RETURN

To an Address presented to His Honour the Lieutenant-Governor, praying His Honour to cause to be sent down to the House copies of all Orders in Council relating to any or all applications of F. B. McNamee & Co., or any one in their behalf, or in behalf of their creditors, for a Petition of Right, *re* claims for compensation on account of work performed on the Esquimalt Graving Dock, etc Also copies of all correspondence, together with the report or reports of the Hon. Attorney-General, relating to the same.

By Command.

JNO. ROBSON,
Provincial Secretary.

Provincial Secretary's Office,
13th March, 1890.

VICTORIA, B. C., May 11th, 1889.

Hon. John Robson,
Provincial Secretary.

SIR,—I have the honour to forward herewith petition of right of F. B. McNamee, A. G. Nish and James Wright, and shall be glad to receive His Excellency's *fiat* therefor at an early date.

Your obedient servant,
(Signed) THEODORE DAVIE.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

To the Queen's Most Excellent Majesty, Victoria, to wit:

The humble petition of Francis Bernard McNamee, of Montreal, Anthony Gilbert Nish, of Montreal, and James Wright, of Montreal, trading under the style or firm name of F. B. McNamee & Co., showeth :—

In this petition the expression "Government" means Your Majesty's Government of the Province of British Columbia.

The expression "Chief Commissioner" means Your Majesty's Chief Commissioner of Lands and Works for the time being of the said Province of British Columbia, acting on behalf of Your Majesty in right of Your Province of British Columbia.

1. That your petitioners, on the 24th February, 1880, at Montreal, entered into a contract with the Chief Commissioner to construct a Graving Dock at Esquimalt, in the Province of British Columbia, upon the site selected by Messrs. Kinipple and Morris, Engineers, of Westminster and Greenock, and in accordance with plans, specifications and bills of quantities in the said contract mentioned, for the sum of $350,997.20.

2. That the said contract comprised the construction of a Graving Dock (with a second entrance at head), wings and harbour quay walls, engine and boiler houses, chimney, pump

wells, culverts, etc., maintainance of cofferdam and staging during construction of works and removal on completion.

3. That the dock was to be built of concrete with a facing of stone, the bills of quantities showing that 30,594 cubic yards of concrete, 4,144 74-100 cubic yards of sand stone and 50 92-100 cubic yards of granite were required in the works.

4. By section 106 of the said specifications it was provided that the Chief Commissioner was to supply the whole of the Portland cement to be used throughout the works, but the Chief Commissioner failed to supply such cement, although duly notified in that behalf by your petitioners. The contractors agreed to supply labour, plant, and utensils required for bringing the cement from the stores to the works. The contractors were also to give ample notice of when, and in what quantity, they might require the cement.

5. That on the 24th February, 1880, and prior to the execution of the said contract, your petitioners, in accordance with section 21 of the said specifications, deposited the sum of $10,000 with the said Chief Commissioner, which sum was to bear interest at the rate of five per cent. per annum while retained on deposit.

6. That under section 23 of the said specifications your petitioners were restrained from commencing any work on the said contract until they were instructed in writing to commence operations by the said Chief Commissioner.

7. That on the 11th June, 1880, the Chief Commissioner gave notice, in writing, to your petitioners to commence work on the said Graving Dock contract.

8. That, accordingly, your petitioners immediately commenced work on the said dock by pumping out the dock site, and your petitioners began excavating on the 13th September, and work was pushed on as fast as the weather would permit till the end of the year.

9. That section 7 of the specifications required that the Chief Commissioner should furnish the contractors with copies of the drawings, but the Chief Commissioner neglected to furnish them with the same, although repeatedly requested to do so, until the 30th September, 1880. On examining the drawings your petitioners discovered for the first time that the coping line or front of the dock had been laid out by the Resident Engineer 43 feet 6 inches inland from the position selected by Messrs. Kinipple and Morris, the Chief Engineers, and shown on the contract drawings.

10. That all the granite required in the works was quarried at Jervis Inlet and had been discharged at the works by the 10th December, 1880, and arrangements had been made by your petitioners to quarry the sandstone for the said work, at Newcastle Island, near Nanaimo.

11. That the work of excavating for the quay wall and body of the dock was pushed as rapidly as the weather would permit till the 10th of March, 1881, on which date the Resident Engineer issued a certificate, No. 1, for $10,990, entitling your petitioners to receive from the Chief Commissioner ninety per cent. of same—viz , $9,891—but that the Chief Commissioner delayed paying the same and the said sum was not paid before the 11th July, 1881.

12 That on the 6th April, 1881, the Chief Commissioner requested your petitioners to furnish him with an estimate, in writing, of the cost of substituting granite for brick and sandstone in the dock site works.

13. That on the 9th April, 1881, your petitioners informed the Chief Commissioner, in writing, that they were prepared to substitute granite for sandstone in the whole body of the dock entrance and quay walls for the additional sum of $62,329, being at the rate of $1.60 per cubic foot, or an advance of sixty cents per cubic foot on the contract price for sandstone, but did not receive an answer as to whether sandstone or granite should be used until the 22nd September, 1881, on which date the Chief Commissioner notified your petitioners that no alterations in the material would be entertained, and thereupon your petitioners forthwith proceeded to open up a sandstone quarry at Salt Spring Island.

