

In the Privy Council.

ON APPEAL

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

BETWEEN :

ROBERT OLIVER SWEEZEY (Plaintiff-in-
Warranty in the Superior Court and
Respondent in the Court of King's Bench)
Appellant

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— AND —

BEAUHARNOIS POWER CORPORATION
LIMITED, (Defendant-in-Warranty in the
Superior Court and Appellant in the Court of
King's Bench) - - - *Respondent.*

CASE FOR THE RESPONDENT.

RECORD.

- 20 1. This is an appeal from a majority judgment of the Court p. 98.
of King's Bench (Appeal Side) of the Province of Quebec, dated 9th
June, 1936, maintaining the Respondent's appeal from and annulling p. 85.
a Judgment of the Superior Court dated 15th January, 1935, which p. 97.
had condemned the Respondent, then Defendant-in-Warranty, to
acquit and indemnify the Appellant, then Plaintiff-in-Warranty
against the Judgment of the Court rendered at the same time in
favour of Clifford Sifton and Others as principal Plaintiffs (herein-
after called "the principal Plaintiffs") against the Appellant as p. 95.
principal Defendant, in capital, interest and costs and also condemn-
30 ing the Respondent, as Defendant-in-Warranty, to pay the costs of
the action-in-warranty.

p. 95.

p. 1.

pp. 173-178.

p. 128.

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tary Record.
p. 19.

p. 28.

2. The Judgment of the Superior Court in the principal action had condemned the Appellant, as principal Defendant, to pay the principal Plaintiffs, as executors of the late Winfield Sifton, the sum of \$53,972.61 (being as to \$50,000 principal and \$3,972.61 interest), the amount claimed by the principal Plaintiffs under an agreement between the Appellant and Winfield Sifton, entered into in 1927. This judgment was reversed by the Court of King's Bench (Appeal Side) at the same time as the Respondent's appeal was allowed: thereupon the principal Plaintiffs appealed from the Judgment of the Court of King's Bench to His Majesty in Council but no appeal 10 was entered by the present Appellant as Plaintiff-in-Warranty nor were any steps taken to make the present Respondent a party in any way to the appeal to His Majesty in Council. The Judgment of the Lords of the Judicial Committee of the Privy Council was delivered on the 1st February, 1938, to the effect that the appeal ought to be allowed and the Judgment of the Superior Court restored except as to the action-in-warranty against the present Respondent, in which no appeal was before the Board.

3. The question in this Appeal is whether the Appellant is entitled to claim indemnity from the Respondent in respect of the 20 liability to the principal Plaintiffs which has been established against him by the decision of the Judicial Committee of the Privy Council. This liability was established by an admission which does not bind the Respondent.

4. The matters in question arise out of a project (known as the "Beauharnois Project") for the development of 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 some 20 to 30 miles above Montreal.

RECORD.

p. 234 l. 29.

5. The Appellant's liability to Winfield Sifton was contracted 30 in October, 1927. Winfield Sifton died in June, 1928. The Respondent Corporation, which was promoted by the Appellant, was not incorporated until September, 1929. It is plain therefore that the Respondent never had any connection whatever with Winfield Sifton, and that its liability, if there is any liability at all, must rest upon the terms of some subsequent agreement of which the Appellant is entitled to take advantage. It therefore falls to be considered (a) whether as between himself and the Respondent the Appellant can prove that he is under any liability at all and (b) whether, even if he can, he can claim indemnity from the Respondent 40 in respect of it.

6. Shortly stated the history of the events is as follows:—

(A) In the year 1902 the Beauharnois Light, Heat & Power Company was incorporated by the Quebec Act, 2 Edw. VII, Chapter 72, as amended by the Act, 1 Geo. V, Chapter 77, to acquire the water power and rights owned and operated by one Robert on a small feeder canal between the St. Lawrence and St. Louis Rivers and to enlarge and extend the feeder canal. Subsequently the Charter of the said Company was amended and the Company was authorised to build a new canal or feeder from any point on the said feeder to any point on the St. Louis River at or near Beauharnois with certain limited powers of expropriation. Attention is drawn to this fact since it was the only power which the said Company had at the time of the Appellant's purchase of its shares and at the time of his arrangement with Winfield Sifton, and in fact during the greater portion of the time which intervened prior to Sifton's death, and was a very different proposition from the one for which the plans were subsequently approved.

p. 136, 1. 40.

p. 223, 1. 29.

p. 223, 1. 39.

p. 150.

