

Record 1015.

No. 655

CANADA  
—  
PROVINCE OF  
QUEBEC  
—  
MONTREAL

Court of King's Ber  
(APPEAL SIDE)

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On appeal from a judgment of the Superior Court, in the District of Montreal,  
rendered by the Honourable Mr. Justice Albert DeLorimier, on the  
28th day of June, 1933.

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GATINEAU POWER COMPANY,  
(Defendant in Superior Court),  
APPELLANT,

— AND —

FREEMAN T. CROSS,  
(Plaintiff in the Superior Court),  
RESPONDENT.

APPELLANT'S FACTUM

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# Court of King's Bench

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(Defendant in the Superior Court),

**APPELLANT,**

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—AND—

**FREEMAN T. CROSS,**

(Plaintiff in the Superior Court),

**RESPONDENT.**

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## APPELLANT'S FACTUM

This appeal is from a Judgment of Mr. Justice deLorimier rendered June 28th, 1933, condemning Defendant-Appellant to pay Plaintiff-Respondent the sum of \$348,481.22 as compensation for damage to Respondent's property caused by the backing up of the waters of the Gatineau River as a result of Appellant's power development at Chelsea Falls on that river. For brevity's sake the separate items making up the total amount of the judgment will be referred to herein as items A, B, C, D and E as follows:

40

Item A: \$90,000.00 indemnity for the submersion of an alleged water power forming part of what are known as the Cascades Rapids.

Item B: \$115,000.00 damage to Respondent's lumber business situated at Farm Point on Meach Creek (a small creek running into the Gatineau River a few miles above Cascades).

Item C: \$60,000.00 damage to Respondent's electrical business also situated at Farm Point.

10 Item D: \$76,981.22 disbursements, fees and costs alleged to have been incurred by the Respondent in connection with this case and in connection with certain legislation passed at Quebec.

Item E: \$6,500.00 being a group of items including depreciation to timber limits, value of a gravel pit and value of gravel lost.

The foregoing items (except item D) carry interest from the 12th March, 1927, at 5% per annum and Respondent was also condemned to pay the costs of the action.

20

#### HISTORY OF THE LITIGATION

30 The Company Appellant is the owner of a large water power concentration at Chelsea Falls and Farmers Rapids on the Gatineau River, a few miles above the point where that river empties into the Ottawa River close to Ottawa. These water powers as now developed produce approximately 200,000 horse power of electrical energy. The Company's right to develop these water powers is derived from the Water Course Act, R.S.Q. 1925, Chapter 46 and amendments. Articles 5 and following of this Act provide that no water power in the Province may be developed unless the plans for such development have been approved by the Lieutenant-Governor in Council. The plans showing the general nature of the scheme and the lands to be affected must previously have been deposited in the Registry Office of the County and public notice must be given of the application for approval.

40 It is common ground between the parties that all the requisite formalities for the approval of its plans were duly observed by the Appellant and that an Order-in-Council was passed on the 21st May, 1926 (Exhibits D-1 and 2, Volume 4, pp. 1 and 3), approving the development.

The development, as approved by this Order-in-Council, necessitated the backing up of the water of the Gatineau River for about 15 miles behind the Chelsea Falls dam. The Orders-in-Council contained the usual clause to the effect that the authority was given without prejudice to the rights of riparian proprietors or of third

parties who might be prejudicially affected by the development and that the Company would be responsible for all damages resulting from the works and that it should act at all times in a manner to conciliate the interests of different parties having the right to use the river.

10 The development in question affected a large number of properties on the river and with the majority of the owners of these properties the Company Appellant settled by amicable agreement without having to resort to expropriation. Exhibit D-13 (Special Exhibit Book No. 3) shows coloured yellow the lands acquired by the Company above the Cascades Rapids (about 8 miles above Chelsea Falls) for the purposes of the Company's development and the Company was also in possession of all the land and riparian rights necessary downstream from the Cascades to its Chelsea Development and this stretch of the river is also shown uncoloured on the same plan, although this case is not concerned with that stretch of the river.

20 The right of expropriation is given under the Water Course Act above recited (R.S.Q., Chapter 46, Article 16 et seq.) and in connection with the comparatively few properties which the Appellant was unable to secure by amicable arrangement, all the formalities for expropriation were carried out after further separate Orders-in-Council had been passed authorizing each individual expropriation, and in particular an Order-in-Council was issued authorizing the expropriation of the Respondent's properties. This Order-in-Council is dated the 17th December, 1926, and is produced as Exhibit D-3 (Volume 4, page 5). An offer for his properties, as required by law, 30 was served on Respondent on the 14th February, 1927, before the water was raised (Exhibit D-54, Volume 4, p. 130), witness Woollcombe (Volume 7, p. 31). This last fact is important for reasons mentioned later in this factum.

By Article 18 of the Water Course Act two restrictions are placed upon expropriation, namely that it shall not take place to the prejudice of an existing industry, nor to the prejudice of a water works supplying in whole or in part a municipality.

40 As it was known that the Respondent's small power development at Farm Point on Meach Creek which runs into the river a few miles further up than Cascades would be affected by a reduction of about 10% in its operating head due to the backing up of the water of the Gatineau River into Meach Creek, and as this was an existing industry, it was considered that the restriction contained in Article 18 of the Water Course Act would apply, but it was assumed by the Company Appellant, and it is respectfully submitted, properly

assumed, that the restriction against expropriation to the prejudice of an existing industry in the Water Course Act was clearly intended to be over-ridden in such a case by the Statute 16 George V, Chapter 16, which added Section 28 (k) to the Public Service Commission Act, and enacted that where a power development had the effect of submerging in whole or in part a water power having a natural force of less than 200 horse power, expropriation might take place notwithstanding the restrictions of the Water Course Act if approval of such expropriation were granted by the Quebec Public Service  
10 Commission.

As the Respondent's water power plant on Meach Creek had less than 200 horse power, the Company Appellant applied to the Public Service Commission under Section 28 (k) for approval of its expropriation, because admittedly the Appellant's development was going to cause it prejudice to the extent of about 10% of its output. The Public Service Commission gave a ruling (Exhibit D-65, Vol. 4, p. 224, dated 22nd April, 1927) to the effect that Section 28 (k) did  
20 not in reality apply to a developed water power, but did on the other hand apply to an undeveloped water power, and as a result of this ruling the Appellant was prevented from expropriating the small pieces of land it required at Farm Point, and was also prevented from expropriating land of the Respondent riparian to the small portion owned by him of the undeveloped rapids at Cascades. The main portion of the Cascades Rapids was already controlled by the Appellant.

The Appellant believed, and still believes, that the ruling of the  
30 Public Service Commission on the interpretation of the Act in question was in error and it appealed to the Court of King's Bench against the ruling. The Court refused the Company leave to appeal, on the ground that this was an order of the Public Service Commission respecting expropriation, and was therefore unappealable under the provisions of the Public Service Commission Act, R.S.Q. 1925, Chapter 17, Section 58. The Company then appealed to the Supreme Court of Canada and that Court upheld the ruling of the Court of King's Bench.

40 The works of construction of the Appellant's development, which are by the Water Course Act made a work in public interest, were completed at very great cost and the Company was in possession of practically all property to be flooded by this authorized development except the property of the Respondent, who was demanding exorbitant indemnities out of all proportion to the value of the property affected.

It is to be noted that the Public Service Commission ruling in question was only given after the Appellant's works had been completed and the water raised to the level authorized by the Government approval, the Appellant, as stated, being then in legal and proper possession of substantially all the property to be affected, save that of the Respondent.

10 The Appellant refers to this point first of all because in raising the water it had no reason to believe that under a proper interpretation of Section 28 (k) it would be prevented from taking in ownership by expropriation the necessary property of the Respondent, and secondly, and more particularly the Appellant was justified in relying upon Articles 12 and following of the Water Course Act which limits the proprietor to a claim in damages caused to his property even if no expropriation of ownership ever took place.

20 It is to be noted that these Articles have been in the Statutes since 1856 and through a long line of jurisprudence have been considered as giving the necessary sanction for the backing up of water under such circumstances; indeed Article 503 of the Civil Code in dealing with riparian rights expressly refers to the law embodying these articles. It was only in 1909 that the right of expropriation to take such land in ownership was brought into the Water Course law and it was then brought in, not to restrict the protection given under Article 12 and following to a promoter who would otherwise be subject to the legal remedies provided for a breach of Article 407 of the Civil Code, but to enlarge the right to develop and make it possible for persons who owned a water power, but needed some  
30 further land, to expropriate the adjacent property, which right they had not before 1909 enjoyed.

All power developments in the Province previous to 1909 were made under the protection of these articles without which promoters might have been subjected to actions designed to compel them to withdraw the water and demolish their dams. The same interpretation was given to these Articles by the Respondent himself, for on April 5th, 1929, over two years after the Company had backed the water up in the manner stated, the Respondent, acting through his  
40 then attorney the late Mr. Eugene Lafleur, K.C., petitioned the Quebec Public Service Commission under Article 12 above mentioned (as amended by 18 George V, Chapter 29, Section 1) to fix the indemnity for the flooding damage to his property at Cascades and the Appellant joined with the Respondent in these proceedings and took no exception whatever to the Commission's jurisdiction, and the matter remained pending before the Public Service Commission for



twenty-one months and it was finally set down for hearing in the month of January, 1931.

Three days before the hearing the Respondent desisted from these proceedings before the Commission and on the 2nd day of March, 1931, four years after the water was raised, he took a petitory action against the Appellant demanding the withdrawal of the water or the payment of the sum of \$600,000.

10       The Company Appellant protested against Respondent's desist-  
ment from the Public Service Commission proceedings because it  
was its contention that the proceedings before the Commission, being  
proceedings in arbitration, could not be unilaterally desisted from in  
the manner stated. The Public Service Commission, however, per-  
mitted the Respondent to desist, and although the Appellant later  
provoked another arbitration before the Public Service Commission,  
the Respondent proceeded with his petitory action, and proof was  
made in the same by both parties and it was taken en delibere by Mr.  
20 Justice deLorimier in the month of January, 1932. These proceed-  
ings are referred to in this factum as the "First Hearing" and they  
were concerned only with the property of Respondent at Cascades  
hereinbefore referred to as Item A.

The utterly unsatisfactory condition brought about by the ruling  
of the Public Service Commission and the lack of right of appeal  
therefrom, to which reference has been made above, was brought to  
the attention of the Quebec Government, together with other un-  
satisfactory provisions of the Water Course Act which have nothing  
30 to do with this case and Public Bills were put forward designed to  
clarify the law and protect the interests both of proprietors and those  
developing water powers.

Had the proposed Bills become law they would not in any way  
have affected the decision which was to be rendered by the Court  
upon the merits of the Respondent's petitory action, but had that  
decision been to the effect that such action was well founded, the  
proposed legislation would have permitted the Appellant to exercise  
the right of expropriation of the Respondent's properties as already  
40 approved by Orders-in-Council, and in the exercise of which right  
the Appellant had been frustrated by the non-appealable order of the  
Quebec Public Service Commission, which is not a judicial tribunal.

The two proposed Bills were objected to by Respondent and  
were withdrawn and the Act 22 George V, Chapter 128, herein re-  
ferred to as the Special Act, was passed, which provided that the  
Respondent was not to be allowed to disturb the Appellant's power

development and that the Court should in the pending action grant the Plaintiff a just and equitable indemnity for the property and rights affected up to any controlled elevation of the water not exceeding 321.5 feet above mean sea level in the Gatineau River at Farm Point.

10 It may be assumed that Respondent would have received a just and equitable indemnity under the original expropriation proceedings which were attempted against him in good faith by the Appellant, or alternatively, having defeated the Company's right to appropriate, that he would have received a just indemnity as a result of the proceedings which he himself instituted before the Quebec Public Service Commission, and the inference is inescapable that by his petitory action he sought to take advantage of the situation which resulted from the non-appealable order of the Quebec Public Service Commission to secure an extravagant indemnity fixed by himself under threat of forcing withdrawal of the water, nearly four years after the water had been raised.

20 After the passing of the Special Act 22 George V, Chapter 128, the delibere on the First Hearing was discharged and the Respondent filed a Supplementary Declaration (Volume 1, pp. 32 et seq.) in which he claimed a further sum of \$458,000.00 for damage to his properties at Farm Point hereinbefore referred to as Items B, C and E, which with the \$600,000.00 he had claimed in the Petitory Action (First Hearing) brought his claim to the enormous sum of over \$1,058,000.00. In addition to this he demanded \$54,104.21 for extra-judicial expenses, and by an amended supplementary declaration he  
30 increased this latter item to \$81,632.19, making a grand total of \$1,140,458.21. The hearing on these supplementary proceedings is herein referred to as the Second Hearing or Supplementary Hearing. The Appellant pleaded and offered \$48,400.00, with interest from March 12th, 1927, when the water was raised. As already stated, the judgment appealed from is for the sum of \$348,481.22 with interest, which at the time of judgment brings the total payable under the judgment to over \$450,000.00.

40 The foregoing remarks on the history of this case are made because throughout the two hearings and in the argument at bar the Appellant was constantly referred to as a trespasser who had arbitrarily and illegally usurped the properties of the Respondent, and the wording of the Judgment indicates that the learned trial judge has accepted this view and has condemned the Appellant to pay sums so greatly in excess of what the proof shows would be just and fair compensation for the property and rights taken that they are in the nature of penalties which the Appellant submits are unjustifiable.

The Appellant was in possession of statutory powers for its development and it proceeded in a regular manner to make offers to Respondent and to expropriate, and was only prevented from expropriating the ownership of the lands required by reason of the facts outlined above, and being so prevented from taking in ownership Appellant was not deprived of the benefit of the provisions of Article 12 and following of the Water Course Act respecting damages, which articles presuppose an encroachment on lands of others by a promoter in possession of statutory authority.

10

It was held by the Supreme Court in the case of *Breakey vs. Carter* (Cass. Dig., 2nd Ed., 463) that the right given by Article 7295 (R.S.Q. 1909, now R.S.Q. 1925, Chapter 46, Article 4) to utilize and exploit water powers when such exploitation has been approved in the manner provided by the Act is a right of legal servitude to which is attached an obligation to indemnify the proprietor who is prejudiced by the exercise of it.

20 Again in the case of *Dorchester Electric Company vs. Roy*, 49 Supreme Court Reports, page 344, the Court held that the present Article 12 of the Water Course Act (then R.S.Q. 7296) did not oust the jurisdiction of the courts if no arbitration had previously been provoked, but there is a clear inference to be drawn from the wording of the judgment that the jurisdiction of the courts would be ousted if, as in the present case, an arbitration had actually been regularly commenced.

30 In this connection the following is a citation from the remarks of Mr. Justice Davies at page 347:

“ On the question as to the right of the plaintiff to take proceedings for the recovery of the damages in the courts, without resorting to the method prescribed by the statute, I am of opinion that we are bound by the authorities to hold that the statute does not take away the common law right of the party damnified to sue unless at any rate proceedings had been properly commenced and prosecuted under the statute for the assessment of the damages.

40

“ I do not think the letter written to the plaintiff in this case before suit began constituted such a valid commencement of proceedings under the statute. It was, no doubt, an invitation to the plaintiff to name an arbitrator under the statute, but that was all, and such a mere invitation without the naming of an arbitrator by the party himself making it cannot be held to constitute a valid commencement of proceedings.”

Again at page 352, Mr. Justice Anglin remarks as follows:

“ If, as Mr. Justice Cross appears to think, effective steps to commence proceedings under article 7296, taken before action has been brought in the courts, would oust the jurisdiction of the latter, I agree in his view that it has not been established in the present case that such steps were so taken. The appeal on this branch fails.”

- 10 The remarks of Mr. Justice Cross in the Court of King’s Bench to which Mr. Justice Anglin apparently refers are as follows (22 K.B., page 268):

20 “ The purport of that rule is varied by articles 7295 and following, R.S.Q., in the respect that, whereas the person or company exercising statutory powers, is, in general, required to have the amount of compensation ascertained and tendered, before the commencement of the prejudicial effects of the works, the effect of arts. 7295 and following, is to sanction resort to the statutory mode of assessment, even after erection of the works. Article 7295 renders lawful a thing, which but for that enactment, would be a tort, but, while that is done, the Act, at the same time, preserves, to the injured party, a recourse in damages, and article 7296, in fact, contemplates the case of the works having been completed, and being made liable to demolition, if the indemnity be not paid within six months after the award or ‘ report ’.

- 30 “ Speaking for myself only, I would say that it follows that the party exercising the statutory power may, in cases to which these articles apply, resort to the statutory expertise even after construction of the works, if he does so in time sufficient. In such cases, it can be said, as was said in *Jones vs. Stanstead Ry. Co.* that ‘ It is not a reasonable construction of the statute to imply, as a condition precedent, that compensation must be paid for such consequential injuries, before doing the work ’.”

- 40 and again at page 269 (K.B. report):

“ I consider, speaking for myself, that in a case to which articles 7295 and 7296 R.S.Q. apply, it is open to either party, to commence proceedings to have the amount of the damages ascertained by experts. I consider that if either party has timeously commenced such proceedings, it is not within the right of a law court to deprive that party of the benefit or result of such proceedings, because of the other party having after-

wards commenced an action in damages. It would be a bold thing to say that, pending an expropriation under the Railway Act, the expropriated party could render the proceedings illusory, by taking an action in damages. It is not for the court to say, in view of the enactments which affect this case, that a thing need not be done, which the legislature says shall be done.”

10 On the question of trespass the remarks of Mr. Justice Anglin at page 353 (S.C. Report) are as follows:

“ The case is not one of trespass. The appellants were not wrong-doers in constructing the dam. They had statutory authority to do so, subject to the condition that they should pay ‘ all damages resulting therefrom ’. It is the resulting damages which constitute the cause of action and they are recoverable when and as they occur.”

and continuing:

20 “ Although the appellants have not exercised a right of expropriation, yet it would appear to be within the purview of article 7296 that damages once for all may be awarded in the expertise for which it provides.”

The Appellant also refers to the case of *Gale vs. Bureau*, 44 Supreme Court Reports, page 305, where at page 311 the remarks of Mr. Justice Idington are as follows:

30 “ An arbitration, as a condition precedent, if properly framed may be as effectual an answer to an action as can well be, and yet, when so, it must be pleaded or claimed as defence before the case reaches here.”

40 The discussion of the foregoing jurisprudence is academic in so far as it concerns the jurisdiction of the court because the Special Act has stated that the damages shall be assessed by the Superior Court in this case, but Appellant respectfully submits that the references are important as substantiating its claim that it did not act in an arbitrary manner as indicated by the judgment appealed from, nor was it a trespasser, but that it acted in all respects pursuant to the laws governing the circumstances and the jurisprudence interpreting those laws.

#### THE SPECIAL ACT 22 GEORGE V, CHAPTER 128

This Act refers specially to the present litigation and it is

printed in extenso in Plaintiff-Respondent's Supplementary Declaration (Case, Vol. 1, p. 35).

10 In its preamble it refers to the Petitory Action of Plaintiff-Respondent which was still pending; it refers to the opposition made by Respondent to the Public Bills already referred to in this factum and to the willingness of Respondent that the Appellant should acquire all his properties submerged or affected by Appellant's development provided he be paid fair compensation. It refers to the desire of the Appellant to expropriate and the inability of the parties to agree on what would be fair compensation. It confirms the propriety of the position theretofore assumed by the Appellant to the effect that it should not be disturbed in its operations provided fair compensation is given to Respondent.

The important points in the Enactment itself are as follows:

20 (1) The reference in paragraph 1 to " any controlled elevation not exceeding 321.5 feet above mean sea level at Farm Point ". Attention is respectfully drawn to the use of these words because of Appellant's submission that they were not intended to, and did not confer upon Appellant greater rights as to height of water than were contemplated by the original development plans duly approved by Order-in-Council under which the proof shows the Company has operated and must continue to operate. The reference to " controlled " elevation not exceeding 321.5 feet is and must of necessity be to the fluctuation of water due to the authorized and normal operation of Appellant's plant downstream and the Government storage works at the head waters of the river. The proof shows that in the years the Appellant's plant has been in operation the water has varied between 318 and 319½ with an occasional rise to 320 feet at week-ends. The Respondent seized upon this technical phrase as to controlled elevation of 321.5 to increase his claims by over half a million dollars after the Special Act was passed, representing alleged damage which would be caused to his Farm Point properties at the 321.5 level, whereas these properties had during the preceding years of normal operation of the Company's plant been themselves operating normally and can continue to so operate by the expenditure of sums less than those offered as compensation for them in the Plea of the Company Appellant.

Reference is made to this enormous increase in Respondent's claim by the learned trial Judge (Vol. 13, p. 157, para. 1).

(2) The words " just and fair compensation " (French ver-

10 sion “juste et equitable”) appear in paragraph 2 of the Act. Attention is drawn to these words because in argument at Bar in the Court below Counsel for Plaintiff-Respondent suggested that the import of the words was to allow on grounds of equity, something more than would ordinarily be allowed in a damage or expropriation case, and it may be inferred from portions of his judgment that the learned trial Judge has leaned to this view. It is the Appellant’s submission that the words are not intended to, and do not, permit departure from the usual and ordinary interpretation which has been given through a long line of jurisprudence in all our Courts in respect of cases of damages and expropriations.

(3) Paragraph 3 states that the date with reference to which valuation shall be made shall be the date of the Order-in-Council approving the plans for the development.

20 The date of this Order-in-Council is 21st May, 1926 (Exhibits D-1 and 2, Volume 4, pp. 1 and 3). The reference is important because the Respondent’s case respecting the small part of the rapid he owned at Cascades is built, not upon its actual value taken alone but upon potentiality he alleges it possessed for development by the utilization of land upstream not owned by him and which land was shown on the Appellant’s approved plans and was in large part then owned or controlled by the Company Appellant.

30 (4) Paragraph 4 empowers the Court to include in the award an amount deemed just for disbursements, fees and costs incurred in the pending action and in connection with the passing of the Special Act, and it is the Appellant’s submission that the intent of this provision was to allow some assistance to Respondent in the matter of expense to which he might be put by reason of the change in his status as a plaintiff in a petitory action to one in a damage action, with the consequent amendments to his action and the supplementary pleadings incident thereto, as well as assistance in any reasonable expense to which he was put in connection with demonstrating his position to the legislature for the purposes of the Special Act itself, and it is a  
40 reasonable inference that they did not presuppose enormous additions to his claim, which had not previously been put forward by Respondent although the water had been at its permanent operating elevations for the previous five years.

The learned trial Judge has apparently interpreted this paragraph as entitling Respondent to receive payment for every

10       extrajudicial item of expense incurred in the litigation and long before the litigation and both before and after the passing of the Act, as well as in connection with the Act itself, leaving to all who have had anything directly or indirectly to do with the matter to name their own figures, and has awarded \$76,981.22 under this paragraph alone. None of the major accounts over \$1,000 save that of one of his Counsel had ever been rendered to Respondent before the passing of the Special Act. The Appellant contends that it was not the intention of the legislature to penalize the Appellant by placing upon it so great a burden of extrajudicial costs, which it would not normally have had to bear and to which Respondent had made no reference in his claims thus far in the litigation, and the paragraph must be interpreted as permitting the Court to allow only such a reasonable and fair sum as would relieve the Respondent of the immediate expense to which he was put by reason as aforesaid of the change in the nature of his action. The matter will be referred to again in this factum.

20

#### THE JUDGMENT

The Appellant's grounds for appeal will be dealt with separately for each of the various items of the condemnation, to which reference has already been made.