14. That on the 2nd August, 1881, your petitioners obtained progress certificate No. 2, from the Resident Engineer, for $14,332.49, entitling them to receive $12,899.24. This sum was not paid by the Government until the 24th September, 1881.

15. That on the 7th November, 1881, your petitioners obtained progress certificate No. 3, from the Resident Engineer, for $12,306.92, plus a jobbing work account for $606.50, entitling them to receive $11,682.73, which was not paid by the Chief Commissioner until 30th December, 1881.

16. That on the 14th April, 1882, your petitioners obtained progress certificate No. 4, from the Resident Engineer, for $14,094.86, plus $501.87 on account of jobbing work, entitling them to receive the sum of $13,187.25, which was not paid till the 12th July, 1882.

17. That your petitioners, on account of the non-payment of their certificate, and for the want of cement, and on account of other breaches of contract by the Chief Commissioner, stopped active work on their contract on the 17th April, 1882.

18. That on the 27th June, 1882, the Chief Commissioner, without any warning or notice to your petitioners and in violation of the terms of said contract, forcibly took possession of the dock works, contractors' plant, and all other (your petitioners') property in and about the said works, and thenceforward, until the transfer to the Dominion Government hereinafter mentioned, remained in possession of the same and carried on the said work.

19. That the work was carried on by the Chief Commissioner, ostensibly on account of your petitioners, throughout the year 1882. On the 5th December, 1882, the Resident Engineer issued certificate No. 5 for $12,836.60.

20. That from the 13th June, 1882, until the turning over of the concern to the Dominion Government hereinafter mentioned, your petitioners made repeated applications to the Chief Commissioner to be reinstated in the conduct of the Graving Dock works, and represented to the Chief Commissioner that they were able and anxious to complete the work with all practical expedition, and further drew attention to the slow and ruinously expensive manner in which the Resident Engineer was conducting the dock work.

21. That the Chief Commissioner refused to reinstate your petitioners.

22. That the amount which it cost your petitioners for sandstone per cubic yard was twenty-five cents, whereas the Chief Commissioner in carrying out the work paid ninety-three cents per cubic yard for some of their stone and $1.92¾ for the remainder.

23. That the work was carried on by the Chief Commissioner ostensibly on your petitioners' account till the 24th August, 1883, when, without the consent of or any notification to your petitioners, the Chief Commissioner handed over to the Dominion Government the dock site, the machinery, cement on hand, your petitioners' plant and everything, in consideration of the sum of $432,272.88 paid to this Province by the Dominion Government.

24. That the removal of the dock site 43 feet 6 inches inland from the place selected by the engineers, Messrs. Kinipple & Morris, and for which alteration no order in writing was given, made the estimates of cost of excavation and construction entirely erroneous, as the quantities of earthwork to be excavated and the cost of excavation and the extra cost of moving the earth when excavated was greatly increased, and the tenders given were based on the site defined in the contract drawings.

25. That the alteration of site also involved a great extra cost in placing materials on the works, as your petitioners were unable to use single derricks upon the wharf for this purpose, but had to build tramways, thus the material had to be twice handled.

26. The extra amount of clay excavation caused by the alteration of the site amounted to nearly 12,000 cubic yards, and a large additional quantity of rock had to be blasted, and in addition to the expense thus incurred the contractors had not sufficient dumping ground room to place the increased quantity of clay required to be excavated, besides having farther to move it.

27. The plans and bills of quantities showed that Kinipple & Morris had so arranged the position of the coping line that the excavation and filling would balance, at the same time providing ample dumping room as the work progressed, and leaving no surplus clay, earth, etc., to be removed and deposited off the works. The southerly movement of 43 feet 6 inches entirely upset that arrangement and increased the excavation about 12,000 yards and decreased the dumping room about 8,500 cubic yards, giving a balance of about 20,500 cubic yards of material to be removed from the works. The loss of dumping room seriously retarded the excavation for the body of the dock and greatly increased the cost, the clay, etc., having to be distributed in thin layers over space already filled up to the specified level, thereby entailing the constant erection and removal of trestles, tracks and the employment of extra men, lumber and other material. The said alteration also increased the depth of the excavation at the head of the dock, which caused extra expense in excavating for the body of the dock, the inclines being more expensive to construct and work.

28. The said alteration also increased the depth of the rock cutting on the caisson recess from 12 feet to 47 feet. On the original lines this part of the work could have been cheaply and rapidly executed. The change in the position of the coping line caused severe loss and delay in this portion of the work; and, moreover, by reason thereof, your petitioners were compelled to perform a large amount of extra rock work which was not returned or allowed to them by the Resident Engineer in the progress certificates granted to your petitioners; and the said alteration of site materially increased the cost of rock excavation generally, and your

petitioners from time to time pointed out to the Resident Engineer the additional cost incurred thereby.

29. From the 6th of April, 1881, until the 22nd September, 1881, the Chief Commissioner kept your petitioners in ignorance whether granite or sandstone was to be used in construction, and in consequence of your petitioners being unaware which material would be finally decided on, they discontinued further proceedings for opening up a quarry until the Government should finally decide that point.

