[TRANSLATION]

The Queen (*Plaintiff*) *v.* **Fidelity Insurance Co. of Canada** (*Defendant*)

Dumoulin J.—Montreal June 15, 16 and 17, 1969; Ottawa March 18, 1970.

Crown—Action in recovery of damages—Contract—Construction of airport—Performance Bond—Contract with penal clause—Reduction of the amount of the penalty —Conditions required—Articles 1131, 1134, 1135, 1931, 1933 C.C.

Defendant had bound itself by a performance bond to indemnify the plaintiff up to a sum of $230,991.75 in case of default by P in fulfilling all the obligations stipulated in a contract which plaintiff granted to him following the submission of tenders for the construction of an airport. As a result of P's inability to carry out the work acceptably, and after a mise-en-demeure in due form, the plaintiff cancelled the contract and entrusted the completion of the work to another bidder. By judgment the cancellation of the construction contract was confirmed and the damages incurred by the plaintiff fixed at $160,786.82.

Alleging that the defendant's commitment is an obligation with a penal clause within the meaning of art. 1131 of the Civil Code, the plaintiff, by the conclusions of the action, is asking for its full application, to wit, payment by the defendant of the sum of $230,991.75. The defence contends that a suretyship pure and simple is involved and, furthermore, that the plaintiff was to have kept the defendant informed of changes in the contract of construction and difficulties in its execution, which she failed to do.

Held (allowing the action up to a sum of $160,786.82), (1) the contract contains a penal clause guaranteeing the faithful execution of the primary obligation to construct the airport.

(2) With regard to the obligations of the Crown, stipulated in the contract, the court, in view of the evidence adduced, is justified in reducing the amount of the penalty if the primary obligation was performed in part to the benefit of the creditor and if the time fixed for the complete performance was not material, conditions required by art. 1135 C.C. and met in this instance.

ACTION in recovery of damages.

L. M. Bloomfield, Q.C., Paul Ollivier, Q.C., for plaintiff.

L. P. De Grandpré, Q.C., for defendant.

DUMOULIN J.—In this action, the facts are less complex than the law. It is alleged in the information that on July 21, 1960, the defendant formally undertook to pay to the Queen in right of Canada the sum of $230,991.75 to provide against the possible failure by E. J. Persons to well and faithfully perform all the obligations stipulated in the contract or bond which the defendant had granted to him for the construction of the airport at Trois-Rivières. The bond from which the litigation stems is exhibit P-1; the contract of construction is exhibit P-2.

Persons, whose bid for this contract was $100,000 lower than the second lowest bid, was not able to carry out the work acceptably as explained in paragraph 4 of the information.

Hence, the department concerned, the Department of Transport, after a mise-en-demeure in due form, on June 1, 1961, which demand remained ineffective, had to cancel the contract on June 14 of the same year. According to the usual practice in such cases, completion of the contract was handed over to the second lowest bidder.

On January 25, 1963, the said department, through required normal channels, claimed by cross-demand the damages resulting from the default of the said E. J. Persons.

By judgment dated June 26, 1967, the Supreme Court of Canada, confirming the cancellation of the contract, referred to our Court the settlement of the damages suffered by the State, fixed on November 2, 1967, by an order of the Honourable Mr. Justice Noël, at $130,191.27 in capital, plus $30,-595.55 in costs.

Following these preliminary details, it is important that we examine closely exhibit P-1, which constitutes the essential document in the litigation.

Issued by the Fidelity Insurance Company of Canada on July 21, 1960, this contract, which is called a Performance Bond, states:

> Know All Men by These Presents, that:
>
> E. J. Persons, 67 Main Street, Sweetsburg, Que., as Principal, hereinafter called the Principal, and Fidelity Insurance Company of Canada, as Surety, hereinafter called the Surety, are held and firmly bound unto Her Majesty the Queen in Right of Canada, represented by the Minister of Transport as Obligee, hereinafter called the Obligee, in the full and just sum of Two hundred and Thirty Thousand, Nine Hundred and Ninety-One 75/100 Dollars ($230,991.75) lawful money of Canada, for the payment of which sum, well and truly to be made, the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. Signed, Sealed and Delivered this 21st day of July, A.D. 1960. Whereas, the Principal has entered into a certain written agreement represented by Principal's tender dated May 3rd, 1960, which was subsequently accepted by the Obligee and which will be reduced to a formal contract in writing for the development of Three Rivers Airport, at Three Rivers, Province of Quebec, in accordance with the plans and specifications submitted therefor which are made part and parcel of this obligation.