#### ITEM A—CASCADES PROPERTY

30       With respect to the amount of \$90,000.00 allowed for Respondent's properties at Cascades, Appellant respectfully submits:

(1) There is no warrant either at law or under the proof made in this case for the finding of the learned trial judge as set out in the following words of his judgment:

40       “ Quoi qu'il en soit, la Cour, pour être juste envers les deux parties en cette cause, trouve qu'il est équitable, vu la preuve contradictoire, d'accorder au demandeur pour la force hydraulique potentielle qu'il aurait développée aux Cascades, la somme de quatre-vingt-dix mille dollars (\$90,000.00) c'est-à-dire dix fois plus que la somme offerte par la défenderesse;

Cette dernière n'aura pas à s'en plaindre puisque c'est elle qui a créé cet état de chose en s'emparant arbitrairement de la propriété du demandeur qu'elle a submergée, sans offrir au préalable, consigner et payer une juste et équitable indemnité; de plus, il est établi qu'il a été payé même par la défenderesse,



des prix plus élevés pour des pouvoirs d'eau moins importants que celui du demandeur;"

10 because, with respect to the 1st paragraph the reference to an award ten times the Appellant's offer is in its terms improper and the proof is definite that Respondent owned no water power possible of economic development, and the award is excessive and with respect to the last paragraph cited above, it appears that the trial judge justifies the award on penal grounds by stating that the Appellant should not complain because it had itself created the situation by arbitrarily taking possession of and submerging Respondent's property without having previously made an offer or paid a just and fair indemnity. Furthermore, there is absolutely no proof that Appellant ever paid such a sum for property such as that of Respondent.

20 It is respectfully contended that the learned judge is in error in not applying the ordinary principles of compensation under the circumstances, apart entirely from his error in the statements of fact that Appellant had paid more for less important properties and that the Appellant had not made a preliminary offer to the Respondent. As appears by Exhibit D-54 (Volume 4, page 430) an offer was made to Respondent for this very property before the Appellant had done anything at all to raise the water and the reason why no indemnity was previously paid to the Respondent is explained in the foregoing part of this factum under the heading History of the Case.

30 (2) Although the Respondent did not prove title to any part of Lot 21-D, Range 15, Township of Hull, the judgment appears to assume that Respondent owns the same and grants a portion of it to the Appellant as being part of Respondent's property covered by the Cascades indemnity (see paragraph headed "Premierement", Volume 13, page 163).

40 (3) The judgment ignores two important points of law raised by the Appellant touching the actual extent of the Respondent's property and water rights at the Cascades, namely the question of division of the river bed by the production of lot lines contended for by the Respondent, as against the division by lines drawn at right angles to the middle thread of the river to connect with the property, as contended for by the Appellant, and the important question of whether or not the Respondent had any rights whatever in a certain portion of the rapids facing property owned by the Canadian Pacific Railway on one side of the river and property of the Appellant on the other side. The decision of this point was of importance in determining the extent of damage to Respondent's property at Cascades.

(4) The respective contentions of the parties as to the value of the Respondent's property at Cascades were clear cut in the lower Court. On the one hand the Appellant contended that the small portion of the Cascades Rapids owned by Respondent was not susceptible of development if Respondent remained within the limits of his own property. On the other hand the Respondent, while forced to admit this fact, contended that he could have built a dam on his own property and by submerging properties above him, which he did not own and which had already been shown on the plans of the Appellant approved by Order-in-Council as being affected by its development, he could secure a developable head of approximately fifteen feet and thereby have secured approximately 15,000 horse power, the value of which he arbitrarily fixed at \$40.00 a horse power. The Appellant submits that the weight of proof is overwhelmingly against this contention.

The Appellant submits that it was the duty of the learned trial judge to decide as a matter of law whether the Respondent was entitled to compensation for loss of property which he himself then actually owned, or whether he could allocate to himself the right to use the property of the persons above him, including the Appellant, and capitalize the same against the Appellant, and having found either in favour of the Plaintiff or of the Defendant on the question of principle, he should have proceeded to weigh the proof of the parties in the light of such finding and render judgment according to that proof. The learned judge, however, has granted a sum of \$90,000.00, which it is respectfully submitted has no justification in the proof, the whole reason given by the Court being that it is ten times the amount of the Appellant's offer.

(5) The trial judge has ignored the important question of whether or not the Respondent was entitled to capitalize against the Appellant the advantage derivable from the increase in flow of water in the river due to the storage reservoirs constructed by the Appellant at a cost of over \$5,000,000.00.

These storage works increased the normal mean flow of the river from approximately 3,000 cubic feet a second (C.F.S.) to over 10,000 cubic feet a second, and it was the Appellant's contention that the jurisprudence, to which reference will hereafter be made, justified a ruling that the Respondent could not value his properties in the light of the benefit of this storage under the circumstances.

THE PROOF AS APPLIED TO THE INDEMNITY OF \$90,000  
FOR THE CASCADES PROPERTY, ITEM A

10 It is first of all necessary to get a clear idea of what the Respondent owned at Cascades, and the respective contentions of the parties on this point are shown by the following: The references hereinafter made to " Case " refer to the stated volume and page of the printed case; the references to " Book " refer to the Special Exhibit books numbers 1 to 4 containing plans, photographs, etc., which it was impossible to reproduce in type.

20 Plaintiff's Exhibit P-61 (Book No. 1): This is a plan prepared by Plaintiff-Respondent's witness G. J. Papineau, Q.L.S., and it shows coloured in red the riparian lands and portion of the river alleged to belong to Respondent which are in question at Cascades. Plaintiff-Respondent's Exhibits P-19 and P-20 (Book 1), the former with only the land coloured, and the latter uncoloured, also show the location of the property. On the lower or west side of the river there is a long strip shown, and on the upper or east side of the river there is a much smaller piece. The river runs downstream from left to right of the plan. On the west side the part coloured red on plan P-19 consists of a portion of Lot 21C of Range 15, Hull, and part of Lot 21D, same range. On the east side the Respondent only owns the triangular piece of land marked Lot 21B, part of which is coloured. It is by virtue of the ownership of these respective pieces of riparian land facing each other across the river that the Respondent is entitled to a part of the rapids in the river at this site. The location of the rapids is not shown on these plans produced by Respondent, but they are clearly shown on the aerial photograph taken in the natural state of the river before the water was raised and produced by Appellant as Exhibit D-71 (Book 4) and on Exhibits D-69 and D-117 (Book 3).

30 The parties agree that the river is non-navigable and that the ownership of riparian land carries with it such rights in the stream to the middle thread thereof opposite the land owned as may by law be appurtenant to such land.

40 The parties do not agree on the following points:

(a) The actual amount of the bed of the river and consequently of right in the stream itself which is appurtenant to Respondent's property;

(b) The Appellant denies that the Respondent owns any part of Lot 21D and consequently any part of the bed of the river or the

stream opposite that lot; indeed the Appellant contends that there is grave doubt as to whether Lot 21D is in fact riparian to the river.

The Appellant's contention as to Respondent's ownership of land and rights in the river is illustrated by Exhibit D-69 (Exhibit Book 4) prepared by S. E. Farley, Q.L.S., and D-117 (Book 3) prepared by Paul Beique, Q.L.S. These plans show in colour the land and river rights which the Appellant attributes to Respondent.

10

*Division of the River Bed*

20 With regard to point of difference (a) above the Respondent contends that the proper method of division of the river bed and stream is by prolongation of the side lines of the Lot 21B on the east side of the river, the right side line which is the line between Lots 20 and 21 would be prolonged to meet at the middle thread of the river, with the prolongation of the same lot line on the west side of the river, and the left line of Lot 21B would also be prolonged across the river although it has no corresponding lot line to meet from the other side of the stream. This division of the river is particularly illustrated by plan Exhibit P-61.

30 The Respondent's evidence on this point was made by Mr. Papineau (Case 6, p. 1 et seq.) and he also produced various exhibits, notably P-11, 12, 13, 14, 15, designed to indicate that in the original layout of the Township of Hull the lot lines ran across the river. It is, however, interesting to note that the original diagram produced as P-12, which is a copy of a very old document, does not show the river at all in the 15th Range.

The Appellant contends that the proper method of division is by drawing a line from the extremities of the property to touch at right angles the middle thread of the river. This is the only way to secure to each riparian owner the share of the stream which would be applicable to his frontage.

40 It is submitted that lot lines can have no significance as applied to the actual division of the bed of non-navigable rivers such as the Gatineau, because the existence of the stream itself brings into being special rights in the bed and water course enjoyed by all owners of riparian land, and equitable effect can only be given to these rights by the method of division claimed by Appellant.

The Defendant-Appellant's principal witness on this point is Mr. Paul Beique (Case 7, pp. 334-341) who produced Exhibit D-117 (Book 3) and it is upon this plan and plan D-69 that Appellant relies

as accurately reflecting the Respondent's property and river rights in question in this case at Cascades.

In support of Appellant's contention and of the evidence of Mr. Beique the Appellant cites the following case:

*Restigouche Salmon Club vs. John L. Wyers.*

10 The judgment in this case was rendered by Hon. Mr. Justice Tessier in the Superior Court on June 14th, 1916, and was confirmed by the Court of King's Bench on January 12th, 1917. The case is not reported but certified copies of the judgments have been secured and are reprinted as an Addenda to this factum. The Appellant respectfully submits this case as being directly in point.

The second point of contention between the parties as to the river rights of the Respondent at Cascades is as follows:

20 On the plan D-69 prepared by Farley and the plan D-117 prepared by Beique (both in Book 3) it will be noted that the red colouring indicating Respondent's property on the west side of the river is interrupted between the penciled points X and Y on plan D-69 and between the corresponding points B and C on plan D-117. By Respondent's deed of acquisition he acquired *inter alia* on the west side of the river, all the portions of Lot 21C between the highway and the river which had not previously been sold by his auteur (Exhibit P-2, Case 2, p. 1) and there was also specially excepted from the sale the property previously sold to the Canadian Pacific Railway.  
30 The Canadian Pacific Railway property is riparian to the river between the points X and Y on Exhibits D-69 and D-70 and the corresponding points B and C on Exhibit D-117.

Witness Farley, Case 7, p. 52.

Witness Beique, Case 7, p. 335.

Witness Strumbert, Case 7, p. 296.

40 It is the contention of Respondent that this riparian ownership of the Canadian Pacific Railway carried with it no rights in the bed of the river "*ad medium filum aquae*" because the Railway could not acquire more than was required for its purposes.

It is to be noted that the Canadian Pacific Railway right-of-way at this point was acquired by agreement and not by expropriation.

The Appellant contends that the riparian ownership by the C.P.R. of the strip between these points carried with it the ownership in the bed and water course of the river to the middle thread thereof. The auteur of the Canadian Pacific Railway purchased this property in 1891 by deed Exhibit P-24 (Case 2, p. 68) which deed describes the property as being bounded partly by the Gatineau River.

10 The Railway could not have had its full width of property purchased without impinging on the river between these points and there is no reserve whatever by the vendor of any river rights.

In support of its contention the Appellant cites the following case in which the facts are identical with those in question here:

*Massawippi Valley Railway vs. J. B. Reed*, 33 Supreme Court Reports p. 457. The same argument as that of Respondent herein is referred to at page 465 of the above report as follows:

20 “The Company could only acquire title to land ‘necessary for the construction, maintenance, accommodation and use of the Railway.’”

The Chief Justice, however, very clearly puts the matter as follows on page 467:

30 “Now there seems to me but one possible answer to that question, first the deed of sale to the Appellants in express terms gives the river as the boundary of the land sold; secondly they purchased 4.3 acres and they would not have had that quantity if they did not go as far as the river, thirdly on the plan deposited with the Government as required by the Statute then in force it appears unmistakably that the land previously indicated by the Appellants as wanted for their railway was bounded on the East by the river.”

The judgment goes on as follows:

40 “The French law and the jurisprudence of the Province of Quebec are in the same sense and it is not strictly accurate to call this a presumption. The river is *ad filum aquæ* included in the sale itself *ex jure naturæ*, as an incident of property as a part and parcel of the land sold, just as the windows and doors of a house, or its chimneys and heating apparatus, form part of a sale of the house if not reserved in clear language. This deed must be read as if the property sold was described in express words as bounded by the middle of the river. The

intention to include the river in the sale is proved by the fact that it was not excluded.”

Attention is also drawn to the case of *Maclaren and the Attorney-General* which was decided by the Privy Council and reported in 15 D.L.R. 1913 beginning at page 835, particular reference being made to the remarks of Lord Moulton at page 862.

10 The Appellant therefore respectfully maintains that the Respondent had no rights whatever in the bed of the river opposite the Canadian Pacific Railway property between the points X and Y on the plans D-69 and D-70 and the corresponding points B and C on the Beique plan D-117.

*Title to Lot 21D*

20 A further point of contention between the parties as to Respondent's property rights at Cascades is with respect to Lot 21D, Range 15, a portion of which is included in the list of properties for which, by the judgment, the Appellant is condemned to take and pay. The Appellant contends that Respondent has not proven any ownership in this lot. The facts are as follows:

30 The Respondent's deed of acquisition from Dame Bridget Smith (Mrs. Byrne) dated October 11th, 1916, purported to convey to him, *inter alia*, parts of Lots 20C and 20D, Range 15 (Exhibit P-2, Case 2, p. 1). When the Respondent provoked arbitration of his claim before the Public Service Commission (from which he later desisted to take a petitory action in 1931) he alleged ownership in Lots 20C and 20D. In its answer to those proceedings Appellant denied Respondent's title, and Respondent on January 5th, 1931, passed a so-called "Deed of Rectification" with Mrs. Byrne, Exhibit P-3 (Case 2, p. 4), in which it is stated that Lot 20D was referred to in error in the first deed of 1916 and it should have been Lot 21D. Paragraph 1 of Plaintiff's declaration in the Petitory Action (Case 1, p. 2) makes no reference to Lot 20C, and the same is in consequence not in issue here, although as above mentioned it was claimed with Lot 20D in the proceedings before  
40 the Public Service Commission.

The position of Lot 21D is clearly shown on the plan of Mr. Beique, Exhibit D-117, and it does not appear to touch the river.

Evidence has also been made about the lot by the witness Farley (Case 7, pp. 68, 81-83, 125 to 132).

A strict examination of the title of Lot 21D fails to disclose that Dame Bridget Smith (Mrs. Byrne) ever had any right of ownership in this lot. The owner of the lot at the time it was cadastred is stated in the book of reference to be Francis Learmont. The Registrar's Certificate of Search on Lot 21D filed as Exhibit D-66 (Case 4, p. 234) indicates that this lot was the property of one Reid and corroboration of this is found in the two documents filed as Exhibits D-67 and D-68, being copies of the Will of the late James Reid dated February 11th, 1891, and of a declaration made by  
10 John Reid dated February 1st, 1902. These show definitely that this property which was after 1891 described in the cadastre as Lot 21D was the property of James Reid.

As further proof that Lot 21D did not belong to Mrs. Byrne there is the fact as indicated in Exhibit P-24 that the Railway Company in purchasing its right-of-way in 1891 purchased from Respondent's auteurs a part of Lot 21C but no part of Lot 21D and in fact the description in Exhibit P-24 of Lot 21C contains the refer-  
20 ence: "Commencing at the intersection of the centre line of the Ottawa and Gatineau Valley Railway with the division line between Lots 21C and 21D in the Fifteenth Range". When the Railway Company purchased its right-of-way on Lot 21D it purchased from Thomas Reid as shown by Exhibit D-87.

In the light of the foregoing there can be no doubt that by the so-called Corrective Declaration Exhibit P-3 made on the 5th January, 1931, Dame Bridget Smith (Mrs. Byrne) purported to convey something which she did not own, and that the plans Exhibits D-69  
30 and D-117 in denying Respondent's ownership of Lot 21D are correct, and that Appellant was in error in referring to this lot in its offer Exhibit D-54 which was made before strict examination of the plan and title to the lot had been made.

There has been no evidence made by the Respondent in contradiction of the Registry Office certificate Exhibit D-66 which certificate discloses no interest whatever belonging to the Respondent's auteurs in Lot 21D.

40 Although considerable evidence was made upon the matters discussed in the foregoing and numerous exhibits were filed the learned trial judge has given no decision upon and has made no reference to the above points of fact and law.

It is submitted that the points mentioned are important, and particularly the question of whether or not the Respondent has any right in the water course opposite the riparian land of the Canadian



Pacific Railway, for it will be noted upon reference to Exhibit D-69 that the uppermost rapid of the Cascades is opposite the land of the Canadian Pacific Railway on the west side and the land of the Appellant on the east side of the river, and it is important to note that by agreement with the C.P.R. produced as Exhibit D-51 (Case 4, p. 122) the Appellant has the right to raise and maintain the waters of the river opposite the Canadian Pacific Railway properties, which right was given in that Exhibit to Appellant's auteur, Canadian International Paper Company, and transferred to Appellant by the latter as appears at page 127 of the same volume.

The Plaintiff therefore submits that the extent of the property and river rights of the Respondent at Cascades which are in question are shown correctly in the Exhibits D-69 and D-117 and it now becomes necessary to discuss the force and value of the water power, if any, appurtenant to the said properties.

*As to Water Power Possibilities at Cascades*  
(a) *Extent of Respondent's Rights*

The site of the Cascades Rapids is shown by Exhibit D-71 (Book No. 4) which is a reproduction of an aerial photograph of the whole rapids taken in the natural state of the river before the water was raised. On this picture there have been superimposed the lines representing division of the river bed to correspond with the plan D-69 (Witness Farley, Case 7, pp. 54-5) and they also correspond with the delineation of property shown on Mr. Beique's plan D-117. The white blotches in the river represent the rapids mingled with stray logs which have been caught therein. The triangular Lot 21B on the east side of the river is the only property owned by the Respondent on that side of the river, and the longer piece between the arrows on the west side of the river with the Respondent's name thereon represents what Appellant claims Respondent owns on that side of the river, always assuming that Appellant's contention is correct that the Respondent has no right in the river opposite the Canadian Pacific Railway property, which is shown at the left side of the picture adjacent to the first rapid.

Looking from left to right on this Exhibit it will be seen that the totality of what is known as the Cascades Rapids consists of four separate rapids or pitches, which going downstream from left to right on the plan will be referred to as Rapids Nos. 1, 2, 3 and 4.

If the Appellant's contentions outlined in the foregoing as to the riparian rights appurtenant to the C.P.R. property are correct, the Respondent has no right of ownership whatever in any part of the

10 first rapid, because the same is riparian to the C.P.R. property on the west side of the river and to the property of the Appellant on the east side of the river, and all that the Respondent owns is one-half of the second rapid, that is to say the portion of that rapid opposite his property on the west side of the river, plus that portion of the other half of the second rapid applicable to his triangular piece of land on the east side of the river, plus that portion of the western half of the third rapid appurtenant to Respondent's property on the west side of the stream. In brief he owns none of the first rapid, three-quarters of the second rapid, one-quarter of the third rapid and no part of the fourth rapid. All the balance of the Cascades Rapids, including the fourth rapid, which is the main drop, belonged to the Appellant before the water was raised.

20 The Quebec Streams Commission profile of the river in this vicinity produced by Respondent as Exhibit P-28 (Book 1) shows the total drop for the whole Cascades Rapids from the bottom of the fourth pitch shown on the right of the photograph to the top of Rapid No. 1 upstream on the left of the photograph to be 12.23 feet, of which the main pitch, which is number 4 downstream, and in which the Respondent claims no rights, has approximately five feet according to this profile and the other three rapids approximate seven feet among them.

What then does the evidence show to be the head of water attributable to the Respondent's river rights described in the foregoing?

30 The Respondent's evidence on this point is made by the witness N. B. MacRostie, and his references to the matter are contained chiefly in his cross-examination. At page 69 (Case 6) the following question and answer appear:

“Q.—From the investigations you have made with respect to water levels within the property of Mr. Cross what head do you determine as being upon that property?

40 A.—Above the line between the north and south halves of Lot 21 on the upper side and the line between Lots 20 and 21 on the downstream side it would be 7.21” (feet).

This the witness states on page 93, line 20, includes the full utilization of the first rapid or fall which is opposite the C.P.R. property on one side and that of the Appellant (acquired from Caves) on the other side.

At page 94 (Case 6) his evidence is as follows:

“Q.—Within the lines of Mr. Cross’ property taking his own property by itself and not borrowing from any one else?

A.—Without giving any weight to this deed from Caves it would be 3½ to 4 feet.”

10 The reference to the deed from Caves in the above is in respect of a promise of sale taken by Respondent fifteen years before (Exhibit P-39) and never acted upon and for which no consideration was given. The Caves property was shown on the authorized plan of Appellant’s developments for inclusion therein, and was taken by expropriation and came into the possession of the Appellant by order of the Superior Court (Exhibit D-58, Case 4, p. 207) several months before the water was raised, without objection on the part of the Respondent. The price allowed and paid by the Appellant was \$4,254.38 (Exhibit D-17) for about 35 acres, including the land on the east side, and the Vendor’s rights in the bed and water course of the river and also some land on the west side of the stream. The Vendor warranted the land to be free of all charges, hypothecs and encumbrances of every kind.

20 Witness Farley of the Appellant testifying as to the water levels (Case 7, p. 56) finds an average head of 3.4 feet if credit is given to Respondent for the head opposite the C.P.R. property and an average of 2.1 feet assuming that the Respondent has no right in the first rapid.

30 Mr. Stuart Scovil, Canadian Consulting Engineer of the International Joint Commission and a hydraulic engineer of outstanding reputation particularly with regard to stream measurement, made special investigations as to elevations and stream flows on the river and he goes into detail (Case 7, pp. 94-102) as to his findings on both these subjects, supporting his statements by the production of Exhibits D-77 to D-84, being Dominion Water Power Branch rating tables and various other diagrams prepared by him plotted from actual gauge readings which definitely establish the available head between a series of points reckoned under varying stream flows. Mr. Scovil establishes the available head from the point A to point C on plan D-69, being from the head of the first rapid to the lowest point on Respondent’s property downstream, as follows (P-98):

40 “ From Point A to C is 6.4 feet. Then deducting the average for the lower portion of the property 1.3 feet, would leave a head of 5.1 feet.”

This, as will be observed from the evidence of the witness, includes the whole of the first rapid across the stream. If this first

rapid were divided and Respondent given the benefit only of the half opposite the C.P.R. this 5.1 would be reduced to 3.8 feet (p. 99, line 14).

If no credit is given to Respondent for any part of the first rapid the above mentioned 3.8 feet is reduced to 2.5 feet (p. 99, line 5).

To summarize the matter the Appellant therefore submits that it has been definitely proven and not contradicted (a) that even if Respondent were given credit for all the head applicable to the first rapid he would have only 5.1 feet, (b) that if he were given credit for the half opposite the C.P.R. of the first rapid he would have 3.8 feet, (c) that if as contended for by Appellant he has no rights in the first rapid he would have 2.5 feet.

The witness (p. 99) goes on to show what the available head would be if Respondent used the head above and not owned by him, including the Peche Rapids, 5 miles upstream, and finds that the same would amount to 10.9 feet, which is the utmost he could possibly make use of to make any development whatsoever upon his property without affecting Paugan. The Respondent's witnesses of course admit that none of their proposed developments would be expected to affect the great power concentration at Paugan Falls about 20 miles higher up on the river. The above evidence of Mr. Scovil is based on the ordinary flow of the river of 3,000 cubic feet a second. If a flow of 10,000 c.f.s. which is assumed by Respondent is used the head would be reduced to 9.9 feet for the utmost which could be done without affecting Paugan (p. 100, line 3 and following).

The witness at pages 100 and 101 describes the scientific methods necessary in order to secure the accurate results he has obtained. His evidence is corroborated by Dr. Lefebvre, Chief Engineer of the Quebec Streams Commission (Case 7, pp. 195-6).

