  
Factum—  
*continued.*

RECORD.  
 —  
 No. 36.  
 Appellants'  
 Factum—  
*continued.*

14. The evidence taken in the case of *Robert H. McGreevy v. The Queen* may be used herein as far as it is applicable.

Three questions present themselves for the decision of the Court.

First. Is the report or certificate of Frank Shanly the final or closing certificate of the Chief Engineer contemplated by the contract.

Second. If the Shanly certificate was the final certificate contemplated by the contract, was the approval of the Minister of Railways necessary to enable the suppliant to recover thereon; if yes, will such approval be inferred from lapse of time and neglect to disapprove, or can the approval be dispensed with by reason of the refusal or neglect of the Minister to act during so long a 10 period of time.

Third. Did the appointment of a Commission to investigate the Intercolonial claims after the Shanly certificate had been signed and the appearance of the late John Ross before such commission, constitute a bar to the Appellants' right to recover supposing the claim to be otherwise well founded.

The first two questions were so fully discussed in the judgments of both the Exchequer and Supreme Courts in the McGreevy case that there is little or nothing to add to the reasons and authorities used in that case.

The third question differs materially in the present cause from that which was adjudicated upon in the McGreevy case. In the last-mentioned case a 20 report favourable to McGreevy had been made by the Commissioners named to investigate the claim, and a large sum had been paid to the claimant. The report of the Commissioners was adverse to the late John Ross.

As in the case of McGreevy, the suppliant appeared under protest and without waiver of his rights under the Shanly certificate. (Case p. 99.)

In what way the report of a Commission named "to make inquiry into the matter of these claims (the claims arising out of the construction of the "Intercolonial Railway), and to report to the Governor in Council, for the "information of Council, that they may be well advised as to the liability of "Her Majesty in regard to these claims" (Case p. 70 l. 12) can constitute a 30 final determination and disposition of the suppliants' claim and a bar to their Petition of Right, we cannot imagine.

No person is presumed to renounce his rights unless he does so expressly and unequivocally, or unless his action is compatible with such a renunciation only. Not only is no such inference a necessary implication from the above facts, but it is directly contradicted by the express declaration of the suppliant in appearing before the Commission.

Wherefore the Appellants pray the allowance of the appeal and the reversal of the judgment of the Exchequer Court of Canada, with costs in both Courts.

PENTLAND AND STUART,  
 Solicitors for Appellants.

## RESPONDENT'S FACTUM.

RECORD.

No. 37.  
Respondent's  
Factum.

## C.

In the Supreme Court of Canada.

Appeal from the Exchequer Court of Canada.

John T. Ross *et al.* - - (Suppliants) Appellants,  
and  
Her Majesty the Queen - - (Defendant) Respondent.

The Appellants commenced their action in the Exchequer Court of Canada, by Petition of Right, to recover from Her Majesty the Queen the sum of \$231,806.00, the amount alleged to be due and payable by Her Majesty upon two contracts, for the construction of Sections 9 and 15 on the Intercolonial Railway. A form of the contract is set out at page 38 of the printed case herein, and the specifications for the construction of the work are to be found at page 26. The Petition of Right of the suppliants will be found at page 1, and the Statement in Defence of the Crown at page 12.

The question of the liability of the Crown was heard and determined in the Exchequer Court upon a Statement of Admissions agreed to between the parties, which statement will be found at page 24 of the Case, but which, for the purposes of convenience, is here set out in full.

20

## Statement of Admissions by both Parties.

It is admitted :—

1. That the contracts mentioned and referred to in paragraphs 2 and 3 of the Petition of Right, were entered into by the said J.-B. Bertrand & Co., for the construction of Sections 9 and 15 of the Intercolonial Railway; copies of which contracts are produced marked "A" and "B."
2. That the said contractors began and prosecuted the works and executed a large amount of work in respect of the contracts and of the said Sections of the Intercolonial Railway.
3. That Sandford Fleming was Chief Engineer of the Intercolonial Railway when the contracts were entered into, and up to the month of May 1880, when an Order in Council was passed on the 22nd of May 1880, which is herewith submitted marked "C"
4. That the late John Ross, the original suppliant herein, duly became by assignment, in or about December 1876, the assignee of and entitled to all the rights, moneys, claims, remedies, contract price and extras of the said original contractors, J.-B. Bertrand & Co., in respect of or arising out of the said contracts and works, which assignment was, on the 22nd of December 1876, duly signified to the Crown; and the said late John Ross, as such assignee, presented a large claim for balance of contract price and extras, and the said other sup-  
40 pliants above-named as the sole heirs at law of the said late John Ross, who departed this life on or about 10th September 1887, became and are now entitled to the said rights, moneys, claims, remedies, contract price and extras of the said J.-B. Bertrand & Co., in respect of the matters aforesaid.

p. 4887.

N

RECORD.

No. 37.  
Respondent's  
Factum—  
*continued.*

5. The said Fleming as such Chief Engineer, during the progress of the work by the contractors, furnished them with progress estimates of the work done under said contracts which were paid; but he gave no final certificate in respect of the said contracts for Sections 9 and 15, as required by the statute. The work was finished on Section 9 in November 1873, and on Section 15 in February 1874.

6. An Order in Council and report are herewith produced marked "D." The effect and admissibility of such paper and Mr. Shanly's appointment are to be discussed.

7. The claim of the said late John Ross, as such assignee, with those of 10 other contractors on the said railway, came before Shanly.

8. The said Shanly made and duly forwarded to the Minister of the Department of Railways and Canals the certificate or report, a true copy of which is produced by the Crown, marked "E."

9. That the said certificate or report duly reached the Minister of the Department of Railways and Canals on or about its date.

10. Subsequently by Order in Council of the 28th July 1892, a copy of which is submitted herewith marked "F," the claim of the said late John Ross, as such assignee, with other claims, was referred to three commissioners to enquire and report thereon. 20

11. The said late John Ross was called upon by the commissioners to appear before the said commission and give evidence; and witnesses were examined in reference to the said claim.

12. The Commissioners made their report herewith submitted and marked "G."

13. The effect and admissibility of the said last-mentioned Order in Council, the commission thereunder, and of what was done thereunder by the parties as well as the said report are to be discussed.

14. The evidence taken in the case of Robert H. McGreevy *v.* The Queen may be used herein as far as it is applicable. 30

Dated at Ottawa, the 14th day of November 1894.

CARON, PENTLAND, AND STUART,  
For Suppliants.

W. D. HOGG,  
Of Counsel for Crown.

It may be well, before setting out the reasons why the judgment of the Exchequer Court should remain and be confirmed, to state some additional facts, so that the circumstances under which the admissions were made, may be fully understood.

The Appellants are the representatives of the late John Ross, of the City 40 of Quebec, who became the assignee of the contractors, Messrs. J.-B. Bertrand & Co., of all their right and claim under the contracts for the construction and completion of Sections 9 and 15 on the Intercolonial Railway.