Here now is the contractual condition of this suspensive obligation which would be void if a contingency did not occur, or would remain in full force if it did occur:

> Now, Therefore, the condition of this obligation is such that if the Principal shall well and faithfully observe and perform all of the obligations of the said Contract on the part of the Principal to be observed and performed, then this obligation shall be void, otherwise to remain in full force and effect. Provided, However, that the Surety shall not be liable for a greater sum than the specified penalty of this bond.

On the strength of this commitment which she says is an obligation with a penal clause within the meaning of Article 1131 of the Civil Code, the plaintiff concludes in favour of its full application, to wit, payment by the Fidelity Insurance Company of Canada of the sum of $230,991.75 with interest and costs, since the contingency did occur.

This contention by the Crown is denied by the defendant in fact and in law, as suggested initially in article 5 of its plea, then admitted in its written statement on page 17 among others.

May we first quote article 5 which answers the allegation about the penal clause advanced in paragraph 6 of the information:

> 5. Paragraph 6 of the Information is denied, defendant adding that its obligation, if it ever came into being, was limited to the performance of the original contract of construction entered into between E. J. Persons Construction and plaintiff and filed as Exhibit P-II.

In the written statement, page 17, paragraph I, "Nature of the Contract", the defendant takes the following position:

> The ensuing dispute leads to two questions:
>
> (1) What is the nature of the performance bond, exhibit P-I?
>
> (2) What were the obligations of the Crown with regard to this bond?

The answer to the first question, under the heading "Nature of the Contract", is that:

> It is clearly a suretyship subject to the rules found under Title XV of the Civil Code, Articles 1929 *et seq*...

Under the heading "Obligations of the Crown", page 23, the answer to the second is given as follows:

> It is obvious that as beneficiary of the performance bond, the Crown, of necessity, assumed certain obligations. Such obligations of the Crown exist first during the entire term of the construction contract; during this period, the Crown shall keep the surety roughly informed on the changes in the construction contract and the difficulties in its execution;
>
> then on cancellation of the construction contract, when the Crown shall permit the surety to either continue the execution of the contract itself or entrust it to another contractor. These clearly are obligations calling for good sense and fairness.

This interpretation of the problem enables the defendant company to conclude that:

> 22. Defendant had the right to be consulted in these matters and plaintiff's failure to do so entails the nullity of the bond, Exhibit P-I.
>
> 23. Even if the bond, Exhibit P-I, was not rendered null and void by plaintiff's conduct, which is denied by defendant, the cost of the work has been considerably increased thereby and cannot be recovered from defendant;
>
> 24. The Information is ill-founded in fact and in law;
>
> Wherefore Defendant Prays:
>
> 1. For a declaration that the bond, exhibit P-I, was rendered null and void by plaintiff's conduct;
> 2. For a declaration that, in any event, the damages claimed in the Information are the result of plaintiff's conduct and not of the delays attributed to Persons;
> 3. For the maintenance of its plea;
> 4. For the dismissal of the Information.
>
> The Whole With Costs.

Continuing the issue, the plaintiff, in her reply, denies the reproaches made in article 22 of the company's plea and the consequences implied in articles 23 and 24 above, affirming, on the contrary, that the defendant received all the relevant information in this case.

Even more significantly, in this same document, the Crown takes the position required by the provisions of Chapter VII, Section VI of the Civil

Code: "Of obligations with a penal clause" by specifying the total amount of monetary damages it suffered as a result of contractor Persons' default; these passages of the plea should be quoted:

> 27. THAT by judgment of the Exchequer Court of Canada on November 2, 1967 damages were allowed to Plaintiff against Persons in the sum of one hundred and thirty thousand, one hundred and ninety-one dollars and twenty-seven cents ($130,191.27) with interest and costs, taxed in the sum of Eleven thousand three hundred and eighty-six dollars and thirty-five cents ($11,386.35); the whole as appears from a copy of the said judgment, forming part of the records of this Court under No. A-731.
>
> 28. THAT as a direct result of Persons' failure to well and faithfully observe and perform all of the obligations of the said Persons in virtue of his contract, with Plaintiff, Plaintiff suffered liquidated damages totalling one hundred and thirty thousand, one hundred and ninety-one dollars and twenty-seven cents ($130,191.27) with interest and costs totalling the sum of Thirty thousand five hundred and ninety-five dollars and fifty-five cents ($30,595.55);

Thus the damages and costs liquidated by judgment handed down with the authority of a final judgment and still unpaid are alleged in order to open the way for the compensation requested. They amount to $160,786.82, but the full amount of the penal and contractual clause is being claimed.

