

Clifford Sifton and another - - - - *Appellants*

*v.*

Robert Oliver Sweezey - - - - *Respondent*

FROM

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

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 1ST FEBRUARY, 1938.

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*Present at the Hearing :*

LORD ATKIN.

LORD THANKERTON

LORD RUSSELL OF KILLOWEN.

LORD WRIGHT.

LORD MAUGHAM.

[*Delivered by* LORD THANKERTON.]

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In this action the appellants, as executors of the late Clifford Winfield Burrows Sifton (hereinafter referred to as Winfield Sifton), seek to recover from the respondent the sum of \$50,000 with interest of \$3,972.61, or \$53,972.61 in all, as due in respect of an agreement made between the respondent and Winfield Sifton in 1927.

By judgment of the Superior Court of the Province of Quebec, District of Montreal (Mackinnon J.), dated the 15th January, 1935, the respondent was condemned to pay to the appellants the said sum of \$53,972.61. On appeal by the respondent, this judgment was annulled and the action was dismissed by judgment of the Court of King's Bench (Appeal Side), dated the 9th June, 1936. The present appeal is from that judgment.

In the year 1927, the respondent, who is a civil engineer and a financier and carried on business under the firm name of Newman, Sweezey & Company, Investment Bankers, was engaged in a plan to develop hydro-electric power from a series of rapids in the St. Lawrence River between Lake St. Francis and Lake St. Louis in the Province of Quebec; this involved the construction of a ship canal near the Village of Beauharnois on the south bank of the river, to provide for navigation between the two lakes, and the diversion of waters from the St. Lawrence River. This rendered it necessary to obtain the approval of the Governor-General

in Council in terms of the Navigable Waters Protection Act, R.S.C. 1927, cap. 140, the material provisions of which are as follows:—

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

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

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

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

The respondent first approached Winfield Sifton in September, 1927. It appears from the evidence that the respondent, in February, 1927, had secured control of all the issued shares of a company known as the Beauharnois Light, Heat & Power Company and had acquired certain rights in the site of the proposed undertaking, and, further, that in May, 1927, he had formed a syndicate in connection with the matter, of which there were five managers, vizt., the respondent, two of his firm partners, Henry Newman and Hugh B. Griffith, Robert W. Steele and, fifthly, William Robert, who resigned at the first meeting. The respondent had also formed a depositary company to hold the assets of the syndicate and make the necessary disbursements, called the Marquette Investment Corporation.

Having been informed that Winfield Sifton had had experience which would be of advantage in the promotion of the application to the Dominion Government under the Navigable Waters Protection Act, the respondent decided to engage his services, and, after an interview between Winfield Sifton and Griffith, who was secretary of the syndicate, arranged by the respondent, the respondent had a meeting with Sifton, at which an arrangement was come to, which was subsequently embodied in certain letters which are the evidence of the contract founded on by the appellants. These letters are as follows:—

Montreal, 15th Oct., 1927.

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

DEAR SIR,

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

This letter is to confirm our conversation in which I agreed to pay you Five Thousand Dollars as a retaining fee, in connection with the St. Lawrence and Beauharnois Power situation, which amount has already been sent you.

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

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

Yours truly,  
" R. O. Sweezey ".

Oct. 17/27.

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

DEAR BOB,

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

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

Yrs. Tly.,  
(Sgd.) " W. B. S. "

Montreal, 19th Oct., 1927.

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

DEAR SIR,

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

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

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

Yours faithfully,  
" R. O. Sweezey ".

After the verbal arrangement had been come to, the respondent had sent Winfield Sifton the retaining fee of \$5,000 by his own cheque on the 28th September, 1927.

In January, 1928, the plans and description of the site were deposited with the Minister of Public Works in terms of section 7 of the Navigable Waters Protection Act, along with a formal application to the Governor-General in Council for approval in terms of section 5.

Winfield Sifton died on the 13th June, 1928, and the first Order in Council relative to the application was made on the 8th March, 1929, after a formal hearing on the application in January, 1929, by the Minister of Public Works.

Though there is no competent evidence as to the nature of the services performed by Winfield Sifton, there is no dispute that he performed his part of the contract up to the date of his death. Various payments were made to him in respect of expenses and other matters such payments being made by the Marquette Corporation.

Two questions arise for decision on construction of the contract, vizt. (a) whether the respondent was personally liable under the contract, or whether it was only a syndicate liability, and (b) whether the plans have been passed and approved by the Dominion Government within the meaning of the contract. In the third place, assuming that the plans were so approved, and, in view of the death of Winfield Sifton 15 months prior to such approval, the question arises whether the contract had been terminated by his death, and any liability for the fee of \$50,000 had been discharged.

If matters had rested there, the decision of the question of the respondent's liability and of the effect of Winfield Sifton's death might have presented some difficulty, but, in the opinion of their Lordships, any need for consideration of these questions is superseded by the subsequent admissions of the respondent, which must now be referred to.

About a month after Winfield Sifton's death, the appellant Victor Sifton, not being aware of the letters of October, 1927, had asked the respondent to confirm his agreement with Winfield Sifton; the respondent replied that he would call on him on his next visit to Toronto, but had then delayed the matter. In April, 1932, the appellant, Clifford Sifton, took the matter up again with the respondent; within a few days later Clifford Sifton found the series of letters and wrote the respondent on the 27th April of his discovery, and asking the respondent to settle the matter without delay. On the 12th May Clifford Sifton wrote to the respondent, expressing disappointment at his failure to call, and stating "A careful perusal of the documents discloses a clear-cut undertaking by you to pay to Winfield fifty thousands dollars (\$50,000) upon the happening of an event which took place a long time ago. . . . We are willing to make any reasonable arrangement with regard to the actual payment of the amount but we must insist that the matter receives your immediate attention." The respondent replied on the following day expressing the difficulties of his then situation and asking the appellants to leave the matter in abeyance for the time, and stating that he would

call if he should be in Toronto soon. In fact a meeting took place between Clifford Sifton and the respondent on the 11th June, 1932, following on which the respondent wrote the following letter:—

June 11th, 1932.