The contracts required that the work upon the said sections should be completed, with respect to Section 9 by the 1st day of July 1871, and with

respect to Section 15 by the 1st July 1872; but the said contractors did not before the said dates complete the two sections of railway undertaken by them, nor did they ever in fact complete these two sections, but failed in their contracts, and in or about the month of May 1873, the Commissioners of the Intercolonial Railway, who had charge under the Government for the construction of the railway, took the works from the contractors into their own hands, as they were entitled to do under the contract, and finished them; the work on Section 9 being completed in November 1873, and on Section 15 in February 1874.

RECORD.  
No. 37.  
Respondent's  
Factum—  
continued.

- 10 After the final completion of the said railway in December 1875, the said contractors Messrs. J.-B. Bertrand & Co., together with a number of other contractors for the construction of other sections of the Intercolonial Railway, presented claims against the Government of Canada for extra work and damages, arising out of their several contracts for the building of the railway.

- Mr. Sandford Fleming, who had been the Chief Engineer of the railway during construction and continued as such up to the month of May 1880, had not investigated the claims of the contractors, and with the view of having these claims investigated and reported upon, the Minister of Railways and Canals, on the 21st day of June 1880, made a report to council, which will be  
20 found at page 55 of the printed case herein, and on the 23rd day of June 1880, the Governor in Council approved and passed an Order in Council based upon the said report, appointing Mr. Frank Shanly, C.E., for that purpose, which Order in Council will also be found at page 55 of the case, but which report and Order in Council are, for convenience, herein set out in full :—

Ottawa, 21st June 1880.

Memorandum.

- “ The undersigned has the honour to report that a letter has been received from Mr. Sandford Fleming, wherein he states that for reasons given, he is under the necessity of declining the position of Chief Engineer of the Intercolonial  
30 Railway and Consulting Engineer of the Canadian Pacific Railway, to which, by Order in Council of the 22nd May last, he had been appointed.

The undersigned accordingly recommends that authority be given for the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of the Intercolonial Railway *for the purpose of investigating and reporting* upon all unsettled claims in connection with the construction of the line, and that his salary while so engaged be fixed at \$541.66 a month, the engagement to be understood to be of a temporary character.

Respectfully submitted,

(Signed) CHARLES TUPPER,  
Minister of Railways and Canals.

## RECORD.

No. 37.  
Respondent's  
Factum—  
*continued.*

Copy of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council on the 23rd June 1880.

On a report dated 21st June 1880, from the Honourable the Minister of Railways and Canals, stating that a letter had been received from Mr. Sandford Fleming, wherein he states that, for reasons given, he is under the necessity of declining the position of Chief Engineer of the Intercolonial Railway and Consulting Engineer of the Canadian Pacific Railway, to which, by Order in Council of the 22nd May last, he had been appointed.

The Minister accordingly recommends that authority be given for the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of the Intercolonial Railway, and that his salary while so engaged be fixed at \$541.66 a month, the engagement being understood to be of a temporary character.

The Committee submit the above recommendation for your Excellency's approval.

(Certified)

J. O. CORÉ, C. P. C.

A number of claims were then referred to Mr. Shanly, and, after hearing evidence and otherwise investigating them, he subsequently made reports thereon, and on the 18th July 1881 he made his report upon the claim of Mr. John Ross, as assignee of the contractors, Messrs. J.-B. Bertrand & Co., which will be found at page 56 of the Case.

This report was never carried into effect by the Government; but on the 20th July 1882, by Order in Council of that date, the said Intercolonial claims, including that of the Appellants, were referred to three Commissioners to make inquiry into the said claims, and to report to the Governor in Council as to the liability of Her Majesty in regard to them. This Order in Council will be found at page 70 of the printed Case.

The said John Ross presented a claim before the Commissioners which was fully investigated, and by their report the Commissioners found that there was nothing due or owing under the said contracts to the said John Ross.

Prior to the reference of the claim by the Government of Canada to Mr. Frank Shanly for investigation and report, the said John Ross had, on the 10th day of December 1879, commenced an action by Petition of Right, which action was stayed during the investigation before Mr. Shanly, and also while the claim was before the three Commissioners appointed by the Order in Council of the 28th day of July 1882 as aforesaid. Subsequently Mr. John Ross died, and the action was, by order of the Exchequer Court, revived in the names of the Appellants herein.

The action was tried before His Lordship Mr. Justice Burbidge in the Exchequer Court, on the 26th day of January 1895, and on the 22nd day of May following judgment was pronounced in favour of the Respondent to the effect that the suppliants were not entitled to any portion of the relief sought by their Petition of Right. The judgment and reasons therefor will be found at pages 101 and 102 of the Case.

From this judgment the suppliants have appealed to this Court, and they ask to have the judgment of the Exchequer Court set aside and judgment entered for them; but the Respondent says that the judgment of the Exchequer Court is correct and should be confirmed and allowed to stand, for the following amongst other reasons:—

RECORD.

No. 37.  
Respondent's  
Factum—  
*continued.*

The principal question to be determined on this appeal, and the one upon which the liability or non-liability of the Crown rests, is this:

Is the report of Mr. Shanly, of the 18th day of July 1881, a certificate within the requirements of the contract?

10 If it is such a certificate, then Her Majesty is liable to pay the amount mentioned in it; if not such a certificate, then the appeal ought to be dismissed.

#### Mr. Shanly was not Chief Engineer under the Contract.

Clause 12 of the contracts provides that the said contracts and specifications should be in all respects subject to the provisions of the Intercolonial Railway Act, 31 Victoria, Chapter 13. By Section 4 of that Statute, it is enacted that “ the Governor shall and may appoint a Chief Engineer to hold  
“ office during pleasure, who, under the instructions he may receive from the  
“ Commissioners, shall have the general superintendence of the works to be  
20 “ constructed under this Act.” It is submitted that the Engineer referred to in this clause, was the Engineer whose duty it was to superintend, under the directions of the Commissioners, the construction of the railway, and to give the progress and final certificates for payment.

At the time of Mr. Shanly's appointment the works of construction had long since been completed, and the railway had been in operation for several years. There were no works of construction at that time going on upon any part of the railway, the only matters arising with respect to the railway were the several claims which had been presented to the Government and were being pressed for settlement. Mr. Shanly's sole duty, under the report and  
30 Order in Council above set out, was to investigate and report upon these claims, and it is submitted that he was not, by this Order in Council, appointed the Chief Engineer of the Intercolonial Railway within the meaning of the Intercolonial Railway Act.

If, therefore, Mr. Shanly was only appointed Chief Engineer of the Intercolonial Railway with certain defined and limited duties to perform, which were apart from and did not include the construction of the railway, then any report or certificate he may have signed recommending payment of money with respect to these sections of the railway, could not be considered or treated as a certificate within the meaning of the contracts.

#### 40 Shanly's Report not a Certificate under 11th Clause of Contract.

But assuming that the Order in Council of the 23rd of June 1880 had the effect of appointing him Chief Engineer of the Intercolonial Railway, it is submitted that his report of the 18th July 1881, which is the only document signed

**RECORD.** by him, is not a certificate within the 11th clause of the contract, nor was it given or intended by him as such, as appears plain by its terms.