30. The value of the plant and material belonging to your petitioners, which plant and material the Government, on the 24th August, 1883, sold to the Dominion of Canada, was $20,000.

31. That your petitioners allege the fact to be that the Provincial Government, in selling the dock, together with the contractors' plant and material, to the Dominion Government, received $42,042.86 more than they had disbursed on the Esquimalt Graving Dock, although that portion of the said work carried on by the Chief Commissioner ostensibly on your petitioners' account had been conducted in the extravagant and ruinous manner hereinbefore set out.

32. Your petitioners claim a refund of the $10,000 deposited with the Government on the 24th February, 1880, with interest at the rate of five per cent. per annum till paid.

33. Your petitioners say they were put to great loss and inconvenience by the Government not paying their certificates as they became due, and claim they are entitled to interest on the delayed payments at the rate of ten per cent. per annum, being the rate charged your petitioners by the Bank of British Columbia for the accommodation they were compelled to seek from that corporation.

34. Your petitioners claim the ten per cent. retained by the Government on certificates Nos. 1, 2, 3 and 4, amouting to $5,172.42, and interest on same at the rate of five per cent. per annum from the 24th August, 1883, till paid.

35. Your petitioners claim the sum of $500, set out in bills of quantities, for clearing the site of the dock works, but which sum has not been included in their certificates.

36. Your petitioners claim payment for five hundred cubic yards of extra rock excavation in the caisson recess not returned by the Resident Engineer in certificates Nos. 1, 2, 3 and 4, at the rate of $2.50 per cubic yard.

37. Your petitioners claim that, owing to the alteration of the dock site and to the increased cost of excavation and removal of material and otherwise, they are entitled to receive increased values in the schedule prices in the bills of quantities, as follows:—

Excavating clay,	15	cents per cubic yard extra.
Depositing clay,	15	" "
Concrete,	50	" "
Brick work,	1.00	" "
Stone work (sandstone),	25	cents per cubic foot extra.
Timber,	10	" "

38. Your petitioners claim the cost price of their plant and material on hand, taken possession of by the Provincial Government on the 27th June, 1883, estimated value $20,000.

39. Your petitioners claim they are entitled to payment for the services of J. J. Robertson, J. Huntington and John Nicholson, as superintendents of the dock works, from the 28th August, 1880, till the 24th August, 1883, at salaries at the rate of $150.00 per month.

Your petitioners pray that they receive compensation as follows:—

(*a.*) Deposit of $10.000 and interest. say		$14,500 00
(*b.*) Interest on delayed payments on certificates Nos. 1, 2, 3 and 4		992 47
(*c.*) Ten per cent. retained on certificates Nos. 1, 2, 3 and 4	$5,172 42	
Interest from 24th August, 1883, at 5 per cent., say	1,422 41	
		6,594 83
(*d.*) Clearing dock site		500 00
Extra rock excavation		2,250 00
(*e.*) Extra cost of excavating concrete, stone work, brick work and timber, by reason of alteration in dock site		16,129 58

(*f.*) Value of plant seized and sold	20,000 00
Interest at 5 per cent. from 24th August, 1883, to date of petition, five and one-half years	5,510 00
(*g.*) J. J. Robertson, J. Huntington and John Nicholson, salaries, superintendents of works	15,550 00
(*h.*) Compensation for sale of works to the Dominion Government.....	30,000 00
	$112,026 88

And your suppliants will ever pray.

(Signed) THEODORE DAVIE,
Counsel and Solicitor for the Suppliants.

VICTORIA, B. C., May 11th, 1889.

Report of the Deputy-Attorney-General.

The undersigned has the honour to report with reference to the application on behalf of F. B. McNamee, A. G. Nish and James Wright, of Montreal, for a *fiat* for a Petition of Right, as follows :—

1 On the 24th February, 1880, the Chief Commissioner of Lands and Works, acting under the authority of British Columbia Statute No. 20 of 1879, entered into a contract with the suppliants, who were carrying on business in the firm name of "F. B. McNamee & Co.," whereby they agreed to build the dock for the sum of $351,000 roughly. A copy of this contract is set out at page 357, British Columbia Sessional Papers, 1880. The terms and conditions as to work, time, payment, &c., &c., are to be found in the specifications printed by Mr. Wolfenden, and dated September, 1879.

2. In compliance with section 21 of the specifications, a bond was given and the sum of $10,000 deposited by McNamee & Co., at the time of the execution of the contract, in the Bank of British Columbia, to the credit of the Chief Commissioner. This deposit (which the suppliants seek to recover) was made "as part security for the due fulfilment of their contract, "and of the covenants and conditions thereof, it having been further agreed that they should "receive back the said money with interest thereon" (that is, at the rate of 5 per cent. while retained on deposit) "upon the due performance by them of the said covenants and conditions."

3. The Dominion Government passed an Order in Council on 12th February, 1880, for the payment of $250,000 towards the construction of the dock. A copy of this order and the correspondence leading up to it can be found at page 327, British Columbia Sessional Papers, 1880.