Mr. Beique (Case 7, p. 347) computes the total average head available to the Respondent at 3.75 feet if the C.P.R. property is included and 2.25 average head if the C.P.R. property is not included.

No evidence at all of this kind, complete as it is in accuracy and scientific detail, has been attempted by Respondent, whose only witness on this subject is Mr. MacRostie, an Ontario Land Surveyor, whose calculation of 7.1 feet on Respondent's property, including the C.P.R. and Caves, and of 3½ to 4 feet without the C.P.R., is refuted by his own Exhibit P-28.

The Appellant's evidence above discussed completely disproves the availability of 14 feet of head which Respondent claims even if he were entitled to take credit for head applicable to properties above him which he did not own.

10 In summarizing the foregoing references as to elevation and head applicable to the Respondent's properties, it may reasonably be inferred, having in view the fact that different stream flows would slightly affect elevations, that the average head applicable to the Respondent's property alone would be something under three feet, and if credit is given to him for the river rights opposite the C.P.R. property and Caves' property, to which the Appellant contends he is in no way entitled, his average head would be something under four feet. The minute exactness in the calculation is perhaps unnecessary because the Appellant's contention that the property which Respondent owned on the 21st May, 1926, at which time it is to be valued under the Special Act, was not a water power in itself is not contested by the Respondent. In this connection the following is the evidence of Mr. MacRostie, chief witness for the Respondent (Case 20 6, p. 94):

"Q.—Can you give me an estimate of what horse power would be developed with such a dam sticking to his own lot on the natural flow of the river?

A.—I would say it would not be an economical proposition on the natural flow."

Again Respondent's witness, J. M. Robertson (Case 6, p. 168):

30 "Q.—And you would not suggest putting an independent power proposition on Cross' property alone, unless you acquired the rights above?

A.—Anybody in his senses would expect to use the rights above."

page 183:

"Q.—Consequently, you either have not made any valuation of Cross' site alone, or else you have made your valuation on the assumption that he owned the right to develop fourteen feet to the Paugan?

40 A.—I have made the *assumption* on the understanding that he *could obtain* the right to develop *fourteen* feet up to Paugan.

Q.—What would you give him as owning?

A.—I was not interested in what he owned. I was interested in what he might own."

Seeing that it is not contended by the Respondent that his property at Cascades had any what may be termed intrinsic value as a

water power, that is to say value for development within itself without affecting or acquiring the rights of others, the issues at this point become clear cut between the parties as follows:

The Respondent's contention may briefly be summarized by reference to paragraph 17 of his declaration in the petitory action as follows:

10           “ That by reason of Plaintiff's ownership at the Cascades he could have made and intended to make a hydro electric development with a fourteen foot head capable of producing 15,000 horse power and said emplacement had a value of not less than \$600,000, that is 15,000 horse power at \$40 per horse power.”

20           It is to be inferred from the foregoing that Respondent's complaint is that he has been frustrated in making such a development by the Appellant's operations, and under the circumstances it would be expected that his evidence would be directed toward demonstrating the damage which had been caused to him by being so frustrated. Under the well established jurisprudence to which reference will be made later, he could not, of course, claim the value of the unrealized possibility, nor the value to the Appellant even if same had been shown to exist.

The matter becomes more confused on reference to paragraph 36 of his declaration in which he states the following:

30           “ That the annual value of such use of Plaintiff's above described properties has been not less than \$36,000, equivalent to 6% per annum on \$600,000, and has had to Defendant a value of not less than \$64,000 a year, equal to 6% on \$900,000, or \$54,000, plus about \$10,000 for pondage.”

40           Apart entirely from the violation of the principle of compensation prohibiting an allowance on the basis of value to the taker, the forepart of the paragraph when read with paragraph 17 of the declaration brings about a surprising averment that the fact that he could make and intended to make a hydro electric development has been worth \$36,000.00 a year to the Respondent.

No proof of this kind has, however, been attempted by the Respondent and all his evidence is irrelevant to his allegation if such allegation is taken in the sense referred to above. His entire evidence has been directed toward an attempt to show that water power in its undeveloped state has a market value of \$40 a horse power. The

Appellant's general contention on this point may be summarized in paragraph 44 of its plea in the petitory action, as follows:

10           “ That if the Plaintiff owns the property situated at Cascades as described in his declaration, which is not admitted, said properties or the ownership thereof do not include any water power capable of economic or commercial development or of a nature or kind which could be scientifically and profitably exploited or developed either alone or in conjunction with any property owned by said Plaintiff either at the time of or before or since the raising of the waters of the Gatineau River by Defendant.”

As there can be no economic development of the properties alone, the issue is clear upon the question of potentialities.

20           All the evidence of the Respondent as to the potentialities of the property was made by the witness MacRostie. The witness Beaubien was examined in rebuttal on the alleged possibilities of the property. His suggested schemes for the development of the property differed from those of MacRostie and objection was made to his evidence (Case 8, pp. 8 to 12) on the ground that it was not rebuttal evidence at all. His evidence was taken under reserve of these objections and the Appellant renews the objections here. Respondent witnesses were speaking of theoretical possibilities and none of them were prepared to give any opinion as to the actual and practical situation in which the Respondent stood on the day Appellant's Order-in-Council was passed fixed by the Special Act as being the date at which his property is to be valued, namely May 21st, 1926.

30           In other words, all of them, before proceeding to their theoretical discussions, made the following assumptions:

(a) That Respondent could secure Government approval of plans for a development, which approval is absolutely essential under the provisions of the Water Course Act 1925, Chapter 46, Section 5, for any development of more than 200 horse power.

40           (b) That the Respondent owned or could acquire all the property and river rights above Cascades which property and river rights were essential to him for development purposes.

(c) That in particular Respondent owned or could acquire the Peches Rapids five miles upstream, having a drop of over six feet, which rapids were then owned by the Appellant and were shown for submersion in the plans approved for its development, and that the

submersion of these rapids would not affect Appellant's power at Pagan.

(d) That the Respondent was entitled to make use of a flow of 10,000 cu. ft. a second in the river, of which 6,000 cu. ft. per second at least was not on the 21st May, 1926, available and which was only made available later by the storage works at the head waters of the river constructed and paid for at a cost of over \$5,000,000.00 by the Appellant.

All the foregoing elements must of necessity be taken into consideration before any practical discussion as to the theoretical horse power available by the utilization of a head of 14 feet could be taken in consideration, and, as mentioned above, the Respondent's witnesses all admit that they have assumed all the foregoing points and have made their calculation on a theoretical basis after giving effect to these assumptions. The evidence of these assumptions on the part of Respondent's witnesses is as follows:

20 MacRostie (page 77, Case 6):

“Q.—You have been very generous to your client, inasmuch as you give him credit for a 10,000 foot flow which did not exist at the time, for 6.8 feet of head which he did not own, to make up your 15,000 horse power?

A.—I *assume* he had the right to use this.

30 Q.—And it is on the basis of that *assumption* and on the basis of storage which did not exist you arrive at 15,000 horse power?

A.—Yes.”

Robertson (Case 6, p. 183):

“Q.—So you made your valuation without determining what he owned or what he might own?

A.—I made my valuation . . . on a basis of what he would have when he raised the water fourteen feet.

40 Q.—I think we have had evidence . . . he would have to acquire the riparian properties and obtain the approval of the Lieutenant-Governor in Council.

A.—He would have to acquire the riparian properties certainly . . . The approval of the plans of the development would, I presume, have to be obtained.

Q.—Before he could develop at all he would require to have his plans approved, would he not?



A.—That is what I said. I take it he had approval for the acquiring of properties.”

10 The Appellant again respectfully repeats that the learned trial judge should first of all have decided as a matter of law whether Respondent was justified in making all these assumptions, and had this been done much unnecessary proof as to the theoretical development itself could have been avoided and the learned trial judge’s remark that the proof is contradictory would have found no application up to that point.

The Appellant respectfully submits that none of the assumptions mentioned were available in favour of Respondent; on the contrary that none of these conditions which were precedent to the consideration of a theoretical development could be fulfilled by the Respondent for the following reasons:

20 (a) The Special Act states that the Respondent’s property is to be valued as of the date of the Order-in-Council upon which the Appellant’s plans for this development were approved, namely 21st May, 1926. This being the case, it of course becomes absurd to suppose that Government approval could have been received to an exceedingly minor development which would preclude the possibility of carrying into effect the plans approved in the public interest for the development of the great natural power concentration at Chelsea Falls and Farmers Rapids.

30 The evidence of Mr. B. Normandin for Appellant (Case 11, pp. 116 to 118) is to the effect that the Respondent made verbal and written objections to the Government at Quebec to the approval of Appellant’s plans and that these objections were overruled and that although Respondent bought the property in 1916 he had never submitted any plans for a development (Case 11, p. 120). In this connection the witness Olivier Lefebvre, Chief Engineer of the Quebec Streams Commission (Case 7, p. 199), gives interesting evidence as to the policy of the Government in the development of rivers in the public interest as follows:

40 “Q.—In connection with the work of your Department in studying a river, what attention do you give to the low head properties on the river?

A.—I must say that part of the work which the Commission has to do for the Government consists in the study of the rivers as regards the possibilities of their development for power, and this work is important for the purpose of determining a proper division of the groups, as we call them, which would guide the

property of Levi Reid (Case 6, p. 73) and also to a small piece of land at the Peches Rapids.

10 The so-called deed from Caves, which has already been discussed in the foregoing, was a promise of sale taken fifteen years before for which no consideration was given and the same was never acted upon and the property was expropriated by the Appellant under an Order-in-Council and preliminary possession was given to the Appellant by the Court before the water was raised.

20 With regard to the Levi Reid property, the document is produced as Plaintiff's Exhibit P-40 (Case 2, p. 87). This document, it will be noted, purports to sell to the Respondent riparian rights and privileges to raise the water of the river to 318 feet above mean sea level. The document is dated May 18th, 1926, more than a month after the Appellant's plans had been deposited in the Registry Office and public notices thereof given and only three days before the Order-in-Council approving Appellant's development was passed. It is interesting to note that this document was only registered on the 7th June, 1926, after the Order-in-Council had been passed approving the Appellant's development. The price for the right to raise the water to 318 feet in front of the Appellant's property was stated in this document to be \$20.00.

30 The Appellant later expropriated the property and was given possession before the water was raised and the price paid was \$11,243.05, including the river rights (Exhibit D-58 and D-59), and the seller warranted that the property was free and clear of all encumbrances and charges.

40 A third piece of property, also referred to at page 73 by Mr. MacRostie, is one at the Peches Rapids, five miles upstream. Here again an agreement was made (Exhibit P-53) on the 6th April, 1926, after Appellant's plans had been filed, whereby one Selwyn agreed to sell about one acre of land in the vicinity of the Peches Rapids to the Respondent. This document, which is signed by Selwyn and by the Respondent, makes the direct statement that the Respondent is the owner of the Peches Rapids in the Gatineau River opposite the property above described. This statement the Respondent in his evidence (Case 6, p. 227) is forced to admit is entirely untrue, as follows:

“Q.—It was also stated Freeman Cross is the owner of the La Peche Rapids in the Gatineau River? Had you any ownership whatever in the Peches Rapids at the time that agreement was made? At the time you signed that declaration, had you

any ownership whatever to one foot of land in the Peches Rapids?

A.—Not before the declaration, no.

Q.—Then why was that put in, you do not know?

A.—No.”

Respondent also filed as Exhibit P-38 under reserve of Appellant's objection a document purporting to give him the consent of a certain few owners above Cascades to control the water of the Gatineau River. The matters which this document purports to cover were originally set down after Appellant's development was started by brief notes in a pocketbook owned by Respondent and objection to the introduction of the evidence was made on the ground that no real rights could be established by such a writing and this objection is again urged. If further proof be needed as to the unreliability of this document as evidencing any rights of the Respondent for the properties above Cascades mentioned therein there is the evidence of Respondent himself at page 206 (Case 6):

20 “Q.—In whose presence did they sign that document in your book?

A.—The majority of them. Mr. Richardson was present.”

It appears, however, if reference is made to the evidence of the witness Woollcombe (Case 7, pp. 36 and 37) and by the Exhibit D-62 produced by him that the Richardson mentioned by Respondent forced the Respondent to radiate this pretended entry against his property.

30 At page 73 Mr. MacRostie's evidence is as follows:

“Q.—As matter of fact, can you show me any one Deed for any riparian property between the Cascades and the Peche Rapids, other than the pieces at Meach Creek in question here, which belonged to Mr. Cross at the time you were calculating the 14-foot head?

A.—There were the Cascades, the Meach Creek. I do not know the date of the one at Peche.

40 Q.—It was shortly after the water was raised, in 1927?

A.—It may have been.

Q.—So, in your investigation in 1926 there was nothing in the Peche that belonged to Mr. Cross?

A.—I would not say that.

Q.—Would you say there was?

A.—No, I would not.

Q.—The Deeds will speak for themselves?

A.—The Deeds will speak for themselves.

Q.—You tell me, then, that so far as you are aware you can vouch for no Deed into Cross, or no ownership into Cross, between the Cascades and the Peche Rapids, other than the Farm Point or the Meach Creek properties mentioned here?

A.—As a matter of fact, I am not vouching for any of those titles at all.

Q.—Still, that is the fact?

A.—Yes.

10

Q.—So, so far as you are concerned, no head he drew upon to be utilized in his development between Cascades and the Peche was on his own riparian right or connected with his own riparian right in any way, except in so far as the Meach Creek property was concerned?

A.—Outside of whatever value you would give to Reid and Caves. I was informed by Mr. Cross at the time he had those rights.

20

Q.—Reid was in October, 1926. Was that after your investigations?

A.—Yes.

Q.—And after the whole plan was projected?

A.—Of course, I did not get into the valuation of the title to this thing at all.

Q.—I know you were retained as a professional man to make a technical investigation into the pretended possibility of a power development, taking it for granted he was in control of the river.

30

A.—And based on the fact that Mr. Cross had the right to control the rights above him within certain limits.”

Evidently the Respondent drew largely on his imagination when dealing with Mr. MacRostie, for the latter deposes as follows (p. 117):

“Q.—He thought it might be well to get some rights along there for the purposes of this matter, and he went and bought that land after the water was raised?

40

A.—The picture Mr. Cross gave me was this: that he either had in his own name or had covered by registered options or by personal agreements with the owners 90 per cent of the land necessary for his own development. That was the picture he gave me. Of course, as I have already told you, I wish to keep out of the legal aspects of the matter. I am only telling you the information he gave me.

Q.—I think you will find that really did not reflect the actual situation.

A.—It did, substantially.

Q.—In reply to one of my questions yesterday I thought you were unable to tell me one piece of land that Mr. Cross owned between Cascades and the Peche, other than Meach Creek.

A.—You are separating your titles. Including those three; actually owned, options registered, and agreements to purchase signed in his little book. Those three combined.

10 Q.—It is the little book that is in your mind?

A.—No, it is not. It is one of three circumstances.

Q.—What I want to know is this: at the time this water was raised, which was the moment Cross began to suffer damage, he was not the owner of anything between the Cascades and the Peche, save a piece of land at Meach Creek?

A.—As stated. Not the registered owner.”

20 In view of the uncontradicted evidence as to the position in which the Respondent then actually stood as regards property or rights in property present and prospective the witness MacRostie's attempts to justify the statements made do not add to the weight of his testimony.

It may here be noted that Appellant has been condemned, as part of Item E of the judgment, to pay the sum of over \$16,000.00 (Exhibit P-71, Case 3, pp. 75-6) for alleged services rendered by this witness to Respondent dating back to 1928 or three years before the present action was instituted, although his evidence is disproved on every major point upon which he has testified.

30 It is only necessary to refer to the plan D-13 (Book 3) and to the deeds D-14 to D-51 inclusive which show the various properties above Cascades up to the Peche Rapids acquired by Appellant to observe how erroneous is Respondent's statement that he had 90% of the land above him for a development up to 318 feet, which would be substantially the same as that of Appellant.

40 The Appellant submits that it is a fair inference from the actions of the Respondent, that these attempts to secure rights on isolated pieces of property above Cascades after Appellant's development had been authorized, and even after the water had been raised upon these properties, is that Plaintiff, as already stated, was endeavouring to establish in his own favour some colour of right to justify the claims he later made that he had a development at Cascades, or that he proposed to make a development there.

All the properties upon which the Respondent attempted to

establish such colour of right after Appellant's work of development began were mentioned in the Appellant's plans approved by Order-in-Council and shown therein for inclusion in Appellant's development and they all belonged to Appellant and were acquired without any word of objection or protest on the part of Respondent either by amicable arrangement or by expropriation and with warranty as to title.

10 (c) The next assumption which is entirely unjustified involves the right of the Respondent to submerge the Peches Rapids. The land riparian to these rapids had been purchased by the Appellant (Exhibits D-33, 34, 35, Case 4, pp. 73 to 83) before the Order-in-Council was issued approving these works, and it is interesting to note that the price paid by private agreement was \$1,405.00 and the head as shown on the Quebec Streams Commission profile (Exhibit P-28) is slightly over 6½ feet, which, it will be observed, is more than the head applicable to the Respondent's property at Cascades and for which he is claiming \$600,000.00.

20 Even at the Peches Rapids alone Respondent would have been blocked in any theoretical development, because it is clear that not having had any plans approved he would be unable to avail himself of the right of expropriation and it is unreasonable to suppose he could have acquired any rights in these rapids without putting himself in the same position in which he is endeavouring to put the Appellant at the present time. The Appellant, therefore, submits that it was impossible for Respondent to have utilized any part of the Peches Rapids and the consequent reduction in head, even  
30 assuming that he was able to come to the foot of the Peches Rapids would reduce the theoretical horse power involved in a supposed fourteen-foot head by nearly half.

(d) The assumption of Respondent's witness as to the right to use the controlled flow of 10,000 cu. ft. in the river is unjustified because in fact the storage making such 10,000 cu. ft. a second flow possible did not exist on the 21st May, 1926, and because in law Respondent would have no right to capitalize this storage in his favour against the Appellant.

40 In this connection, Appellant respectfully refers the Court to the case of

*Fraser vs. Fraserville.*

This case went to the Court of King's Bench and the Privy Council, and the latter confirmed the decision of the two Courts

below. The Superior Court report is 21 *Revue de Jurisprudence*, p. 104, and reference is made to the remarks of Belleau, J., at p. 115.

The Court of King's Bench report is 25 K.B., p. 106, and attention is directed to the remarks of Archambault, C.J., at p. 111.

10 The Privy Council report is Appeal Cases 1917, p. 187, and attention is directed to the remarks of Lord Buckmaster at pp. 189 and following.

The Appellant submits that it is justified in relying upon the foregoing as being sufficient in itself to justify the statement that Defendant's properties had no potentialities for development at the time they are to be valued under the Special Act, and Appellant believes this to be one of the major issues before this Court.

20 If the Appellant's contention in this respect is justified its evidence as to the value of what Respondent owned at Cascades stands unchallenged and the offers made in its plea for the property should be maintained, for no proof has been made by Respondent except on the basis of taking for granted all the assumptions referred to in the foregoing.

(b) *Possibility of Economic Development*

30 Nevertheless the Appellant in its proof has not stopped here, but without waiver of the stand which it takes with respect to the foregoing contentions it has proceeded to proof designed to demonstrate, and which the Appellant respectfully submits does conclusively demonstrate, that even granted for the sake of argument that Respondent did not require to fulfill, or could successfully fulfill, the legal conditions precedent to a development he did not then have a water power which could be economically developed or was of any commercial value for development purposes. In other words, that even assuming that he was entitled to utilize 10 or 11 feet of head, the great part of which was applicable to property above which he did not own, including the Peches Rapids or the 14 feet contended for by Respondent, and that he had the right to base himself upon a flow of 10,000 cu. ft. a second in the river the result would not bring  
40 about a development which would be economically possible, or which could even compete with power generated by steam.

In the light of the foregoing it is necessary to examine the evidence as to the economic or commercial possibilities of the property for development purposes and in this connection the Appellant draws attention to the personnel of the witnesses of the respective parties. The only witness for Respondent in chief is Mr. MacRostie,

who is a Civil Engineer and Ontario Land Surveyor. He has not specialized in hydro electric developments (Case 6, p. 62) and he has never designed a construction such as that to which his evidence refers (p. 83). He proposed to raise the water to 318 feet, which, it will be observed by reference to the Appellant's approved plans, is practically the same elevation as that at which the Appellant's development is designed to operate.

10 The total cost of construction as set out in practically the only details which he gives (Case 6, p. 82) amounts to \$1,481,580.00 for a development of 11,904 horse power (not 15,000 horse power as claimed), and he reckons the cost of this development to represent \$124.00 a horse power. He files no plans or estimates by which his computations can be checked, whereas Appellant has produced plans and estimates of the most scientific and detailed kind prepared and vouched for by most reputable independent hydraulic engineers which definitely contradict Respondent's evidence.

20 At page 79 Mr. MacRostie states that he did not take into consideration any effect on the Canadian Pacific Railway right-of-way which runs parallel to the river from the Cascades upward, and later, on the same page, states that possibly \$2,000.00 would straighten it up, and he also states that his scheme would need no re-location of the highway.

In contradiction of this statement the witness Hillman, Engineer of Construction for the Canadian Pacific Railway, whose approval for any protective works necessitated by changing river levels would  
30 be required. has testified (Case 7, pp. 257-8) as follows:

“Q.—Is it to your knowledge that the water level up to 318 did require remedial works to your railway?

A.—Yes, the water level up to 318 would undoubtedly flood some portions of our right-of-way.

Q.—And in that case to what would you ask a promoter to carry your sub-grade? To what elevation?

A.—We would ask that the sub-grade be raised to elevation  
323.

40 Q.—That is the minimum?

A.—Yes.

Q.—Would you impose upon him any other condition in respect to flooding?

A.—All the embankments affected by the change of water level would have to be protected by rock rip-rap.”

and again:



“Q.—Bridges, I presume, would have to be raised, if there were any?

A.—Yes, bridges would have to be raised. Culverts would have to be lengthened to take care of the width necessitated by the raising of the embankment.”

and again (p. 261):

10 “Q.—That work would be done by the railway?

A.—Yes. At the expense of the promoter.

Q.—You would not permit the promoter to do that work himself?

A.—No. Such work would interfere with the safety of traffic, and we would feel unsafe to allow outsiders to work on the track.

Q.—You invariably do that within your own jurisdiction?

A.—Yes.”

20 Following the evidence of Mr. Hillman as above, the witness Dibblee, Locating Engineer of the C.P.R., was examined and testified as follows (Case 7, pp. 261 to 265):

“Q.—For a distance of about how far would work be necessary along that section? Just roughly. I don't want to a foot. Half a mile or two miles?

A.—Three-quarters of a mile, anyway.

Q.—Would that need readjustment to connect with the other part of the railway?

30 A.—Yes.

Q.—Have you made an estimate of what that would cost?

A.—I did about two years ago.

Q.—To the 323?

A.—Yes.

Q.—That was not prepared in any way, I take it, for the purpose of this law suit?

A.—No.

Q.—Just what was the amount you found would be required to be expended on that work?

40 A.—\$66,000.

Q.—There has been a statement made here by one of the witnesses of the Plaintiff that all the work that would be necessary to be required to be done in connection with the development of the water power at Cascades would cost \$2,000. What is your opinion as to that?

A.—I am afraid they would not get very much done.

Q.—What would the bridge alone cost? (Speaking of the bridge across Meach Creek.)

A.—It would cost about \$6,000.

Q.—What would the ballasting cost alone?

A.—Probably about \$5,000.

Q.—And what would the balance of the \$66,000 be made up of?

A.—By bringing material, the base and the riprap, and lengthening the culverts.