(B) By Agreement dated 3rd February, 1927, the Appellant bought from the Robert family (*inter alia*) all the issued shares of the said Beauharnois Light Heat & Power Company. A second Agreement was executed on the same date (3rd February, 1927) evidencing a deposit of the shares of Beauharnois Light, Heat & Power Company with the National Trust Company, as Trustee, to secure the payment of the purchase price instalments of the said shares.

p. 136.

p. 150.

(C) On the 12th May, 1927, the Appellant transferred to Marquette Investment Corporation all his rights under these two Agreements. This Agreement by which the transfer was made was signed on behalf of Marquette Investment Corporation by R. W. Steele, its Vice-President, by Hugh B. Griffith, the Secretary-Treasurer, and witnessed by Mr. Henry Newman, both Mr. Newman and Mr. Griffith being partners of the Appellant in the firm of Newman, Sweezy & Company, Limited. A later Agreement was executed "as of the 12th day of May 1927," between the Appellant and Marquette Investment Corporation, in which it was declared that the rights and interests transferred were to be held by Marquette Investment Corporation as depositary in trust for and on behalf of a Syndicate to be known as "The Beauharnois Syndicate" (hereinafter sometimes referred to as "the first Syndicate") consisting of the Appellant together with the other persons nominated as Syndicate

p. 135.

p. 237, 1. 8

p. 136.

p. 36, 1. 20.

p. 54, 1. 46.

p. 153, 1. 33.

p. 154, 1. 36.

p. 154, l. 44.

p. 162, l. 17.

p. 160, l. 23.

p. 160, l. 30.

p. 162, l. 16.

Managers and such other persons as should from time to time be admitted to membership by the Syndicate Managers. The purposes of the first Syndicate are stated at some length, it being provided that the affairs of the Syndicate should be managed by a Board of five Syndicate Managers consisting of the Appellant and Newman, Steele, Griffith and Robert, and by paragraph 8 that the Board of Syndicate Managers should in all things administer, manage and control the property rights, affairs, concerns, business and undertaking of the Syndicate and make or cause to be made for the Syndicate any description of contract 10 which the Syndicate might by law enter into, and that the Board could borrow money and incur liabilities on behalf of the Syndicate.

p. 162, l. 36.

p. 166, l. 40.

p. 52, l. 14.

pp. 173-178.

An elaborate set of By-laws follows providing *inter alia* for the keeping of Minutes.

(D) In the month of September, 1927, the Appellant commenced negotiations with Winfield Sifton with a view to obtaining the latter's assistance and advice with regard to the Beauharnois project.

These negotiations were concluded in October, 1927, and are set 20 out in the following correspondence:—

Newman, Sweezey & Company Limited,
Investment Bankers,
136, St. James Street,
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. 30

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.S.”

“R. O. Sweezey”.

Letterhead of
WINFIELD B. SIFTON

Telephone & Telegraphs.
Brockville, Ont.

Assiniboine Lodge,
Mallorytown.

Copy.

Oct. 17/27.

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

Dear Bob,

10 I beg you 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.

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

Newman, Sweezey & Company Limited,
Investment Bankers,
136, St. James Street,
Montreal, 19th Oct. 1927.

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

Dear Sir,

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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."

ROS. HMK.

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p. 225, l. 10.

(E) On the 17th January, 1928, Beauharnois Light, Heat & Power Company applied to His Excellency the Governor-General-in-Council for approval under the Navigable Waters Protection Act of its plans and site of proposed works and for the right to divert 40,000 cubic feet per second from Lake St. Francis. It is uncertain as to whether or not this was the application which was later acted upon. Mr. Griffith, the Secretary of the Company, testified that it was subsequently withdrawn and that later an application was made after Mr. Sifton's death and after the grant of a lease by the Province 20 of Quebec.

p. 57, l. 23.

p. 225, l. 10.