4. The terms of this Order in Council were accepted by the Legislature of British Columbia on the 19th April, 1880 (British Columbia Statutes, 1880, chapter 8), and were ratified on the 7th May, 1880, by the Dominion Parliament (43 Vic., chap. 15). The terms so ratified provided—

Firstly. That advances should be made by the Dominion to the Province as the work progressed, to an extent not to exceed in the whole the sum of $250,000.

Secondly. That such advances should be made on the certificate of the engineer of the Provincial Government, countersigned by the agent of the Dominion Government in British Columbia.

Thirdly. That on the failure of the Province to proceed actively with the work, the Dominion might step in.

The other sections are not material to this report.

5. On the 10th June, 1880, the contractors were ordered, in accordance with the specifications, to commence work. The dock should, therefore, have been completed on 10th October, 1882.

6. On the 4th October, 1880, a second contract between the three suppliants of the one part, and the Chief Commissioner of the other part, was executed, which second contract is set out at page 435, British Columbia Sessional Papers, 1882.

7. In September, 1880, work was commenced and proceeded with by the contractors, Mr. W. Bennett being the Resident Engineer. His reports of progress during the years 1880, 1881 and 1882 respectively, are to be found in the Sessional Papers, page 391, of 1881, page 366 of

1882, and page 300 of 1883. Mr. Bennett, who came to this Province for the purpose of superintending the construction of this work, on its completion returned to England in 1888. In connection with Mr. Bennett's return to England, and having reference to telegrams dated 2nd and 14th June, 1887 (see post section 20 of this report), the undersigned would call attention to the fact that the suppliants have delayed presenting their claim for consideration until after the departure of Mr. Bennett, without whose presence, as well to instruct the Crown solicitors in the preparation of the case as to give evidence at the trial, it would be imprudent for the Crown to attempt any defence. Since the receipt of the Petition of Right now under consideration, Mr. Bennett has been communicated with, as to the terms upon which his presence here can be obtained, and he demands $15.00 a day from the date of his leaving England, to and including the date of his return, in addition to his travelling expenses from and to England. In the opinion of the undersigned, the delay on the part of the suppliants would, in the event of its being decided to grant a *fiat*, fairly justify the Crown in requiring of the suppliants, as a condition precedent to the granting of a *fiat*, an undertaking, accompanied with sufficient security on their part, that they would pay these charges in any event.

8. On the 16th December, 1881, the Honourable the Secretary of State for Canada addressed a letter to this Governnment calling attention to the slow rate of progress of the dock, and also drawing attention to the third clause of the Order in Council of 12th February, 1880 (see paragraph 4 of this Report) This was communicated to the contractors in a letter from the Chief Commissioner, dated 18th February, 1882.

9. On the 27th June, 1882, the Chief Commissioner took possession of the works. The correspondence leading up to this step will be found at page 355, Sessional Papers, 1884. A report by Mr. Morris as to the condition of the work shortly after it was taken over is to be found at page 294, Sessional Papers, 1883. The statements contained in paragraphs 17 and 18 of the petition now under consideration, that it was on account of the non-payment of their certificate and of the failure of the Government to supply cement, that the contractors were forced to stop active work, and that the Chief Commissioner, without warning or notice to the petitioners, took forcible possession of the works, are, the undersigned is informed, wholly without foundation. The work was then carried on by the Provincial Government (for expenditure see page 216, Sessional Papers, 1883), and on 24th August, 1883, was handed over to the Dominion, on the terms hereinafter mentioned. The reports of the case of McNamee *v.* McKenna, 14 Ontario Appeal Reports, page 339, and 15 Supreme Court (Canada) Reports, page 311, may be referred to for further information.

10. On the 20th December, 1882, Drake & Jackson applied for a *fiat* for a Petition of Right on behalf of McNamee & Co., of Montreal and Victoria. This petition, usually spoken of as "the local contractors' petition," claimed:

(1.) Compensation for additional work entailed on the contractors by removal of Dock site.
(2.) Cost of plant and material.
(3.) Compensation for damage sustained by them in consequence of the Government taking the work out of their hands.

The amount of claim is not specified, but in a subsequent petition, mentioned in page 12 of this Report, the total claim in the local contractors' petition is stated to be $58,000.

This application was refused (See p. 461, Sessional Papers, 1883).

11. In January, 1883, Mr. J. P. Walls presented a petition to the Lieutenant-Governor in Council, from McNamee & Co., of Montreal, in which they pray that the contract may be restored to them.

12. On the 8th May, 1883, a petition signed "F. B. McNamee & Co., per J. J. Robertson," purporting to be the petition of F. B. McNamee, A. G. Nish, James Wright, J. J. Robertson, John Huntington, and John Nicholson, was presented to the Legislative Assembly.

This petition states that the Messrs. Robertson, Huntington & Nicholson were taken into the partnership of F. B. McNamee & Co. on the 28th August, 1880, and that the application by Messrs. Drake & Jackson for a *fiat* for a Petition of Right was made on behalf of the present petitioners, *i. e.*, all six, and not the local contractors only. The petition is set out at page 463, Sessional Papers, 1883.