This long but unavoidable recounting of the facts, this explanation of the points of law raised by the parties lead to the crucial stage of the examination of the two contradictory arguments: is this a case of an obligation guaranteed by a penal clause, as the plaintiff contends, or is it a pure and simple suretyship as the defendant would have it? Such is the puzzle that has to be solved.

What does the written contract, the Performance Bond, exhibit P-I, say? What are the contracting parties called? What is the obligation agreed upon and how is it described? As we have seen, the contractor Persons is called the "Principal" and the company the "Surety". In an insurance contract proper, as everyone knows, the terms used are "the insured" and "the insurer" respectively.

Here the obligation of the parties jointly and severally expressed thus: "The Principal and the Surety bind themselves . . . jointly and severally, firmly by these presents", is subject, with regard to its compensatory performance, to the complete performance of the obligations signed by Persons, the contractor, who shall "well and faithfully observe and perform all the obligations of the said Contract on the part of the Principal to be observed and performed". In the case of even partial non-performance of the job entrusted by the State to the Principal, the Surety will pay the penalty to the Obligee, Her Majesty the Queen in right of Canada. It seems to me that that is the formal statement of a penal clause stipulation whose purpose is to assure the performance of the primary obligation. If such is the case, and I think it is, we have to refer to doctrinal teachings in order to correctly deduce the practical consequences of the law—both ours and the *Napoleonic Code* on which ours is patterned.

First let us compare our article 1131 with article 1226 of the French Code.

> 1131. A penal clause is a secondary obligation by which a person, to assure the performance of the primary obligation, binds himself to a penalty in case of its execution. (sic)

N.C. Art. 1226: A penalty is a clause by which a person, to secure the fulfilment of an agreement, binds himself to something in case it is not fulfilled.

Then let us compare our own articles 1134 and 1135 with the corresponding provisions of Nos. 1230 and 1231 of the French Code.

1134. The penalty is not incurred until the debtor is in default of performing the primary obligation or has done the thing which he had obliged himself not to do.

1135. The amount of penalty cannot be reduced by the court.

But if the obligation have been performed in part to the benefit of the creditor, and the time fixed for its complete performance be not material, the penalty may be reduced; unless there is a special agreement to the contrary.

N.C. 1230. Whether the original obligation fixes a time within which it must be fulfilled or whether it does not, the penalty is only due when a demand has been made upon the person who has undertaken, either to make delivery or to receive or to do a certain thing.

N.C. 1231. The penalty can be modified by the Judge when the principal obligation has been partially fulfilled.

The close similarity of the texts is reflected both among French authors —I shall cite two of the most reputable, F. Laurent and Beaudry-Lacantinerie—and in the classical treatise of the late Mr. Justice P. B. Mignault.

Thus Laurent[1] points out that:

No. 426 (page 426) Article 1226 states that the purpose of the penalty is to secure the fulfilment of an agreement; this is done by binding oneself to something in case of *non-fulfilment;* the penalty, as repeated in article 1229, is compensation for the damages which the creditor sustains because of *non-fulfilment* of the principal obligation. By *non-fulfilment* is meant not only the non-performance proper, when the debtor does not want to or cannot observe the obligation he has contracted, but also the time he takes in performing it; a delay is a partial non-performance and gives rise, to the creditor's advantage, to damages called *moratory* damages to distinguish them from *compensatory* damages which are owing to the creditor in case of total non-fulfilment. (The italics appear in the text.)

Under the heading "Damages—Can the Judge modify the penalty?", Laurent writes, quoting article 1152 of the *Napoleonic Code*:

No. 451 (p. 449) "When the agreement provides that the party who fails to carry it out shall pay a certain amount as damages, no larger or smaller amount can be awarded to the other party." It is true that this provision is not reproduced in the section dealing with the penal clause; but that was entirely needless because the penalty is nothing but the assessment of damages by agreement: the penal clause and the conventional damages are one and the same clause under different names. It should therefore be said that the penalty which article 1152 calls conventional damages cannot be modified by the Judge in favour of either the debtor or the creditor.