No. 37.  
Respondent's  
Factum—  
continued.

\* *Sic.*

The learned Judge of the Exchequer Court has felt himself bound by the decision in the case of *The Queen v. McGreevy*, 18 S. C. R., 371, which arose upon a contract in the same words as those in question, and involving a report or certificate of Mr. Shanly upon a claim preferred in the same\* as this claim was preferred. The result in that case was to sustain the contention of the Crown that the report or certificate of Mr. Shanly did not constitute a certificate within the meaning of the contract, and without discussing the merits of the present case further, the learned Judge properly holds that he must follow the principles therein laid down and treat this case in the same way. The Respondent, however, deems it proper to mention some additional reasons why the report or certificate of Mr. Shanly in this case is not binding on the Crown as a certificate under the contract, and

1st. The document on its face does not purport to be a certificate under the contract. On the first page of the document, which is addressed to the Secretary of the Department of Railways and Canals (*see* p. 56, line 30), he says:—"These claims having been referred to me by the Minister of Railways and Canals for investigation, I have now the honour to lay before you the following report"; and then he proceeds to state what steps he took in connection with the investigation, and with reference to Section 9 he goes on to say, (page 57, line 9): "Referring to sheet 'A,' and the evidence for and against, bearing upon the several items, numbers 1 to 28 inclusive, I confess I can find nothing to warrant in a strict legal point of view, a departure from the terms of the contract, which provides for all contingencies arising out of the increase or decrease of quantities shown in the bill of works sheet 'C,' upon which and the schedule of prices, sheet 'E,' the contract was based. It does not appear by the evidence that the quantities were increased in the aggregate, but on the whole they were rather decreased, as shown on sheet 'C,' being a comparative statement of the quantities in the bill of works of 1869, and the quantities as revised in 1872, when the work was nearly completed." This is certainly not a certificate under the requirements of the contract, as he says there is nothing to warrant a departure from the contract in the evidence before him, which clearly means that under the terms and stipulations of the contract, he could find nothing in favour of the contractors. It is in the nature of a recommendation for an increase in the prices for some of the classes of work in sheet "C" over and above the prices upon which the tender for Section 9 was based (*see* sheet "E"), and also an allowance in a general way of certain items of the claim on sheet "A."

It is quite plain that the engineer of construction would have had no right to make either of these classes of allowance. The 9th clause of the contract (at page 44) is specific as to the nature of the claims which the engineer may allow, and that for any others than those therein referred to, no allowance or payment can be made. That clause is as follows:—

"9. It is distinctly understood, intended and agreed, that the said price or consideration of three hundred and fifty-four thousand eight hundred and ninety-

seven dollars (\$354,897.00) shall be the price of, and be held to be full compensation for, all the works embraced in or contemplated by this contract, or which may be required in virtue of any of its provisions or by law, and that the contractors shall not upon any pretext whatever be entitled by reason of any change, alteration or addition made in or to such works, or in the said plans and specification, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act, intituled "An Act respecting the construction of the Intercolonial Railway," or in the Commissioners or engineer by this contract, or by law, to claim or demand any further or  
 10 additional sum for extra work or as damages or otherwise, the contractors hereby expressly waiving and abandoning all and any such claim or pretension to all intents and purposes whatsoever, except as provided in the fourth section of this contract."

RECORD.  
 No. 37.  
 Respondent's  
 Factum—  
*continued.*

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D.

In the Supreme Court of Canada.

Monday the ninth day of December, A.D. 1895.

Present :

The Honourable Sir Henry Strong, Knight, Chief Justice.

„ Mr. Justice Gwynne.

20 „ Mr. Justice Sedgewick.

„ Mr. Justice King.

The Honourable Mr. Justice Taschereau being absent his judgment was announced by the Honourable the Chief Justice pursuant to the statute in that behalf.

Between

John Theodore Ross, Frances Ella Ross, John Vesey

Foster Vesey-Fitzgerald, and Annie Ross

(Suppliants) Appellants,

and

30 Her Majesty the Queen - - - (Respondent) Respondent.

The appeal of the above-named Appellants from the judgment of the Exchequer Court of Canada, pronounced in the above cause on the twenty-second day of May in the year of our Lord one thousand eight hundred and ninety-five, having come on to be heard before this Court on the first day of October in the year of our Lord one thousand eight hundred and ninety-five in the presence of Counsel as well for the Appellants as for the Respondent, whereupon, and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment and the

No. 38.  
 Judgment of  
 Supreme  
 Court,  
 9th Dec.  
 1895.

**RECORD.** same coming on this day for judgment, this Court did order and adjudge that said judgment of the Exchequer Court should be and the same was affirmed, and that the said appeal should be and the same was dismissed with costs to be paid by the said Appellants to the said Respondent.

No. 38.  
Judgment of  
Supreme  
Court,  
9th Dec.  
1895—con-  
tinued.

Certified.

ROBERT CASSELS, Registrar.

**E.**

REASONS FOR JUDGMENT.

Ross *versus* The Queen.

The Chief Justice.

10

For the reasons stated in my judgment in the case of *The Queen v. McGreevy* (18 S. C. R., p. 371), a case which involved precisely the same question as that which is presented by the appeal now before the Court, I am of opinion that this appeal should be allowed and judgment should be entered in the Exchequer Court for the suppliant.

The case of *The Queen v. McGreevy* I do not consider a binding authority for the reason that a majority of the Judges composing the Court were not of accord on any proposition of law on which the decision of the appeal depended. The late Chief Justice and Mr. Justice Gwynne were of opinion that the certificate of Mr. Shanley was not the final certificate of the Chief Engineer. My brother Taschereau, my brother Patterson, and myself, in accord with the Exchequer Judge—Mr. Justice Fournier—were of opinion that the certificate of Mr. Shanley was the final and closing certificate required by the contract; Mr. Justice Patterson, however, differing from the members of the Court who in other respects agreed with him, thought that was not sufficient to entitle the suppliant to recover. Upon this latter point there was no concordance of a majority of the Court. Under these conditions it is apparent that there was no agreement of a majority of the Court in any distinct proposition of law. Upon authority, therefore, I consider the judgment in *The Queen v. McGreevy* not to be a decision binding upon me, inasmuch as the judgment of the majority of the Court proceeded upon no settled principle but upon different grounds. For this reason Whiteside, C. J., in *Mansfield v. Doolin* (Irish Rpts., 4 C. L., p. 17), held that he was not bound by a previously decided case.

I am therefore of opinion that the appeal should be allowed and judgment entered in the Exchequer Court in favour of the suppliant.

A true copy.

C. H. MASTERS, Reporter S. C. C.

No. 39.  
Reasons for  
Judgment.  
The Chief  
Justice.

30

Ross *versus* The Queen.

RECORD.

Taschereau, J.

Whatever may have been the reasons given by each of the Judges who concurred in dismissing the suppliant's claim in *The Queen v. McGreevy*, the decision in that case is that, upon a certificate such as the one upon which the suppliant here relies, the Crown is not liable. By that decision we are bound, and the appeal must be dismissed. It would be a blot on the administration of justice in this country if the present Appellants succeeded upon a case precisely similar to that in which McGreevy failed.

