

JOHN P. CLARKE AND JOHN R. }  
 BARBER..... } SUPPLIANTS;

1890  
 Jan. 20.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

*Contract to supply printing paper—Construction—Omission in Schedule—Evidence.*

On the 1st December, 1879, B., to whose rights the suppliants had succeeded, entered into a contract with the Crown to supply, for a given time, "such quantities of paper, and of such varieties, as may be required or desired from time to time for the printing and publishing of the *Canada Gazette*, of the statutes of Canada, and of "such official and departmental and other reports, forms, documents "and other papers as may at any time be required to be printed "and published, or as may be ordered from time to time by the "proper authority therefor, according to the requirements of Her "Majesty in that behalf." Attached to the contract, and made part thereof, were a schedule and specifications showing the paper to be supplied and the price to be paid therefor, but in which no mention was made of double demy,—the paper ordinarily, though not exclusively, used for departmental printing.

*Held*, that notwithstanding this omission, the contractor had agreed to supply the Crown and the Crown by implication had agreed to purchase of the contractor, among other paper, that required for departmental printing.

**APPEAL** from a ruling of two special referees of the court refusing certain evidence tendered by suppliants in support of their claim for damages upon an alleged breach of contract by the Crown.

The facts of the case are fully stated in the judgment.

October 18th, 1889.

*McCarthy*, Q.C. and *Macdonald* for suppliants;

*Hogg* for Crown.

BURBIDGE, J. now (January, 20th, 1890) delivered judgment.

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I am of opinion that the learned referees should have received the evidence tendered of the purchase from parties other than the contractor of paper required for departmental printing.

On the 22nd of September, 1879, the Under-Secretary of State advertised for, amongst other things, tenders for furnishing, during a term of five years from the first day of December then next, of printing paper for the printing of the *Canada Gazette*, the statutes and orders-in-council, and for pamphlets and other work required by the several departments of the Government of Canada, and it was stated in the advertisement that blank forms of tender and specifications would "be furnished" on application to the Queen's Printer, on and after "Wednesday, the 24th instant."

At this time the contractor, a manufacturer of paper, was, under a contract of the 1st October, 1874, supplying the Government with the printing paper required for the *Gazette*, the statutes and the departmental printing. In the schedule and specifications attached to, and forming part of, such contract, the paper to be supplied in accordance therewith, and the prices to be paid for such paper, were described as follows:—

Per ream of 500 sheets, No. 1 Double Royal, for the laws, to weigh 52 lbs. per ream.....	\$6.15
Per ream of 500 sheets, No. 1, Royal, to weigh 26 lbs. per ream	3.10
Per ream of 500 sheets, No. 2, <i>Gazette</i> paper, double quadruple foolscap, to weigh 64 lbs. per ream of 500 sheets. ....	6.95
Per ream of 500 sheets, No. 2, <i>Gazette</i> paper, quadruple cap, to weigh 32 lbs. per ream.....	3.50
Per ream of 500 sheets, No. 1, Double Demy, 50 lbs. per ream.	6.00

In the blank forms of tenders supplied in pursuance of the advertisement, to which I have alluded, there were the following schedule and specifications:—

Per ream of 500 sheets, No. 1, Double Royal, for the laws, to weigh 52 lbs. per ream.

Per ream of 500 sheets, No. 1, Royal, to weigh 26 lbs. per ream.

Per ream of 500 sheets, No. 2, *Gazette* paper, double quadruple foolscap, to weigh 64 lbs. per ream of 500 sheets.

Per ream of 500 sheets, No. 2, *Gazette* paper, quadruple cap, to weigh 32 lbs. per ream.

On the 15th of November, 1879, by direction of the Secretary of State, the Queen's Printer informed the contractor that his tender for printing paper for the "statutes and *Gazette*" had been accepted, and subsequently, in pursuance of the advertisement, tender and acceptance, the contract of the 1st of December, 1879, set out in the pleadings, was duly executed.

