BETWEEN:

THE MINISTER OF NATIONAL REVENUE
APPELLANT-RESPONDENT;

1959
Oct. 19, 20

1960
June 16

AND

JOHN COLFORD CONTRACTING COMPANY LIMITED .....RESPONDENT-APPELLANT.

Revenue—Income—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 85B(1)(b)—Final payment under contract made on issuance of certificate of architect or engineer—Progress payments—Holdbacks—"Amount receivable"—Taxation year in which to include income—Appeal allowed in part—Cross-appeal dismissed.

Respondent, carrying on most of its business as a sub-contractor, is engaged in furnishing and installing plumbing, heating, air conditioning and ventilation equipment. It receives from the prime contractor monthly progress payments for 85% or 90% of the work done, the remaining 15% or 10% being withheld as a holdback. Final payment is made when the project is completed and the certificate of an architect or an engineer named in the contract is issued that the work is satisfactory.

For the taxation year 1953 respondent did not report progress payments of $80,000 actually received or holdbacks of $67,000 not yet received, related to three incompleted contracts, a large one in Ontario and two smaller contracts in Quebec. The Minister of National Revenue added both amounts to respondent's 1953 income. The Income Tax Appeal Board held that the progress payments were taxable in 1953 but that the holdbacks were not so taxable. The Minister appealed to this Court and the respondent cross-appealed. The respondent contends that its profits, if any, cannot be determined until after the completion of each of the three projects to the satisfaction of the supervising architect or engineer.

1960

MINISTER OF NATIONAL REVENUE v. COLFORD

Held: That the cross-appeal must be dismissed and the progress payments were taxable in 1953 since the *Income Tax Act* does not provide that a taxpayer may reckon his income according to the duration of each individual contract especially when payments received thereon during any year exceed the aggregate of the taxpayer's direct costs applicable to them, and thus contain an element of profit.

2. That the holdbacks related to the larger Ontario contract were "amounts receivable" in 1953 since the certificate of the supervising architect or engineer was issued in the respondent's 1953 taxation year and not withstanding that by the terms of the contract such amounts only fell due in a subsequent taxation year they must be included in the company's income for the year in question, but the holdbacks related to the two Quebec contracts were not amounts receivable in 1953 as the certificates for them were not issued until later years.

3. That "amount receivable" means an amount which the intended recipient has a clearly legal, though not necessarily immediate right to receive, and the clause in each contract dealing with the architect's or engineer's certificate constituted a binding condition precedent which prevented respondent claiming the holdbacks until the certificate was issued.

APPEAL and CROSS-APPEAL under the *Income Tax Act*.

The appeal and cross-appeal were heard before the Honourable Mr. Justice Kearney at Montreal.

Guy Favreau, Q.C. and *Paul Boivin, Q.C.* for appellant.

H. H. Stikeman, Q.C. and *J. N. Turner* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

KEARNEY J. now (June 16, 1960) delivered the following judgment:

This is an appeal and a cross-appeal from a decision of the Income Tax Appeal Board[1] rendered on January 9, 1957, in respect of a re-assessment of taxable income for the taxation year 1953 made by the appellant-respondent (hereinafter called the "Minister") against the respondent-appellant (later referred to as the "taxpayer").

The taxpayer is engaged in the furnishing and installation of plumbing, heating, air conditioning and ventilation equipment. In the computation of its taxable income for its fiscal year ended March 31, 1953, which is the only year in issue, the taxpayer excluded therefrom all receipts and

[1] (1957) 16 Tax A.B.C. 252

expenditures (but we are here concerned only with gross receipts) directly related to three then incompleted contracts. The issue is not whether the excluded amounts are taxable but when they are taxable. The amounts in question fall into two categories: progress payments actually received and unreceived holdbacks. According to the taxpayer, the provisions of the contract were such that profits and losses in connection therewith could only be determined if and when each entire project had been completed to the satisfaction of the owner, as witnessed by a certificate to that effect signed by an architect or engineer selected by the owner and mentioned in the contract.