Mr. Clifford Sifton,  
Executor Estate Winfield Sifton,

DEAR SIR,

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

Yours truly,  
" R. O. Sweezy "

To this letter Clifford Sifton replied as follows:—

13th June, 1932.

Mr. R. O. Sweezy,  
c/o Newman, Sweezy & Co.,  
210, St. James St. West,  
Montreal, Quebec.

Personal and Confidential.

DEAR MR. SWEEZEY,

I thank you for your kindness to me on Saturday and for your frankness in going over the matter of the obligation to Winfield's Estate and for your admitting the facts.

On behalf of the Executors I undertake not to press the matter of the collection of the Fifty Thousand Dollars (\$50,000.00) which you acknowledge owing, for a period of six months from the 11th June, in accordance with your handwritten letter which you gave to me on Saturday.

Thanking you again, I remain,

Yours very truly,

As a result of these letters the appellants did not take the matter up again until about a year later.

In the opinion of their Lordships, the respondent's letter of the 11th June, 1932, forms an unequivocal admission by him, first, of his personal liability to Winfield Sifton under the contract, and, secondly, that he owed Winfield Sifton at his death the sum of \$50,000, subject to only one contingency, vizt., approval of the Beauharnois plans at Ottawa, which, in their Lordships' opinion, has the same meaning as the phrase in the contract, vizt., " upon the plans being passed and approved by the Dominion Government." This resolves any ambiguity in the construction of the contract as to the respondent's personal liability and supersedes any suggestion that the obligation for \$50,000 was affected by the death of Winfield Sifton.

Their Lordships are unable to agree with the view expressed by Hall J. that this letter amounted to nothing more than an admission of the contract itself or the view of

Bond J. that it is merely a re-statement of the original letter of the 15th October, 1927, as modified by the letter of the 19th October, in which views Sir Mathias Tellier C.J. and Galipeault J. concurred.

This leaves only the question as to the approval of the plans.

As already stated, the plans of the proposed works and a description of the site were deposited with the Minister of Public Works in terms of section 7 of the Act in January, 1928, and the first Order in Council was passed on the 8th March, 1929. That Order proceeded on the report by the Minister of Public Works, after a careful examination of all the points raised at the hearing held in connection with the application, as amended, that the approval of the plans and site of the proposed works could be recommended, subject to twenty-eight specified conditions. The submission by the Committee of the Privy Council, which was approved by the Governor-General, was as follows:—

“The Committee, on the recommendation of the Minister of Public Works, submit for Your Excellency’s approval, under section 7, chapter 140, Revised Statutes of Canada 1927—the Navigable Waters Protection Act—(subject to the foregoing conditions and to such additions, improvements, alterations, changes, substitutions, modifications or removals as may be ordered or required thereunder) the annexed plans of works, and the site thereof, according to the descriptions and plans attached, in booklet form, which works are proposed to be constructed by the Beauharnois Light, Heat & Power Company, with respect to the diversion of 40,000 cubic feet of water per second from Lake St. Francis to Lake St. Louis, in connection with a power canal to be built by the said Company along the St. Lawrence River between the two lakes mentioned; the said approval to take effect only after an agreement incorporating the conditions enumerated above and satisfactory to the Minister of Public Works of Canada has been executed between the Beauharnois Light, Heat & Power Company and His Majesty the King, as represented by the said Minister.”

The agreement referred to was drawn up, and by the second Order in Council, dated the 22nd June, 1929, it was approved and the Minister was authorised to execute it. The agreement was executed on the 25th June, 1929. The conditions embodied in this agreement related to the execution of the works, and provided for the supervision of its construction by the Minister through his engineers, as also for the submission of detailed plans.

Their Lordships, in agreement with Mackinnon J., who tried the case, and St. Germain J., who dissented in the Court of King’s Bench, are clearly of opinion that the approval of plans referred to in the contract was the statutory approval of the Governor-General in Council under section 4 of the Act of the plans deposited under section 7 of the Act, and that the plans were “passed and approved by the Dominion Government” within the meaning of the contract when the Orders in Council of the 8th March and the 22nd June, 1929, were passed. Thereafter the matter stood upon the agreement, and became a Departmental concern. Accordingly, the additional fee of \$50,000 became

due in June, 1929. The subsequent annulment of the Orders in Council by Parliament in 1931 cannot affect this liability. Their Lordships agree with St. Germain J., who says:—

“ Or ces plans ont été approuvés, sujets, il est vrai, à certaines conditions, mais à des conditions acceptées par la Compagnie. Dès lors, il n'appartenait plus qu'à la Compagnie de respecter ces conditions, et si plus tard le parlement du Canada a jugé à propos de révoquer le dit Ordre en Conseil pour entre autre motifs que la dite Compagnie ne s'était pas conformée à tous les termes et conditions du dit arrêté en conseil, Sifton ou ses héritiers ne sauraient en supporter les conséquences.”

Their Lordships are accordingly of opinion that the judgment of the Superior Court was correct and should be restored, except as to the respondent's action in warranty against the Beauharnois Power Corporation in which no appeal is before the Board, and their Lordships will humbly advise His Majesty accordingly. The respondent will pay the appellants' costs of this appeal and in the Court of King's Bench.

In the Privy Council

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CLIFFORD SIFTON AND ANOTHER

*v.*

ROBERT OLIVER SWEZEY

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DELIVERED BY LORD THANKERTON

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