13. On the 12th May, 1883, the Local Legislature passed an Act (chapter 14) dealing with the transfer of the dock to the Dominion. However, as the reciprocal Act was not passed by the Dominion Parliament, nothing turns on the Act of May, 1883.

14. On the 13th June, 1883, "F. B. McNamee & Co., per J. J. Robertson," asked the Lieutenant-Governor in Council to reconsider the decision arrived at on the application of the 20th December, 1882. Mr. Robertson was then informed that "before any reconsideration can be had, it must be made to appear to the Government that the petition in question is preferred by and with the authority of Messrs. McNamee, Nish, and Wright."

In reply, Mr. J. J. Robertson produced a copy of the partnership deed, of 28th August, 1880, between McNamee, Nish, and Wright, of the one part, and Robertson, Huntington, and Nicholson, of the other; also a power of attorney from McNamee, Nish, and Wright, to Nicholson; and he claimed that the local contractors had been recognized as principals by the Chief Commissioner (Mr. Walkem). In his evidence before a Committee of the House (page 18, Journals, 1882) Mr. Walkem flatly denies that he so recognized them. At this time, Mr. Walls formally notifies the Government that he, as attorney in fact for McNamee, Nish, and Wright, in a letter to the Provincial Secretary, strongly objects to their names being used in connection with an application for a petition of right. This was communicated to Messrs. Robertson, Huntington, and Nicholson; and there the matter, so far as the local men were concerned, seemed to drop.

15. In August, 1883, F. B. McNamee & Co., through Mr. Walls, stated that they personally were willing and prepared to take the work into their own hands (*i. e.*, without the local contractors) and complete it.

Owing to negotiations being then pending with the Dominion Government relating to the Dry Dock, it was impossible to do more than acknowledge the receipt of the letter containing this proposition.

16. On the 19th December, 1883, the Local Legislature, by an Act (chapter 14 of 1884) repealed the Act of May, 1883, and after reciting that the following agreement, namely:—

"(*g.*) The Government of Canada shall forthwith take over and seek the authority of "Parliament to purchase and complete, and shall, upon the completion thereof, operate as a "Dominion work, the Dry Dock at Esquimalt; and shall be entitled to and have conveyed to "them all the lands, approaches and plant belonging thereto, together with the Imperial "appropriation therefor, and shall pay to the Province as the price thereof the sum of "$250,000, and shall further pay to the Province whatever amounts shall have been "expended by the Provincial Government, or which remain due up to the time of the passing 'of this Act, for work or material supplied by the Government of British Columbia, since the "27th day of June, 1882," had been made, ratified and adopted the same.

The Dominion also ratified the contract by their Act, 47 Victoria, chapter 6 (19th April, 1884). Under this agreement, the Province has on more than one occasion contended that the Dominion, and not the Province, was the proper authority to settle all claims arising out of the Dry Dock construction.

The Dominion has paid to the Province under this agreement:

(*a*) $250,000.00.

(*b.*) $134,512.66.

The sum of $5,797.49 paid by the Province for claims against F. B. McNamee & Co., by former employés, for wages, has not been paid.

17. On the 29th January, 1885, it was resolved by the Legislative Assembly, "that in the "opinion of this House it is desirable that the Government should take into consideration the "claim of those persons who are creditors of McNamee & Co. in this Province, for work and "labour rendered, and for services performed by them for the said McNamee & Co., in the "construction of the Dry Dock at Esquimalt, and who still remain unpaid."

On 21st February, McNamee & Co. wired:—"We have no objection to leaving the "$10,000 of our deposit in Esquimalt Graving Dock contract in the hands of the Pro-"vincial Government, to be employed in the payment of our legitimate debts for labour, wages "and material supplied. Answer if you will acccept orders from us.

(Signed) "F. B. MCNAMEE."

In April, 1885, Edwin Johnson, Esq., Q. C., was appointed "a Commissioner to examine "into such of the claims of those persons who are creditors of McNamee & Co., for work and "labour, and for services performed by them, for the said McNamee & Co., in the construction "of the Dry Dock at Esquimalt, who still remain unpaid, as may be brought before him." The appointment of this commission was communicated to F. B. McNamee & Co., of Montreal (22nd April, 1885), and on 12th May, 1885, they forwarded to the Government a list of creditors, to assist in the settlement of the claims.

On Mr. Johnson's report, the sum of $5,797.49, already mentioned in paragraph 16, was paid (see Public Accounts, page 116, Sessional Papers, 1886). Particulars of payments made were sent to F. B. McNamee, at his request, on 25th March, 1886.

18. In April, 1885, McNamee & Co. obtained from the Dominion Government a *fiat* for a Petition of Right in the Exchequer Court of Canada. In this petition they ask for:—

Unpaid balance of work done	$31,568.00
Value of plant	30,337.97
	$61,905.97

or about $3,000 more than the sum claimed by the local contractors' petition. No claim is made in the Ottawa petition in respect of the $10,000 deposit. This action is still pending, and in itself is sufficient ground, as to the matters therein comprised, for refusing the present application.

19. Prior to the granting of the *fiat* by the Dominion Government, and subsequent to the passage of the "Settlement Act, 1884," some correspondence relative to the liability of the Governments to McNamee & Co., had taken place between the two Governments. The correspondence may be shortly noted here.