10 Q.—I understood Colonel Hillman to say you did not permit that work to be done by others. The railway did it themselves?

A.—Yes.

Q.—And at the cost of the promoter?

A.—Yes.”

20 Again the witness MacRostie stated that no expense would be required for remedial works on the highway, which also runs parallel to the river. Again he is contradicted by the witness Ralph (Case 7, p. 271). This witness, who was in charge of the highway work for the Appellant's development, has stated that from estimates prepared accurately from cross sections taken of the road, the cost for the raising necessitated by a water level of 318 would be \$43,900.00, and the same witness, from a knowledge of prices paid by the Appellant in this section, has placed the figure for land damages at \$100,000.00 instead of \$60,000.00 estimated by Mr. MacRostie.

30 It is submitted that the evidence of the Engineers of the C.P.R. and the Engineer Ralph, who both made very careful surveys of the work, completely refute the evidence of the witness MacRostie who says at page 99 of his testimony, “As to the road I have only my general impression of going over it.”

40 The foregoing contradictions of Mr. MacRostie's evidence concern what may be considered important items of expense, but on the main cost of development itself, which is of the utmost importance, he is absolutely contradicted by the following hydraulic engineers, all of outstanding reputation: C. N. Simpson, Chief Engineer of the Appellant Company, Mr. Olivier Lefebvre, Chief Engineer of the Quebec Streams Commission, Mr. W. S. Lea, Mr. Arthur Surveyer, Mr. Paul Beique and Mr. Stuart Scovil.

The witness Simpson for Appellant prepared detailed estimates of schemes of development both with respect to the actual head applicable to Mr. Cross' property itself and also with the utilization of head referred to by the witness MacRostie and on the basis of the natural flow of the stream without storage and also with storage. He

produced estimates minutely detailed as Exhibits 88 to 95 inclusive (Case 4, pp. 265 to 282), also plans (D-96 to 99, Book 3) illustrating these estimates. He also produced statements (Exhibits D-100, 101, 102) of capital cost and the economics involved in raising the head by stages to refute the statements of Mr. MacRostie as to the advantage obtained by the Appellant by the inclusion of the head above Cascades in its own development and to justify the statement made in paragraph 50 of the Defendant-Appellant's Plea that this stretch of the river was much more costly to develop than the balance of the  
10 river below.

Mr. Simpson's estimates, details and plans have been worked out from preliminary designs as explained in his evidence. He has under scheme 3D (Exhibit D-95) assumed in favour of the Respondent's properties a development to elevation 318, including the Peches Rapids and using a full flow of 10,000 cu. ft. a second, and he finds (Case 7, p. 145) 9,210 horse power available at a cost of \$268.00 per horse power, which would mean 8,520 horse power available for  
20 delivery in Hull at an annual cost of \$30.40 a horse power, provided it was all sold immediately, and he states (p. 146) that in no case could a development be made which would compete even with steam.

In corroboration of Mr. Simpson's evidence there is the testimony of Dr. Lefebvre, Chief Engineer of the Quebec Streams Commission, entrusted with the power investigations of the streams and rivers of the Province, a member of the St. Lawrence River Advisory Board, an engineer of many years' standing, who states that he has examined the estimates of Mr. Simpson and that they are correct and  
30 that he is in agreement that no economical or profitable development could have been constructed on Respondent's property (Case 7, p. 200). Dr. Lefebvre in his testimony gives clear explanations of many hydraulic problems touched upon by Respondent's witnesses and refutes their statements as to the possibilities of the Respondent's properties for development.

Mr. Arthur Surveyor, a hydraulic engineer of high standing in his profession and long and varied experience, examined the property in company with Mr. Paul Beique before the water was raised. They  
40 checked the levels taken by the witness Farley and shown on Exhibit D-69 and found them correct (Case 7, pp. 241-2). He made independent estimates along the same lines as Mr. Simpson and these estimates were even higher than those of the witness Simpson. He definitely states that the property has no value as a water power project (p. 243).

The witness W. S. Lea (Case 7, pp. 230-231 and 233) further

corroborates Mr. Simpson. Mr. Lea is another entirely independent witness and a hydraulic engineer of high standing and wide experience and he made an independent estimate of the cost of development of the property.

10 Further corroboration is found in the testimony of Mr. Paul Beique, a Civil Engineer and Surveyor of outstanding reputation. The Appellant specially stresses the whole evidence of Mr. Beique on the various points in issue in this case as contained in Case 7, pp. 331 to 372, taken at the first hearing, and in Case 12, pp. 210 to 260, taken at the supplementary hearing, the latter with reference particularly to the Farm Point properties.

Mr. Beique in his evidence has testified in a clear and logical manner with respect to the values of all the properties in issue herein and has in particular dealt with the Cascades property in a most reasonable and impartial manner, and the Appellant submits that his evidence stands uncontradicted in all particulars.

20 Having failed to make any real proof on this point in his case in chief the Respondent brought forward Mr. Beaubien in Rebuttal, and this on the last day of a two weeks' enquete after the closing of the case in chief of both parties. The evidence of this witness was admitted under reserve by the learned trial judge after repeated objections by Appellant's Counsel (Case 8, pp. 8, 9, 11, 12, 13) and these objections are reiterated here. The evidence on the main facts in his testimony can in no wise be considered as rebuttal.

30 He sets up entirely new theories as to development quite different from those of MacRostie, whom he contradicts, and he bases himself upon elevations and conditions not claimed for in the Declaration, and not previously referred to in evidence. He assumes elevations higher than those theretofore considered, and which would obviously impinge on the Paugan development.

40 There appears to be no justification for Respondent's examination of this witness in rebuttal, as he has himself stated that he worked at his theories and computations for a considerable period before the litigation began (p. 7) and certainly before the Defendant-Appellant's evidence in chief began.

The witness uses water levels ranging from 319.2 feet at Cascades to 325.2 feet at Wakefield and states (Case 6, p. 36, line 13) that the maximum level at Cascades would be 321.2, and it must be noted that Cascades is lower down the river than Farm Point. This would of course mean a higher level at Farm Point than 321.2. This

evidence is given in the face of Respondent's statement in paragraph 17 of the Supplementary Declaration (Case 1, pp. 39-40) that he would not have raised the water to a point higher than 318 at Farm Point.

10 This higher water level proposed by Mr. Beaubien would of course affect Respondent's property at Farm Point to as great, if not greater, degree than the actual levels at which the water has been controlled by Appellant and incidentally neutralize the excessive claim for damages made against the Appellant with respect to the Farm Point properties.

Further, the same witness brings forth as a result of alleged technical research made by him, not the figures 11,904 h.p. as contended for by his associate witness, Mr. MacRostie, but the startling figure of 20,000 h.p., nearly 100% in excess of his associate witness and very much greater than the amount of horse power claimed for in Respondent's original declaration.

20 Mr. Beaubien produces no plans but proposes to use the designs of Appellant's witness, Mr. Simpson, for his dam and power house and to utilize them for a greater head than that for which they were designed. He admits (Case 7, p. 18, line 40) that the power house would have to be deepened and that the generators would have to be enlarged, but apart from these general statements gives no details of cost.

30 As an essential part of his scheme he presumes the ability to operate under a load factor of 70%, that is to say on the assumption that he could get the equivalent of 20,000 h.p. by putting more wheels in operation during peak loads of 2½ hours, and of course thus drawing down during those times more water from above his dam than is ordinarily and continuously available, but in this connection he states at page 45, "I would not like to take my pond down more than 2 feet."

40 The basic errors in these computations are shown by the witness Simpson for Appellant (Case 8, p. 65), who shows that as a matter of actual fact the Appellant's plants (which Mr. Beaubien uses for comparison with his own scheme) work under a seventeen hour peak and similar period of draw down in order to get a 70% load factor, and that the same load factor would necessitate in Mr. Beaubien's scheme the same peak period of seventeen hours instead of 2½ hours, and would involve a draw down of 10 feet as against the maximum of two feet referred to by Mr. Beaubien, and this draw down of 10 feet would leave practically no head whatever.

The witness' suggestion that the high levels he uses could be maintained without effect on Paugan is disproven by Dr. Lefebvre, Mr. Scovil and Mr. Lea. Dr. Lefebvre (Case 8, p. 74) directly contradicts the witness and states that elevation 316.9 is the maximum to which the water could be raised without affecting the Paugan development. In this connection it may be stated that Appellant, being the owner of the Paugan, can go higher than 316.9 above Chelsea, and by scientifically timed operation of both plants minimize the loss of head at Paugan involved in the higher level.

10

In cross-examination witness Beaubien was asked concerning remedial works that would be necessitated at Peches Rapids, five miles above Cascades, and which is the controlling point between Cascades and the Paugan development, and he states that some work of a minor nature would be necessary at this point (Case 6, p. 55, line 10). At line 45 on the same page he states: " I am convinced of that by looking at it."

20 Dr. Lefebvre in sur-rebuttal (Case 8, p. 74) completely refutes this evidence as to the minor character of these works, basing himself on the result of scientific investigation of the conditions existing at the Peches Rapids after the taking of cross sections at this point a half a mile above and below the rapids in order to determine just what the conditions were.

30 Mr. Ralph, testifying for the Appellant in sur-rebuttal (Case 8, p. 29), states that a complete survey and investigation of these remedial works was made by him several years before apart entirely from and without reference to the present litigation and that it was found that the cost of the work would be prohibitive and in the neighbourhood of a half a million dollars. The same witness shows that the Beaubien elevations would result in an additional expenditure approximating \$300,000.00 for flooding damages in the Village of Wakefield. This village is not affected by the Appellant's works.

40 The Appellant therefore submits as its second main contention regarding the Cascades property of the Respondent that the latter has totally failed to prove the allegations of his declaration concerning the Cascades property or that the property had any possibilities whatever as an economic or commercial development under any circumstances; on the contrary the proof of Appellant is overwhelming that as alleged in paragraph 50 of its Plea (first hearing) " the properties or the ownership thereof do not include any water power capable of economic or commercial development or of a nature or kind which could be successfully and profitably exploited either alone

or in conjunction with any property owned by the said Plaintiff (Respondent) either at the time of or before, or since the raising of the waters of the Gatineau River by Defendant” (Appellant).

*As to Value of Respondent's Property at Cascades*

10 The Respondent has next attempted to prove a value of \$40.00 a horse power in its raw or undeveloped state for this 14,000 of theoretical horse power, although it will of course be apparent that if the site has no possibilities for economic development as alleged and proved by Appellant it can have no real value at all as a water power, because to establish any value for it as such it would have to be clearly demonstrated that it was susceptible of profitable exploitation, having in view the cost of the site, the cost of development and the assurance of an immediate market at prices which could at least compete with those existing in the vicinity for major blocks of power.

20 The witness MacRostie refers to the Hull district as being the proposed outlet for the power (Case 6, p. 82, line 25). The Respondent himself has no definite ideas on the subject and his evidence on this point as on others to which he has testified is vague and unsatisfactory.

The witness Simpson (Case 7, pp. 137-8) testifies as to the market for power in the Ottawa-Hull district as follows:

30 “The class of power that we have estimated Mr. Cross would supply through this development would be worth \$17.75, which is about the maximum we get in and around Ottawa.”

The same witness, by Exhibit D-95, confirmed by all the independent hydraulic engineers, shows that even assuming that Respondent used head which he never owned and a stream flow of 10,000 c.f.s. which was not in existence in May, 1926, he could not produce power under \$30.40 per h.p. (per annum) (Simpson, p. 145) and that this could not compete even with steam (p. 137).

40 The theory upon which the Respondent's witnesses have worked in attempting to prove a value of \$40.00 a horse power in the raw state is quite as unsound as their theories with respect to the physical capabilities of the property itself. They have based themselves on several sales of independent water power sites in different parts of the Province which in their character are entirely different to the property in question here and by a series of calculations they have put forward the theory that raw power can be estimated in terms of

dollars per h.p. They have cited the following sales of property and water powers:

Sale by Gatineau Company Limited (not Appellant) to James Maclaren Company.

Sale Higginson to Maclaren Company.

10 Sale of the Dorwin and Manchester Falls to Company Appellant.

Sale of the Maskinonge River—St. Ursule site.

Sale Metis River Falls.

Sale by Canada Cement Company to Appellant of certain property at Cascades.

20 Sale of Paugan Falls.

Sale Montreal Cottons to Beauharnois Co.

30 Taking the first sale to the Maclaren Company on the Lievre River. The witness MacRostie has given it as his opinion that the only part of the river flow conveyed by this transaction is the part flowing in the easterly channel and he estimates this at 32% of the total flow of the river. The quantity of horse power he uses is 4,000 h.p. based upon 30 feet of head, all above the Railway Bridge shown on the aerial photograph produced by Appellant as D-73 (Book 4).

40 In cross-examination it was shown that there was involved in this sale an additional fall below the bridge, making a total as proven by Farley (Case 7, p. 63) of 60.9 feet instead of 30 feet. Mr. Farley (Case, pp. 62-3) for Appellant further testified that he had surveyed the properties himself and instead of 32% of the total flow of the river the sale included 46% of the total and instead of 4,000 h.p. estimated by Mr. MacRostie a total of 10,500 h.p. was involved in the sale, and moreover that the sale included valuable lands as well as the power site. It was also proven that this site was one complete water power having a high head within the limits of the property sold, and that it was in no way comparable to the Respondent's property at Cascades.

If the value of \$175,000.00 placed by witness MacRostie on this power site (that is \$200,000.00 less \$25,000.00 for land) be divided by the quantity of 10,500 h.p. proven by Mr. Farley the price becomes



\$16.60 per h.p. instead of \$40.00 and this for an economically developable site complete in itself.

10 The same remarks in substance are applicable in the next sale cited above, namely that of Higginson to Maclaren Company. This property was bought for \$25,000.00 and controlled within itself a maximum of 700 h.p., according to the witness MacRostie. Mr. Farley has demonstrated that there were 1,300 h.p. available using the same total flow and if the price of \$25,000.00 be divided by 1,300 h.p. the price becomes \$19.25 instead of \$40.00. The evidence shows that there is no measure of comparability whatever between these sites on the Lievre River and Respondent's property at Cascades.

20 Mr. Simpson has shown (Case 7, p. 161) that the development by and of itself of that part of the property sold by Gatineau Company Limited to Maclaren Company lying above the railway bridge could have been made to yield an annual profit of \$21,600.00 after all charges, whereas no profit could have been derived from the exploitation of Respondent's Cascades property.

30 The next sale referred to is that of Dorwin and Manchester Falls. In cross-examination (pp. 190-195) it is shown that this is a complete water power within itself having a head of 212 feet within the limits of the property sold. The witness Robertson estimates the power available at the ordinary minimum flow of the Ouareau River upon which it is situated to be 4,000 water h.p., which at \$50.00 gives him a price of \$200,000.00 paid for the property (Case 6, p. 136). In actual fact at this site, with regulation proposed by the Quebec Streams Commission in their report of 1923, the water h.p. available would be 13,250 (Lefebvre, Case 7, p. 209). Mr. Robertson ignores the possibility of future regulation in his estimate, although he gives the benefit of future regulation to Respondent's site when he is comparing the two. On the basis of regulated flow the Dorwin and Manchester would work out at \$15.00 a h.p. instead of \$40.00 and this for a water power having a head of 212 feet and susceptible of economic development within itself.

40 With regard to this site and to the other sites to which Respondent has referred there are many other considerations to be taken into account before any comparison could be made. This is admitted by Robertson in his cross-examination (pp. 153 and 154) where he states that high head sites are more economical of development than low head sites, and that the cost of development is a very important factor in the valuation of a property and that the sum of money required to be spent on any site may render its development impossible. The witness is forced to admit (p. 153, line 23) that there is no

one price for raw power. The witness makes no attempt to discuss the relative cost of development of the high head at the Dorwin site and the low head at Respondent's property.

The same remarks apply to the next site quoted, namely that of Maskinonge—St. Ursule. Here again the witness Robertson has put forward the sale of a high head power site of 265 feet (Case 6, p. 196) at a price of \$125,000.00, and taking the unregulated flow of the river his estimate of a quantity of h.p. at 3,000 h.p., or approximately 10 \$40.00 h.p. On the other hand, if he had used the regulated flow as has been done in estimating Respondent's property the result would have been 7,144 h.p. (p. 195), equal to \$17.00 a horse power for an economically developable site complete within itself, and again the other considerations as to cost of development of the high head as against a low head have been given no consideration by the witness.

The next property referred to by Mr. Robertson is that of Paugan Falls on the Gatineau River about 30 miles above Cascades. 20 The witness' discussion of this site offers an outstanding example of the unreliability of Respondent's evidence in respect of the price of \$40.00 per horse power. The Paugan site was owned by the Hull Electric Company and the witness Robertson states that the entire stock of the Hull Electric Company was purchased for \$4,750,000.00 (Case 6, pp. 170-175). From this figure he arbitrarily deducts \$750,000.00 which he assumes to be the value of other Hull Electric assets and leaves \$4,000,000.00 which he infers is applicable to the Paugan site, which he supposes to represent 100 feet of head which at 10,000 c.f.s. would produce 100,000 h.p., and again this conveniently fits the figure of \$40.00 a h.p. In the first place (p. 170) the 30 witness admits that he does not know what amount of head was involved at Paugan, in the second place (pp. 171-175) he has no basis whatever for the deduction of \$750,000.00 from the \$4,750,000.00 as he knows nothing whatever about the Hull Electric Company, its assets or its field of operations.

As a matter of fact the Paugan site is developed to approximately 140 feet of head and actually has an installed capacity of 238,000 h.p., but the most significant fact is that Respondent himself 40 a few years before had entered into a contract with the Hull Electric Company, which contract is produced as Exhibit D-119 (Case 5, p. 28), and he undertook to acquire this Paugan site and to convey it to Hull Electric Company for the sum of \$333,333.00 for the first 100 feet of head and \$3,333.00 for every additional foot of head over 100 feet. He delivered this power site to the Hull Electric Company and no doubt he made a profit on it. It seems manifest that if there had been any real comparison to be made with respect to this site it

should have been made on the basis of that transaction which concerned the Paugan site alone in which Respondent himself was involved and not on the basis of the capital stock of the Hull Electric Company to which Mr. Robertson refers, for the Hull Electric Company not only owned the Paugan site but owned other developed water powers on the Ottawa River and operated the tram line system in Hull and to Aylmer and Ottawa under an exclusive franchise, served the City and residents of Hull (4,000 customers) with light, heat and power in addition to enjoying a charter declaring it to be a  
10 work for the general advantage of Canada.

The next site referred to by Robertson is the Metis Falls. This was the sale of a high head of 120 feet complete within itself at a price of \$85,000.00, and again the cross-examination (pp. 198-200) of the witness shows that there is no measure of comparability between it and Plaintiff's property.

The next site referred to is that of the Canada Cement property at Cascades, in which the witness Robertson makes a most ingenious  
20 calculation to bring about the desired result. His theory is that this property, having about 11 or 12 feet of head, which includes the fourth rapid at the Cascades under discussion here, was made the subject of an agreement between Canada Cement Company and the Appellant (Exhibit P-43, Case 2, p. 103) whereby the property was transferred to Appellant, who gave in lieu thereof to Canada Cement 3,000 h.p. at a price of \$10.00 a h.p. per year to be taken at Appellant's power house and the witness states that the Canada Cement Company obtained a benefit or saving of \$30,000.00 a year by this  
30 contract, which capitalized would amount to \$450,000.00.

Again in cross-examination (pp. 184-190) the witness frankly admits he knows nothing of what Canada Cement were paying for power before this agreement was made, and the complete unreliability of this evidence becomes obvious on reference to the evidence of the witness Binks (Case 7, pp. 304 to 308) where it is shown and not contradicted in any way by Respondent that the amount payable by Canada Cement Company under this agreement is \$34,650.00 per year compared with an average payment in the 10-year period prior  
40 to the making of the agreement of \$30,712.00 per year for power obtained from another Company.

The Appellant stresses the substantial breakdown under cross-examination of all the evidence given by witness Robertson on all the subjects upon which he has testified.

The final transaction to which reference has been made is that of the Montreal Cottons and the new Beauharnois Company. The lack

of any element of comparability in this transaction with elements involved in valuation of Respondent's property is so evident that the matter scarcely merits attention.

10 The contract between the two companies was a contract whereby the Montreal Cottons Company which was utilizing under Government authority a flow of about 13,000 c.f.s. over a head of 10 feet made a mutually satisfactory agreement with the Beauharnois Company to permit the latter to divert this 13,000 feet a second and use it over an 80-foot head. The witness Robertson in his evidence on this property (p. 197) has admitted that there is a very definite dissimilarity between this transaction and the sale of raw water power.

20 If further proof be needed as to the unreliability of the evidence produced by Respondent's witness with reference to a value of \$40.00 per h.p. reference is made to the evidence of the witness Binks for Appellant (Case 7, p. 309) who shows that the Bryson Power site, which was the first to be developed in the Ottawa district subsequent to Respondent's purchase of his property and which was an economically developable site within itself, whose development relieved the so-called shortage of power mentioned by the witness MacRostie was sold for \$140,000.00, being less than \$3.00 a h.p. of its present installed capacity.

30 No serious attempt has been made to establish the allegations of paragraphs 26, 27 and 28 of Respondent's first declaration as to the value of 14 feet of head for inclusion in another development. Such evidence, in so far as it referred to inclusion in Appellant's development, would of course in any event be evidence of value to the taker and Appellant has objected on this ground in any instances where the point has arisen. There was absolutely no competition for Respondent's property and in this connection Appellant refers to the case of *Sidney vs. North Eastern Ry.*, Law Reports (1914), 3 K.B., Rowlatt, J., p. 636.

40 The witness MacRostie made some statements in chief (Case 6, p. 45) as to what he considered the pondage value of the stretch of the river above Cascades as applied to the operations of Appellant at Chelsea and he refers to an advantage of 77,000 horse power. In his cross-examination at pp. 101-102 he is quite unable to substantiate his statements which are so confused that they are entirely incomprehensible. He reduces the 77,000 horse power to which he had previously referred to 1,000 horse power. Even his fellow witness Robertson declared himself unable to understand these computations (Case 6, p. 179). The witness Robertson in chief at p. 146 refers to a value of 1½ million, but in cross-examination (p. 158) he denies

this and states (p. 159) that he is not prepared to say what its value would be to Appellant. He of course admits (p. 178) that Respondent's property taken alone had no pondage value in itself, and that pondage would be dependent upon the properties above which did not belong to Respondent and practically all of which were owned by Appellant.

10 The Appellant's evidence is clear on these points and refutes these suppositions of Respondent. Mr. Simpson (Case 7, pp. 157-160), basing himself on actual operating figures, shows, as he states, that the estimates of Mr. Robertson and Mr. MacRostie are "absolutely absurd and ridiculous", and that the advantage gained in pondage by the inclusion of the head above Cascades is in the nature of 1,035 horse power.

20 Mr. Lefebvre (pp. 197-8) checked the charts and calculations of Mr. Simpson and confirms their correctness. The witness at p. 193 gives a clear idea of what pondage means, and the difference between pondage and storage.

Mr. Lea (Case 7, p. 233) also checked the computations of Mr. Simpson and entirely agrees with them and confirms the evidence previously given by Appellant's witnesses.

#### *Appellant's Evidence as to Value of Cascades Property*

30 As outlined in the foregoing, the only evidence as to value for the Respondent's property at Cascades has been made particularly by witness Robertson and is designed to show that there is a general country-wide market for raw undeveloped horse power at a price of \$40.00 a theoretical horse power. Comment has already been made upon the unsatisfactory nature of this evidence and the fallacy of the reasoning upon which it is based.