(F) On the 22nd March, 1928, the Charter of Beauharnois Light, Heat & Power Company was further amended by the Quebec Legislature, 18 Geo. V, Chapter 113, and the Company was given the power to build a new canal from Lake St. Francis within two miles from the mouth of the feeder to Lake St. Louis within one mile and one-half from the junction of the St. Louis River with Lake St. Louis. This was a complete change in the scheme and was the one which, with some modifications, was subsequently carried out. It is not suggested that Winfield 30 Sifton had anything to do with the change made by the Quebec Legislature.

p. 57, l. 14.

p. 184.

(G) By Agreement dated the 4th of April, 1928, the first Syndicate, represented by Mr. Steele, its Vice-President, and Mr. Griffith its Secretary-Treasurer, sold its undertaking including its rights under the Agreement of 12th May, 1927, to a second Syndicate known as the "Beauharnois Power Syndicate" (hereinafter sometimes referred to as "the second Syndicate").

represented by Mr. F. S. Molson, its President, and Mr. Clare Moyer, its Secretary-Treasurer, Marquette Investment Corporation intervening and being represented by the Appellant, its President, and Mr. F. S. Molson, its Secretary-Treasurer. This Agreement contained a covenant whereby the second Syndicate assumed the liabilities and obligations of the first Syndicate in existence at the date thereof.

p. 185, l. 41.

7. On the 13th June, 1928, Winfield Sifton died. There is no precise evidence as to what his work had been but Mr. Hunter, the Deputy Minister of Public Works, the Officer in charge of the Department to whom the plans would be submitted for approval, testified that no real action on the application had been taken before December, 1928 and that he himself had never seen Sifton at all in connection with the application.

p. 38, l. 32.

p. 82, l. 39.

8. By his contract set out above Winfield Sifton was to receive a retaining fee of \$5,000 and was to be paid \$100 a day and expenses when employed away from home, and was to be paid a further amount of \$50,000 when he had used his best endeavours on the Appellant's behalf and the plans had been passed and approved by the Dominion Government. He was in fact paid the \$5,000 retaining fee and he was later paid additional amounts totalling \$14,314.52 during his lifetime and on June 19th, 1928, a few days after his death, a final payment of \$10,094.95 was remitted to his executors, making a total of \$29,409.47. In addition to this subsequent payments were made to his widow amounting in all to \$10,100.

p. 175.

p. 174.

p. 265.

p. 188, l. 40.

p. 61, l. 32.

p. 266.

9. After the death of Winfield Sifton, Senator Haydon, of the legal firm of McGiverin, Haydon & Ebbs, was retained by a somewhat similar arrangement, including a contingent fee of \$50,000.

pp. 70-71.

pp. 251-252.

10. The first real action on the application for the consent of the Governor-General in Council was in December, 1928, when a reference was made by the Department of Public Works to the Department of Justice to ascertain whether the application was one that might properly be dealt with under the Navigable Waters Act. The Government then appointed a Board of Engineers from three Departments in the early part of January, 1929, and while the Board was getting to work it was decided to hold a public hearing, which took place on January 15th, 1929.

p. 77, l. 17.

p. 82, l. 22.

p. 77, l. 30.

11. On the 8th March, 1929, Order-in-Council P.C.422, was passed. After a number of recitals the Order-in-Council states that the Minister reports that the approval of the plans and the site of

p. 190.

p. 201. the proposed works can be recommended subject to some twenty-
 p. 209. eight conditions. An agreement incorporating these conditions
 was authorised by a further Order-in-Council (P.C.1081) on the
 22nd June, 1929.

p. 211. **12.** On the 17th September, 1929, Beauharnois Power Corpora-
 tion Limited (the Respondent) was incorporated and by Agreement
 dated the 31st October, 1929, the second Syndicate agreed
 conditionally to sell to the Respondent its undertaking and assets
 Marquette Investment Corporation intervening as depository. The
 second Syndicate was represented by the Appellant, its President, 10
 and Mr. Griffith, its Secretary, and the Respondent by Mary H.
 Kelly, its President, and Lyla Brennan, its Secretary, and Marquette
 Investment Corporation by Mr. Newman and Mr. Molson.

p. 216. **13.** This Agreement was followed by an Indenture of Sale,
 dated 17th December, 1929, whereby the second Syndicate sold to
 the Respondent—Marquette Investment Corporation intervening—
 all its undertaking and assets the Respondent (*inter alia*) contracted
 that it

p. 217, l. 26. “assumes and undertakes to pay all of the liabilities and obligations of the
 Syndicate except its liabilities and obligations to its members as such.” 20