No. 39.  
Reasons for  
Judgment—  
*continued.*  
Taschereau,  
J.

10 Gwynne, J.

Upon the 26th day of October 1869 two persons doing business together as contractors in partnership, under the name, style, and firm of J.-B. Bertrand and Company, entered into a contract by deed with Her Majesty, represented by the Intercolonial Railway Commissioners appointed under the Dominion Statute 31 Vict., Ch. 13, for the construction of a portion of the Intercolonial Railway known as Section 9 of that railway, according to certain plans annexed to and made part of the said contract.

Gwynne, J.

20 Upon the 15th day of June 1870 the same contractors in like manner entered into a similar contract with Her Majesty for the construction of another portion of the said railway known as Section 15 thereof.

By the said respective contracts the said contractors covenanted with Her Majesty that the said section number nine should be finally and entirely completed in every particular, to the satisfaction of the said Commissioners and their Engineer, on or before the 1st day of July 1871, at and for the price or sum of \$354,897.00, to be paid as in the contract for that section was provided, being at the rate of \$16,899.86 per mile of that section; and that the said section number fifteen should in like manner be finally and entirely completed, to the satisfaction of the said Commissioners and their Engineer, on or before the 1st day of July 1872, for the price or sum of \$363,520.59, to be paid as in the contract for that section provided, being at the rate of \$30,000.00 per mile on that section. The said contractors by the said respective contracts further covenanted with Her Majesty:—

40 " 1. That all the works should be executed and materials supplied in strict accordance with the plans and specifications and to the entire satisfaction of the Commissioners and their Engineer, and that the Commissioners should be the sole judges of the work and material, and that their decision on all questions in dispute in regard to the works, or as to the meaning or interpretation of the specifications or plans, or upon points not provided for or not sufficiently explained in the plans or specifications, should be final and binding upon all parties.

" 2. By paragraph No. 3 of the said respective contracts they covenanted that the times before mentioned for the final completion of the works embraced in the respective contracts should be of the essence of the said respective

p. 4887.

O

RECORD.

No. 39.  
Reasons for  
Judgment—  
*continued.*

Gwynne, J.

contracts, and that in default of such completion on the respective days for that purpose limited by the contracts the said contractors should forfeit all right or claim to the sum or percentage by the said respective contracts agreed to be retained by the Commissioners, and also to any monies whatever which, at the time of such failure of completion as aforesaid, might be due or owing to the contractors; and that the contractors should also pay to Her Majesty, as liquidated damages and not by way of fine or penalty, the sum of two thousand dollars for each and every week, and the proportionate fractional part of such sum for every part of a week, during which the works embraced in the said respective contracts, or any portion thereof, should remain incomplete or 10 for which the certificate of the Engineer, approved by the Commissioners, should be withheld; and that the Commissioners might deduct and retain in their hands such sums as might become due for liquidated damages from any sum of money then due or payable, or to become due and payable thereafter, to the contractors.”

By paragraph numbered 4 in the said respective contracts it was provided that—

“4. The Engineer should be at liberty, at any time before the commencement or during the construction of any portion of the work, to make any changes or alterations which he might deem expedient in the grades, the line of 20 location of the railway, the width of cuttings or fillings, the dimensions or character of structures, or in any other thing connected with the work, whether or not such changes should increase or diminish the work to be done or the expense of doing the same, and that the contractor should not be entitled to any allowance by reason of such changes unless such changes consisted in alterations in the grades or the line of location, in which case the contractors should be subject to such deductions for any diminution of work or entitled to such allowance for increased work, as the case might be, as the Commissioners might deem reasonable, their decision being final in the matter.”

By paragraph 9 of the said respective contracts it was declared that:— 30

“9. It was distinctly understood, intended and agreed, that the said prices or consideration of \$354,897.00 in the one case, and of \$363,520.50 in the other, should be and should be held to be full compensation for all the works embraced in or contemplated by the said respective contracts or which might be required in virtue of any of the provisions of the same or by law, and that the contractors should not, upon any pretext whatever, be entitled by reason of any change or addition made in or to such works, or in the said plans and specifications, or by reason of the exercise of any of the powers vested in the Governor in Council by the Act intituled “An Act respecting the construction of the Intercolonial Railway,” or in the commissioners or Engineer by the said respective contracts, 40 or by law to claim or demand any further or additional sum for extra work or as damages or otherwise, the contractors by the said respective contracts expressly waiving and abandoning all such claims or pretensions to all intents and purposes whatsoever *except as provided in the fourth section or paragraph of the said respective contracts.*

By the eleventh paragraph or section of the said respective contracts it was further mutually agreed upon by the parties thereto :—

“ 11. That cash payments equal to 85 per cent. of the value of the work done approximately made up from the returns of progress estimates should be made monthly, on the certificate of the Engineer that the work for or on account of which the sum should be certified had been duly executed, and upon approval of such certificate by the Commissioners; and that at the completion of the whole work to the satisfaction of the Engineer a certificate to that effect should be given, but that the final and closing certificate, including the 15 per cent. retained, should not be granted for a period of two months thereafter; that the progress certificates should not in any respect be taken as an acceptance of the works or a release of the contractors from their responsibility in respect thereof, but that they, upon the conclusion of the works, should deliver over the same in good order according to the true intent and meaning of the contracts and of the specifications annexed to and made part of the said contracts.”

The contractors proceeded with the construction of the works under these contracts and from time to time received progress certificates from Mr. Fleming the Engineer of the Commissioners, and payment thereof, but they wholly failed to complete the said works on the days limited by the contracts for the completion thereof, namely, Section 9 on the 1st day of July 1871, and Section 15 on the 1st day of July 1872, and in the spring of 1873, by reason of such default continuing, the Commissioners were obliged to take the completion of the said works into their own hands, and did complete the same under terms of the said contracts at the cost of the Government.

The statement in the suppliant's Petition of Right in relation to this matter is thus stated by the suppliant in the 23rd, 24th, 25th, and 26th paragraphs of the Petition of Right :—

“ 23. The said J.-B. Bertrand & Co., under the aforesaid contract for Section 9, had undertaken to finish and complete the same on or about the first day of July one thousand eight hundred and seventy-one, and they did virtually complete the same on or about the month of May 1873, and if any delay occurred in the completion of the same it is altogether attributable to the acts of the Commissioners and engineers under their directions, to the alterations made in the grades and line of location, to changes in the works, and to large quantities of extra and surplus work imposed upon the said J.-B. Bertrand & Co., and for which they cannot be held responsible.”

“ 24. The said J.-B. Bertrand & Co., under the aforesaid contract for Section 15, had undertaken to finish and complete the same on or about the 1st day of July 1872, and they did virtually complete the same on or about the month of May 1873, and if any delay occurred in the completion of the same it is attributable to the Acts of the Commissioners, and the engineers under their directions, to the alterations made in the grades and line of location, to changes in the works, and to the large quantity of extra and surplus work imposed upon the said J.-B. Bertrand & Co., and for which they cannot be held responsible.”