Notwithstanding this arbitrary provision, we have seen both in our article 1135 and in article 1231 of the French Code a spirit of fairness and of common sense; it is this assuagement which Laurent reproduces with the following explanations:

No. 454 (p. 451) Article 1231 states that "the penalty can be modified by the Judge when the principal obligation has been partially fulfilled". This provision should be combined with the one in article 1244 whereby a debtor cannot

[1] *Principes de droit civil,* 3rd edition (1878), vol. XVII, Nos. 426, 451, 454 (partim).

> compel his creditor to receive partial payment of his debt, even when divisible... To tell the truth, such strictness would be excessive; the creditor has renounced performance of the whole by accepting a divided payment; therefore, he can no longer avail himself of the non-performance of the obligation against the debtor. The obligation must be taken as is, divided with the creditor's consent; he has received a part of what he stipulated; the penalty took the place of damages for total non-fulfilment. This means that the creditor can no longer ask for the full penalty for this would be taking advantage of all of the partial performance and of the damages for the non-performance of the part of the obligation which was executed; according to article 1229, the creditor cannot ask for both the principal obligation and the penalty. Therefore, when the creditor has been paid for a part of the principal obligation, he can no longer receive the penalty for that part.

With regard to these comments, the objection will be raised that in the present instance, the creditor, to wit the State, presumably renounced the execution of the contractor's obligation not voluntarily but under pressure comparable to a case of circumstances beyond its control—Persons' incapacity. With that exception, the fact remains that the plaintiff terminated the contractual tie which bound her to the other party, that she assessed the damages suffered, for which she obtained liquidation by judgment handed down on November 2, 1967. Would this not be a play, if not on words, at the very least on the texts, and would this not be giving the letter of the law a precedence which its spirit and fairness could not allow.

The involvement of a commercial guarantor, the defendant, who assumes, for payment of a premium, the risk of even partial non-performance of the contract granted to its client Persons, has scarcely any influence on the intrinsic nature of the matter. Apart from the obligee's obligation to keep the surety "roughly... informed on the changes in the construction contract and the difficulties in its execution" (page 23 of the defendant's written statement), the surety, in all other respects, abides by "the rights and duties" of its insured, the "Principal".

Consequently, it is advisable that we add these lines to the quotation from legal expert Laurent:

> (Last paragraph of No. 454, page 452):
>
> Does this mean that the penalty shall necessarily be reduced and that it shall be done in proportion to the part of the contract that was executed?
> No, article 1229 does not say that the penalty *shall be* modified (the italics are in the text); it says that the Judge *can* modify it. This is a question of fact. It may be that, despite partial payment, the creditor suffers the same damages as though the obligation had not been executed; in any event it may be that the damage is not reduced in proportion to the partial fulfilment. It is up to the judge to assess the damages sustained by the creditor and to assess the damages and interest to which he is entitled accordingly.

In Beaudry-Lacantinerie's important *Traité théorique et pratique de Droit civil*,[2] the author expresses the same opinion as Laurent where the distinctive conditions of the penal clause are concerned but comes even closer to article

[2] Third edition (1907), vol. XIII, Nos. 1349, p. 469, and 1350, p. 470 *partim*.

1135 of the Quebec Code by mentioning a partial performance to the benefit of the creditor as a condition of a legal reduction of the penalty agreed upon. At page 469, we read that:

> The penal clause is a law which the parties have imposed on themselves and which they must observe.

And at page 470, the severity is lessened thus:

> No. 1350. However, there are a few exceptions to our principle. First, there is the one given in article 1231 (N.C.) *"The penalty can be modified by the Judge when the principal obligation has been partially fulfilled"* (italics in the text) . . . Article 1231 assumes, of course, that the creditor has accepted partial performance because under article 1244, paragraph 1 (N.C.), the debtor could not have imposed it on him. Article 1231 assumes moreover, that partial fulfilment was of some use to the creditor.

There follows a corroborative example citing a somewhat outdated situation, but one which is objectively correct both in its simplicity and its truth, based on an incident in the wine-producing area of France:

> Thus a grape-grower undertook to work two hectares of vineyard for me or else be subject to a penalty of 2,000 francs in damages; if he worked one hectare, it was only fair that the penalty be reduced proportionally, consequently by half, since there was non-fulfilment of only half of his obligation, the partial execution being of profit to me.