After a recital of the *Act respecting the Office of Queen's Printer and the Public Printing* (32-33 Vic. c. 7), the advertisement and the acceptance of the contractor's tender, we find the following provisions in the contract:—

Now this indenture witnesseth, that in consideration of the sums and prices to be paid for such paper as may be supplied in accordance with, and at the rates mentioned, in the schedule and specification thereof, signed by the "Contractor" (hereunto annexed and marked "A"), which said schedule and specification are to be construed and read as part hereof and as if embodied in and forming part of this contract, he the "Contractor" doth hereby covenant, promise and agree to and with Her Majesty in the manner following, that is to say:—

(1.) That he the "Contractor" shall and will, well and truly and faithfully, and from time to time, and when and so often as application or order may be given to him for the same, and during the term of five years from the first day of December, one thousand eight hundred and seventy-nine, supply and deliver to the person or persons appointed to take charge thereof, at Ottawa, such quantity or quantities of paper, and of such qualities and varieties as may be required or desired from time to time for the printing and publishing of the *Canada Gazette*, of the statutes of Canada, and of such official and departmental and other reports, forms, documents, and other papers, as may at any time be required to be printed and published, or as may be ordered from time to time by the proper authority therefor, according to the requirements of Her Majesty in that behalf.

In the schedule and specification referred to, the paper to be supplied, and the price to be paid therefor, are described in these terms:—

Per ream of 500 sheets, No. 1, Double Royal, for the laws, to weigh 52 lbs. per ream, per sample "A".....	\$5.95
Per ream of 500 sheets, No. 1, Double Royal, for the laws, to weigh 52 lbs. per ream, per sample "E".....	5.95

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~	per sample "A".....	2.97½
CLARKE	Per ream of 500 sheets, No. 1, Royal, to weigh 26 lbs. per ream,	
v.	per sample "E".....	2.97½
THE QUEEN.	Per ream of 500 sheets, No. 2, <i>Gazette</i> paper, double quadruple	
—	foolscap, to weigh 64 lbs. per ream of 500 sheets, per	
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for	Per ream of 500 sheets, No. 2, <i>Gazette</i> paper, quadruple cap, to	
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It will be observed that the material difference between the schedule and specification attached to the first contract and that attached to the second lies in the omission from the latter of any reference to double demy, in which respect it follows the form of tender already referred to. Now, double demy was the paper ordinarily but not exclusively used for departmental printing, for which also both double royal and royal were at times used. There was, apart from size and weight, no difference in the quality of double royal, royal and double demy, and the prices charged therefor per ream give nearly the same rate per pound, so that the difference is not material. It also appears that from the manufacturer's standpoint the question of size was of no consequence.

For the respondent it is contended, and the referees are of opinion, that the second contract was limited to paper required for the *Gazette* and the statutes, and that the provision as to the supply of paper for departmental printing was introduced by inadvertence or error in drawing up the formal document. This conclusion is arrived at, to state the grounds very briefly: (1) because there is in the tender, and in the schedule and specification, no reference to the class of paper described in the first contract as double demy; and (2), because in the Queen's Printer's letter, and in the recitals contained in the contract, paper for printing the *Gazette* and statutes only is mentioned.

So far as the recital is concerned it is not, and does not profess to be, a complete description of tenders advertised for, and is not, I think, in any way inconsistent with the covenant for the supply of paper for departmental printing.

The form of tender, the letter of acceptance, and the schedule and specification forming part of the second contract, are matters of more importance; and unexplained, tend no doubt to support the view entertained by the referees.

It is not unimportant, however, in this connection to observe that the Queen's Printer's Department and the Government Stationery Office were, in 1879, separate branches of that part of the public service which was under the direction of the Secretary of State. The Queen's Printer had, under both contracts, to do with the paper for the *Gazette* and the statutes, while the paper for departmental printing was, under the Minister's direction, ordered by the Chief Clerk of the Stationery Office; and perhaps there is nothing singular in the fact that the Queen's Printer should, in the letter accepting the tender, have described only the paper with which he was concerned. In any event, this circumstance standing alone would not, I think, be of sufficient importance to justify the rejection of the express agreement contained in the contract.

A few days before the date of this letter of acceptance the contractor, writing to the Chief Clerk of the Stationery Office in respect to other matters, adds the following:—

According to the *Globe* we have been awarded the contract for the departmental paper, but have no official information to that effect. Mr. Chamberlin said that you would probably have the paper added to your Department, which we hope will prove correct.