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*continued.*

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“ 25. That the said Commissioners, in the spring of the year 1873, under misapprehensions and without any reasonable cause and at the time when a large amount of money was due to the said J.-B. Bertrand & Co. for work done, assumed control of the said works upon the said sections, and without giving to J.-B. Bertrand & Co. any notice of their intention of so doing in writing or otherwise as required by the contract, paid out money so belonging to the said J.-B. Bertrand & Co. to some of the workmen on the said works, which position the said J.-B. Bertrand & Co. were forcibly constrained to accept.”

“ 26. That in consequence of this action of the Commissioners the said J.-B. Bertrand & Co. suffered great loss from the fact that the said Commis- 10  
sioners after assuming control of the works, expended unnecessarily large sums of money which would not have been expended, and which the said J.-B. Bertrand & Co. were not bound to expend, and which were for works not contemplated nor included in the contracts, and it is submitted that no portion of the same can be charged in deduction of the lump sum mentioned in the contracts for sections 9 and 15.”

The allegations in these paragraphs of the petition are thus answered in paragraph No. 24 of the Statement of Defence filed by Her Majesty's Attorney-General.

“ 24. Her Majesty's Attorney-General, in answer to paragraphs 23, 24, 25, 20  
and 26 of the said petition, says that the contractors having made default in the prosecution of the work required to be done under the said contracts, the said Commissioners, in strict accordance with the provisions of the said contracts, and with the contractors' assent, finding the men employed by the contractors on the said sections of the said railway unpaid notwithstanding that up to that time the contractors had been paid more than they were entitled to under the contracts; and finding the work upon the said sections stopped, took the work into their own hands and proceeded to complete the same in accordance with the terms of the said contracts. And the said Attorney-  
General denies that the default of the contractors in not proceeding with 30  
their work upon the said sections was in any way attributable to the said Commissioners or the Engineers of the Government.”

Now, after the completion of the work by the Commissioners, and upon the first day of June 1874, the said Commissioners, by force of the Act of the Dominion Parliament, 37 Vict., ch. 15, became *functi officio*, and thereupon all the powers and duties which had been vested in them became by the said Act transferred to and vested in the Minister of Public Works, and by the Act it was enacted and declared that all contracts entered into with the Com-  
missioners as such should enure to the use of Her Majesty, and should be 40  
enforced and carried out under the authority of the Minister of Public Works, as if they had been entered into under the authority of an Act passed in the 33rd year of Her Majesty's reign, intituled “An Act respecting the Public Works of Canada.”

Although the Commissioners by this Act ceased to have control over the contracts entered into with them for the construction of the works contracted for by the above-named contractors, their Engineer, Mr. Fleming, continued

for several years to be the Engineer in charge of the Intercolonial Railway under the Minister of Public Works, and he could have given to the contractors the certificate in the above 11th paragraph of their contracts mentioned if they had, by fulfilment of their contracts to his satisfaction, become entitled to such certificates; but he never did give to them, and indeed never could have given to them, any such certificates within the terms of the contracts in that behalf, for by the default of the contractors to complete the works within the times in that behalf provided by the contracts, and the Commissioners having been obliged because of such default to take the works from the contractors and to complete  
 10 them themselves, the contractors, by the express terms of the above third paragraph of the contracts, had absolutely forfeited all claim to all sums which then remained due to them under their contracts, and all claim to have a certificate given to them by the Engineer to the effect that they had completed the works in the contracts specified to his satisfaction.

In the month of September 1875, all the rights, title, interest, and demand of the said J.-B. Bertrand & Co. against the Government of the Dominion of Canada, arising out of and connected with the construction of the said Sections 9 and 15 were duly transferred to a Mr. John Ross, since deceased, whose representatives the present suppliants are. In the month of June 1880, a  
 20 Mr. Frank Shanly, C.E., was, by an Order in Council dated the 21st of June 1880, appointed Chief Engineer of the Intercolonial Railway "for the purpose" (as stated in the Order in Council) "of investigating and reporting upon all unsettled claims in connection with the construction of the line." In the month of July 1881, Mr. Shanly made a report to the Government in relation to a claim of J.-B. Bertrand & Co. in respect of their contracts for the said Sections 9 and 15, and it is upon this report that the claim of the suppliants is wholly rested, their contention being that it constituted the final and closing certificate of the Engineer given under the provisions of, and within the meaning of, the above-quoted 11th section of the contracts with the said J.-B.  
 30 Bertrand & Co., and that under it the suppliants, as representing J.-B. Bertrand & Co. are entitled to recover the amount mentioned therein as an amount due to J.-B. Bertrand & Co. under their contracts.

Now, without saying that in 1880, when Mr. Shanly was so appointed Chief Engineer of the Intercolonial Railway, there may not have been contracts in existence for work upon that railway in such a position that Mr. Shanly could have given certificates as contemplated by and provided for in the contracts for such work, it is, in my judgment, quite impossible to say that his appointment "for the purpose of investigating and reporting upon all unsettled claims in connection with the construction of the line" gave him, or that any Order in  
 40 Council could give him, authority to accept as complete, and to certify as completed by the contractor to his satisfaction, works which, like those on Sections 9 and 15, had seven years previously been taken from the contractors for default in fulfilment of their contracts and had been completed by the Government through the said Commissioners under the direction of their engineer, Mr. Shanly's predecessor, who alone was the person who could have certified that the contractors had completed the works contracted for, if they had completed them to his satisfaction as provided by the contracts. The

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*continued.*

Gwynne, J.

language of the Order in Council appointing Mr. Shanly plainly, in my opinion indicates that in a case like the present Mr. Shanly could do no more than investigate and report to the Government any circumstances attending the default of Messrs. J.-B. Bertrand & Co., in fulfilment of their contracts which might appear to warrant the Government, notwithstanding the forfeiture by the contractors of all right to any payment under their contracts, in entertaining favourably and *ex gratia* any claim preferred on behalf of the contractors, altogether apart from the contracts, and this, in my opinion, is precisely what Mr. Shanly's report in relation to J.-B. Bertrand & Co's. contracts does, and nothing more.

He reports, first, that in May 1873, neither of the sections was completed, and that the Commissioners then took the works into their own hands and finished them. He then proceeds to say that he could find nothing to warrant, in a strict legal point of view, a departure from the terms of the contracts which provide for all contingencies arising out of the increase or decrease of quantities shown in the bill of works and schedule of prices upon which the contracts were based; that it did not appear that the quantities were increased in the aggregate, but that, on the contrary, they were decreased.

He thus reports to the Government that the Commissioners were justified in taking the works off the contractors' hands and in completing them 20 themselves.

Now in this state of facts the contracts provided in the above third paragraph thereof that the contractors should forfeit all monies whatsoever which, at the time of their failure of completion of the works as provided in the contracts, should be due or owing to them.