After exhaustive recourse to these two masters of French doctrine, it seems superfluous to repeat the words of Mignault who, on this point of law, is to some extent an echo of his doctrinal predecessors, Frédéric Mourlon more precisely, were it not that our article 1135 adds this loophole which the Napoleonic Code does not mention: "if . . . the time fixed for its complete performance be not material". For this reason, and in corroboration, I shall include these few lines in which the author is satisfied with quoting article 1135 and adding a brief comment thereto.[3]

> 5. That *the creditor who received a portion of the premium which he stipulated does not have the right to demand the full penalty* (italics in the text). This is what the Code tells us in these words in article 1135 which is new law:
>
> 1135. The amount of penalty cannot be reduced by the court. But if the obligation have been performed in part to the benefit of the creditor, and the time fixed for its complete performance be not material, the penalty may be reduced; unless there is a special agreement to the contrary.

And now, this comparison:

> You promised me, with penal clause, to work my field; you worked only half of it, you owe me only half of the sum that was stipulated as penalty.

It is possible to dispose immediately of one of the grounds set forth on page 18 of the defendant's written statement to the effect that:

> Article 1933 of the Civil Code states:
>
> Suretyship cannot be contracted for a greater sum nor under more onerous conditions than the principal obligation.
>
> In this instance, the construction contrat (exhibit S-1, volume 8, page 1488) does not contain any penal clause and it would therefore be illegal for the bond guaranteeing this construction contract to contain such a clause which, needless to say, is more onerous than the payment pure and simple of the damages.

[3] Canadian Civil Law (1901), vol. 5, p. 523.

The reply stems from the stipulations of the main exhibit (P-1) in which it is agreed that the obligations assumed in the contract to be concluded between Persons and the plaintiff will be part and parcel of the Performance Bond:

> Whereas the Principal has entered into a certain written agreement... which was subsequently accepted by the Obligee (the State) and which will be reduced to a formal contract in writing... in accordance with the plans and specifications submitted therefore *which are made part and parcel of this obligation.*

This language does not lend itself to any ambiguity and incorporates the penal clause in the construction contract.

Finally, no matter how disappointing the performance of the work may have been, there is no allegation, apart from the damages claimed, that the primary obligation was not performed, at least partially, to the benefit of the creditor. As for the time fixed for the complete performance of the job, the action is rather silent on this point. Supposing even that there had been a month's delay, it does not seem preposterous to think that such a delay would have been immaterial in view of the type of project, the construction of the Trois-Rivières airport.

To the first question raised, page 17 of the Fidelity Insurance Company's written statement, the Court replies that the Performance Bond contains a penal clause guaranteeing the faithful performance of the primary obligation to construct such a public work.

We still have to decide what the obligations of the Crown under this guarantee may have been.

The learned counsel for the plaintiff filed as commendable a factum as did his distinguished colleague. At page 14 of his "Notes and Authorities" he cites as his authority the opinion of a highly reputable author on the subject, *Rowlatt on Principal and Surety*[4], in which we read that:

> The subject-matter of a contract by way of suretyship is always a debt either already incurred or intended to be incurred... (and) is therefore narrower than that of insurance by which indemnity may be secured against losses by the acts or omissions of strangers, considered as perils analogous to the risk of accident, and without regard to any legal responsibility of the persons guilty of them. (However) the risk of default by a debtor can be insured against as effectually as the debt can be guaranteed. But the two securities are not identical either in the form of the obligation imposed or in respect of the basis upon which the parties are taken to contract. A surety becomes bound, it may be, unconditionally and without previous notice or demand, to pay the debt or make good the default which the principal is or shall be liable to pay or make good, and the surety must see he does it.

The following lines come closer to the theme of the discussion; the amount of information the compensated surety, as opposed to the accommodation surety, may claim, an obligation, as we have seen, with which the defendant deals in these words:

> The Crown shall keep the surety roughly (the underlining is mine) informed of changes in the contract of construction and difficulties in its execution. (Defendant's written statement, page 23).

[4] (1936) 3rd ed., pp. 9-10.

The annotator Rowlatt goes on as follows:

> An insurer only engages to pay the loss, measured in a certain way, upon the happening of a defined contingency, against the happening of which, however, he is not considered as capable of exercising any influence. An insurer is entitled to a disclosure of all facts material to the risk within the knowledge of the assured. But a surety can only complain of positive deception, by representations express or implied.