October, 1884, the Lieutenant-Governor in Council passed an order authorizing the payment over to the Dominion Government of the $10,000 deposit, on condition of the settlement by the Dominion of all contractors' claims in connection with the Graving Dock, including McNamee & Co.'s British Columbia partners in the Dock contract.

No notice was taken by the Dominion Government of this offer.

16th January, 1885.—Secretary of State informs this Government that McNamee is willing to accept as a final settlement the sum of $25,000; that is to say, a return of the $10,000 and payment of $15,000 for plant. He adds, at the end of the letter, that should a *fiat* for Petition of Right be granted, "your (*i. e.*, B. C.) Government will be expected to defend the action."

24th March, 1885.—Secretary of State writes (after intimating that a *fiat* would be granted) as follows:—

"I have to add, that if the case should be decided against this [Dominion] Government, "there would be a claim for compensation against the Government of British Columbia, and "your Government would be afforded an opportunity of answering the petition."

The Provincial Government, protesting against the liability of the Province to indemnify the Dominion Government in respect of these claims, agreed to assist, and did assist, in the preparation of the defence to this action, and on the 17th October, 1885, an answer framed chiefly on instructions from the Attorney-General's department, to the Petition of Right was put in. No further steps in this action have been taken by McNamee & Co., and the action is still pending.

With reference to this action, it was the desire of the Attorney-General to have the case settled once and for all time. He proposed, therefore, to bring forward, in the answer to the petition, the alleged partnership of August, 1880, so as to have the rights of all parties determined; but this was successfully resisted by F. B. McNamee & Co.

20. In May, 1887, F. B. McNamee & Co. presented to the Dominion House of Commons a petition, which was referred to a committee. The following correspondence passed between the chairman and the Attorney-General:—

"OTTAWA, 31st May, 1887.

"*To A. E. B. Davie,*
"*Attorney-General, Victoria.*

"McNamee petitions Government to be compensated for Dock Plant, etc.; referred to "Select Committee, which I am chairman. Do you wish to be represented?

(Signed) "N. SHAKESPEARE."

VICTORIA, June 2nd, 1887.

"*To Noah Shakespeare, M. P., Ottawa.*

"Tribunals of the country are the proper forum for the investigation of this claim, and "not Parliamentary Committee. Our principal witnesses are Bennett and others resident here. "McNamee has not applied to this Government for a Petition of Right, and has neglected to "prosecute his Petition of Right against Dominion Government. This Government cannot "recognize the jurisdiction of Ottawa Committee, so far as Provincial interests are concerned.

(Signed) "A. E. B. DAVIE."

"OTTAWA, June 11, 1887.

"*To A. E. B. Davie, Attorney-General.*

"Will your Government grant McNamee & Co. a *fiat?* Answer.

(Signed) N. SHAKESPEARE, Chairman."

"VICTORIA, June 14, 1887.

"*Noah Shakespeare, M. P., Ottawa.*

"If McNamee presents Petition of Right it will be duly considered.

(Signed) "ALEX. E. B. DAVIE."

The Select Committee reported as follows:—

"MR. SHAKESPEARE, from the Select Committee appointed to examine into and report "upon the claim of Francis B. McNamee, Anthony Gilbert Nish, and James Wright, as set "forth in their petition received by this House on 6th May, 1887, presented to the House the "report of the said Committee, which was read as followeth:—

"The Committee met and had the Petitioners, with their Counsel, before them, and "notified the Honourable Minister of Justice, and also sent a telegram to the Honourable Mr. "Davie, the Premier of British Columbia, who replied that:—

'"Tribunals of the country are the proper forum for the investigation of this claim, and '"not Parliamentary Committee. Our principal witnesses are Bennett and others resident here. '"McNamee has not applied to this Government for a Petition of Right and has neglected to '"prosecute his Petition of Right against the Dominion Government. This Government cannot '"recognize the jurisdiction of Ottawa Committee, so far as Provincial interests are concerned."

(Signed) '"A. E. B. DAVIE.'

"From the examination of the facts presented to the Committee on behalf of the Petitioners, and from the papers obtained from the Department of Public Works, it appears:—

"1st. That the petitioners enter into a contract with the Government of British Columbia to construct a Graving Dock at Esquimalt, British Columbia.

"2nd. That they may commence work under the contract, but in June, 1882, the Provincial Government, under authority contained in the contract, took possession of the works, and also of the plant and property of the petitioners, on the alleged ground of failure of satisfactory performance of the contract.

"3rd. Subsequently, by an arrangement between the Dominion Government and the Provincial Government, ratified by this Parliament, the Dominion Government undertook the construction of the Graving Dock, and paid to the Provincial Government a large sum of money for the work done, and also the plant and other connected therewith, including the plant and property of the petitioners.

"4th. The Dominion Government entered into a contract with Messrs. Larkin, Connolly & Co. to finish the work, and transferred to them the plant, including that of the petitioners, at a valuation.

"5th. The petitioners claimed from the Government of British Columbia a return of the sum deposited by them as security when they entered into their contract, and a balance due them on their contract, and also the value of their plant.