The meaning of the concluding sentence is not very clear. At first it occurred to me that perhaps it indicated a knowledge on the part of the contractor that he had not tendered for the paper for departmental

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printing; but that he hoped, in case his tender for paper for the *Gazette* and the statutes were accepted, that this would be added. But on consideration I think he was referring to the departmental arrangements to which I have referred, and expressing the hope that the Stationery Branch would be given the control of the purchase of all the printing paper required by the Government, as well that used by the Queen's Printer's Department as that used by the other departments of the Government. If this was the writer's meaning, it is clear from the letter as a whole that the contractor believed that he had tendered for the paper for departmental printing, and from this circumstance, and other facts of the case, such as the course of business under the first contract and the terms of the advertisement, I am satisfied that such was the contractor's belief at the time. So far as I can see, there never was any intention on his part to enter into a contract from which the paper for departmental printing would be excluded. Nor is it at all clear that the Governor-in-Council ever had any such intention. The contract of 1874, it is admitted, covered paper for departmental printing. The contract of 1879 was, so far as appears, the only contract entered into for printing paper during the period that it was in force. The advertisement of 22nd September, 1879, called expressly for tenders for paper for departmental printing. The form of the tenders was settled by the officers of the Crown, and was probably drafted at the same time or; at most, within a day or two after the advertisement, for copies were to be ready for delivery on application on and after the 24th.

Now, if the intention of the Crown, clearly indicated in the advertisement, of entering into a contract for paper for departmental printing as well as for printing the *Gazette* and the statutes, was changed, that change

must have taken place during the few days that intervened between the date of the advertisement and the delivery of the forms of tender. It is fair, too, I think, to assume that if any such change of intention had taken place it would have been indicated in a manner more intelligible to contractors in general than the omission of any reference in the form of tender to paper known as double demy, and would have been evidenced in some manner capable of proof.

But there is no evidence of any such intention, except the omission referred to, and the importance of such omission is lessened by other considerations,—such as the fact that double royal and royal could be and were used for a part of the departmental printing; that the size was a matter of comparative indifference to the manufacturer, and that ordinarily he would, under such a contract as the one in question, have been willing to supply double demy (if that size had been desired) at the contract price fixed for double royal or royal.

Then, too, we have the further fact that both parties have acted upon the contract as though it covered paper for departmental printing. During the period it was in force the Stationery Office from time to time ordered from the contractors not only double royal and royal but also double demy; the former being charged and settled for at the contract price, and the latter at a proportionate price, having regard to its weight. And we find, further, that, when in 1886 the suppliants complained of the breaches of the two contracts, they were not told that after 1879 there was no contract for the paper for departmental printing, but they were informed by the Under-Secretary of State that His Excellency was advised that during the pendency of the contracts in question no paper had been ordered, either by the Queen's Printer or the Stationery Office, from any one but the contractor.

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Then by the express terms of the contract the contractor agreed to supply the Crown, and the Crown by implication agreed to purchase from the contractor (1), not only the paper required for printing the *Gazette* and the statutes, but also the paper required for departmental printing. This agreement, the result of negotiations that commenced with an invitation to contractors to tender for such printing, ought not, it appears to me, to be set aside, except for reasons the most satisfactory. No doubt the report of the referees presents, and, I may add, forcibly presents, reasons entitled to the most careful consideration. They come to the conclusion that, prior to the drawing up and execution of the formal document, the parties being of one mind, had by the tender and acceptance made a contract limited to paper for the statutes and *Gazette*, and that in giving expression to such contract a mistake had occurred. But the facts, it appears to me, do not warrant that conclusion. I do not think that the parties ever intended to enter into any such contract. On the contrary, I am of opinion that from the first they had in mind a contract covering as well the paper for the departmental printing; and I do not feel myself compelled to an opposite view because difficulties, which in the result did not arise, might have been occasioned by the omission to designate more clearly the paper required for departmental printing.

The matter will be sent back to the referees, with a direction to admit the evidence tendered of the purchase from parties other than the contractor of paper required for departmental printing.

*Case remitted to referees.*

Solicitors for suppliants: *Maclaren, Macdonald, Merritt & Shepley.*

Solicitors for defendant: *O'Connor & Hogg.*

(1) *McLean v. The Queen*, 8 Can. S.C.R. 210.