The second Syndicate was here represented by Mr. Ebbs, of the legal
 firm of McGiverin, Haydon & Ebbs and Mr. Molson; the Beauharnois
 Power Corporation by the Appellant and Mr. Griffith, and Marquette
 Investment Corporation by Mr. Newman and Mr. Ibbotson.

p. 35, l. 34. **14.** The Appellant severed his connection with the Respondent
 on the 19th November, 1931. Thereafter he had no authority to act
 on its behalf.

p. 267. **15.** On the 16th April, 1932, nearly three years after Winfield
 Sifton's death, Mr. Clifford Sifton, as one of his Executors, wrote to
 the Appellant enquiring as to the exact terms of the agreement with 30
 Winfield Sifton and if there was anything outstanding. The
 Appellant replied by letter on the 23rd April, 1932, that there never
 p. 268. was any written agreement as far as he could remember. Certain
 pp. 270-271. further letters were exchanged under date the 13th May in which
 the Appellant represents that he is left without any capital whatso-
 ever but that on the other hand he is hoping to get back into the
 saddle (*i.e.*, control of the Respondent), in which event he proposed
 to make an arrangement satisfactory to Mrs. Sifton and the letter
 ended with an invitation to Mr. Sifton to give him a call if in
 Montreal.

16. On the 11th June, 1932, Mr. Sifton called at the Appellant's office and their interview ended by the Appellant writing out a letter, Exhibit p. 8, in his own hand, reading as follows:—

“June 11th, 1932. p. 272.

“Mr. Clifford Sifton,
Executor Estate Winfield Sifton.

Dear Sir,

10 In consideration of the executors' undertaking not to press this matter for six months from today, 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 Corpn. Ltd.

Yours truly,

R. O. Sweezey.”

17. The money was not paid. Legal proceedings were accordingly instituted by the principal Plaintiffs against the Appellant on the 12th January, 1934. pp. 273-278. p. 1.

18. On the 1st February, 1934, the present action-in-warranty was instituted. By his Declaration-in-Warranty the Appellant referred to the Agreements constituting the first and second Syndicates and to the principal Plaintiffs' action against him in respect of his contract with Winfield Sifton. He then alleged that by the terms of the Syndicate Agreements the Managers assumed no personal liability for their actions but were entitled to be indemnified out of the funds of the Syndicate, and that in his dealings with Winfield Sifton he had acted solely as one of the Syndicate Managers, and as representing the Board and with their concurrence and approval. He then alleged (paragraph 10) that if any valid obligation had been incurred to the principal Plaintiffs it was incurred on behalf of the Syndicates or one of them and he was under no personal liability in respect thereof. Finally he referred to the Agreement dated 17th December, 1929, under which the Respondent had assumed all the obligations of the second Syndicate. 30

This declaration failed to make plain whether the Appellant was claiming to be relieved from the principal action because he was under no personal liability or to be indemnified because he was.

19. The Respondent's Plea-in-Warranty was delivered on 1st March, 1934. By its Plea (paragraph 10) the Respondent denied that

the letters founding the contract sued upon in the principal action (any liability of the Appellant under which was denied) were ever authorised by the Board of Managers or reported to the Board, or that the Respondent by any of the Agreements referred to assumed the obligation in question. Finally the Respondent (paragraph 12) relied on the fact that at the date of the Appellant's letter dated 11th June, 1932, he was no longer an officer of or connected with the Respondent and alleged (paragraph 13) that any obligation incurred by him through that letter was incurred by his own wilful act or default.

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p. 85. **20.** The judgment of the Superior Court, Mackinnon J., was delivered on the 15th January, 1935. After discussing the pleadings
p. 89. and the evidence the learned Judge recites the letter of the 11th June, 1932, which is

p. 93. “not accepted as the creation of any new liability but as an admission of a liability incurred by him in a Syndicate matter while a member of the Syndicate and for which the Syndicate consequently became liable.”