The facts as above reported also showed that nothing was claimable by or on behalf of the contractors under the 4th paragraph of the contracts, and that being so, the 9th paragraph of the contracts expressly provided that upon no pretext whatsoever should the contractors be entitled to claim or demand any sum in excess of the respective above-mentioned contract lump sums, for extra 30 work, or as damages, or otherwise, howsoever "the contractors hereby expressly " waiving and abandoning all such claims or pretensions to all intents and " purposes whatsoever, except as provided in the fourth section of the " contracts."

Having thus reported and shown that the contractors had no claim under the terms of their contracts, Mr. Shanly in his report proceeded to recommend an allowance in excess of the lump sums agreed upon in the contracts to be made, namely, \$104,587.00 on Section 9 and of \$127,600.00 on Section 15. Of the lump sum or contract price agreed upon for Section 9, namely, \$354,897.00, he reported that the contractors, when the work was taken off their hands in 40 May 1873, had been paid \$346,658.00, leaving only a balance of \$8,239.00 of the contract price for completion of the work, and he reported that the contractors had been paid the sum of \$372,130.00, or the sum of \$8,610.00 in excess of the contract price agreed upon for that section, and adding the \$8,239.00 to the \$104,587.00 making \$112,816.00, he recommended that this sum should be allowed by the Government on Section 9; and deducting the above \$8,610 from the \$127,600 recommended in excess of the contract price

of Section 15, making the sum of \$118,990, he recommended should be allowed on Section 15. These sums he recommended should be allowed, not as being due under the contracts, for his report clearly shows they were not, but because the evidence furnished to him disclosed great difficulties and cost incurred by the contractors in carrying out the heaviest portions of the work; and he closes his report by saying that he thought the increased amounts he recommended would be equitable to the contractors and to the Government; that he thought that if the Government should adopt his recommendations the contractors would have a reasonable profit and that the Government would have full value for its money.

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No. 39.  
Reasons for  
Judgment—  
*continued.*  
Gwynne, J.

I confess that I am utterly unable to understand how these sums so recommended can be claimed to be sums recoverable under the terms of the contract, or how Mr. Shanly's report can be claimed to be a certificate within the meaning of the 11th paragraph of the contracts.

The appeal must, in my opinion, be dismissed with costs.

As it was argued that in a case of *McGreevy v. The Queen*, where a similar question arose, there was not a concurrence of a majority of the court in the reasons upon which the judgment in that case was founded, and that it therefore should be considered an open question. I have thought it best, without entering into any question as to the correctness of that argument, to state anew my views in this case irrespective of the judgment in that case, the court being now differently constituted.

A true copy.

C. H. MASTERS, Reporter, S.C.C.

Sedgewick and King, J.J., were of opinion that the appeal should be dismissed.

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In the Supreme Court of Canada.

Between

John Theodore Ross, Frances Ella Ross, John Vesey  
Foster-Vesey Fitzgerald, and Annie Ross

(Suppliants) Appellants,

and

Her Majesty the Queen - - (Respondent) Respondent.

No. 40.  
Registrar's  
Certificate of  
Verification,  
31st Dec.  
1895.

I, Robert Cassels, Registrar of the Supreme Court of Canada, hereby certify that the printed document annexed hereto marked "A" is a true copy of the Original Case filed in my office in the above Appeal, that the printed documents also annexed hereto marked "B" and "C" are true copies of the Facts of the Appellants and Respondent respectively deposited in said

RECORD.  
—  
No. 40.  
Registrar's  
Certificate of  
Verification,  
31st Dec.  
1895—*con-  
tinued.*

Appeal, and that the document marked "D" also annexed hereto is a true copy of the formal judgment of this Court in the said Appeal, and I further certify that the document marked "E" also annexed hereto is a copy of the Reasons for Judgment delivered by the Judges of this Court when rendering judgment as certified by C. H. Masters, esquire, the official reporter of this Court.

Dated at Ottawa, this 31st day of December 1895.

(L.S.)      ROBERT CASSELS, Registrar.

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IN THE PRIVY COUNCIL.

No. 27 of 1896.

ON APPEAL  
FROM THE SUPREME COURT OF CANADA.

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BETWEEN

JOHN THEODORE ROSS, FRANCES  
ELLA ROSS, JOHN VESEY FOSTER  
VESEY FITZGERALD, AND ANNIE  
ROSS - - - - (Suppliants) Appellants,

AND

HER MAJESTY THE QUEEN (Respondent) Respondent.

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RECORD OF PROCEEDINGS.

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HARWOOD AND STEPHENSON,

31, Lombard Street, E.C.,

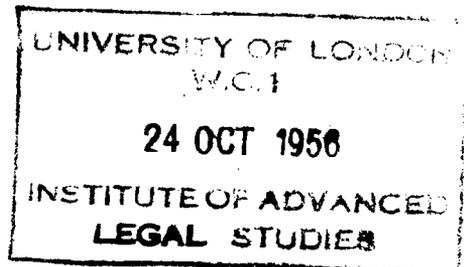
*for Appellants,*

BOMPAS, BISCHOFF, & Co.,

Great Winchester Street, E.C.,

*for Respondent.*

29147



*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of John T. Ross and others v. Her Majesty the Queen, from the Supreme Court of Canada ; delivered 28th July 1896.*

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Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Appellants in this case are the legal personal representatives of Mr. John Ross who acquired by assignment the rights and interest of a firm of railway contractors trading as J. B. Bertrand & Co. in certain Government contracts for the construction of two sections of the railway which connects the River St. Lawrence with the City of Halifax and is known as the Intercolonial Railway. Mr. Ross claimed from the Government large sums of money as due to him in right of the contractors. Payment was refused and he then presented a petition of right to enforce his claim. This petition which was revived in the name of his representatives has now been dismissed by the judgment of the Supreme Court of Canada. The present appeal is brought by special leave from that decision.

The construction of the Intercolonial Railway was one of the terms of the agreement which resulted in the union of the Provinces of Canada, Nova Scotia, and New Brunswick. In order to give effect to that part of the agreement the

British North America Act 1867 declared that it should be the duty of the Dominion of Canada to provide for the commencement of the Railway within six months after the union and for its completion with all practicable speed. Another Imperial Act known as The Canada Railway Loan Act 1867 authorized a guarantee by the Imperial Government of interest on part of the money required to be raised for the construction of the Railway.

Provision for the Intercolonial Railway as contemplated by the British North America Act 1867 was made by the Dominion Act 31 Vict. cap. 13 intituled "An Act respecting the construction of the Intercolonial Railway." This Act declared that the Railway should be a public work belonging to the Dominion of Canada. It enacted that the construction of the Railway and its management until completed should be under the charge of four Commissioners to be appointed by the Governor. It also enacted that the Governor should appoint a Chief Engineer to have the general superintendence of the works under the Commissioners who were themselves to appoint the assistant engineers and other officials. The Commissioners were to build the Railway by tender and contract after due advertisement of plans and specifications. The contracts were to be guarded by such securities and to contain such provisions for retaining a proportion of the contract monies to be held as a reserve fund for such periods of time and on such conditions as might appear to be necessary for the protection of the public and for securing the due performance of the Contract. Section 18 enacted that "no money shall be paid to any Contractor until the Chief Engineer shall have certified that the work for or on account of which the same shall be claimed has been duly executed nor until such

“ certificate shall have been approved of by the  
“ Commissioners.”