As a result the taxpayer, in its income tax return for the fiscal year in question, showed its taxable income as $21,150.84; but by notice of reassessment dated November 24, 1954, it was informed by the Minister that, upon taking into account the excluded items, the said sum of taxable income had been increased by $146,819.53. On January 12, 1955, the taxpayer filed a notice of objection to this addition to its declared taxable income, but the Minister reaffirmed it, and on September 23, 1955, the taxpayer was notified accordingly. On November 3, 1955, the taxpayer appealed to the Income Tax Appeal Board which allowed the appeal with reference to an unspecified part of the $146,819.53, representing unreceived holdbacks which, the parties agree as of March 31, 1953, amounted to $67,728.24. It is in respect of the amount thus allowed that the Minister now appeals. The Board dismissed the appeal as to the balance of approximately $80,000 which, it is conceded, was made up of amounts actually received by the taxpayer during the taxation year 1953 by way of progress payments, or by what has been called in the evidence gratuitous payments made in advance of the completion of the three contracts in issue. The taxpayer by way of cross-demand herein appeals from the decision of the Board in respect of the above-mentioned balance of $80,000.

In respect of the taxability of the progress payments, the Minister relies on ss. 3 and 4 of the *Income Tax Act*, R.S.C. 1952, c. 148, and amendments. As to the holdbacks, the Minister claims that they are amounts receivable within the meaning of s. 84B of the Act. The so-called gratuitous

1960

MINISTER OF NATIONAL REVENUE v. COLFORD

Kearney J.

payments arose because there were instances in which the taxpayer was the sub-contractor and where the prime contractor, instead of insisting on its right to retain holdbacks, made partial payments on account thereof to the taxpayer notwithstanding that the contract had not yet been completed.

The facts in this case are not in dispute. The taxpayer carries out most of its work as a sub-contractor but occasionally enters into a contract directly with the owner as, for instance, when plumbing and heating apparatus is to be renewed or installed in a building otherwise completed, in which case it acts as a prime contractor, though not in the ordinary sense that it undertakes to construct an entire building.

We are here concerned with the following three contracts which are known in the trade as lump sum contracts: contract dated February 13, 1951, for $999,166 (subsequently increased to $1,084,655.14) between the taxpayer acting as sub-contractor and Anglin Norcross (Ontario) Limited as contractors in connection with the installation of "heating, plumbing, fire protection, kitchen equipment, refrigeration, ventilation, air conditioning, pneumatic controls and insulation" in the Dominion Bureau of Statistics in Ottawa (Ex. A); contract dated July 28, 1950, for $69,218 (subsequently increased by a change order to $101,711) between His Majesty, represented by the Minister of Trade and Commerce, and the taxpayer as contractor, covering a steam distribution project in nine buildings located at Bouchard, Que. (Ex. B); contract dated June 7, 1950, for $89,778 (subsequently increased on several occasions) between the taxpayer as sub-contractor and Héroux & Robert Limited as general contractor, for the supply of all labour and materials for the heating of the Basilica of St. Joseph's Oratory in Montreal (Ex. D).

The taxpayer follows the practice of submitting a tender wherein it offers to complete a job for a specified price. In fixing the amount of its tender, it estimates the overall cost of performing the work and adds thereto a certain percentage for profit which varies between $4\frac{1}{2}$ and $6\frac{1}{2}$ per cent, depending on the amount involved and the particular nature of the undertaking.

The provisions of the three contracts which have most bearing on this case are not identical. The following is a relevant extract from the Dominion Bureau of Statistics contract (Ex. A):

As the work progresses payable on or about the twentieth day of each month an amount equal to 85 percent of the value of the completed work done during the preceding calendar month, provided that a proper requisition in triplicate therefor be delivered to Contractor on the last day of the month during which the work covered thereby was done and provided further that the unpaid balance of the contract price shall at all times be sufficient in the judgment of Architect to complete the work.

Final payment to be made within 30 days after satisfactory completion of the entire building and acceptance by the Architect.