"6th. It appears that the petitioners gave notice to the Dominion Government of their claim before they assumed the construction.

"7th. The petitioners applied for a *fiat* for a Petition of Right to the Government of British Columbia, and it was refused, as appears from Sessional Papers of British Columbia for 1883.

"8th. The petitioners applied to the Legislature of the Province, and a special committee appointed to examine into their claim and who took evidence, reported favourably to them, and that they had just cause of complaint.

"9th. The petitioners frequently applied to the Dominion Government for compensation and presented their case, and the Honourable Mr. Smithe, Premier of British Columbia, on 8th March, 1884, stated, in a letter to the Minister of Public Works, that he considered the petitioners were entitled to compensation for the value of their plant and property.

"10th. The Dominion Government have also admitted that the petitioners were entitled to the value of their plant, but that they should look to the Provincial Government.

"11th. The petitioners commenced proceedings by a Petition of Right in the Exchequer Court against the Dominion Government, but, owing to the legal objections pleaded to the maintenance of their suit, they have withdrawn their proceedings.

"From the above statement of facts and upon a careful examination of the evidence and the whole case, the Committee beg to report:—

"That the facts do not create a legal cause of action, and that as to the claim of the petitioners for the deposit made by them with the Government of British Columbia, and the indebtedness of that Government to them, the Dominion Government is under no obligation therefor; but that, in regard to the value of the plant and property of the petitioners which came into the possession of the Dominion Government and handed over to Messrs. Larkin, Connolly & Co., the Committee are of the opinion that the petitioners have an equitable claim upon the Government of the Dominion, and should be paid therefor

"As to the value of their plant and property, there was some difficulty in ascertaining the amount; but from the examination of the papers and of the report of Mr. Perley, Chief Engineer, that the sum of $15,000 was not an excessive valuation, the Committee unanimously recommend that amount as the value of the plant and property of the petitioners, and that they should be paid the said sum of $15,000, with interest, from the 8th day of November, A.D. 1884, the date of the contract with Messrs. Larkin, Connolly & Co."

And in the following session (1888) the sum of $17,383.15 was voted by Parliament "For settlement of McNamee & Co.'s claim arising out of their contract for the construction of this [Esquimalt Graving] Dock with the Government of British Columbia, in accordance with the recommendations made by a Select Committee of the House of Commons of the Dominion of Canada."

The Attorney-General, on the 28th May, 1889, endeavoured to obtain a statement from the Department of Public Works as to the terms of this settlement, but, at the time of writing this Report, the requisite information has not arrived.

21. In the session of 1888 two petitions (Sessional Papers, pp. 297 and 359, 1888) were presented to the local House by John Nicholson. On the 19th April, 1888, it was resolved that the Government should take into consideration the advisability of issuing a Commission under the "Public Inquiries Act" to enquire into the allegations contained in the petition of F. B. McNamee & Co., in so far as they affect John Nicholson's claim for compensation, and the other creditors in British Columbia of that firm who assisted them in carrying on the work of constructing the Graving Dock at Esquimalt by furnishing the labour, material, cash and supplies."

22. On the 4th May, 1889, this present application was made, whereby claims are put forward amounting to, or, roughly speaking, twice the sum claimed in the Ottawa petition.

It is the petition of F. B. McNamee, A. G. Nish and James Wright. As already mentioned, these three, who were the original contractors, formed, in August, 1880, with Messrs. Robertson, Huntington, and Nicholson, a special partnership to carry on the work of construction, and one of the terms of the contract was that the sum of $10,000, the deposit, should be paid to the three last named partners. This contract, although nominally the basis of a special partnership, possibly amounts to an assignment of the contract. As to this, it may be well to note that Mr. Walkem (Chief Commissioner in August, 1880,) says in his evidence before a Select Committee of the House (see Journals, 1882, p. xviii) that the Government refused to recognize the so-called local partners or permit McNamee & Co., of Montreal, to transfer the contract.

If a *fiat* were to be allowed in respect of any claim arising out of the dock contract, it should, in the opinion of the undersigned, be at the prayer of the local contractors as well as of the three original partners, otherwise this Government will be harassed with two actions in respect of the same matter.

23. The petition claims "(*a*) deposit of $10,000 and interest, say $14,500."

As this claim was not included in the Ottawa petition, much can be said in favour of affording an opportunity to those interested of having this point determined; but having regard to the items following it in the petition, the undersigned cannot recommend that a *fiat* be granted on this application.

It is to be observed that payments have been made to McNamee's creditors with McNamee's knowledge and approval; and that to any petition in respect of this deposit the Government would plead as a set-off—

Disbursements to creditors	$5,797 47
For professional valuation of plant (made at request of McNamee & Co.)	700 00
	$6,497 47

24. "(*b*) Interest on delayed payments on certificates Nos. 1, 2, 3 and 4, $992 47"

As to this it is submitted that the retaining of these moneys was by the Dominion Government.

The specifications (sec. 57) provide that payment was to be made by the Dominion Government upon certificates signed by Provincial officers. The Provincial Government is in no respect liable for the delay (if any) on the part of the Dominion.