40 That there can be no such general price established for undeveloped water power appears to be an elementary matter of common sense, because a water power being something which can inherently be put to only one use, that of producing energy, which in this case is hydro electric energy, can have no value in the ordinary economic or commercial sense unless it can be made to produce such energy at a cost which will permit the promoter to sell it at a profit. The evidence clearly shows that this could not be done with Respondent's property, even with the addition of the properties above which he did not own, and the property consequently offers no elements of comparison with the properties with which it has been compared in the evidence made for Respondent, apart entirely from the fact that

the prices paid for the latter properties, all economically developable, in no single instance bear any relation to the figure cited by Mr. Robertson, the Respondent's witness on this point.

The witnesses of the Appellant examined on this point and on the question of fair and just compensation for Respondent's Cascades property are as follows:

10 Lefebvre (Case 7, pp. 198-9):

“Q.—In your opinion it is possible to assume a general price for raw water power in comparing a high head proposition with a low head proposition such as this?

20 A.—No, it is not possible to assume a general price for low head water power sites. The fact that a site is worth a certain amount of money at one point does not mean that another site, even nearby—even on the same stream—may be comparable to it at all as regards value. It all depends on the physical conditions, the geological conditions, the facilities for development, and so on; which may be altogether different at the two sites. Every site has to stand on its own merits. A water power site may be absolutely impossible of development, if, for example, rock is not available whereon to place the dams and the power houses and the works which are required.”

Again at page 204 on this question and on the question of the value of the Respondent's site the same witness testifies as follows:

30 “Q.—You spoke of raw undeveloped power properties not being susceptible of comparison from the point of view of head or general conditions. Are there, to your knowledge, any other small low head rapids on this river which might perhaps be assimilated to the Cross rapid?

40 A.—To the best of my knowledge I think the La Peche Rapids might be assimilated. And further up the river, in the vicinity of Maniwaki, there are other small sites which might be assimilated, as regards head in any event. I do not know about the facilities for development, but as regards head available they might be comparable.

Q.—What are the names of those you have in mind?

A.—I have in mind particularly the Rapides des Os, above Maniwaki, where there is a head of about 7 feet.”

and continuing at page 206:

“Q.—You state you are familiar with the des Os Rapid?

A.—I saw it, yes.

Q.—In your opinion, what would be a reasonable and proper price to pay the owners for the des Os Rapid, undeveloped, just as it stood?

A.—I gave it as my opinion at that time that an offer of \$200.00 per foot of head was reasonable and should be accepted.

Q.—To whom did you give that advice?

10 A.—To the owners of the power site, who wrote to me asking for my opinion on the matter. I gave them my opinion in a letter which is on file.

Q.—Who were the owners?

A.—The Oblate Fathers, at Maniwaki.

Q.—When was this?

A.—In the month of May, 1927, if I am not mistaken.

Q.—And, you say you recommended they should accept \$200.00 per foot of head?

20 A.—Yes. I told them they could not hope to make a separate development out of the small head available, and that the only value this could have would be the possibility of incorporating it with some other development in the vicinity, and that in the circumstances I thought a value of \$200.00 per foot of head was a fair price for them to accept.”

Further at page 207:

30 “Q.—Taking into consideration the various elements you have mentioned with respect to high and low heads, and taking into consideration the statement you have just made with respect to the des Os Rapids, in your opinion what would be the value of the rapids on Mr. Cross’ property?

A.—Assuming conditions to be the same, I would say that Mr. Cross’ property would be somewhat more valuable than the other, per foot of head; because the drainage area is a good deal larger. There is a big tributary, such as the Desert River coming in between the two. On the same basis I would say \$300.00 per foot of head would be about fair.

Q.—That is speaking of Mr. Cross’ own property?

A.—Yes.

40 Q.—And giving effect to the advantages you spoke of as belonging to that property, as against the des Os?

A.—Yes. There is more water available.

Q.—Giving effect to the fact that there is more water available, and to the other advantages you have spoken of, you would consider \$300.00 per foot of head to be about fair for the Cross’ property?

A.—Yes.

Q.—Of course, you are an entirely independent witness, and you have no interest in this case one way or the other. Had this Cross case come up at all at the time you were asked your opinion in regard to the des Os property?

A.—Not to my knowledge.”

The witness Simpson, a hydraulic engineer and Chief Engineer of the Company Appellant, testifies to the same effect as follows (Case 7, p. 134):

10

“Q.—The theory has been put forward by the Plaintiff in this case to the effect that there is a general market price for undeveloped water power. Would you give us your opinion as to that particular statement or assumption that has been made?

20

A.—There is absolutely no general market value for undeveloped water power. There are a large number of water powers in an undeveloped stage which are worth absolutely nothing, in my opinion never will be worth anything to be turned into any kind of commercial development, making that type of property worthless, and other properties in their undeveloped state range up to very considerable prices per horse power, I might say, depending on the amount of profit that you can make out of developing that site, assuming that you can get a fixed price per horse power after you have the development completed.

The two factors have to go together, the price at which you can sell the power and the price at which you can develop the power, and the difference is the intrinsic value of the raw power.

30

Q.—In other words, I take it you mean that each power site, undeveloped power site, must stand on its own feet insofar as its potentialities are concerned?

A.—That is right.

Q.—And consequently so far as its value in the raw may be concerned?

A.—That is right.”

and again at page 135:

40

“Q.—You are familiar, of course, with the Masson power, the power on the Lievre River which has been in question here. You have heard some testimony given in respect to it?

A.—Yes.

Q.—In your opinion, would it be possible to compute at the same price raw power at the property of Mr. Cross, as one would compute it on the property of Masson on the Lievre?

A.—The two properties have no relationship in any way whatever. The Masson property has to be considered of and by



itself, and the property of Mr. Cross at Cascades has to be considered of and by itself.

Q.—And I take it, the same remarks would apply to the various other powers that have been mentioned here, all of which in some phenomenal way work out to \$40.00 a horse power?

A.—That is right.”

10 The witness W. S. Lea, another hydraulic engineer, testifies to the same effect (Case 7, p. 229) and goes on to state that he has examined and made an estimate of the cost of development of the Cross site under what he considered the best conditions from an economic point of view (p. 230, line 10) and that he has checked designs and estimates made by Mr. Simpson (p. 230, line 25) and that he would not estimate the power any cheaper than Mr. Simpson has, and at page 231, line 36, he states that his total estimate would not be less than Mr. Simpson’s. He also (at p. 232) discusses the question of the Metis site referred to by Respondent’s witness Robertson and states that the development of this Metis site did not in  
20 fact cost \$60.00 a horse power, which is less than a half of what even Respondent’s witness MacRostie has estimated as the cost per horse power at the Respondent’s site. This evidence alone of Mr. Lea indicates the utter lack of comparability between the two sites alleged by Mr. Robertson.

At pages 234-5 the witness Lea discusses the value of the Respondent’s property and estimates it at \$1,500.00.

30 Arthur Surveyer, a hydraulic engineer of international reputation, made independent investigations as to the possibilities of the property and his estimate of the cost of the development was higher than that of Mr. Simpson (Case 7, p. 242).

At page 244 he testifies as follows:

“Q.—As a matter of fact, what is your opinion as to the possibility of establishing a general market price for raw power?

40 A.—I do not think it can be done. I think you have to take each case separately and take into consideration the vicinity of the market, the price at which power is selling in that particular market, and the price at which you can deliver power to that market by utilizing the water power which you own.”

Appellant’s witness, Mr. Paul Beique, to the whole of whose evidence (Case 7, pp. 331-375) the attention of the Court has already

been respectfully drawn, refers to the question of valuation on a raw power basis at page 351 as follows:

“Q.—Would you give an expression of opinion as to the method of proceeding to value that property for the site of Mr. Cross by relating it indiscriminately to sales of raw water power all over the province as has been done by Plaintiff’s witnesses. Do you think that offers any intelligent or sound method of comparison?”

10 A.—I have studied this question for weeks, and I may say I consider it most improper and very fallacious. I think in doing so they are inferring general value from a case or a series of cases of particular value, and which may have characteristic features and conditions, and situations entirely different. I think it is trying to use an instrument of investigation which may be applicable for certain particular purposes, but it has no application at all in the manner in which it was used and that it is entirely unscientific and that it cannot stand critical examination. The  
20 fact is, the moment you place Mr. Cross’ site purely as an economical development by itself, you are bound to come to the conclusion that it has none, and this element necessarily reflects, it is the mere element, that reflects value.” (The witness continues his explanation.)

Beginning at page 341 of his evidence Mr. Beique proceeds to an analysis of the value of Respondent’s site which the Appellant submits is clear and logical. He separates the land value and the river rights value and gives as his opinion that if the Respondent has no  
30 rights in the bed of the river opposite the C.P.R. right of way the value of his whole property, including land and river rights, is \$8,000.00 and if Respondent is entitled to the river rights applicable to the C.P.R. right of way the same property is not worth more than \$11,000.00 (Exhibit D-188, Case 5, p. 156).

#### ARGUMENT AS TO CASCADES

The Special Statute governing this case provides that the Appellant shall make just and fair (*juste et equitable*) compensation to  
40 Respondent for all his properties and rights taken or affected by Appellant’s development by maintaining the level of the river at any controlled elevation not exceeding 321.5 above mean sea level and that the date with reference to which the valuation shall be made shall be the date of the Order-in-Council approving the plans for such development.

The principles on which just and fair compensation should be

assessed are now thoroughly well settled by the Courts. *Cripps on Compensation*, 6th Edition, p. 108:

“ The basis on which compensation for lands taken is to be assessed is the value of the lands to the owner as it existed at the date of the notice to treat and not their value when taken, to the promoters. (*Cedars Rapids v. Lacoste* (1914), A.C. 569; *Lucas & Chesterfield* (1909), 1 K.B. 16; *Fraser v. Fraserville* (1917), A.C. 187.)

10

“ The increased value of lands by reason of any advantage over and above the bare agricultural value is merely the price which possible intended undertakers would give. That price must be decided by the imaginary market, which would have ruled had the land been exposed for sale before any undertakers had secured any powers or acquired the other subjects which made the undertaking as a whole a realized possibility. In assessing the value of any probable future advantages, it is the present value alone of such advantages that falls to be determined.”

20

The Appellant submits that in the above and similar authorities references to the hypothetical time of valuation are superseded by the fixing in the Special Act of the exact date for the valuation, namely that of the Order-in-Council approving plans for Appellant's works the date of which is May 21st, 1926, and it is obvious from this fixing of date that the valuation is to be made in the light of the powers already granted to the Appellant with all that such grant meant both to Respondent and to third parties.

30

The Respondent's declaration (First Hearing, para. 17) states “ that by reason of his ownership at the Cascades he could have made and intended to make a hydro electric development with a 14-foot head capable of producing 15,000 horse power, and said emplacement had a value of not less than \$600,000.00, that is 15,000 horse power at \$40.00 per h.p.”

40

The first statement above as to Respondent's intentions is meaningless in the light of the actual fact that he had never attempted to make a development. He cannot capitalize his unrealized intentions against Appellant, and if he could do so the measure of his damage would obviously be the amount of the commercial value of his realized scheme on the general basis of its dependable annual profit. No indication is given in the declaration as to any amount which is claimed by Respondent on this basis, for the reference to \$600,000.00 has of course no reference whatever to developed water power. It refers to water power in its raw or undeveloped state and no atten-

tion has been given in the proof to the question of possible profits from a realized scheme.

10 The whole of Respondent's case is obviously based upon the second part of the statement in the above paragraph of his declaration, and his evidence is entirely directed toward proving that the general market price for raw power is \$40.00 per h.p. and as a preliminary to that he has of necessity been forced to some attempted proof that he had 15,000 h.p. which could be developed and sold at a profit, for it is clear that until that is proven he can have no grounds for assuming that the power would be worth anything at all in the raw.

20 It is the potentiality for profitable development which gives to raw power its main and for all ordinary purposes its only value. If it had no potentiality for economic or profitable development by Respondent himself, which Appellant submits has been absolutely proven, then for that purpose it can have no open market value whatever, for anything paid by a purchaser for the property would of necessity be just so much added to the cost of the completed enterprise, that is to say that each dollar per horse power in the raw so paid would be reflected by a dollar in increased price of each developed horse power.

30 It is manifest, therefore, that to determine what a purchaser could afford to pay for raw horse power he must first of all estimate minutely every item of cost of development and operation, and having done so he must be assured of an immediate market at prices prevailing in the vicinity for a sufficiently large proportion of his power to enable him to make a profit after providing all his carrying charges, including the carrying charges of such portion as he has not sold and which is progressively adding to the average price of all his power.

40 His market must be close at hand unless he can develop so cheaply that he can absorb the very serious additional expense involved in long distance transmission. This is one of the reasons why the large high head concentrations are approved in the public interest, because they are cheaper of development and consequently can supply electric energy at greater distances.

Having therefore determined all these elements the promoter may then be in a position to judge what he could pay for the site itself, and naturally that price would vary accordingly as the costs mentioned were low or high.

It is apparent therefore that an attempt to estimate any general market price for raw power is fallacious in the extreme, and it is further respectfully submitted that such proof would be and is entirely irrelevant to the present issue, and to the determination of what would be a just and fair indemnity to be paid to Respondent, until in any event it had been demonstrated that a development was legally and commercially possible.

10 The evidence is definitely to the effect that no development was economically or commercially possible even by the use of the property of others and with the benefit of the 10,000 c.f.s. stream flow supplied by Appellant, and that the property could not be developed to produce electrical energy at prices which would even compete with steam.

20 The Respondent must be compensated for the value of his property at Cascades with all its advantages present and future, but it is the present value alone as existing on the 21st May, 1926, which falls to be determined.

30 It is respectfully submitted that the first duty of the Court was to determine what physical properties the Respondent actually owned on that date. To determine this it was necessary that a decision be given on the points of contention between the parties as to the ownership of the river rights opposite the C.P.R. property and as to the division of the river bed. The pretensions of both parties and the arguments with respect thereto have already been referred to in the foregoing part of this factum and it is not necessary to mention them here.

After having decided these points of contention, and established definitely what Respondent actually owned, it is submitted that the Court should then have decided whether the actual property owned had any advantages over and above the bare agricultural value, and fix a just and fair compensation for the land, giving consideration to these special advantages, if any.

40 The only advantage contended for by the Respondent is the advantage based on adaptability for water power development.

Even granting for the sake of argument that a decision favourable to Respondent was given with regard to the disputed questions involving division of the river bed opposite his property and the extent of riparian land owned by him, it is then common ground between the parties that no economic water power development was possible on the actual property itself. In other words, the value con-

tended for by the Respondent is admittedly not inherently in the property itself which he owned, but on the property of others, for in order to get 14 feet of head he assumes the right to back the water up above him on properties which he did not own for a distance of five miles up the river.

10 The Respondent owned two pieces of land facing each other across the river, carrying with them a very small percentage of the head involved in the small Cascades Rapids, all the balance of the Rapids being owned by Respondent, and his own witnesses admit that before attempting any development at all he would have been obliged to make some arrangement with the owner of the balance of the rapids (Case 6, p. 74, line 15). He had owned the property since 1916 when he purchased it for about \$2,600.00. He had declared it to have a value of \$5,000.00 in his statements each year, including the year 1926 (Case 5, Exhibits D-137, p. 76; D-138, p. 80; D-139, p. 83; D-140, p. 88; D-141, p. 92; D-142 (Sept. 30th, 1926), p. 96). He had made no investigations as to its possibilities until the Appel-  
20 lant's works were an assured fact. He had filed no plans nor complied with other conditions precedent to the obtaining of statutory powers for development and his objections, written and verbal, to the granting of statutory powers to the Appellant which would of necessity preclude a grant to himself, even if he had asked for one, had been taken into consideration and overruled in the public interest.

Apart from his own small pieces of property in Meach Creek, he owned none of the property above him and he could not have acquired such property by expropriation unless he was in possession of  
30 statutory authority which he could not secure.

The actual properties owned by Respondent admittedly having within themselves no possibilities for development, it becomes necessary to decide what rights, if any, the Respondent possesses to utilize the five-mile stretch of the river above him, which he did not own, in order to make a development on his own property.

On reference to the Water Course Act it will be observed that before the 9th February, 1918 (8 George V, Chapter 68) the unconditional right to develop reposed in the proprietor of a water power,  
40 but after the passing of that statute the right to develop or to maintain works in the rivers and streams of the Province which would affect the Crown or third parties was strictly subject to the securing of government approval.

This 1918 enactment making necessary this approval as a condition precedent to proposed works of development was brought into

the law for the very purpose of giving the Crown, through the Minister of Lands and Forests, the opportunity of determining how any water powers on rivers, lakes and streams of the Province were to be developed or whether they were to be developed at all or not, for they are all matters of public interest.

10 As has been explained in the evidence of Mr. Lefebvre, Chief Engineer of the Quebec Streams Commission, it was found that low head developments were not normally economical or scientific and practically none have been approved in the last 15 years because the public interest is best served by development of the great natural high head concentrations.

20 This is the legal situation in which the Respondent or anyone else who owns a supposed water power finds himself, whether such water power is economically developable or not. The necessity for approval of development works creates a species of legal risk which everyone takes who owns or proposes to purchase a water power site. It detracts from the absolute right to develop enjoyed by the owner before 1918.

30 The Appellant respectfully refers to the fact that if the Crown has in the present case granted the Appellant an approval which in the nature of things prevents the possibility of a development by Respondent, there can be no fault on the part of Appellant arising from such grant, and that the consequences flowing from such grant in so far as they affect the Respondent or third parties can give rise to no claim against Appellant.

40 The Appellant does not contend that the statutory powers carry with them any right in favour of Appellant to deprive the Respondent of his physical property or affect the same adversely without compensating him for all the advantages which the property possessed, present and future, on 21st May, 1926, but Appellant does contend that there could not be numbered among those advantages the legal possibility of its being used for power development purposes, for it had been stripped of that possibility by the operation of law without fault on the part of the Appellant. The foregoing is of course leaving aside the question of physical possibilities for profitable development which in this case it has been definitely proven did not exist.

The learned trial judge has apparently given no consideration to these matters.

The Appellant submits that it would require a very forced inter-

pretation of the judgment on the Cascades item to read it as including any element of compensation for a developable water power, but if it could be so interpreted, then the learned trial judge has not really valued the Respondent's property at all but has valued property in great part belonging to Appellant, and in a minor degree to third parties, and has more particularly valued rights not belonging to Respondent but belonging exclusively by law to Appellant, and has also valued in favour of Respondent the advantage of a stream flow of 10,000 c.f.s. made possible by storage works built and paid for at huge cost by the Appellant and which were not in existence on May 21st, 1926, and which would not have come into existence at all apart from the construction of the Appellant's major works at Chelsea already approved by governmental authority.

The Appellant urges that there is absolutely no justification at law or in fact for permitting the Respondent to assume these matters as being advantages attached to his property itself or as rights belonging to Respondent.

From the wording of the judgment it would appear that the learned judge has taken the Appellant's valuation of Respondent's property as correct at \$9,000.00 and multiplied it by 10 as a punitive measure, at the same time averring that the Appellant has no reason to complain because of alleged arbitrary confiscation of Respondent's property without previous offer of an indemnity.

As has already been shown in this factum, the latter statement is in error, as is also the statement in the same paragraph of the judgment that the Appellant had paid higher prices for water powers less important than that of Respondent, for it may here be remarked that apart from the main power sites of the Appellant which have no relation to the matter in question, the purchases of power sites by Defendant as referred to in the evidence are four in number, the first being the Dorwin and Manchester Falls, having a concentrated head of 212 feet economically developable, purchased for \$200,000.00, being less than a \$1,000.00 per foot of head, as against the Respondent's 3½ feet of head undevelopable for which he asks \$600,000.00; the second the Des Os Rapids (Exhibit D-114) having seven feet of head purchased for \$1,500.00; the third Calumet Rapids (Exhibit D-120) with four feet of head purchased for \$5,000.00, and fourthly, the most comparable to Respondent's property, being the Peches Rapids a few miles above Respondent's Cascades property and having over six feet of head, which was purchased for \$1,500.00.

As has been stated, the Respondent in his declaration asks for



no value on any basis other than capability for development, although in paragraphs 26, 27 and 28 he makes reference to this supposed value to the Appellant.

On this question of value to the taker the jurisprudence is clear that none of that given could be allowed even if any evidence of it had been made, which is not the case.

10 Although Respondent has made no evidence as to the value of the property over and above its bare agricultural worth except as above outlined, nevertheless the Appellant has attributed to the property some added value over its bare agricultural worth and has offered in its pleadings (Case 1, p. 56, para. 57 (a)) the sum of \$9,000.00 with interest from the date the property was submerged.

20 The elements which enter into this sum are clearly explained by Mr. Beique (Case 7, pp. 341-348 inclusive). The various other hydraulic engineers who are witnesses for the Appellant have given definite evidence as to what in their opinion would be a reasonable and fair compensation for the water rights alone. Mr. Beique has separated the land value and the value of the water rights and has analyzed the whole matter in a logical way consistent with well-established jurisprudence.

30 There has been no contradiction of the facts upon which this evidence is based and the Appellant respectfully submits that the principles of valuation which he has applied to these facts, and the conclusions at which he arrives are sound, and that the sums he mentions constituted just and fair compensation to the Respondent for the Cascades property, and that the action of the learned trial judge in multiplying the sum by 10 has no justification either in law or in fact.

ITEM B

DAMAGE TO LUMBER PROPERTY AT FARM POINT IN  
MEACH CREEK

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PHYSICAL CHARACTERISTICS OF FARM POINT  
PROPERTY

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Meach Creek is a small stream running into the Gatineau River on the west side a few miles above Cascades.

It comes from the high land bordering the river and runs down a hill a short distance back from the river, goes under the Canadian Pacific Railway and the highway bridges, and empties into the river. Its dependable minimum flow has been proven by Mr. Scovil to be 6 cubic feet a second.

At the top of the hill about 74 feet above the normal level of the river the Respondent had a dam which impounded the water of the creek above, and it was diverted into a penstock or iron pipe running down the hill, and motivated Respondent's sawmill which was about half way up the hill and this water was thereafter discharged into the creek. Such water as was left when the sawmill was working proceeded down the hill in the penstock and motivated a water wheel which was connected a generator in a small concrete power house at the bottom of the hill. The matter of damage to this small electric plant will be dealt with later under Item C of the judgment.

As has been remarked, the sawmill was about half way up the hill, and there were approximately 40 other rough wooden buildings, some of them with small lean to's or outhouses also built at various places on the slope of the hill, and nearby in the vicinity of the mill site. These buildings are claimed by the Respondent to have been used in large part as workmen's houses.

40

Exhibit D-187 (Book 4) is a panoramic view of the Farm Point properties, and Exhibit D-160 (Book 3) shows the location of the various groups of buildings by number in their relation to the water. It will be noted therefrom that certain of these houses, being groups 5, 6, 9, 10, 30, and also the power house, are on the margin of the creek. All the balance of the houses and the sawmill are well above

even the 324.5-ft. level, and they are in no way physically affected by the water. This is admitted by Respondent (Case 9, p. 200).

10 It will also be noted that the area of land at the bottom of the hill below the houses and the power house and comprising the bed of the creek and land immediately adjacent to it is low lying. It was in large part under water for portions of the year at least, as will be observed from Exhibit D-162 (Book 4), which is an aerial photograph taken under natural conditions before the water in the river was raised. This low lying land has been referred to in the evidence as the "Delta". The approximate number of days per year during which this land was submerged under ordinary natural conditions is shown by Exhibit D-173 (Case 5, p. 146) and there is no evidence in contradiction of this fact.