Commissioners were appointed in pursuance of the Act and they proceeded to advertise plans and specifications for the construction of the Railway in sections. At the foot of the specifications for each section there followed a printed form of contract and a printed form of tender.

It was a leading and prominent feature of the proposed contract in every case that the work should be done for a lump sum without extras of any kind. The printed form of tender contained an express recognition of that stipulation as well as an undertaking to complete the section for the sum named to the satisfaction of the Chief Engineer and Commissioners such sum being expressed to be “ the full payment  
“ without extras of any kind for the entire  
“ completion of the section.”

Messrs. J. B. Bertrand & Co. sent in tenders for the construction of Section No. 9 and Section No. 15 at the price of \$354,897 and \$363,520. 50 respectively, the date of completion in the one case being the 1st of July 1871 and in the other the 1st of July 1872. Their tenders were accepted and contracts for the construction of those Sections were duly executed on the 26th of October 1869 and the 15th of June 1870. For the purposes of this appeal the two Contracts are admitted to be identical in their terms.

The material clauses of the Contract of the 26th of October 1869 which was the Contract referred to in the argument are as follows :—

“ 4. The Engineer shall be at liberty, at any time before the  
“ commencement or during the construction of any portion of  
“ the work, to make any changes or alterations which he may  
“ deem expedient in the grades, the line of location of the  
“ Railway, the width of cuttings or fillings, the dimensions  
“ or character of structures or in any other thing connected  
“ with the works, whether or not such changes increase or

“diminish the work to be done or the expense of doing the  
 “same, and the Contractors shall not be entitled to any  
 “allowance by reason of such changes, unless such changes  
 “consist in alterations in the grades or the line of location, in  
 “which case the Contractors shall be subject to such deductions  
 “for any diminution of work or entitled to such allowance  
 “for increased work (as the case may be) as the Commissioners  
 “may deem reasonable, their decision being final in the matter.

\* \* \* \*

“9. It is distinctly understood, intended and agreed, that  
 “the said price or consideration of three hundred and fifty-  
 “four thousand eight hundred and ninety-seven dollars  
 “(\$354,897.00) shall be the price of, and be held to be full  
 “compensation for all the works embraced in or contemplated  
 “by this Contract or which may be required in virtue of any  
 “of its provisions or by law, and that the Contractors shall  
 “not upon any pretext whatever be entitled by reason of any  
 “change, alteration or addition made in or to such works, or  
 “in the said plans and specification, or by reason of the  
 “exercise of any of the powers vested in the Governor in  
 “Council by the said Act, intituled ‘An Act respecting the  
 “‘construction of the Intercolonial Railway,’ or in the Com-  
 “missioners or Engineer by this Contract or by law to claim  
 “or demand any further or additional sum for extra work or  
 “as damages or otherwise, the Contractors hereby expressly  
 “waiving and abandoning all and any such claim or pretension  
 “to all intents and purposes whatsoever, except as provided in  
 “the fourth Section of this Contract.

“10. In this Contract . . . . the words ‘the  
 “‘Engineer,’ shall mean the Chief Engineer for the time  
 “being, appointed under the said Act intituled ‘An Act  
 “‘respecting the construction of the Intercolonial Railway.’

“11. And it is further mutually agreed upon by the parties  
 “hereto, that cash payments equal to 85 per cent. of the value  
 “of the work done, approximately made up from the returns  
 “of progress measurements, will be made monthly, on the  
 “certificate of the Engineer, that the work for or on account  
 “of which the sum shall be certified, has been duly executed,  
 “and upon approval of such certificate by the Commissioners.  
 “On the completion of the whole work to the satisfaction of the  
 “Engineer, a certificate to that effect will be given, but the final  
 “and closing certificate including the 15 per cent. retained will  
 “not be granted for a period of two months thereafter. The  
 “progress certificates shall not in any respect be taken as an  
 “acceptance of the work or release of the Contractor from his  
 “responsibility in respect thereof, but he shall at the conclusion  
 “of the work deliver over the same in good order, according  
 “to the true intent and meaning of this Contract and of the  
 “said specification.

“12. This Contract and the said specification shall be in all  
 “respects subject to the provisions of the herein first cited Act

“intituled ‘An Act respecting the construction of the  
 “ ‘Intercolonial Railway,’ and also in so far as they  
 “ may be applicable to the provisions of ‘the Railway Act  
 “ ‘of 1868.’”

The Contractors proceeded with the works comprised in the two Contracts. They did not however complete either section within the prescribed period. Ultimately in May 1873 the Commissioners under powers contained in the Contracts took the work into their own hands. Section 9 was completed by them in November 1873 and Section 15 in February 1874.

Progress certificates were given to the Contractors from time to time during construction by Mr. Sandford Fleming, C.E., the Chief Engineer appointed by the Governor, but that gentleman did not give a certificate to the effect that the whole works had been completed to his satisfaction nor did he give “the final and closing certificate” as provided by Clause 11. Claims upon the Government were made by Messrs. J. B. Bertrand and Company and also by other Contractors in much the same position in respect of other sections of the Railway. None of these claims however seem to have been admitted.

By an Act of the Dominion Parliament passed in 1874, 37 Vict. cap. 15 intituled “An Act to “amend the Act respecting the construction of “the Intercolonial Railway ” it was declared that the Railway should be a public work vested in Her Majesty and under the control and management of the Minister of Public Works and it was declared that all the powers and duties vested or assigned by the Act 31 Vict. cap. 13 in or to the Commissioners appointed under it should be transferred to and vested in the Minister of Public Works.

In 1875 or 1876 Messrs. J. B. Bertrand and Company assigned their rights and interest under their contracts to Mr. Ross. The assignment was

duly notified to the Government on the 22nd of December 1876.

On the 10th of December 1879 Mr. Ross presented a Petition of Right to enforce his claims. There were many other claims arising out of the Contracts for the construction of the Intercolonial Railway then unsettled. In these circumstances it was proposed on the recommendation of the Minister of Railways and Canals that Mr. Sandford Fleming who was then Engineer-in-Chief of the Pacific Railway should be re-appointed Chief Engineer of the Intercolonial Railway. Mr. Fleming however declined the appointment and thereupon Mr. Frank Shanly, C.E., was appointed as Chief Engineer of the Intercolonial Railway "for the purpose of investigating and reporting upon all unsettled claims in connection with the construction of the line." His salary while so engaged was fixed at \$541.66 a month "the engagement being understood to be of a temporary character."

In 1881 Mr. Shanly reported on various unsettled claims and among others on the claims of Mr. Ross and the claim of one McGreevy who had a contract for the construction of Section No. 18.