Exhibit B is a contract in which the taxpayer appears as prime contractor. The provisions regarding the certification of the work required designated an engineer instead of an architect for this purpose, and the holdback instead of being 15 per cent, as in the Bureau of Statistics contract, was 10 per cent. Section 1 of the said agreement contains a provision that form C.C.C. 34A, entitled *Department of Trade and Commerce—General Conditions—(construction)*, shall form part of the present contract. Copy of the said *General Conditions* is annexed to exhibit B. Section 41 of the *General Conditions* read in part as follows:

The written certificate of the Engineer certifying to the final completion of the said work to his satisfaction, shall be a condition precedent to the right of the Contractor to receive or to be paid the remaining ten per cent, or any part thereof. Provided that if the Contractor shall be required by His Majesty to do work additional to the work as defined in the contract, the completion of such additional work shall not, unless otherwise determined by the Minister, be a condition precedent to the payment of the remaining 10 per cent retained as above provided, but such moneys so retained may be paid to the Contractor upon the written certificate of the Engineer certifying that the work as defined in the contract has been completed to his satisfaction. . . .

By reason of section 1 of the agreement the Director of Works and Accommodation of the Department of National Defence of Canada was appointed as the engineer. The same section also provides that—

any act on the part of the Director of Works and Accommodation, in connection with and in virtue of the present contract, and any instructions or directions or certificates given, or decisions made by the Director of Works and Accommodation, or by anyone acting for him, shall be subject to approval or modification or cancellation by the Minister of National Defence.

1960

MINISTER OF NATIONAL REVENUE v. COLFORD

Kearney J.

In exhibit D, in which Héroux & Robert Limited are contractors and the taxpayer is the sub-contractor, the provisions regarding progress payments and holdbacks are very simple and are contained in Article 2 which reads as follows:

> The General Contractor agrees to pay to the Sub-Contractor the sum of $89,778.00 Eighty Nine Thousand, Seven hundred and Seventy Eight Dollars Tax Included on the Certificate of Architect or owner as the work progresses to the value of ninety per cent (90%) of the work done as estimated by the Architect or owner. Final payment to be made within thirty days after the completion of the work and acceptance by the Architect or owner.

According to an analysis (Ex. E) of payments and holdbacks prepared by Mr. C. H. Bray, C.A., who testified on behalf of the taxpayer, of the amount of additional income totalling in round figures $147,000 which the Minister sought to take into the taxpayer's fiscal year 1953, approximately $134,000, $5,000 and $8,000 were related, respectively, to the Statistics building, the Bouchard contract and the Oratory contract.

Without the Minister's knowledge, the taxpayer with the approval of its auditor did not take into account for the year in question the above-mentioned income on the ground that, according to accepted accounting principles and good business practice, its profits, if any, could not be determined until after the completion of each project and a final certificate to that effect had been issued by the architect or engineer appointed for the purpose by the owner.

We are concerned with a question of principle rather than one of amount. If the amounts in question were not included in 1953, they had to be taken into account in a subsequent year. The taxpayer included the sum of $134,000 in his 1954 return instead of 1953, and the ensuing monetary consequences to either party were negligible. The issue in respect of progress payments turns on whether the taxpayer is justified in ignoring the payments actually received during 1953 until the architect or engineer has given the certificate referred to in the contract. Sections 3 and 4 of the *Income Tax Act* provide:

> 3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,
(*b*) property, and
(*c*) offices and employments

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

Judson J. in *Interprovincial Pipe Line Co. v. Minister of National Revenue*[1] observed:

> Sections 3 and 4 of the Act do not require a separate computation of income from each source for the taxpayer is subject to tax on income from all sources. The deduction against income given by s. 11(1)(*c*) is attributable to all sources of income and there is no authority to break it up and relate various parts of the deduction to various sources.

I think the above reasoning is applicable *mutatis mutandis* in the present case and it is my view that progress payments, whether made on demand or otherwise during the course of any year in connection with the contracts in question, must be reckoned with in the year in which they are received, and may not in effect be ignored by placing them in a suspension account as was done in the present case.

The *Income Tax Act,* in my opinion, contains no provision which will allow a taxpayer to reckon his income according to the duration of each individual contract, especially when payments actually received thereon during any year exceed the aggregate of the taxpayer's direct costs applicable to them, and thus contain an element of profit. This is what occurred in respect of the Dominion Bureau of Statistics contract, as appears in the analysis thereof shown on p. 2 of exhibit E. As of March 31, 1953, the taxpayer had received in excess of direct costs an amount of $77,532.48. According to the evidence, this occurred because, when filing application for progress payments, it was aware that four to six weeks would elapse before payment would be made; and, in order to be able to finance in the interval, it would anticipate its expenditures beyond the end of the previous month.