25. "(*c*) 10 per cent. retained on certificates 1, 2, 3 and 4	$5,172 42
" Interest on same from 24th August, 1883, at 5 per cent	1,422 41
	$6,594 83"

In the specifications it was provided that the orders for payment should be issued at the rate of $90.00 for every $100.00 worth of work performed, the remaining $10.00 to be payable six months after the date of the completion and acceptance in writing by the Chief Commissioner of the whole works. The sum of $1,422.41 is for interest, in respect of which no legal claim can be made. *Re* Gosman L. R. 17, Ch. D. 771.

As to the sum of $5,172.42, the officers of this Government duly certified to the performance of the work ; after that it was for the Dominion Government to make the payments. The remarks made on claim (*b.*) apply to this claim. It is to the Dominion Government that the suppliants should look for this money. Further, this is actually included in the Ottawa petition.

26. "(*d.*) Clearing dock site	$ 500 00
" Extra rock excavation	2,250 00
	$2,750 00"

These claims are for work performed by the contractors, but not included by the Resident Engineer in his certificates. Under section 70 of the specifications this matter could have easily been set right. Now it will be difficult to do so.

This is the first time this claim has been specifically mentioned in the petitions presented to the Provincial Government. The language of the Ottawa petition is wide enough to include it.

27. "(*e.*) Extra cost," &c., "by reason of alteration of dock site ..... $16,129 58"

This is included in the Ottawa petition.

The explanation given by Mr. Bennett of the alteration of the site of the dock is as follows :—

"The site of the dock was shifted due south a distance of 36½ feet with their knowledge and consent. It was done for their own benefit to ensure the safety of the cofferdam, for the maintenance of which they were responsible. The setting out of the work was done by their own engineer, in conjunction with Mr. Bennett. The work was laid out in June, 1880, and no complaint was made until June, 1882, after they had ceased operations."

28. "(*f.*) Value of plant	$20,000 00
Interest	5,510 00"

This, also, is included in the Ottawa petition, and possibly is one of the subjects of the settlement whereby McNamee & Co. received $ from the Dominion.

It is obvious that if any settlement has been made by the Dominion, claims under the same head should not be pressed against this Government; and it is submitted that as a large sum of money has been paid to McNamee & Co., it is incumbent on them to disclose most fully the terms on which they received that money.

It is to be observed as to this head of claim that the estimate made by a professional valuator, on the Province taking possession of the works, of the value of the plant was $4,544.30, on basis of its market value, and without reference to any particular use ; or $15,950.44 on basis of the worth of the plant and material to any person proceeding at once with the construction of the dock.

29. "(*g.*) Robertson, Huntington and Nicholson, salaries as superintendents of works ..... $15,550 00"

There is not to be found in the petition any statement upon which this claim is founded. It is simply a bare demand.

30. "(*h.*) Compensation for sale of works to the Dominion Government.. $30,000 00"
It is difficult to say on what grounds this claim is based.

31. For the reasons appearing from the above statement of facts, I advise that His Honour be recommended to refuse the *fiat* without prejudice to the presentation of a petition on behalf of both Montreal and local contractors seeking payment of the deposit.

32. The delay in pressing a claim for over $100,000.00 for a period of about seven years is an element for consideration, although the Statute of Limitation does not run for or against the Crown; memories of witnesses fail, some have gone, and the Crown cannot be but prejudiced in defending claims advanced after so long a time.

33. The pendency of the Ottawa petition—covering much of the ground of the present—prevents the granting of a *fiat*.

34. The non-disclosure of the terms upon which McNamee received the $17,000.00 from Dominion Government is another reason for refusing the *fiat*.

35. It is to be noticed that for his whole claim, including the deposit, McNamee was willing to take $25,000.00. It is hard to think, in the face of this statement, that the present claim of over $100,000.00 is *bona fide*; in fact, some of it is absolutely destitute of any support in the petition, *e.g.*, the claim for $250.00 a month to Messrs. Huntington, Robertson and Nicholson. So also is the claim for compensation for sale of the works.

(Signed) P. Æ. IRVING,
Deputy Attorney-General.

Attorney-General's Office, 30th July, 1889.

Copy of a Report of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 23rd day of August, 1889.

The Committee of Council having had under consideration the application of Francis Bernard McNamee, Anthony Gilbert Nish and James Wright, all of the City of Montreal, trading under the firm name of F. B. McNamee & Co., and a memorandum thereon from the Deputy Attorney-General, dated the 30th July, 1889, reporting against the granting of a *fiat*, advise that His Honour be recommended to refuse his *fiat* to the petition.

Victoria, 23rd August, 1889.

Certified.

(Signed) A CAMPBELL REDDIE,
Deputy Clerk Executive Council.

VICTORIA, 24th August 1889.

SIR,—With reference to your letter of the 11th of May last, presenting a Petition of Right on behalf of Messrs. F. B. McNamee & Co., I have the honour to inform you that the petition has been duly submitted to His Honour the Lieutenant-Governor and a *fiat* refused.

I am, etc.,

(Signed) JNO. ROBSON,
Provincial Secretary.

The Hon. Theodore Davie, &c., &c.

VICTORIA, B. C.:
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