In McGreevy's case Mr. Shanly reported that he had come to the conclusion "owing to various unforeseen difficulties" and other matters which it is not necessary for their Lordships to refer to "that the deductions and additions provided for by the Contract should be waived and the lump sum on a final settlement be adhered to and allowed together with certain items claimed by Mr. McGreevy as extra to and not properly belonging to the Contract." Mr. Shanly thought that "it was perfectly correct in law" that the strict letter of the Contract should be adhered to "but I cannot help thinking" he

added "that the present is a class of case where a " little equity may very properly be introduced." Accordingly he recommended that McGreevy's claim for extras to the extent of \$111,879 should be allowed.

Mr. Shanly dealt in a similar manner with Mr. Ross' claims under the Bertrand contracts. He reported that he had come to the conclusion "that the lump sums of these " contracts should remain intact and in addition " that certain items . . . outside the Contract " proper . . . should be allowed as well as " an increase in some of the principal item " prices." He could "find nothing," he said, "to warrant in the strict legal point of view " a departure from the terms of the Contract," but still he recommended payment of extras and an advance in price. "The Government," he said, "will get full value for its money and "I think" he added "the Contractors will have " a reasonable profit." In the result he recommended that Mr. Ross should be paid \$231,806 in liquidation of his claim a sum which appears by the figures in his report to be \$232,187 in excess of the aggregate of the lump sums mentioned in the two contracts.

The Minister did not approve of Mr. Shanly's report either in the case of McGreevy or in the case of Mr. Ross and the whole matter was referred to a Royal Commission on the 28th July 1882 before whom Mr. Ross appeared under protest. The Commissioners reported on the 12th of March 1884 that Messrs. J. B. Bertrand & Co. had been actually overpaid to the extent of \$175,776 or if the Government thought fit to waive their claim for diminution of work due to changes of grade and location and by the omission of the wooden superstructure for bridges to the extent of \$116,331. In the

case of McGreevy the Commissioners found that the sum of \$84,079 was still due to him.

Mr. Ross died on the 10th of September 1887. By an order of the Exchequer Court of Canada the Petition of Right filed by him was revived in the name of the Appellants and was amended on the 12th of March 1894.

In the meantime McGreevy had presented a Petition of Right claiming the difference between the sum awarded by the Commissioners and the amount recommended by Mr. Shanly's report.

The case of *McGreevy v. The Queen* (18 Sup. Co. Rep. 371) raised the same questions that are raised in the present case. It was agreed there as it has been agreed here that the only question to be argued in the first instance was whether the suppliant was entitled to recover on the certificate or report of Mr. Shanly reserving his right to proceed on other clauses of the petition for the general claim.

The question before the Court was argued under three heads:—

1. Was Mr. Shanly chief engineer of the railway within the meaning of the construction contract?
2. Was Mr. Shanly's report a "final and closing certificate" within the meaning of Clause 11.
3. Was the approval of the Minister who was substituted for the Commissioners necessary?

*McGreevy v. The Queen* came on to be heard in the Exchequer Court of Canada before Mr. Justice Fournier on the 3rd of December 1888. He decided all questions in favour of the suppliant. On appeal to the Supreme Court the learned Judges were divided in opinion. Ritchie, C.J., and Gwynne, J.

held that Mr. Shanly's report was not a final certificate. Strong and Taschereau, JJ., held that Mr. Shanly was the Chief Engineer of the Railway within the meaning of the Contract and that as such he had power to deal with the suppliant's claim and that his report was the final and closing certificate entitling the suppliant to the amount found due to him by the Exchequer Court. Strong, Taschereau, and Patterson JJ. held that as the office of Commissioners had been abolished and their duties and powers transferred to the Minister of Railways and Canals no approval of the certificate by anybody was required. Patterson J. held that although Mr. Shanly was Chief Engineer and his report might be considered as the final certificate as it involved in it and was a certificate that the whole work had been completed to his satisfaction yet the suppliant was not entitled to recover because the contract price and allowances in respect of alterations of grade were not left to the arbitrament of the Engineer; if the extra cost arose from alteration of grade the claim fell to be decided by the Commissioners and not by the Chief Engineer.

In this divergence of judicial opinion the Appellants brought on their Petition of Right. The case was heard by Burbidge J. on the 20th of January 1895. Judgment was delivered on the 22nd of May following when the petition was dismissed the learned Judge holding that he was bound by the decision of *The Queen v. McGreevy* but stating that independently of that decision his own view was that the Crown was not liable.

On appeal to the Supreme Court Sir Henry Strong C.J. held that owing to the diversity of opinion in *The Queen v. McGreevy* the decision in that case was not binding upon him and he adhered to his former view. Taschereau J. held that the judgment in

*The Queen v. McGreevy* was a decision binding on the Court. Gwynne J. with whom Sedgewick and King JJ. agreed held that Mr. Shanly's appointment did not authorize him to give a final certificate in the particular case of the Bertrand contracts and that he "could do no more than investigate and report to the Government any circumstances attending the default of Messrs. J. B. Bertrand & Co. in fulfilment of their contracts which might appear to warrant the Government notwithstanding the forfeiture by the Contractors of all right to any payment under their contracts in entertaining favourably and *ex gratia* any claim preferred on behalf of the Contractors altogether apart from the contracts." That in his opinion was precisely what Mr. Shanly's report in relation to the Bertrand contracts did and it did nothing more.

Having now reviewed the circumstances of the case at some length their Lordships do not think it necessary to do more than state briefly the conclusions at which they have arrived.

Assuming that Mr. Shanly's appointment constituted him Engineer in Chief of the Inter-colonial Railway for the purpose of giving the final and closing certificate in the case of the Bertrand contracts (a point which it would not be proper for their Lordships to determine as the Respondent has not been heard) their Lordships are of opinion that Mr. Shanly's report was not either in form or in substance the final and closing certificate within the meaning of Clause 11. It was nothing more than a recommendation to the effect that certain allowances should be made to the Contractors as a matter of fairness grace and favour. It was for the Government to consider and determine whether they would act upon that recommendation or not. The report conferred no legal right on the contractors or their assignee.

In their Lordships' opinion the construction of

the Contract is perfectly clear. It would be impossible to state in plainer language that the Contract was to be a lump sum contract and that no extras were to be allowed. Their Lordships are unable to follow the reasoning of the learned Chief Justice in his opinion delivered in *The Queen v. McGreevy*. His view seems to be that the expression "final and closing" as applied to the certificate mentioned in Clause 11 imports that some matters would necessarily be in controversy between the Crown and the Contractors. The only matters that could be in controversy were he thinks claims for extras. His conclusion therefore is that it would be too narrow a construction of the Contract to give effect to the express stipulation that no extras were to be allowed and that that stipulation is to be read as if it contained an exception of such extras as might be allowed by the final and closing certificate.

Their Lordships are further of opinion that Section 18 of the Act 31 Vict. cap. 13 applies to the final and closing certificate as much as to any other certificate on which money might be claimed and therefore they consider that no money would be payable on a certificate given as the final and closing certificate unless such certificate had been approved of by the Minister substituted for the Commissioners by the Act 37 Vict. cap. 15. The Minister never did approve of Mr. Shanly's report. He rejected it and refused to act upon it.

Their Lordships will therefore humbly advise Her Majesty that the appeal must be dismissed. The Appellants will pay the costs of the appeal.

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