Subsequently to the hearing in the present case, Cameron J. held in *Wilson & Wilson Ltd. v. Minister of National Revenue*[2] that moneys paid before the completion of any contract during any year must be regarded as income and

[1] [1959] S.C.R. 763, 768. [2] [1960] C.T.C. 1.

1960

MINISTER OF NATIONAL REVENUE v. COLFORD

Kearney J.

not as mere advances, and that the completed contract method of reporting is contrary to ss. 3, 4 and 85B of the Act, unless the Minister accepts such method of reporting. In the *Wilson* case the contracts in question were on a unit price basis and not on a lump sum basis as in the instant case, but in respect of progress payments I do not think this distinction is material. Although in the present case it was alleged that the completed contract method of reporting had been accepted by the Minister, no proof was offered to support this allegation.

The second point in issue, namely, whether the holdbacks amounting in the aggregate to $67,728.24 should have been included as taxable income by the taxpayer in 1953, hinges on a narrow issue which is not easily resolved. It depends on the interpretation to be given to the word "receivable" found in s. 85B(1)(*b*) of the *Income Tax Act*, R.S.C. 1952, c. 148, which reads as follows:

> In computing the income of a taxpayer for a taxation year, every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year.

In the *Wilson* case (*supra*) Cameron J. came to the conclusion that before s. 85B became effective holdbacks were taxable only after the issuance of a final certificate by the architect or engineer appointed by the owner, but that, after the passage of s. 85B(1)(*b*), this was no longer true because, in his opinion, as a result of it a holdback became "receivable" within the meaning of the said section. Although admittedly the section is drafted in broad terms, I am disposed to add to the above statement the proviso that the facts in each particular case are such as to give to the holdback the quality of a receivable.

As "amount receivable" or "receivable" is not defined in the Act, I think one should endeavour to find its ordinary meaning in the field in which it is employed. If recourse is had to a dictionary meaning, we find in the *Shorter Oxford*, Third Edition, the word "receivable" defined as something "capable of being received." This definition is so wide that

it contributes little towards a solution. It envisages a receivable as anything that can be transmitted to anyone capable of receiving it. It might be said to apply to a legacy bestowed in the will of a living testator, but nobody would regard such a legacy as an amount receivable in the hands of a potential legatee. In the absence of a statutory definition to the contrary, I think it is not enough that the so-called recipient have a precarious right to receive the amount in question, but he must have a clearly legal, though not necessarily immediate, right to receive it. A second meaning, as mentioned by Cameron J., is "to be received," and Eric L. Kohler, in *A Dictionary for Accountants,* 1957 edition, p. 408, defines it as "collectible, whether or not due." These two definitions, I think, connote entitlement.

This leads to a consideration of whether, legally speaking, each of the holdbacks in the instant case possessed the quality required to bring it within the meaning of a receivable. Speaking of the quality required to constitute income, the learned president of this Court stated in *Robertson Ltd. v. Minister of National Revenue*[1]:

> Did such amounts have, at the time of their receipt, or acquire, during the year of their receipt, the quality of income, to use the phrase of Mr. Justice Brandeis in *Brown v. Helvering*[2]. In my judgment, the language used by him, to which I have already referred, lays down an important test as to whether an amount received by a taxpayer has the quality of income. Is his right to it absolute and under no restriction, contractual or otherwise, as to its disposition, use or enjoyment? To put it in another way, can an amount in a taxpayer's hands be regarded as an item of profit or gain from his business, as long as he holds it subject to specific and unfulfilled conditions and his right to retain it and apply it to his own use has not yet accrued, and may never accrue?

I might here interpose that in the present case the amounts of the holdbacks eventually were paid to the taxpayer, but to say that they might never have accrued to him would be to express something far beyond a mere figure of speech. As illustrative of the risks of the trade, proof was made that, in connection with the installation of plumbing in the Queen Elizabeth Hotel in Montreal, the taxpayer was required at its own expense to remove and replace immediately 600 bath-tubs out of a total of 1,200

[1] [1944] Ex. C.R. 170, 182. [2] (1934) 291 U.S. 193.