20 The Appellant's plan Exhibit D-160 shows individual parcels A, B, C, D, E-1 and E-2 which together comprise all the land and buildings in any way actually affected at Farm Point up to a water level of 324.5, which is 3 feet higher than the level of 321.5 mentioned in the Special Act, and Appellant has offered to compensate Respondent for everything affected up to this 324.5 level so that there may be no even theoretical possibility of adverse effect through seepage or dampness from an assumed level of 321.5. The Appellant believes that in doing this it has given every possible advantage to Respondent, because the normal operating level of the water brought about by its works as authorized by the Government is considerably below 321.5 and in fact varies between 318 and 319 with occasional rises to 320 (Respondent's witness MacRostie, Case 9, p. 158) and 30 that the parties are in substantial agreement on this point is shown by Exhibit D-107 (Book 3) which is a graph based upon the actual operating levels of Appellant's works for a continuous period of three months.

40 It will consequently be seen that in using the level 324.5 Appellant has protected Respondent from the possible but very questionable effect of seepage or infiltration of water to a level approximately  $4\frac{1}{2}$  feet above the normal operating level of the water and a full 3 feet above even the theoretical maximum controlled level "not exceeding 321.5" referred to in the Special Act.

#### THE JUDGMENT ON THE LUMBER PROPERTY ITEM

The wording of the judgment referring to the indemnity which Appellant is condemned to pay to Respondent in respect of the lumber business is as follows (Case 13, p. 160):

“ Quant à la valeur de l'industrie de bois du demandeur (y compris ' Milège 12 ' ), elle a été fixée dans l'allégation 27 de la déclaration amendée à la somme de \$265,112.78 et à celle de \$13,913.24 y compris le terrain faisant un total de \$279,026.02 moins \$53,000.00, soit en tout la somme de \$226,026.02 que le demandeur, par son avocat M. St-Laurent, a réduit à la somme de \$115,000.00 (voir son argument du 21 novembre 1932 pp. 50 in fine et 51).

10 La Cour accorde au demandeur ce dernier montant de \$115,000.00.

Pour l'item de la dépréciation des limites à bois, maître St-Laurent, dans son même argument (pp. 63 et fine et 64) la fixe à la somme de \$54,000.00; c'est trop, la Cour, toujours à raison de la preuve contradictoire en accorde 10% soit \$5,400.”

20 Although the arguments of all Counsel heard at Bar were taken by stenography they have not been reproduced as part of the printed case for this appeal, but they are on file as part of the record. For this reason it may be convenient to cite the portion of the argument of Mr. St. Laurent at pages 50 and 51 and at pages 63 and 64 to which the judgment refers:

“ Nous sommes dans cette situation, nous avons droit à une indemnité juste et équitable. C'était la principale partie d'une industrie qui consistait en plusieurs parties et qui se tenaient comme un tout.

30 Le Juge: C'est sous l'item “lumber business”.

Me St-Laurent, C.R.: Oui, votre Seigneurie.

Le Juge: C'est sur ce point-là.

40 Me St-Laurent, C.R.: C'est sur ce point-là. Nous avons allégué que c'était \$165,112.78. Goodwill for the three mills, \$100,000.00. Goodwill est une expression un peu malheureuse. Ce que nous voulions dire, c'est ' système comme système en opération—' one going value. Nous ne justifierons pas pleinement le \$165,112.78, mais nous le justifierons jusqu'à concurrence d'environ \$115,000. Nous donnerons les détails du calcul. J'ai ici ces détails, mais nous les mettrons dans le mémoire avec référence aux pièces, etc. A part cela, il y a certainement une dépréciation dans nos propriétés forestières, et cette dépréciation se chiffre dans les \$77,800.

Le Juge: Vous passez un item de \$13,913.34?

Me St-Laurent, C.R.: Je l'ai mis dans le montant de \$115,000.00. C'est une partie de "lumber business".

Le Juge: Alors, je vais le mettre comme note que les \$13,000 sont compris dans les \$115,000.

10 Me St-Laurent, C.R.: Compris dans les \$115,000. L'item de \$77,800, nous ne tenterons pas de le justifier en entier, nous chercherons de le justifier jusqu'à concurrence d'environ \$50,000 ou exactement \$54,725.

Le Juge: Au lieu de \$77,800?

Me St-Laurent, C.R.: Au lieu de \$77,800. Je ne veux pas entrer dans les détails. Mon confrère M. Scott, qui me suivra, donnera les détails de cela, mais je désire discuter les évaluations ou estimations qui ont été faites par M. Pepler". (continues)

20 pp. 63-64:

30 " Nous avons affirmé que ce commerce de bois valait environ \$20,000 par année. Quoique la preuve ne soit pas aussi satisfaisante que possible, loin de là. Si nous avions tenu des des livres qui nous auraient permis de donner des précisions mathématiques, ç'aurait été préférable, mais cette preuve est une preuve qui permet de se faire une idée de l'importance du commerce de bois de M. Cross, et si ce commerce de bois est anéanti comme conséquence des opérations de la Gatineau, il a droit à une indemnité substantielle. Votre Seigneurie en viendrez peut-être à la conclusion que vous ne pouvez pas nous accorder plus que les \$115,000 que nous établissons pour la valeur physique de nos propriétés et une dépréciation sur une partie des \$54,000 que nous réclamons comme dépréciation de nos limites, mais vous avez des éléments qui démontrent qu'il avait là un commerce important et profitable, qui a permis à cet homme qui a commencé avec rien d'avoir en 1926, au moment où il a été inondé, un actif d'environ \$400,000".

40 In view of the above statement of the learned Counsel for Respondent, it is interesting before proceeding to a discussion of the evidence to examine Exhibit D-142 (Case 5, p. 95). This is a statement eventually secured, with other yearly statements, from Respondent after various attempts had been made by Appellant to get some clear idea of Respondent's financial position in 1926 and previous years. Respondent kept no books and was either unwilling or unable himself to give any figures on this subject, declaring that

statements of his affairs were in the hands of his auditors and his experts (Respondent on Discovery, Case 9, pp. 53-57).

10 The Exhibit D-142 is a statement of Respondent's affairs for 1926 prepared by his auditors, who are Chartered Accountants of Ottawa, and is declared to be based upon information supplied by Respondent himself. It is a statement of assets and liabilities, and gives no information as to revenue and expenditures. It is important to remember that this statement is obviously intended to include everything owned by Respondent, not only assets concerned in this litigation but also all his assets in other parts of the country miles away which are not concerned herein, and which, it will be observed, make up by far the greater portion of his worth.

The attention of the Court is respectfully directed to the following facts appearing from an approximate and non-technical analysis of the statement on its face without reference to the evidence.

20 (a) The surplus, or total of all assets over all liabilities, is \$286,026.25 (Case 5, p. 97, line 39).

(b) Of this surplus \$102,141.77 (p. 97, line 24) consists of mercantile assets, such as sawn lumber logs, ties and some timber limits, horses and wagons, accounts and bills receivable and bank balance. Of course none of these are actually affected in any way by the flooding; indeed they are in large part at far away points not concerned herein.

30 (c) The deduction of this sum of \$102,141.77 from the total surplus leaves \$183,884.48 of fixed assets. This is the total net worth of Respondent in fixed assets.

(d) The following fixed assets are at remote points not in any way concerned herein:

P. 95	(line 30)—Sawmill at Low (14 miles away) . . . . .	\$ 1,400.00
	(line 33)—Frame house, Kirk's Ferry (5 miles away) . . . . .	1,275.00
40	(line 37)—Boarding house at Cascades (2 miles away) . . . . .	5,925.00
	(line 45)—Lots in Ranges 11 and 12 (about 4 miles away) . . . . .	15,000.00
P. 96	(line 1)—Land at Meach Lake (about 5 miles away) . . . . .	1,000.00
	(line 4)—Electric mill, machinery and five acres at Alcove (about 8 miles away) . . . . .	3,250.00

	(line 10)—Steam mill, farm and 1,300 acres at Lot (15 miles away) . . . . .	30,400.00
	(line 16)—Sawmill and machinery, houses, roads and dams at Pickanock (about 40 miles away) . . . . .	47,431.25
	(line 27)—Land at Perras (40 miles away) . . . . .	4,400.00
	(line 34)—Water power at Quyon (on Ottawa River) about 50 miles away . . . . .	3,000.00
10		<hr/> \$113,081.25

(e) The deduction of this sum of \$113,081.25 of fixed assets located at places not concerned in this litigation from the total fixed assets of \$193,736.25 (p. 96, line 36) leaves \$80,655.00 as the total declared value of fixed assets which in the statement have any physical relation whatever to this case taken as for the year 1926, when by the Special Act the valuation is to be made; in other words it indicates the part of Respondent's worth in fixed assets which these properties represented in 1926, including Cascades Rapids, the Farm Point lumber business and the electric business, before deducting liabilities.

The Appellant desires to make it clear that the foregoing analysis is made taking the statement alone as it has been produced by Respondent's auditor, Mr. A. M. Milne, a Chartered Accountant of Ottawa for the year 1926. As stated above, it purports to list all the assets then existing, including bank balance and even horses and wagons, and in the absence of any books of account produced by Respondent it must be taken as documentary evidence emanating from Respondent himself and making proof of what Respondent owned and the value thereof at that time.

The Appellant points out that the property at Farm Point claimed for in Plaintiff's supplementary declaration dated March 5th, 1932, is not all included in the 1926 statement. For instance, in respect of timber limits in particular (for which depreciation alone of \$77,800.00 is claimed (Case 1, p. 42, line 33)) it is difficult to determine whether they are all in the statement or not, but if they are, then this claim alone is almost as great as the 1926 declared value of all the fixed assets applicable to this case, which fact is evidence in itself that far from being depreciated they had increased enormously in value after the date at which by the Special Act the damage is to be assessed. None of the Respondent's timber limits are actually affected by the water; indeed they are all miles away from Farm Point and only a very small percentage of the property making up this total of \$80,655.00 is actually affected even at elevation 324.5.

At Farm Point the property of all kinds physically affected at elevation 324.5, of which the portion between 321.5 and 324.5 is only theoretically subject to effect by seepage, is shown in parcels A, B, C, D, E-1 and E-2 on Exhibit D-160 is as follows:

(a) Land—total 30.05 acres, of which

- 10
- (1) 17.73 acres are below the 318 level and their submer-  
sion is stated in paragraph 17 of Respondent's Supple-  
mentary Declaration (Case 1, p. 39) to have no effect  
on the lumber business. They are, however, submerged  
and the Appellant offers to pay for them;
  - (2) 10.33 acres are between 318 and 324.5 to which latter  
level Appellant offers compensation to Respondent al-  
though it is 3 feet above the level given in the Special  
Act. None of this is piling ground and a large part is  
subject only to the possible effect of seepage;

20

  - (3) 1.9 acres of piling ground of which one acre is between  
318 and 321.5 and 9/10ths of an acre is between 321.5  
and 324.5.

(b) Total buildings: Five groups affected up to 324.5, some  
only theoretically affected by dampness or seepage. The five groups  
are numbers 5, 6, 9, 10 and 30. The small power house is also affected,  
but will be dealt with separately under remarks on the electric busi-  
ness.

30

Although the foregoing are the only properties affected up to  
the 324.5 level, the Court has awarded the sum of \$115,000.00, which  
includes property in no way directly affected by the water, such as  
the sawmill and machinery built in 1928 replacing the old mill which  
was burned down in the same year.

Between 30 and 35 buildings.

40

Part of the alleged value of the dam at the top of the hill, the  
other part being adjudged against the Appellant under the electric  
business.

A plot of land on a hill some distance from the site of the lumber  
industry and referred to in Plaintiff-Respondent's declaration as " 20  
acres on the hill ".

About 30 acres of other land at varying levels above 324.5.



A certain property forming part of Lot 24C not even owned by Respondent, described in the declaration as two lots.

With regard to all these admittedly unaffected properties, as well as those affected, the judgment for \$115,000.00 is based not upon the evidence, but upon the statement of Respondent's Counsel that Respondent had justified a claim of about (environ) \$115,000.00, which incidentally is more than that given by MacRostie, Respondent's chief witness, as the physical value of everything claimed for  
10 whether affected and unaffected after deduction of salvage value.

As will be observed, the Respondent's own statement for the year 1926 shows total fixed assets for all properties at Farm Point and elsewhere which have any reference to this case of approximately \$80,000.00.

Apart from the condemnation of \$76,000.00 for extra judicial costs the Court has granted a total sum of \$271,500.00 for all items  
20 claimed for in this litigation, which sum is more than three times the total declared value of about \$80,000.00 applicable in the 1926 statement to the fixed assets involved, leaving aside the fact that these assets are in large part entirely unaffected by the flooding.

In other words, if the Respondent had received by the judgment \$80,655.00 he would have been paid for every fixed asset shown by the statement as affected by all items of this litigation at the full declared value thereof even though they are only in small part affected. He has received judgment for \$271,500.00, which would  
30 leave him with all these assets paid in full, whether affected or unaffected, as well as leaving him in possession of the great part of these assets, and in addition increases his net worth by nearly \$200,000.00.

The Appellant respectfully submits that the learned trial judge has made an award with little or no reference either to the facts or to the evidence, and that on this item of the lumber business as on the various other items of the award the amount allowed is out of all proportion to what the clear weight of testimony indicates would  
40 represent just and fair compensation even on the most generous scale.

#### PROOF AS TO THE LUMBER BUSINESS

The issues between the parties with respect to this item are clear cut. The Respondent states that the water at a controlled elevation not exceeding 321.5 feet at Farm Point would destroy his lumber business there for the sole reason that it so affects his piling

ground as to render the business valueless. He consequently claims from the Appellant the physical value of the whole industry, including assets which are admittedly not actually affected and in many instances not even adjacent to the water there, including over 40 groups of buildings of which only five groups would actually be affected by the water.

10 The Appellant contends that at elevation 324.5 (3 feet higher than referred to in the Special Act) there is affected at Farm Point either by submersion or as a possible result of seepage 30.05 acres of land and five groups of buildings. The word "group" is used because some of the buildings affected have sheds or small out-buildings appurtenant to them.

20 The Appellant contends definitely that of the land affected up to the level 324.5 only 1.9 acres is piling ground, and that up to the 321.5 level only one acre is piling ground, and that none of this 1.9 acres was actually used for piling lumber in 1926, although some of it was used for depositing cordwood or slabs at that time.

30 The Appellant further contends that the 1.9 acres of so-called piling ground can be raised by filling in, and offers as compensation for the damage to this 1.9 acres alone the sum of \$10,300.00, which includes the total cost of filling in, rip rapping the shore and raising the railway spur running toward the sawmill from the main line of the C.P.R., as well as an allowance of \$1,000.00 for inconvenience caused to Respondent. In addition, the Appellant of course offers to pay for the other land and buildings to which reference is made above as being affected up to the elevation 324.5.

The buildings and land other than piling ground are relatively unimportant as between the parties, and Appellant believes that the parties are on common ground in considering them as not essential to the business; in other words, not property the loss of which would affect the carrying on of the business.

40 That Respondent's contention with regard to destroying of his lumber business at Farm Point is based solely upon loss of piling ground is clearly shown by the evidence of Respondent's principal witness, MacRostie, who has been assisting Respondent for many years in connection with his claims against Appellant (MacRostie, Case 9, p. 176):

"Q.—There is one more question I would like to ask you with regard to this claim of Mr. Cross, in so far as the Farm

Point lumber industry is concerned: does the claim arise from any other reason than loss of piling ground?

A.—At Farm Point?

Q.—Yes.

A.—I would think the loss of piling ground was the main reason.

Q.—The main and only reason?

A.—As far as I know.”

10 And again at page 178:

“Q.—Let me come out boldly and say that I conclude that those three or four acres, instead of having to pay you \$265,000.00 for the value of your whole industry, including timber limits which are miles away, that Mr. Cross should be given enough money to properly place that ground in a condition to make it available as a piling ground?

20 A.—If you can give him enough money to properly replace it, I think it would be fair compensation.

Q.—In other words, you would agree that a just and fair compensation both to me and to you would be arrived at, if I could give him the necessary money to replace his piling ground?

A.—If you can produce for him the necessary money to give him a piling ground that would be satisfactory.

Q.—And in that case you would think he would be justified in desisting from all these enormous claims for timber limits?

A.—Now you are getting into the legal side.

30 Q.—But if we restored to him his piling ground, you believe that being the underlying claim, the balance of the claims for the whole of this advanced industry should vanish?

A.—If you put it in as good a condition as it was before.

Q.—We have only to restore to him his piling ground, in your opinion?

A.—Of course, there are certain houses—leaving those aside.”

Evidence of Respondent on Discovery (Case 9, p. 79) as follows:

40 “Q.—I am speaking only of the lumber business. The unit of the lumber business at Farm Point, the only effect is on that unit. It could operate successfully by itself as one unit. It is physically possible to operate it in every respect, except insofar as the piling ground?

A.—There is the piling ground, and there is no way to ship out there. The railway is taken away.

Q.—The railway spur and the piling ground are the only two possible objections raised by the flooding?

A.—On that business.

Q.—That is all.

A.—Yes.”

#### AREA AND PHYSICAL FEATURES OF PILING GROUND

10 It is therefore necessary to analyze the proof which has been made as to the physical characteristics of the piling ground and as to the effect which a controlled water elevation not exceeding 321.5 may have upon it, and in this connection the statement contained in paragraph 17 of Plaintiff's supplementary declaration (Case 1, pp. 39-40) is a clear statement of fact as follows:

20 “That had the Plaintiff been permitted to carry out the hydro-electric development referred to in Paragraph 17 of the Declaration (original declaration), he would have raised the waters of the Gatineau River to a point not higher than 318 feet at Farm Point which would not have affected said lumber business,” (etc.).

This is a definite allegation of fact indicating beyond question that no part of the lumber business would be affected by a water elevation of 318 feet, and as a consequence the effect upon the lumber business must be the effect upon such land as may be shown to be piling ground between the elevation 318 and the elevation 321.5 referred to in the Special Act.

30 The above is clearly borne out by the evidence of the Respondent himself at page 37 of his Examination on Discovery (Case 9) as follows:

“Q.—In other words, at elevation 318 the water will not flood any of your piling ground?

A.—I would have no trouble. There is none of my piling ground affected at 318, that I have piled lumber on. At 318 I was in no way affected with what I used as my piling ground.

40 Q.—In other words, there was no land that you were using as a piling ground which was affected by the 318 level?

A.—That I was using as a piling ground, no.

Q.—Or that you wanted to use as a piling ground?

A.—I did not want to.

Q.—You never had occasion to use it?

A.—No.”

In view of the foregoing allegation of Plaintiff's declaration and the above statement in his testimony, Appellant is justified in assuming, and does assume, as one of the admitted facts of this case, that the total effect upon the piling ground and consequently upon Respondent's lumber industry at Farm Point takes place above the level 318 and up to the level 321.5.

10 What, then, does the proof show to be the area of piling ground affected between these levels?

In order to answer this question definitely and with absolute accuracy, most careful surveys of this site were made and the Plan D-160 (Book 3) was produced by Appellant.

20 This plan was prepared by S. E. Farley, a Quebec Land Surveyor of long experience, and has been absolutely corroborated by the witness Cassels, another Land Surveyor, who, after the plan was made, was sent on the ground to make an independent survey and who produced the sketch Plan D-176 which was found to correspond with the Plan D-160.

The Appellant emphasizes the importance of this Plan D-160 and it has spared nothing to ensure its absolute accuracy both with regard to areas and elevations.

On the Plan D-160 are shown several parcels of land A, B, C, D, E-1 and E-2.

30 The parcel "A" is essentially the most important parcel from the point of view of this case, for it is the only parcel which has any reference to the piling ground. In the parcel "A" the most important plot is the portion on the right colored in red.

40 It will be noted that the portion of parcel "A" edged in the original yellow follows the contour line 318 (Note: The yellow pencil mark curving left has no reference to the parcel nor to the actual plan; it was put on by a witness to illustrate a point which has no application here). From the table of areas given on the upper part of the plan it will be noted that the portion edged in yellow, that is, the area below the contour line of elevation 318, has an area of 15.05 acres. This land is low-lying and includes what has been referred to as the "Delta", and a considerable part of it, as has already been stated, was submerged yearly during varying periods, as indicated in Exhibit D-173. It has already been noted that the Respondent's Supplementary Declaration alleges, and the Respondent himself in his evidence states definitely, that the submersion of this land up to

the 318 level, which are shown on the plan contains 15.05 acres in parcel A has no effect whatever on the lumber business.

10 The area edged in green on the right side of parcel "A" is what may be termed, in so far as the lumber industry is concerned, non-essential land, because it has no reference to the piling ground which is on the other side of the creek. It will be observed that this green section includes buildings groups numbers 5, 6, 9 and 10, with the lean-tos, and small out-houses appurtenant to these groups, as well as the small out-house (4-C) appurtenant to group 4, which is outside of the area. It also includes building No. 11, which is the power house, to which reference will be made hereafter in discussing the electrical business.

As has been stated, the question of value of this land in green and the buildings thereon is of only secondary importance.

20 Having in view that the whole claim for the lumber business is admittedly based upon loss of piling ground, as set out in the testimony of Mr. MacRostie cited in the foregoing, and having in view that the Respondent's declaration supported by his own evidence is definitely to the effect that the lumber business is not affected by a water elevation of 318, and that none of the land below that level was piling ground or was ever intended to be used as such, it must be definitely taken for granted that the only effect upon the lumber business is caused by loss of such piling ground as may lie above the level 318 up to the level 321.5 referred to in the Act.

30 As a consequence of the foregoing, the most important part of parcel "A" is the portion thereof on the right side edged in red which shows definitely that the total area of piling ground affected from 318 to 324.5, three feet higher than the Act mentions, is 1.9 acres, and that the only area affected between 318 and 321.5 is approximately one acre.

These facts have been proven beyond any doubt.

40 Exhibit D-160, Farley (Case 11, pp. 124, 5.)

Cassels corroborated Farley as to the accuracy of the plan (Case 12, pp. 49 to 51).

It next falls to determine what the situation was, as to piling ground, before the water was raised, and particularly in the year 1926 referred to in the Special Act. In this connection, Appellant refers to Exhibit D-187 (Book 4), which Appellant believes to be an

exhibit of very great importance. It is a panoramic photograph taken on September 21st, 1926, and Appellant became aware of its existence only a short time before this case began.

10 On the extreme right side of the photograph there can be seen a small part of the Provincial Highway running up to Maniwaki and points in the north. Proceeding to the left, there are seen several cottages and then a building with a cupola. This is Respondent's summer house. The C.P.R. main line is seen disappearing around a curve going north to points up the river. It is crossed at the curve by the Mulvahill (or Dunlop) Road.

20 The spur line running from the C.P.R. main line on Respondent's property is also shown with some freight cars upon it. This spur line curves around to the left and stops below the sawmill which is seen in outline through the trees behind the power house, which is the small white concrete structure. The sawmill may also be marked as the building which is connected with the top of the hill by a narrow white platform. In the foreground the outlet of the creek is seen running down toward the river. Its bed, and the surrounding land, has been referred to as the Delta.

The importance of this photograph lies in the following:

30 There is a road running in front of the power house which begins somewhere among the houses on the left side of the creek, and proceeds to the right across the creek, and passes directly in front of the power house and in front of the lumber piles and connects with the Mulvahill Road somewhere near where a motor car is shown as standing.

The picture shows definitely that in 1926 the only portion of the property upon which lumber was piled was above this road, and that considerable quantities of slabs or cord wood were also piled above this road. It further shows clearly that in 1926 there was not even a trestle for piling lumber below the road.