He then deals with the Orders-in-Council approving the plans which he holds to be sufficient approval for the purposes of the Contract, and maintains the principal action against the Appellant. 20
Adjudicating on the action-in-warranty he finds that the contract made by the Appellant with Winfield Sifton was made by him “personally for and on behalf of the first Syndicate”, that it is in evidence that all the other first Syndicate Managers were advised as to the contract having been made with Sifton and the amount earned was paid out of the funds of the first Syndicate on the terms provided for in the Contract. That on the 4th April, 1928, while Winfield Sifton was still alive and employed, the first Syndicate undertaking was transferred to the second Syndicate, and Sifton's remuneration and expenses were thenceforth paid by that Syndicate. 30.
Thereby, the learned Judge holds, the second Syndicate assumed the liabilities of the Vendor including the Sifton contract, and if there had been no authorisation and approval of the Board of Syndicate Managers of the first Syndicate, the contract made by the Appellant personally with Sifton for the benefit of the first Syndicate was approved by being taken over and assumed by the second Syndicate. The payments made by the Syndicate to Mrs. Sifton are also mentioned as being in recognition of an obligation.

p. 96, l. 33. Founding himself upon the Respondent's undertaking contained in the Agreement of Sale of the 31st October, 1929, whereby it 40
p. 96, l. 42. assumed the liabilities of the second Syndicate (except its liabilities

and obligations to its members as such) the learned Judge maintains the action-in-warranty in capital, interest and costs.

21. Two appeals were then taken to the Court of King's Bench, one by the present Appellant against the Judgment in the principal action, and the other by the present Respondent against the Judgment in the action-in-warranty. The Court of King's Bench (Sir M. Tellier, C.J., Hall, Bond, Galipeault and St. Germain, J.J.) by Judgment dated 9th June, 1936, reversed the Judgment of the Superior Court and dismissed both the principal action and the action-in-warranty, Mr. Justice St. Germain dissenting.

22. Sir Matthias Tellier, C.J., agreed with the reasons given by Bond, J., and Mr. Justice Galipeault agreed with the reasons given by Hall and Bond, J.J.

Hall, J., in his reasons for judgment in the main action found that the obligation of Winfield Sifton under the contract was to continue to use his best endeavours to act subject to instructions until the approval of the plans was formally granted, that he died long before any approval was obtained and that the contract was terminated by his death. He also found that plans were never passed within the meaning of the contract. In regard to the action-in-warranty he states: "It follows that the appeal of the Beauharnois Power Corporation should also be maintained and that the Respondent Swezey's action-in-warranty should also be dismissed with costs".

Bond, J., in his reasons for judgment in the main action refers to Article 1668 of the Civil Code dealing with Contract of lease or hire of personal service, which reads:—

"1668. It is terminated by the death of the party hired or his becoming without fault unable to perform the services agreed upon."

and he states:—

"The Respondents (the Plaintiffs in the main action) invoke the terms of the contract contained in the letters upon which they rely to shew that Winfield Sifton was not obliged to prove that his efforts were the cause of the plans being approved. I think there is no room for doubt on this point. But his personal services to that end were the consideration of the stipulated payments and this consideration ceased with his death. He was no longer able to carry out his share of the bargain Moreover, the approval of the plans was the condition upon which Sifton's right to the \$50,000 depended. Neither during his lifetime or after were these plans approved."

And dealing with the action-in-warranty he states:—

“and for the same reasons I would maintain the appeal of the appellant
“Beauharnois Power Corporation Ltd. with costs and dismiss the action-in-
“warranty of the Respondent Sweezey.”

Mr. Justice St. Germain was for dismissing both appeals upon the same grounds as those found by the learned Judge. He did not deal with the question whether the contract was terminated by the death of Winfield Sifton long before any plans were approved.

23. The principal Plaintiffs appealed from this Judgment to His Majesty in Council. No appeal was taken by the present Appellant from the Judgment dismissing the action-in-warranty nor was the present Respondent brought into the appeal to His Majesty in Council. The Judgment of the Privy Council, delivered on the 1st February, 1938, advised the allowance of the appeal and the restoration of the Judgment of the Superior Court except as to the action-in-Warranty, in which no appeal was before the Board. 10

24. The Judgment of the Privy Council was determined by the admissions made by the present Appellant in his letter dated 11th June, 1932, on all questions other than that of the approval of the plans.

The Judgment states:—

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“Two questions arise for decision on construction of the contract, viz. (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 30

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tary Record
p. 23.

p. 25.