1960

MINISTER OF NATIONAL REVENUE v. COLFORD

Kearney J.

installed, because three or four months subsequent to the installation a hair-line flaw was discovered in them. Material and labour costs amounted to $263,000. The owner could not be held responsible and, at the date of hearing, the taxpayer had been unable to recover anything from the supplier of the bath-tubs. In connection with the power house attached to the Printing Bureau at Hull, Que., the engineers of the Department of Public Works refused to accept the layout and construction of the steam lines installed, and the taxpayer without recourse was obliged to remove and replace them at a cost of $77,000.

There is no doubt that, insofar as the provisions of the Dominion Bureau of Statistics contract are concerned, it is the law of Ontario which applies, and with regard to the other two contracts it is the law of the Province of Quebec which governs. The jurisprudence in respect of the status of holdbacks in the Province of Ontario is similar to that found in England and is little different from the case law of Quebec, at least insofar as the present case is concerned. In both provinces much depends on the wording of each individual contract.

In this case each contract must be scrutinized in order to ascertain whether in law the clause dealing with the procurement of an architect's or engineer's certificate either expressly or by implication constitutes a binding condition precedent on the taxpayer which prevents him from claiming a holdback until the certificate is issued. In Ontario it has been held that the contractor has no legal right to the amount of the holdback until the issuance of the certificate, and no suit can be properly commenced by him before certification unless it is clear that the certificate has been improperly withheld by the architect. See *McDonald v. Oliver*[1], *Quaintance v. Howard*[2], *Coatsworth v. Toronto*[3], *Ferguson v. Galt*[4].

The above-mentioned jurisprudence deals with the relationship between a contractor and the owner, but I think it applies with even greater force between a sub-contractor

[1] (1884) 3 O.R. 310.
[2] (1890) 18 O.R. 95 (C.A.).
[3] (1858) 7 U.C.C.P. 490; (1858) 8 U.C.C.P. 364.
[4] (1873) 23 U.C.C.P. 66 (C.A.).

and a prime contractor. Mr. W. E. Williams who has been engaged in the construction business for several years and is a past president of the Montreal Building Exchange gave evidence as an independent expert regarding the usual provisions found in construction contracts and how they operate. He stated that a sub-contractor is never paid by the prime contractor until the latter has secured the certificate of the engineer or architect appointed by the owner and until the whole construction, which may include the work of many sub-contractors, has been completed to the satisfaction of the owner, and a certificate of the architect or engineer chosen by him has been issued. It will be seen therefore that, notwithstanding that a sub-contractor may have carried out his sub-contract perfectly, insofar as payment is concerned, he must wait until every other sub-contractor has done so to the satisfaction of the prime contractor and the latter has received a certificate to that effect from the architect or engineer.

The law of England regarding the nature and effect of an architect's certificate is described together with supporting jurisprudence in *Law and Practice of Building Contracts* by Donald Keating, 1955 edition, pp. 62 *et seq.* At p. 68 the following is found:

> It is a question of construction in each case to determine whether it was intended that a particular certificate should be conclusive upon the matter with which it purports to deal. Express words are frequently used such as, for example, that "the certificate of the engineer . . . shall be binding and conclusive on both parties." It seems that prima facie a final certificate which is a condition precedent to payment is conclusive. Progress certificates are usually not conclusive. . . .

At p. 69 the author states:

> The architect's decision may be conclusive on some matters but not on others.

It is provided in article 3 of the Dominion Bureau of Statistics contract that the amount of the holdback is to be 15% of the progress payments, and the article concludes in these words:

> Final payment to be made within 30 days after satisfactory completion of the entire building and acceptance by the architect.

Although it does not add that such completion and acceptance by the architect are conditions precedent which must be fulfilled before the taxpayer is entitled to final payment

1960

MINISTER OF NATIONAL REVENUE v. COLFORD

Kearney J.

of the holdback, in my opinion, under the jurisprudence such meaning is to be implied. As a corollary, I consider that the holdback does not, as far as the taxpayer is concerned, take on the quality of a receivable until the work has been accepted by the architect. This does not, however, dispose of the issue in regard to the contract under consideration.