40 The Appellant is not contending that the portion below the road was unused by Respondent, for it is clear that there were deposited thereon certain quantities of what appear to be slabs or cord wood, but Appellant does contend in view of the fact that Exhibit D-160 makes it definite that none of the land above this road on the mill and piling ground side of the creek is flooded or even affected by a water level 324.5, that there is no basis whatever in fact for the claim that the lumber business has been destroyed.

The Appellant further states that this photograph in itself demonstrates the incorrectness of Respondent's statement (Case 9, p. 35) that "there is no place to pile one cord of slabs or lumber".

The Exhibit D-160 shows the road in dotted lines, and spot levels on the piling ground above the road show this portion to be high and dry.

10 It also shows (edged in red) the total area affected of piling ground below the road upon part of which slabs are deposited, and this total is 1.9 acres between the levels 318 and 324.5. The total area of piling ground between 318 and 321.5 has been definitely established at approximately one acre (Farley, Case 11, p. 124).

Below the level 318 the declaration states there is no effect upon the lumber business. The Respondent states definitely that he never used or intended to use the land below that level for piling purposes (Case 9, p. 38).

20 In face of the statement in Respondent's declaration and of the evidence which he himself has given, and in view of the accurate Plan D-160 and of the definite picture of the whole situation in 1926 disclosed by the photograph D-187, the attention of the Court is respectfully drawn to the further evidence of Respondent and of his witness MacRostie.

30 The Appellant believes it be reasonable to expect that the Respondent himself could have given some clear statement as to area of land he had used as a piling ground, and that Mr. MacRostie, who has worked with Respondent since 1926 (and for whose services Appellant has been condemned to pay over \$16,000.00) should have been able to give concise evidence on this very important question, seeing that the whole claim of Respondent for the lumber business admittedly rests upon it. The following, however, indicates how erratic and even misleading are their statements in this connection:

Respondent on Discovery (Case 9, p. 36):

Q.—What area of your piling ground has been affected by this water?

40 A.—Every bit of it has been affected.

Q.—I am speaking only of your piling ground.

A.—Up to the present time, the biggest part.

Q.—How much of the whole area of the piling ground?

A.—I could not say. You would have to get the engineers to tell you that.



Page 37:

Q.—Do you tell me you cannot give me a rough or approximate estimate of the area of your piling ground as originally made?

A.—No. If I knew the level, I would have a rough idea.

Q.—I mean before the Company Defendant came on the river at all.

A.—I had the whole total then.

10

Q.—How much was it?

Witness: Before the Company came?

Counsel: Yes.

A.—It would probably run around 30 or 40 acres. I do not know how many acres it would be.

Q.—Would it be 10?

20

A.—Somewhere thereabouts. I do not know. I have not any idea.

(Continues):

Q.—What space did you have?

A.—Somewhere around 20 or 25 acres.

Q.—Of piling ground?

30

A.—Which we did pile on. I might only pile on it once in five years. If you call it piling ground, then it would be 20 or 25 acres.

Q.—How much of that would be affected by the raising of the water to elevation 318?

A.—None at all. It never came out of the banks of Meach Creek. That is to my knowledge, of course. The engineer has been over the ground. Speaking of the levels at Farm Point, it never came out of the banks of Meach Creek, coming up to the mill, at 318.

40

Again at the bottom of page 38:

Q.—If none of your land was affected at elevation 318, how many acres do you maintain have been affected at 321.5?

A.—Speaking of the piling ground, it is all affected.

Q.—How many acres of piling ground are affected?

A.—I do not know.

Q.—Why do you not know?

A.—Mr. MacRostie will give you those figures.

Q.—Then how do you know there is going to be any considerable effect, if you do not know the acreage affected?

A.—The piling ground is all affected.

Q.—Then you do know it is all affected?

A.—Yes. But, whether the acreage is 15, or 20, or 25, or 30, or what it is, I do not know. I know it is 15 or 20, anyway; and probably more.

Q.—And it is all affected?

A.—It is all affected, yes.

10 Q.—And it is all rendered useless to you as a piling ground?

A.—As far as I am concerned, it is all useless.

It seems probable that the Respondent in the foregoing uncertain estimates is including as piling ground the area up to the level 318, the submersion of which as appears by his supplementary declaration does not affect the lumber business, and which in his evidence he states was not used or intended to be used as piling ground.

20 If, on the other hand, he is not including this area, then there still remains to him of piling ground the 15, 20 or 30 acres, whatever it may be, less only a total of 1.9 acres even when reckoned to an elevation three feet higher than the Act provides, and in this case his statement that no piling ground remains is not true.

Proceeding along the same lines to analyze the evidence of MacRostie, to whom the Respondent refers as being the person who would give the figures respecting the area in question, his testimony is as follows:

30 (Case 9, p. 176, line 44):

Q.—Let us not work at cross purposes. Leaving aside any question of any development, what is the amount of piling ground which is going to be affected, because he says there is nothing affected up to 318: what is the amount of piling ground which, in your opinion, having made Plan P-93 as to the area of piling ground, which would be destroyed by the operations of the Company at 321?

40 A.—Mr. Cross' property which he owns at that point between—the part I should say between the railway and the hill which will be affected by your development to the said elevation contains about 17 acres. Now, he will be deprived of the use of all of that. How much of that is absolutely necessary for him I am not prepared to say.

Q.—Do you know how much of those seventeen acres are above the 321.5 level? You have told me that insofar as the item of lumber business is concerned, the only adverse effect to

it which the Gatineau Power Company has made is loss of piling ground?

A.—Yes.

Q.—And you built up quite a large sum of money, \$200,000, against us on that item, and I would ask you, as it seems to me rather important, to know exactly what area it is we are affecting of piling ground, because that is the whole question?

10 A.—That was why I was asking you which way you wanted the answer given. Are you admitting the development up to 318?

Q.—I am talking about this level that started at 321.5, how many acres, in your opinion, of piling ground has been affected?

A.—I am telling you one thing first, that I do not know exactly the area that Mr. Cross has used or contemplates using for a piling ground, so I am saying that all the area below the 321.5 will be submerged by water and rendered useless, and that area according to your own plan, and that is why I used it, is around 17.6 acres.

20

Page 177, line 35:

Q.—You say that up to 325 there are seventeen acres of piling ground affected?

A.—Seventeen acres of land available for him for use. I won't say he is using all that piling ground, because I don't know.

Q.—Seventeen acres of piling ground available?

A.—Seventeen acres of land for piling grounds, or in use.

30

Q.—I would like to know what would be affected between 321.5?

A.—There is very little between 321.5 and 325. They are quite close together. I have taken off the area.

Q.—You don't know whether those seventeen acres have ever been used by Mr. Cross as a piling ground?

A.—I would think it had not all been used.

Q.—How many acres would you think had been used?

40

A.—I could not say, because I never saw Mr. Cross in operation, nor examined it critically during his big years.

Q.—Could you tell me how much land would be required for the piling ground?

A.—I could not.

At page 178, line 20:

Q.—Have you any idea what the area would be between level 318 and 321.5?

A.—I would like the privilege of calculating it.

Q.—You could not give me a rough idea of it? Would it be three acres?

A.—I should say some place within 318 and 321, possibly about four acres. Don't hold me to that as an absolute figure.

Q.—But as Mr. Cross definitely says, not only in his deposition, but in his declaration, his lumber business would not be affected by a level of 318?

10 A.—I don't care what he says.

Q.—If the Gatineau Company is to compensate Mr. Cross to 321.5, we ought to compensate him for those four acres, should we not?

A.—If you can.

Q.—What makes you think we cannot?

A.—It depends upon you to define compensation, then I will answer your question. Is it a monetary compensation or reproduction of equivalent area?

20 Q.—Let me come out boldly and say that I conclude that those three or four acres, instead of having to pay you \$265,000 for the value of your whole industry, including timber limits which are miles away, that Mr. Cross should be given enough money to properly place that ground in a condition to make it available as a piling ground?

A.—If you can give him enough money to properly replace it, I think it would be fair compensation.

30 Q.—In other words, you would agree that a just and fair compensation both to me and to you would be arrived at if I could give him the necessary money to replace his piling ground?

A.—If you can produce for him the necessary money to give him a piling ground that would be satisfactory.

Q.—And in that case you would think he would be justified in desisting from all these enormous claims for timber limits?

A.—Now you are getting into the legal side.

Q.—But if we restored to him his piling ground, you believe that being the underlying claim, the balance of the claims for the whole of this advanced industry should vanish?

A.—If you put it in as good a condition as it was before.

40 Q.—We have only to restore to him his piling ground, in your opinion?

A.—Of course, there are certain houses—leaving those outside.”

From the foregoing it will be seen that this witness refers to the area in parcel A below 321.5 as 17.6 acres (p. 177, line 26) and states that the area between 321.5 and 325 is very small as the contour lines

are close together (p. 177, line 42). As a matter of fact this latter statement is quite correct, for the plan shows only 1.59 acres between 321.5 and 324.5, and if this be added to 17.6 acres, then the total area to 324.5 in parcel A as testified to by this witness is 19.19 acres.

As this area includes 15.05 acres below the level 318 as shown on Plan D-160, upon which the witness makes his calculations, the total area above 318 is therefore 4.14 acres, against the witness's rough estimate of about 4 acres between 318 and 321.

10

It must be noted, however, that this 4.14 acres includes the portion of parcel A edged in green on Plan D-160 on the left side of the creek which has not been contended for as piling ground by Respondent, which portion contains approximately 2.34 acres and the deduction of this green area leaves the total piling ground between 318 and 324.5 according to this evidence at 1.8 acres, and consequently MacRostie substantially confirms the Appellant's own contention as to the area of actual piling ground affected.

20

The witness MacRostie, who is not a Quebec Land Surveyor, produced a Plan P-93 (Book 1) purporting to show a somewhat greater area of piling ground affected. This plan is not accurate in relation to the Plan D-160 and an attempt was made to explain this inaccuracy in rebuttal by statements to the effect that the elevation shown on Appellant's Plan D-160 had been taken from the surface of a sawdust fill assumed to have been put in since 1926, while the MacRostie plan was alleged to have been made from what the witness called the natural surface of the ground below this fill.

30

Considerable discussion and numerous objections were made by the Appellant to this attempt to set up a new situation in rebuttal, and in cross-examination of the witness it was found that independent of whether there was a sawdust fill or not both plans were in contact with natural ground at the point where the contour line 321.5 crosses the railway spur and that at that point, which is marked X on the Plan D-160, there was a discrepancy in the MacRostie plan of 185 feet in favour of Respondent.

40

A proof of the fact that the Farley Plan D-160 as corroborated by Mr. Cassels accurately reflects the situation existing in 1926 is obtained by comparing the Plan D-10 (Book 2) with the Plan D-160. This Plan D-10 was made under the natural conditions existing in 1926 before the Appellant's development was started, and long before the water was raised, and is a copy of the official plan of the development registered in the Registry Office and approved by the Government. It is significant that a duplicate of this Plan D-10 was filed

as Respondent's Exhibit P-35 and relied upon by Respondent's witness MacRostie himself. When the two plans are compared it is found that the 321 contour line crosses the spur line at the same place on D-10 as it crosses the spur line on the Plan D-160, always remembering that the scale of the Plan D-10 is half of the other. These facts, which are perfectly obvious, indicate that the MacRostie Plan P-93 is not accurate and cannot be relied upon. It does not even agree with the plan which he himself produced as Exhibit P-35 and whose contour lines he states are correct.

10

Having by the photograph D-187 viewed the situation as it existed in 1926, the year mentioned in the Special Act, the attention of the Court is directed to Exhibit P-31 (Book 4), which is a panoramic photograph showing the total effect of the flooding in 1928. This exhibit was produced by Mr. MacRostie with his evidence as follows (Case 6, p. 40):

20 "Q.—You told us what the effect was of rasing the level of the water from 318 to 320 on the power plant at Farm Point; what other effect did it have upon the properties at Farm Point?

A.—It has flooded out a good deal of Mr. Cross' piling ground below his sawmill. I have a photograph showing that. I have a panoramic photograph taken in September, 1928.

Q.—Under your instructions?

A.—Yes.

Q.—And does it compare with what you personally saw?

A.—Yes.

Q.—Will you file a copy of this photograph as P-31?

30 A.—Yes."

This photograph was therefore taken 1½ years after the water was raised to its permanent controlled operating level, and it was produced on September 22nd, 1931, 4½ years after the water had been so raised and operated.

40 It is to be noted that it was produced at the First Hearing, and that no claims for damage to the properties shown in the photograph were made in that part of the litigation. It is significant also to note that between the date in 1926 when the photo D-187 was taken and September, 1928, when the photo P-31 was taken, the lumber piles had been extended across the road to which reference has been made as passing in front of the power house, and that a trestle for piling lumber had been built into the lower area.

The witness refers to the water elevation as being 318 to 320 when this photograph was taken. Assuming for argument sake that

it was only at 318, then the only piling area affected by a further water elevation of  $3\frac{1}{2}$  feet to 321.5 would be one acre, and if seepage is included up to 324.5, the total affected over and above that shown in the picture would only be 1.9 acres.

10 The foregoing remarks, exhibits and citations from the evidence are made with a view to reducing to a reasonable degree of comparison the relative pretensions of the parties as to actual area of piling ground affected, and to sift down what will be observed were the irrelevant and inexplicable statements made in chief by Respondent's witnesses as to the extent of the affected area of piling ground, which when not probed by cross-examination operate to create the impression that the piling ground has been completely submerged, upon which contention the huge claim for the whole lumber business is made five years after the water was raised.

#### RESTORATION AND REPLACEMENT OF PILING GROUND

20 The Appellant respectfully submits that the evidence shows conclusively that only a small area of somewhat less than two acres of piling ground is affected and the topography of the site of the lumber business at Farm Point as indicated in the photographs which have been produced show without any other proof being necessary the unreasonableness of the Respondent's contention that the small area affected renders his lumber business valueless, for it appears on the face of these photographs that there is a great deal of land owned by the Respondent himself about the mill premises which could be re-arranged if necessary to replace this small acreage at a very small  
30 fraction of the amount awarded in the judgment for the whole lumber business.

The Appellant believes that Respondent has throughout attempted to magnify his damages and to force the Appellant to pay for the whole business five years after the water came up, although, as will be referred to later, he had operated the business at a greater capacity during those five years than he had in the five years up to 1926.

40 The Appellant further submits that it has definitely proven that the small area of piling ground affected can be reclaimed by filling in the ground in such a manner that Respondent would have a better and leveller piling ground than he had before. It appears that the Respondent does not desire to be compensated in this way, for before Appellant had started its evidence Respondent had produced the witness Langford, a geologist, whose evidence was designed to show that the nature of the ground was such that it would not support the

piling ground, and some evidence was made to this effect by the witness MacRostie himself.

10 Their theories, which Appellant believes to be entirely unsound, were that with the water maintained at the controlled level a softening of the soil underneath would take place which would render questionable the ability of the surface to carry the sustained weight of the lumber. In this connection an inconsistency in the evidence of MacRostie is noted, for while both he and the witness Langford in reference to remedial works proposed by Appellant attempted to show that filling in would not be satisfactory because the bearing surface of the ground would not be sufficient to support the weight, nevertheless MacRostie had previously stated that with the water level at 318, and the effect of seepage to 321, improvements were contemplated which would have been rendered necessary to the piling ground by the flooding from his client's pretended development at Cascades, which of course did not take place. His evidence in this connection is as follows (Case 9, p. 161):

20 “Q.—So his own development which was only to go to 318 and which he alleges in his Declaration would not affect his piling ground you state it would be affected up to 321.5 according to you.

A.—My statement previously was that at 318 he would certainly have to do a certain amount of improvement to his piling ground.”

30 The witness has endeavoured to extricate himself from this inconsistent position by adopting the view that if filling were done before the water was raised the ground would bear the load, but that if it was done after, the ground would not bear the load. It is necessary briefly to refer to the evidence of Langford and MacRostie because it was designed to create a doubt as to the propriety of filling in the affected area, whereas the Appellant believes that no doubt whatever exists on this point.

40 It is apparent from a close study of the testimony of these witnesses that in speaking of the piling ground they are not confining themselves to the actual piling ground area which has by Respondent himself been limited to land above the 318-foot level. This is clear from the testimony of MacRostie who has spoken of making a series of test holes covering the piling ground but who admits (Case 9, p. 173) that the only holes which went down any distance were holes numbers 1, 2 and 3 shown on Plan P-93, and two of these holes are toward the centre of the Delta and well below the elevation 318.



There is no proof made by any other witness that what the witness Langford assumed to be piling ground was in fact piling ground.

10 The water level at the time of Langford's inspection was between 318 and 319 (Case 10, p. 33) and the piling ground to which he refers is largely below the level 318. This point is of importance because as a matter of fact Langford has admitted that a part of the piling ground at or above 318 or 319 is still being used and that there is no reason why such land which is exposed, that is above 318, could not be filled in if you have a crust on it. As to this latter point MacRostie has stated (Case 9, p. 122), "First on the surface there are five or six feet of crust which is consolidated. It is hard."

20 Clearly therefore on the hypothesis of Mr. Langford himself the ground of the nature he found can be satisfactorily filled as long as the filling is done while there is still unsaturated crust on the surface, and certainly this applies to the ground from 318 to 324.5, the latter elevation being three feet above what the Act provides and approximately five feet above the normal operating level of the water. As a matter of fact the Respondent's own borings indicate that with the water level then existing of 318 to 319 and the borings made on dry land at points above 318 a hard surface was found to a depth of five or six feet (Case 10, pp. 15-16) which would be considerably below the elevation of the water. This evidence was made by MacRosite and indicates that no substantial evidence of softening of the ground has taken place above or below the water level in the five years of operation.

30 It was shown that the right of way of the C.P.R. at this point is built upon a very heavy fill upon that portion of the land immediately contiguous to the bed of Meach Creek itself and that it is undoubtedly upon the softest place in the Delta (Ralph, Case 11, pp. 214, 219-20) and that the clay beneath is bearing the whole weight of this high embankment and of the bridge and of the trains and the basic soil has been under water for centuries, and that the portion of the fill up to the level 318 has in addition been submerged for the last five years and there has been no sinking whatever in the C.P.R. right of way at this point.

40 In an attempt to explain away these clear facts Langford put forward the theory that softening had not taken place on the C.P.R. because the fill had been put on originally above the water level, but he could not give any satisfactory reason in support of this theory.

The theory itself and other statements made by Langford were directly contradicted by the witness Gill, Professor of Geology of

McGill University, and who instead of relying upon theoretical assumptions actually made tests with clay taken from the Delta at a point below the original water table of the river where the sample had been under water for thousands of years as he states (Case 12, p. 21). He tested a cube of this clay by leaving it in water for 18 days and found that there was no perceptible softening and that it retained its form, dimensions and the sharpness of its edges perfectly (p. 24). This practical experiment indicates clearly that no further softening of the clay will take place after it has become saturated and it refutes the theory put forward by MacRostie and Langford on this point.

Professor Gill made a further test of the clay with a view to determining how long it took to become completely saturated after being in a dry state and the method of carrying out this experiment is outlined at pages 25 and 26 of his evidence. A completely dry block of this clay was taken from Meach Creek and was placed in water and in four minutes it was completely saturated. This further experiment refutes the theories put forward by Respondent to the effect that saturation would not take place in the fill after the water was raised if the fill had been made before, and it demonstrates that the under-water portion of the C.P.R. right of way is in a complete state of saturation and is still able to carry the great weights which are placed upon it and which are much heavier than the piling ground would have to bear.

Further, the borings made by the Appellant indicate clearly that on those portions of the ground which would be filled in, there is nothing whatever to indicate any weakness in the ground. The result of these borings is clearly indicated in Exhibit D-166 (Book 3) and it will be observed that out of seven borings made, five were carried down to solid rock, which was encountered at elevations varying from 298 to 307½ feet.

The Appellant therefore submits that the geological theories put forward by the witness Langford have been proven to be entirely wrong, and that the nature of the soil presents no abnormal features whatever.

But apart from all these theoretical and technical discussions, the Appellant respectfully submits that the testimony of practical experts produced on its behalf is definite and uncontradicted to the effect that the entire area of approximately two acres of piling ground affected can be filled in and restored in a manner which will leave it leveller and better in all respects for the Respondent's business than it was under natural conditions.

In this connection the Appellant respectfully draws the attention of the Court to the evidence of Mr. R. E. Chadwick. This witness is the Chief Engineer and President of The Foundation Company of Canada, a company which specializes in foundations of all kinds, and the witness is an authority, recognized not only in Canada but in the United States, on matters of foundations and the bearing capacity of land.

10 The Appellant respectfully refers to the whole of Mr. Chadwick's evidence (Case 11, pp. 267-291) as being conclusive on the question of filling in and the cost thereof, and that the work would leave the Respondent in a much better position than he was under natural conditions.

20 Mr. Chadwick is corroborated by Mr. W. S. Lea, a Civil Engineer of wide experience (Case 11, pp. 294-301). Like Mr. Chadwick, he examined the ground and the record of borings and material secured in these borings and states definitely that the land can be filled in and rendered more satisfactory in every way than it was before for Respondent's purposes. Mr. Lea makes a complete answer to the suggestion of Mr. Langford that the reason the C.P.R. embankment has stood up was because it was built upon ground that was dry at the time of construction.

30 Mr. James A. Kennedy, of the Kennedy Construction Company, a contractor of long experience (Case 12, pp. 1-7) also testified for Appellant and corroborates the evidence of the foregoing witnesses. This witness is familiar with the Gatineau district and knows the conditions existing in this locality because his Company did work in connection with the raising of the highway. In addition, he built the Taschereau Boulevard between the Harbour Bridge in Montreal and Laprairie, also the Mountain Street and Guy Street Bridges in Montreal for the Canadian National Railway and the subway approaches to the Victoria Bridge. Mr. Kennedy definitely states that he will carry out the work detailed in Exhibit D-168, which is a statement of the cost of reclaiming the piling ground at the total price of \$10,000.00.

40 The Exhibit D-168 was produced by the witness Ralph, a Civil Engineer (Case 11, pp. 203-264) who, in his evidence, goes minutely into the whole subject of remedial works to the piling ground in all its aspects and he definitely states that the work can be done for \$10,000.00.

Mr. Marshall Small, a lumber manufacturer of long experience, who has been in the business for twenty-eight years, including ten

years with Price Brothers and eighteen years with the Laurentide Company, and he is presently part owner of the Pembroke Lumber Company, gives as his disinterested opinion, after a thorough examination of the property, that fair compensation in respect to the lumber business at Farm Point would be represented by the raising of a portion of the piling ground affected, plus \$500.00 to \$1,000.00 for disturbance. The witness states (Case 12, p. 122) that if interest were allowed on the cost of raising the piling ground, such interest would amply compensate Respondent for any inconvenience which he suffered since the water was raised.

Mr. Boyle (Case 12, pp. 155-162) also gave evidence for Appellant. This witness, who has spent fifty years of his life in the lumber business and who comes from the Gatineau district and who has carried on lumber operations under circumstances resembling those of the Respondent, gives as his opinion that \$9,000.00 to \$10,000.00 would be a just and fair indemnity for the piling ground item.

Mr. Paul Beique for the Appellant (Case 12, pp. 210-261), an engineer of wide experience, states that the practicability of the method of remedial works suggested by Mr. Ralph is being demonstrated on the site itself by the C.P.R. roadbed built forty years under conditions similar to those existing on the piling ground.

He states that the ground is quite able to carry the load which would be imposed upon it and he testified to a total estimate of \$10,300.10 as being fair compensation to Respondent on this item, of which the sum of \$1,000.00 represents an allowance for inconvenience. Reference will be made later to Mr. Beique's evidence as to the fair and just compensation to be paid to Respondent for the other lands and building at Farm Point, apart from the piling ground.