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, viz., approval of the Beauharnois plans at Ottawa, which, in Their Lordship's opinion, has the same meaning as the phrase in the contract, viz., 40

'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. . . .

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

The Judgment then proceeds to investigate this question, and concludes that plans were approved within the meaning of the contract when the Orders-in-Council of 8th March and 22nd June, 1929, were passed.

10 **25.** The Respondent respectfully submits that, in view of the fact that the Appellant had severed all connection with the Respondent in November, 1931, his letter of 11th June, 1932, could have no binding effect upon or constitute any admission on the part of the Respondent.

p. 58.

20 **26.** It is submitted accordingly that in the events that happened, namely Winfield Sifton's death 13 months before the approval of the plans, the Appellant has not established as between himself and the Respondent that he was under any liability to Winfield Sifton or the principal Plaintiffs, and that there is nothing for the Respondent to indemnify him against.

30 **27.** The Appellant was a promoter, and, as such, was subject to all the fiduciary duties which attach to one in that capacity and for the onerous consequences of any failure to perform any of them. He alone purchased the Beauharnois interests from the Robert family; he promoted and incorporated the Marquette Investment Corporation, which was controlled by his firm (Newman, Sweezy & Company) and was never at any time controlled by either of the Beauharnois Syndicates or the Respondent; he promoted the Beauharnois Syndicate, the Beauharnois Power Syndicate and, finally, the Respondent, he himself, as President, and his partner, Mr. Griffith, as Secretary, signed the agreement of 17th December, 1929, on behalf of the Respondent.

pp. 51, 109,
237.

28. In the agreement between the Appellant and the Marquette Investment Corporation, under which the first Syndicate was formed, it is provided that the syndicate "shall consist of the Appellant, together with the other persons hereinafter nominated as Syndicate Managers."

p. 153.

40 Certain clauses of this agreement which are of importance, are set out verbatim below:—

7. (a) The property, rights, affairs and concerns of the Syndicate shall be managed and controlled by a Board of five Syndicate Managers, but the number of Syndicate Managers may from time to time be decreased to not less than three, or increased, provided such decrease or increase receive the approval of members holding a majority in number of the then outstanding part-interests.

(c) The said Sweezy and Henry Newman and Robert W. Steele both of the City of Westmount and Hugh B. Griffith and William H. Robert both of the City of Montreal shall be the first Syndicate Managers until replaced by others duly appointed in their stead ;

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(f) Every Syndicate Manager and his heirs, executors, administrators and estate and effects respectively, shall be indemnified and saved harmless out of the funds of the Syndicate from and against all costs, charges and expenses whatsoever which such Syndicate Manager sustains or incurs in or about any action, suit or proceeding which is brought, commenced or prosecuted against him for or in respect of any act, deed, matter or thing whatsoever, made, done or permitted by him in or about the execution of the duties of his office ; and also from and against all other costs, charges and expenses which he sustains or incurs in or about, or in relation to the affairs thereof, except such costs, charges or expenses as are occasioned by his own wilful neglect or default.

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8. The Board of Syndicate Managers shall in all things administer, manage and control the property, rights, affairs, concerns, business and undertaking of the Syndicate, and make or cause to be made for the Syndicate any description of contract which the Syndicate may by law enter into, and do or cause to be done anything with the Syndicate as a whole can do, or cause to be done, the whole however subject to the restrictions and provisions contained in Article 9 hereof.

9. The Board of Syndicate Managers may borrow money for and incur liabilities on behalf of the Syndicate upon such terms and conditions as they deem expedient, provided however that no loans may be effected nor other liabilities incurred except upon the condition assented to by the creditors of such loans or other liabilities that neither the Syndicate Managers nor any other members of the Syndicate shall be personally liable for the repayment of such loans or liabilities, and that the creditors of such loans or liabilities shall be entitled to look only to the assets of the Syndicate, or the proceeds thereof, for repayment. Nothing herein contained, however, shall be construed so as to prevent any member of the Syndicate who is willing to do so,

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from personally guaranteeing or rendering himself liable for the repayment of any loan or other liability of the Syndicate.

29. To the Syndicate Agreement is attached a set of By-laws :

By-law 2 (i) provides that minutes shall be kept of the proceedings at each meeting; p. 168.