Ross, Patterson, Townsend and Fish, as appears by the contract, had been named by the owner as the "architect;" and on March 9, 1953, the above-mentioned firm, *per* J. K. Ross, certified that all the work in connection with the Dominion Bureau of Statistics, which totalled some $6,000,000, had been completed by the prime contractor according to plans and specifications; and that no holdback was to be retained. The above-mentioned certificate, of course, covered the work done by several sub-contractors, including the taxpayer. It will thus be seen that the condition precedent ceased to exist before the termination of the taxpayer's fiscal year 1953 and the holdbacks payable under it acquired the quality of a receivable as of the date of the certificate. It is to be recalled that final payment was to fall due thirty days after the issuance of the certificate which would bring it into the taxpayer's subsequent fiscal year, and it was in fact paid on April 11, 1953. I do not think that the latter can rely on the delay allowed for payment as justification for bringing the amount of the holdback into the fiscal year in which it fell due. In my opinion, a term or instalment account must be included in the taxation year in which it could be said that it had the quality of a receivable since s. 85B(1)(*b*) provides that it shall be thus included "notwithstanding that the amount is not receivable until a subsequent year."

It was alleged by counsel for the taxpayer that, because of article 4 of the contract, the holdback in question did not become a receivable in the true sense of the word until April 11, 1953, the date on which the taxpayer received it from the general contractor, since the taxpayer was not aware of the issuance of the architect's certificate to the

prime contractor until he had received payment of the holdback. In support of the foregoing submission reference was made to *Price v. Forbes*[1] wherein it was held that—

> An architect's certificate may be made, by express agreement, final and binding on both the owner and contractor, and in that sense conclusive as between them. But, as pointed out by the judgment of the Court of Appeal, in *Smallwood Brothers v. Powell*[2], that result by no means follows if the contract itself affords evidence that the certificate is not finally to settle the matters which it deals with, and does not absolve the contractor from responsibility for work badly done or omitted.

I do not think that the reference to the *Smallwood* case is particularly applicable in the present instance because it dealt with progress payments and the architect issued a certificate to the builder, knowing there was nothing due to him by the owner. Article 4 of the contract reads in part as follows:

> No Payment made under this contract shall be conclusive evidence of the performance of this contract, either wholly or in part, and no payment shall be construed to be an acceptance of defective work or improper materials or to relieve Sub-Contractor of responsibility for any guarantee or maintenance for which he may be liable under this contract or the specification applicable thereto.

In my opinion, article 4 notwithstanding, the architect's certificate given in the present case on March 9 is sufficiently conclusive to give to the holdback in question the character of a receivable as of that date.

On April 11 the taxpayer could have ascertained, as he did later, that the architect's certificate had been issued on March 9. It is not the date on which he obtains knowledge of the existence of the certificate but the date of its execution which governs. I am accordingly of the opinion that the holdback of approximately $56,000 which was paid on April 11, about thirty days after the issuance of the architect's certificate, as contemplated in the contract, must be considered as an amount receivable in the taxpayer's fiscal year 1953.

I will now pass on to a consideration of the relevant law applicable to the two Quebec contracts. As to the effect of the acceptance by the architect of the work done constituting a condition precedent, the most recent case which

[1] (1915) 23 D.L.R. 532.

[2] (1910) 1 O.W.N. 1025.

1960

MINISTER OF NATIONAL REVENUE v. COLFORD

Kearney J.

has been brought to my attention is that of *Bertheau v. Gagnon*[1] in which it was held that, once the work undertaken has been accepted either by the architect or the proprietor, this acceptance implies a recognition that the contract has been fulfilled and dispenses the contractor from otherwise proving the fulfilment of his obligations. The judgment then deals with the ensuing consequences when the contractor's work has been refused, but this situation does not arise in the present case. In *Traité du Droit civil du Québec* by L. Faribault, a notation in respect of Art. 1686 C.C. to the following effect is found in vol. 12, p. 432:

> In the following cases it has been decided that when an undertaking must be completely fulfilled and delivered, the contractor cannot make claim for the amount of his contract before the work has been completely terminated and accepted.