Another extract from *Keith on Performance Bonds*[5], reproduced at page 20 of the "Notes and Authorities" of Mr. Bloomfield, Q.C.:

> The second point which the principal and the obligee should be careful to observe is the obligation to ensure that all material facts are disclosed to the surety before the contract is entered into. It is beyond argument that performance bonds, unlike contracts of insurance, are not subject to the ultimate standard *uberrimae fidei* and if authority is needed, reference may be made to: (a list of 7 corroborative judgments appears at page 21).

From theory, let us go on to the facts.

The first of the two witnesses heard at the inquiry, the only one whose evidence recounts the concrete incidents of the matter, was, as a matter of fact, the manager of the surety department of the Fidelity Insurance Company, Gérard Brunet, 46 years old. I refer to my own notes which are fairly faithful, I trust.

Gérard Brunet reports that he was the one who, on July 21, 1960, saw to the issuance of the Performance Bond. Even before Persons submitted a tender to the Department of Transport, Gauthier, his insurance agent, had questioned Brunet about the possibility of getting a Performance Bond. After the tender was sent in, a second meeting took place between Persons, his engineer Léonard and Brunet. At this time, the contractor-bidder disclosed the $100,000 difference between his price and the next bid, explaining that this difference was due to the fact that he would have access to a sand-pit which was two miles instead of fifteen from the airport.

The witness stated that "his company had received no complaints from the Crown during August, September or October 1960, and no information about the Persons-department interview on September 20 of the same year". Brunet added "that it would have been important for the defendant to have been advised of all these difficulties" and repeated this assertion.

In cross-examination, he said again that he knew before the bond was issued that the bid submitted by Persons "was $100,000 lower than the next bid". Brunet agreed that in May 1960, when asked by the insurance agent Gauthier about the possibility of getting a Performance Bond "should Persons be the lowest bidder for a $400,000 to $500,000 contract, he had answered that all things being equal, this Performance Bond would be granted".

This conditional expression "all things being equal" is a rather vague answer, the manager of the surety department having gone on to agree that right after the contract was awarded to Persons this $100,000 difference in bids caused him some worry. According to Brunet, when he asked for details

[5] I am quoting with reservations because Mr. Bloomfield did not indicate the edition or the page of this reference.

Persons gave two explanations, the one we already know concerning the proximity of the gravel-pit and the other some "jargon" (textual) "concerning the obligation to dig the ground to a depth of three feet". Anyone who is satisfied with "jargon"-type explanations is ill-advised to blame someone else before he has settled his own affairs.

In addition, the witness said that "on December 9, 1960, the representative of the Department of Transport in Montreal, R. L. Davies, telephoned him that Persons had four unpaid accounts outstanding at Trois-Rivières and gave the names of the creditors and the amounts owing. On December 21, engineer Léonard and "another person" advised Brunet that these accounts had been paid "asking him whether he wanted to see the receipts".

But there is more, and it is still the same witness who gives us this information. Afterwards, Brunet did not attempt to obtain information from the department concerning the execution of the contract "despite the fact that the company usually requires progress reports from its insured when the work is half-completed". He said that he took it for granted from "past experience that it was pointless to ask the department to accede to such a request".

He concluded his evidence by stating that he "had relied on the satisfactory information which Persons sent him concerning the carrying out of the work in December 1960".

The second witness, Richard L. Davies, is the regional engineer for the Department of Transport at Montreal.

Engineer Davies did not share Gérard Brunet's opinion; on the contrary, he insisted that "I don't know of any instance where the Department of Transport has ever refused to give information of this nature. We are only too glad to do so. I never refused to extend such information when so requested by bonding companies or other interested parties. Information concerning the progress and execution of contracts has always been forthcoming."

It is not the essence of this action to review the lengthy testimony given in another case, *Persons v. The Queen.* It will suffice to know that up until the winter weather interrupted the work at the airport, towards the end of December 1960, difficulties arose because of the contractor's attempts to reduce operating costs by using an unacceptable grade of gravel. The Minister did not cancel the contract until June 14, 1961, when evidence of Persons' inefficiency was obtained.

From all of the foregoing, was the plaintiff's obligation to keep the surety (according to the defendant) "roughly" posted on changes in the contract of construction respected?