3. (b) provides for the holding of meetings; p. 169.

4. (e) provides that the secretary shall keep proper records of all meetings of members and syndicate managers. p. 171.

30. The Appellant contracted personally with Sifton : this has been definitely established by the judgment in the principal action. No mention is to be found in the minutes of either Syndicate or of the Respondent referring to the Sifton retainer or to any action of the Syndicate Managers in respect to it. In the absence of a Minute or other writing, the best proof of any adoption of the Sifton agreement by the Syndicate would have been the evidence of the other Syndicate Managers, but the Appellant did not call either Mr. Newman or Mr. Steele. The only evidence in the record, apart from the Appellant's own, is that of Mr. Griffith, who says that he believes it was discussed and that it is his opinion that they (except Mr. Robert) were made aware of it. p. 55, l. 32.

The only other evidence is that of Moyer, who says that he takes it for granted that the other Managers must have known that Sifton was being retained, but he does not say that any of them were aware of the terms of the retainer. There is no evidence that the letters which constituted the retainer were ever submitted to any Manager. p. 74, l. 38.

31. The learned Trial Judge found in the payments made to Winfield Sifton an adoption of the Sifton agreement. Attention is, however, drawn to the fact that these payments were made by Mr. Griffith out of the funds of the Marquette Investment Corporation, a company controlled by Newman, Sweezey & Company. Moreover it is impossible to infer from payments in respect of current remuneration and expenses a knowledge and adoption of an agreement to pay a future contingent fee. The payments made to Mrs. W. B. Sifton which were also referred to and which were made by the Respondent or Beauharnois Light, Heat & Power Company cannot be said to have been made on account of anything due to the estate of Winfield Sifton, since the Appellant and Griffith did not make them to her in the capacity of executrix (which she was not) and had already had occasion to make a payment to the executors themselves. p. 256. pp. 188-9.

32. The fact that Winfield Sifton was seen working about the office did not imply any knowledge of this contingent retainer He was being paid regularly for the service which he rendered.

33. It is submitted that the Judgment of the Court of King's Bench sitting in Appeal which allowed the Respondent's appeal in the action-in-warranty is right and should be confirmed for the following

REASONS.

- (1) Because owing to the death of Winfield Sifton the Appellant was discharged from any liability for the sum of \$50,000 under the contract of October, 1927. 10
- (2) Because the obligation towards Sifton was undertaken by the Appellant personally and not by the Respondent or by either of the Syndicates which preceded it.
- (3) Because the Appellant was never authorised on behalf of the first Syndicate to make the contingent contract with Winfield Sifton for the payment of \$50,000.
- (4) Because the Appellant was not entitled to any indemnity from the first or second Syndicate in respect of such an unauthorised personal liability. 20
- (5) Because the Respondents only contract was with the second Syndicate, and the other members of the Syndicate are not parties to the action.
- (6) Because the contract was never disclosed either to the Respondent or to either of the Syndicates which preceded it.
- (7) Because the Appellant as the promoter of both Syndicates and of the Respondent was under a fiduciary duty to make a full and complete disclosure of any liabilities which he, on their behalf, was calling upon them to assume. 30
- (8) Because the Appellant had no authority to speak for the Respondent at the time he wrote the letter of 11th June, 1932.

- (9) Because the judgment of the Judicial Committee of the Privy Council, in the principal action, did not assume to determine the questions involved in the action-in-warranty, their Lordships having found that there was no need for consideration of any of these questions (except that of the approval of the plans) in view of the Appellant's admission in his letter of 11th June, 1932.
- (10) Because the Respondent could not in any event be condemned for interest from the 11th June, 1932.
- 10 (11) Because the Appellant acquiesced in the judgment of the Court of King's Bench dismissing his action-in-warranty, and cannot now appeal from the same.

GEORGE H. MONTGOMERY.

CYRIL RADCLIFFE.

W. F. CHIPMAN.

In the Privy Council.

ON APPEAL

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

BETWEEN :

ROBERT OLIVER SWEEZEY
Appellant

— AND —

BEAUHARNOIS POWER
CORPORATION LIMITED
Respondent.

CASE FOR THE RESPONDENT.

LAWRENCE JONES & Co.,
Lloyd's Building,
Leadenhall Street,
London, E.C.3,
Solicitors for the Respondent