A long list of cases follows, among which is *Rochon v. Favreau*[2] wherein it was held that, when a job had to be perfected and delivered within the meaning of Art. 1686 C.C., the contractor could not claim the price of a contract before the work had been completed and accepted. Keating at p. 34 (*supra*) observed that the rights of contractors to be paid in the fact of a condition precedent has greatly exercised the courts in England. That the same is true in respect of the Province of Quebec appears from the fact that the above-mentioned judgment was affirmed by the Supreme Court of Canada only because the six presiding judges were equally divided on the subject. See also *Corporation of Drummondville v. Simoneau*[3], *Lalonde v. Fickles*[4]. In *Whiting v. Blondin*[5], the Supreme Court held, reversing the judgment appealed from, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been fulfilled by the contractor who had no right of action under the contract. To the same effect is the case of *Bertrand v. Pépin*[6].

[1] [1959] B.R. 473, 476.
[2] (1911) 21 B.R. 61.
[3] (1912) 23 B.R. 392.
[4] (1915) 47 C.S. 257.
[5] (1904) 34 Can. S.C.R. 453, 457.
[6] (1917) 51 C.S. 496.

It will be seen that a number of the cases referred to deal with a situation wherein the contractor had not completely fulfilled his obligations, but this situation does not arise in the present case, and the applicability of the above-mentioned jurisprudence is accordingly limited.

I will consider first the Quebec case which I think offers the least difficulty, i.e., that concerning the Bouchard contract. This contract leaves no doubt as to the existence of a condition precedent with respect to the taxpayer's entitlement to payment of holdbacks. Section 1(*a*)(ii) of the contract (Ex. B) provides that Form C.C.C. 34A shall form an integral part of the contract, and section 10 of the said form reads in part as follows:

> . . . no work under this contract shall be deemed to have been performed, nor materials or things provided, *so as to entitle the Contractor to payment therefor* unless and until the Engineer is satisfied therewith, as evidenced by his certificate in writing, which certificate *shall be a condition precedent to the right of the Contractor to be paid therefor*. . . . (Emphasis supplied)

It has been proved that the engineer's final certificate (Ex. H) was duly signed and issued on January 26, 1954. It follows, in my opinion, that, insofar as that portion of the sum added to the taxpayer's income amounting to approximately $3,000, in connection with the holdbacks on the original contract, or by reason of additional work, the Minister's appeal should be dismissed.

The Héroux & Robert Limited Oratory contract (Ex. D) provides that the final payment is to be made thirty days after the completion of the work and acceptance by either the architect or the owner. I note in passing that nowhere in this contract is there an article protecting the owner in the event that defects should develop in a building after final payment has been made, such as article 4 in the Statistics building contract. This seeming omission may be due to the fact that the C.C. article cited hereunder affords protection against such eventuality.

> Art. 1688. If a building perish in whole or in part within five years, from a defect in construction, or even from the unfavorable nature of the ground, the architect superintending the work, and the builder are jointly and severally liable for the loss.

1960

MINISTER OF NATIONAL REVENUE v. COLFORD

Kearney J.

Although the contract does not specifically state that such acceptance shall constitute a condition precedent to payment, I think, by reason of the foregoing jurisprudence, it should be given the same interpretation as if such words appeared in the text. It is in evidence that the owner accepted the work only when final payment was made in 1957, amounting to some $5,000 which falls under the heading of holdbacks.

In view of the foregoing jurisprudence and attributing what I consider to be the ordinary meaning to the word "receivable," I think that those portions of the amount added by the Minister to the taxpayer's income in connection with the holdbacks on the Bouchard and Oratory contracts are unjustified.

For the above-mentioned reasons I consider that the cross-appeal of the taxpayer should be dismissed with costs. Insofar as the appeal of the Minister is concerned, I think it should be maintained in respect of that portion of the amount added to the taxable income of the taxpayer in connection with the holdbacks in the Dominion Bureau of Statistics contract but without costs. I would accordingly vary the decision appealed from and refer the matter back to the Minister for reassessment.

In the event that the parties fail to agree on the amount of holdback which is to be attributed to each of the three contracts in issue, this matter may be spoken to.

Judgment accordingly.