The final document in the file is one entitled "Admissions"; it acknowledges that:

The defendant admits:

(1) having received, on June 5, 1961, the notice dated June 1, 1961 (the mise-en-demeure or demand from the department to the contractor to resume the project not later than June 12 of that year) filed as exhibit S-9 in *Persons v. The Queen.*

(2) having acknowledged receipt of the said notice by letter dated June 5 to Mr. H. J. Connolly of the Department of Transport, in accordance with the copy attached hereto.

(3) that the letter of June 5 attached hereto was followed by a letter dated June 7 addressed to Mr. Connolly and filed in the *Persons* case as exhibit R-3.

Dated at Montreal, this 24th day of April, 1969.

Undersigned by counsel for the defendant.

A fair assessment of this correspondence by the learned legal adviser of the Crown reads at pages 33 and 34 of the "Notes and Authorities" filed:

On June 1, 1961 a copy of the mise-en-demeure sent to Persons was forwarded to Defendant. On June 5th receipt thereof was admitted (see "Aveux" forming part of the records of this case) and on the same date receipt was acknowledged by letter from Defendant to H. J. Connolly, Director Construction Branch, Department of Transport.

It is interesting to note the contents of this acknowledgement:

"We are contacting our Principal to obtain full particulars about the status of this contract and we will then be pleased to discuss this matter with you."

On June 7, 1961 Defendant wrote once again to Plaintiff which communication was produced as Exhibit R-3 in the Persons case and reference to which was made by the Supreme Court of Canada on page 6 of the judgment of that Court.

Two conclusions, given hereunder, actually seem to emerge from the evidence: (cf. page 33)

The significance of this correspondence cannot be overlooked. On being advised of the status of the contract the Bonding Company elected to continue the status quo and indicated that its contractor would resume the work. (An assumption thus worded: "and we have been assured he (Persons) will be on the site to resume work on Monday, June 12") (cf. exhibit P-4, p. 6).

Page 33, second line from the bottom, then on page 34 of the "Notes and Authorities":

Defendant now takes the position it should have been advised earlier. We question how the situation would have been improved thereby, when in the face of the most drastic action possible on the part of the Crown (the cancellation of the contract of construction on June 14, 1961), the Defendant elected to allow the continuation of its principal without qualification.

In short, we submit that this final point advanced on the part of the Defendant is not borne out by the facts as proven. The Bonding Company was kept fully informed at all times crucial to the proceedings and knew full well the implication of the notice of June 1st and the proceedings which followed. Yet on the basis of such knowledge it pursued the course of merely allowing its contractor to continue with the work.

May we add that after choosing such a line of action it would ill beseem the defendant to claim that it was unduly refused the opportunity to terminate, on its own initiative, the construction of the airport. Its abstentionist attitude does not lead one to expect such an intention on its part.

The Fidelity Company was certainly not deceived in any way by the State; when the critical phase occurred and when dealings between the Department of Transport and Persons definitely turned sour, it was more than "roughly" advised of the situation, and yet it did not come out of its inertia.

However, going on to claim the full amount of the penalty is perhaps going too far. On this point, let us see what the very able counsel for the defendant, Me de Grandpré, Q.C., says on page 20 of his statement:

> We also submit that good sense still has certain rights. In this instance, the contractor's default entailed approximately $130,000 in damages and yet the Crown would like to receive $230,000. The difference is large, but it is not as bad as if the default had entailed only $10,000 in damages. In that case, would the Crown still have claimed that, because it suffered $10,000 in damages, it was entitled to the full amount of the bond, namely $230,000.

Save for this difference that, in my humble opinion, we have, in this instance, not a suretyship within the meaning of article 1931 but an obligation with a penal clause as provided for in articles 1131 and others of our Code, could we think of a more convincing justification for the power of equity attributed to the court, under the conditions experienced in this case, to reduce the amount of the penalty "if the obligation have been performed in part to the benefit of the creditor, and the time fixed for its complete performance be not material . . ." (C.C. 1135).

For these reasons, the Court allows the information of Her Majesty the Queen in right of Canada up to a sum equal to the legally liquidated damages and related costs, to wit: $130,191.27 for the former and $30,595.55 for the latter, amounting to a total of $160,786.82, and orders the defendant company to pay the sum of $160,786.82 to the plaintiff, the whole with costs of this action.