The Appellant respectfully emphasizes that against this great weight of proof there is really no contradictory evidence, and attention is again drawn to the fact that Respondent's chief witness, MacRostie, in his evidence already cited in this factum, has stated that if enough money is given to Respondent to properly replace the piling ground it would, in his opinion, be fair compensation.

The Appellant therefore submits that the only portion of Respondent's piling ground, and consequently of his actual lumber business, which has been affected can be replaced in a better state than it was before by the payment to Respondent of about \$10,000.00 which includes compensation for any inconvenience to which he has already been put. It also includes the raising of the spur line, the raising of the piling tramway and the loading platforms, and the rip-

10 rapping of the shore line to prevent any erosion taking place and includes also the raising of a section of the road south of the power house and the raising of the section of the road and a small bridge indicated as parcel D on Plan D-160, and even this is all upon the assumption that Respondent was actually making use of the land affected for the purpose of piling the lumber output of his mill at Farm Point above the level 318, which the photograph D-187 definitely shows the Respondent was not doing in 1926, the valuation year referred to in the Special Act.

#### THE PROOF AS TO COMPENSATION FOR DAMAGE TO LUMBER BUSINESS AT FARM POINT

The Respondent contends that the flooding has destroyed and rendered valueless the lumber property at Farm Point and all the evidence of Respondent is predicated upon the assumption that Appellant should pay for all the physical assets of the lumber business carried on there, whether actually affected by the water or not.

20 The Appellant contends, and believes it has proven, that such a claim on the part of the Respondent has no basis whatever in fact because the small area of piling ground, even if it were an essential part of the industry, can be restored and Respondent placed in a better position than he was before as regards piling ground, and consequently as regards his lumbering industry which he alleges is dependent upon the piling ground, and Appellant offers the necessary money to accomplish the work of restoration, which money the Appellant believes would be more than required to make available an  
30 equivalent area in the vicinity if Respondent did not desire to fill in the approximately two acres affected.

So firmly does Appellant believe in the justice of its stand in this respect that it has concentrated its proof upon the physical features and value of the affected properties after giving to Respondent the benefit of a water effect three feet higher than the Act provides.

40 In reviewing the evidence as to compensation for the lumber property, it is necessary to remember that in view of the conflict that exists between the parties arising from their respective contentions above outlined, they are not in reality valuing the same things, for, on the one hand, the Respondent is valuing everything in the way of physical property shown in the panoramic picture D-187 and, on the other hand, the Appellant is valuing only the land and buildings which could possibly be affected either by flooding or by the problematic effect of seepage up to elevation 324.5, three feet higher than

the Act provides, and in valuing to this higher level the Appellant believes it has in fact gone much further than was necessary, because, as has already been explained, the Special Act in fixing a level not exceeding 321.5 apparently intended that that level would exhaust every effect of the water either by flooding or by seepage, having in view the normal operating levels authorized for the development. This is perfectly logical because the operating level has been shown to fluctuate between 318 and 320 and these were the operating levels declared in the Respondent's first declaration as having existed up to  
10 the year 1931, four years after the water was raised (Original Declaration, paragraph 23, Case 1, p. 8). It was only after the Special Act was passed that the Respondent by his Supplementary Declaration (Case 1, p. 37, paragraph 6) stated that the water had been maintained, and was proposed to be maintained at the level of 321.5. Insofar as this allegation is in the past tense it is obviously inconsistent with Respondent's original Declaration and with the proof and it was no doubt made solely because of the mention of the level of 321.5 in the Act.

20 It will, therefore, be noted that although Respondent's second Declaration is clearly based on this technical interpretation, the Appellant has given to Respondent the benefit of this interpretation in his favour, and has based its valuations and its estimates of damage caused upon a level three feet higher than that provided in the Special Act.

Referring back again to the valuations, it may be stated that in the preparation of this factum considerable difficulty has been found  
30 in analyzing Respondent's evidence for the purpose of securing a clear idea of what he contends for as the value of all these affected and unaffected properties, and the matter becomes more confused when an attempt is made to relate the various conflicting sets of figures to the amount of about (environ) \$115,000.00 declared by Respondent's Counsel in the argument at Bar to have been the amount to which Respondent had testified, and upon which statement alone the judgment for this large sum is based.

40 The following remarks on Respondent's evidence in this connection are made under reserve of the objection respectfully submitted by the Appellant, that the bulk of the property, which is the subject of Respondent's evidence, is entirely unaffected by Appellant's operations and evidence of its value is remote from and irrelevant to the issue between the parties. This objection was frequently made during the trial (Case 9, p. 132, p. 142, p. 145, p. 285) and Appellant submits that none of this evidence should have been admitted.

## RESPONDENT'S EVIDENCE AS TO VALUE

The first reference to the claim for damage to the lumber business is in Respondent's Supplementary Declaration dated 5th May, 1932, and will be found in Case 1, page 42. The amount demanded is \$165,112.78 for physical assets, and the goodwill for three mills \$100,000.00, making a total of \$265,112.78.

10 The item goodwill has no practical application in the case, as no proof was made on it and the judgment is based upon physical assets.

20 It may be stated, however, with regard to this item of goodwill for three mills, that in reality there is only one mill concerned in this case. The other two mills refer to Alcove and Mileage 12 and this is somewhat misleading because the Alcove property itself is really not concerned in this case and the facts are that one portable mill served both at Alcove and at Mileage 12 and this portable mill was moved back and forth from one place to the other from time to time. The portable mill itself is not concerned here because the evidence shows that it was removed from the shed under which it happened to be at Mileage 12 and was stored in the lower part of the main mill at Farm Point before the water was raised and it appears to have been destroyed in the fire which took place at that mill in 1928 (Respondent, Case 9, p. 48). The Mileage 12 mill property, for which \$13,913.24 is claimed at the same page of the Supplementary Declaration, will be referred to briefly later in this factum. The property was a small piece of ground with a very rough shed under which this portable mill was housed and there were also some rough out-buildings. The 30 photograph D-183 (Book 4) shows the mill shed and the photographs D-184, -185 and -186 (Book 4) are also pictures of the structures on this site. This Mileage 12 item is of no particular importance in the case and it will be observed that Respondent's Counsel in his remarks at Bar, upon which the judgment is based, referred to it as being included in the amount of \$115,000.00.

40 Returning again therefore to the item of \$165,000.00 (odd) it will be observed that details thereof are alleged to be given in Exhibit P-66 (Case 3, p. 6).

### *Buildings*

No attempt whatever has been made to substantiate this sum of \$165,000.00. The first reference to it is found in the evidence of Mr. MacRostie (Case 9, p. 131) where he states that the first item of \$88,401.57 for buildings is not his valuation but that of Hazelgrove & Adamson, although the witness states he made his own valuation, which at page 132, line 10, is given as \$66,250.00 replacement value

exclusive of the sawmill and fair value as at 1926 of \$45,654.50. He produces Exhibit P-96 (Case 3, pp. 103 *et seq.*) giving details of this valuation. He then refers to the sawmill at page 134 as being somewhere between \$9,000.00 and \$10,000.00, of which the fair value in 1926 would be about 80% (i.e., \$7,200.00-\$8,000.00). He sums up the fair value of all buildings, including the mill, as \$52,000.00-\$53,000.00 (p. 134, line 35). This valuation of course includes at least 33 groups of buildings and the sawmill, none of which are admittedly affected by the water. (MacRostie, Cross-examination, p. 196, line 13, to  
10 p. 198, also p. 200).

The other witnesses of Respondent referred to as having valued all these buildings were Hazelgrove & Adamson. These witnesses stated they valued the buildings in 1926. Hazelgrove (Case 9, p. 287) gives the 1926 fair value of all buildings as \$53,000.00. It is notable that MacRostie's figure corresponds to that of Hazelgrove, although it was the old mill which had been in existence in 1926 which was valued by Hazelgrove, whereas it was apparently the new mill built  
20 after the fire in 1928 which Mr. MacRostie was valuing.

The witness Adamson (Case 9, pp. 297-299) corroborates the evidence of Hazelgrove. With regard to these two witnesses it is to be noted incidentally that Appellant has been condemned to pay 1½% (\$1,250.00) commission based on the total replacement value of \$88,000.00 for all these buildings (Exhibit P-83, Case 3, p. 95). The date of this exhibit is March, 1932, after the Special Act was passed and the evidence as to when it was rendered is most unsatisfactory (Case 9, pp. 291 and 292) and the question is rendered more  
30 doubtful upon reference to Exhibit P-82, dated February, 1927, which is an account rendered for \$216.08 and stated to be then overdue. This latter account was subsequently withdrawn. It has not been explained why Respondent should have gone to the expense of making so exhaustive a valuation in March and April, 1926, the result of which was in no way reflected in his statement, Exhibit D-142, dated September, 1926, to which reference had already been made, and the claims based upon which were not put forward until  
40 1932—six years after the valuation was made and five years after the water was raised, during the most of which five years and up to the time of the countrywide depression Respondent had continued to operate at greater capacity than he had done in the five years before 1926.

Among the 34 unaffected buildings in this valuation of \$53,000.00 there are included the hotel (group 31), the value of which is given as \$7,514.00. The witnesses Mrs. Howell and L. Rawson for Respondent stated that the cellar of this building had been damp and



even had water and ice in it since the water was raised, but they prove no liability on the part of the Appellant.

The elevation of the bottom of this cellar is 324.9 (Case 11, p. 230), that is, about four and one-half feet above the operating level of the river. The evidence of Mr. MacRostie (Case 9, p. 198) is as follows:

10           A.—My reason for thinking there is damage, is there was an under-drain out to the river, and in crossing the saturation line has broken down.

          Q.—So that, as far as the hotel is concerned, you think it is a breakdown in the drain that is causing it?

          A.—Yes, caused by the raising of the water.

          Q.—Do you not think that drain could be repaired?

          A.—I believe it functioned satisfactorily before. As to the damage, I do not want to state anything particularly about this as there will be witnesses brought to prove that part of it—

20           A.—I cannot say the drain is broken, because I have not seen it.

No witnesses proved any liability on the part of the Appellant for damage to this building and the witness Ralph for Appellant (Case 11, pp. 229-231) testifies as to the conditions existing and that he saw water in the cellar, but that it could not come from the river on account of the high elevation of the bottom of the cellar (Case 11, p. 230) and he states that a drain would cost about \$100. Mr. Beique (Case 13, p. 128) also testified as to this building.

30           This building is shown on the photograph D-187. It is on the extreme right of the picture facing the highway which runs between it and the river. It is in no way connected with the lumber business, and has been rented each summer. Nevertheless, it has been put in as part of the lumber industry and is included in the condemnation made against the Appellant.

40           The other buildings to which Appellant desires to refer are groups 27 and 40. They are also to be seen in the photograph D-187. Building No. 40 is the round house with the cupola referred to as the Comet and number 27 is the next building to the right. Apart from the fact that they are in no way affected, there has been no proof whatever of the Respondent's title either to the buildings themselves or the surrounding land. This plot is not included as belonging to Respondent on the Plan P-17 (Book 1) prepared by his own surveyor, Mr. Papineau. The location and extent of this block of land is shown on Plan D-160. It is across the Mulvahill Road from the plot parcel B.

Finally, the buildings groups 36, 37 and 38 in addition to being in no way affected by the water are actually on the other side of the river. Respondent in his personal evidence (Case 9, p. 90) admits they are not affected, and that they are summer cottages which he rented.

10 A plan of this plot of land on the east side of the river is produced as Exhibit D-163. It is referred to as the gravel pit property and \$3,000.00 is claimed for the whole of the land in paragraph 23 of Respondent's Supplementary Declaration (Case 1, p. 41). Notwithstanding this claim in paragraph 23, there is also claimed in Exhibit P-66 the sum of \$1,500.00 for five lots forming part of the same property which is a clear duplication (Case 9, p. 89), and in the end the parties agreed on a valuation of \$100.00 for all the damage to this land, which was the amount offered in the plea. Nevertheless, these three buildings still form part of the condemnation of \$115,000.00 against the Appellant.

20 The total value of these groups 31, 27 and 40, 36, 37 and 38 on MacRostie's estimate is \$15,716.00. In addition to being entirely unaffected, they do not form part of the lumber business and their deduction from the total of \$53,000.00 would leave about \$36,000.00 for 34 groups of buildings, only five of which group are affected.

30 The Appellant definitely contends that there are only five groups of buildings physically affected by flooding or possible seepage up to elevation 324.5. These (apart from the power house dealt with later under the electric business) are groups 5, 6, 9, 10 and 30. Respondent (MacRostie, Case 9, p. 196) contends there are seven groups physically affected, namely, the five cited above plus groups 27 and 31, to which reference has been made above and with regard to which Appellant respectfully submits the evidence and the Exhibits D-187 and D-160 show clearly that they are not affected.

40 After producing Exhibit P-66, which shows the value of \$88,000.00 (odd) for buildings, and P-96 and P-107, reducing the fair values as in 1926 to \$52,000.00/\$53,000.00, Respondent produced Exhibit P-122 again reducing \$52,500.00 for buildings by \$8,900.00 salvage value.

To summarize Respondent's claim for buildings it appears that the total sum of \$43,600.00 is demanded for about 40 buildings, of which 35 are not affected in any way whatever even at elevation 324.5. These 35 unaffected groups include numbers 27 and 40, to which Respondent has shown no title; number 31 (hotel) rented each summer; the summer cottages numbers 36, 37 and 38 on the east side of the river on the gravel pit property, the total damage to

which property has been agreed between the parties as \$100.00. This agreement was referred to in the argument at bar of Respondent's Counsel and is noted in the judgment (Case 13, p. 160).

In addition to being entirely unaffected none of these latter groups have anything to do with the lumber business, nevertheless all 35 groups appear to have been included in the condemnation of \$115,000.00 made in the judgment for this item.

10     The Respondent's valuation for the five groups of buildings affected is \$7,964.50, which is arrived at by adding the total values for groups 5, 6, 9, 10 and 30 given in Exhibit P-96. The salvage value for these buildings cannot be ascertained as the total salvage item of \$8,900.00 referred to in Exhibit P-122 applies to all buildings.

Appellant's valuation for these five groups of buildings is \$4,594.99 as given by Mr. Beique (Case 12, p. 226).

20                                   *Dam on Meach Creek*

The next item referred to in Exhibit P-66 is the dam on Meach Creek for which \$23,484.00 is claimed.

It next appears in Exhibit P-107 (Case 3, p. 120, line 24) where it is reduced to \$22,000.00 by the allowance of 10% to 12% depreciation. This dam is on a hill about 75 feet above the river and impounds the water which runs into the penstock to motivate the saw-mill, which is run by water power and the power house below which  
30 generates electricity.

This dam is of course entirely unaffected by the water. The Chief Engineer of the Company Appellant, Mr. Simpson, refers to it as being badly out of repair (Case 11, pp. 91-92; see also Chadwick, Case 11, p. 278). The Appellant believes that this witness, who is a hydraulic engineer of 20 years' experience, is much better qualified to testify as to the condition of this dam than Mr. MacRostie.

40     Mr. Simpson produced photographs D-155, D-156 and D-157 which give an idea of the material of which the dam is composed and the condition it was in. He found that there was a hole through the southerly end of the dam and also that the floor of the spillway had crumbled away due to the rotting of timber which had been mixed with the fill. He estimated 70% depreciation as against the 10% of Mr. MacRostie, and he valued it at \$5,270.00 (Case 11, p. 96, and Exh. D-158). The claim for this dam was again reduced by Exhibit P-122 to \$21,702.00.

As has been observed, this dam served for both the lumber mill and the electric mill and Respondent's Counsel at Bar allocated half of its alleged value to each of the industries and stated that \$10,-851.00 was applicable to the lumber industry (see p. 59, Plaintiff's Factum before lower Court, not printed).

*Penstock and Sills*

10 The next item in Exhibits P-66 and P-107 (p. 120, line 24) and P-122 (p. 143, line 14) is the item of Penstock and Sills or Saddles. The penstock is the pipe which carries the water down the hill to the sawmill and the sills are the supports upon which it rests.

The claim made in P-66 is \$4,500.00, in P-107 it is depreciated at 30% and put in at \$2,500.00 and in P-122 it is given at \$2,450.00.

20 The penstock and sills are on the hill and are entirely unaffected, and Appellant's witness, Mr. Simpson, gives a value of \$875.00 for this item (Case 11, p. 92, Exh. D-158).

*Sawmill Equipment*

The next item in P-66 is the equipment in the sawmill for which \$18,551.82 is claimed. This is reduced to \$12,145.49 by Exhibit P-107 and it is given as having a fair value of \$12,000.00 with salvage of \$4,000.00 by Exhibit P-122.

30 This machinery was apparently not in the mill in 1926 and was put in after the fire in 1928.

*Railway Spur*

The next item in P-66 is C.P.R. siding to the sawmill at \$3,001.25. This is reproduced in Exhibits P-107 and P-122 (item 9) at the same figure. The Appellant admits that this siding is affected and offers to compensate Respondent for it. The item is included in Respondent's offer of \$10,000.00 for the renovations to the piling ground.

40 *Private Roads*

The next item on P-66 is the private road around the yard—\$2,000.00. It is taken as item 10 on Exhibit P-107 as \$3,000.00. It is reduced again by Exhibit P-122 to \$2,000.00 with salvage value of \$500.00.

The witness MacRostie (Case 9, p. 137) states that this value is arrived at by simply going over the road and making an estimate as it

was without going into detail. The witness refers to part of this road as being the road up to building number 40 on the property to which Respondent has proven no title. This portion is clearly seen on Exhibit D-187, being the white piece running up to the house with the cupola on it. It is clearly shown as entirely unaffected on the photograph P-31 (Book 4) taken after the water was raised.

10 As a matter of fact the only road which is actually affected is a portion of the road running in front of the small power house, to which road reference has already been made, and the part affected is a small portion on the other side of the creek to the left of the power house.

The witness Ralph for Appellant gives the total damage to roads at \$205.00.

#### *Four Wells*

20 The next item is four wells for which the claim is \$300.00 in Exhibits P-66 and P-107 (item 11). The replacement value of these wells is raised to \$500.00 in Exhibit P-122 and the fair value is given at \$300.00 with \$50.00 salvage. The witness MacRostie (Case 9, p. 137) states that only two of these wells are physically affected, one of them being located at group 27 to which no title has been proven.

#### *Crib Work and Log Rollway*

30 The next item on Exhibit P-66 is Crib Work and Log Rollway, \$2,000.00. This is given at the same amount in Exhibits P-107 and P-122, with \$275.00 salvage in the latter case. This crib work is high up on the hill and is an accessory of the mill and is in no way affected (Case 9, p. 208).

#### *Storage Dams and Improvements*

40 The next item in Exhibit P-66 is storage dams and improvements in the upper reaches of Meach Creek, \$8,000.00, which does not appear to be included in Exhibit P-107, but it does appear in Exhibit P-122 as \$6,314.00, notwithstanding the fact that in the Respondent's Particulars given on the Supplementary Declaration this item is reduced to \$2,300.00 (Case 1, p. 46, line 23). These dams are in the back country and on a level at least 100 feet above the Gatineau River. Always under reserve of Appellant's objection as to the remoteness of these items, the witness Ralph was questioned (Case 11, p. 232) about these dams and he appraised them at about \$1,200.00. There does not appear to have been any other evidence made about them, and they are not even claimed for in Respondent's factum in the Court below.

*Service Pipes for Water*

The next item on Exhibit P-66 is service pipe lines for water. The figure is given as \$1,407.14, but this is a typographical error and it should be \$1,740.14. The item was abandoned by Respondent (Case 9, p. 145).

*Land*

10 The balance of the items are for land, including the hotel site (group 31) and 20 acres of land on a hill about a half a mile away from Farm Point and including five lots on the east side of the river to which reference has already been made.

This land, which is given in Exhibit P-66 as \$13,234.00, is given in greater detail in Exhibit P-99 and the value is raised to \$16,730.00. It is not mentioned in Exhibit P-107 but is brought into Exhibit P-122 at \$16,730.00 with a salvage value of \$4,930.00.

20 For this item the Appellant is charged regardless of location or water effect. Some of it is taken in on the basis of its possible value as subdivided property and on Exhibit P-99 there are 29 imaginary building lots referred to with a total value of \$6,100.00. These imaginary lots are shown in detail in Exhibit P-100 (Book 1). Of course no subdivision was ever made, nor does the land lend itself to such use.

30 Twenty-four of these lots plus the hotel site, which is listed at \$1,200.00, are given a total value of \$7,310.00 for property purchased by the Respondent in December, 1923 (Exhibit P-8) for \$4,000.00. This included not only the 24 lots in this imaginary subdivision, but also the hotel on the property listed as building 31, for which the Respondent asks a depreciation value of \$9,730.00 because of dampness in the cellar, which incidentally has not been shown to have been caused by the Appellant. This \$4,000.00 purchase also included a narrow 1,400-foot strip of land between the river and the road (300 feet of which does not even belong to the Respondent) for which Appellant is asked to pay at the rate of \$1.75 per lineal foot or a total of \$2,450.00.

40

The absurdity of these values is obvious, especially in view of MacRostie's evidence (Case 9, p. 139, line 26) that in arriving at the basis of value he was guided by a number of sales in that locality, but notwithstanding this he swears that in his opinion Appellant should pay Respondent \$5,000.00 for lots, plus \$1,200.00 for hotel site, plus \$9,750.00 for the hotel, plus \$2,450.00 for a narrow strip of land along the shore, making \$18,000.00 for property for which Respondent paid

\$4,000.00 on December 18th, 1923, twenty-nine months before the valuation was to be made under the Act.

Of course the great bulk of this land is entirely unaffected by the water, but notwithstanding this it forms part of the award of \$115,000.00, and, under the judgment, apparently the Respondent can keep the property, as well as the amount of the award.

10 Further items of land apart from the above are in Exhibit P-122 shown in detail on P-99 as two residential lots—these are the portions marked F. T. Cross residence and Morrison residence on Exhibit P-100. As has already been stated, there is no proof whatever of any ownership on the part of the Respondent in these properties.

20 Finally, with respect to land, there is the item of 20 acres on the hill and again the absurdity of this claim is obvious. The land is a considerable distance away from Farm Point on a hill and entirely unaffected. The only evidence produced concerning it is by Mac-Rostie in direct examination (Case 9, p. 141) and he refers again at page 210 in cross-examination as follows:

“Q.—Do you know anything about the 20 acres on the hill?

A.—No. I know where the property is, as far as that is concerned.”

30 The property is referred to as Lot 24C and Exhibit P-113, which is a deed of sale filed to prove ownership of this property on the hill, describes five acres on Lot 25A. Exhibit P-119 is a plan filed to substantiate P-113 which shows 13½ acres of land on Lots 24C and 25C.

From the mass of the foregoing conflicting testimony and exhibits, the following appears to be an approximate estimate, taking Exhibit P-122 which appears to be intended as a summary. It will be noted that items concerning both the electric business and lumber business are included in Exhibit P-122. Taking the lumber business items alone the Appellant submits the following in connection with this exhibit and in the light of the evidence and the other exhibits to which reference has been made:

40

Buildings: Fair value .....	\$52,500.00	
Salvage .....	8,900.00	
	<hr/>	
Net total .....		\$43,600.00
Machinery and Mill: Fair value .....	\$12,000.00	
Salvage .....	4,000.00	
	<hr/>	
Net total .....		8,000.00

	Half dam at Meach Creek .....		10,851.00
	Penstock and saddles .....		2,450.00
	C.P.R. siding .....		3,001.25
	Private roads .....	\$ 2,000.00	
	Salvage .....	500.00	
		<hr/>	
	Net total .....		1,500.00
	Four wells .....	\$ 300.00	
	Salvage .....	50.00	
		<hr/>	
10	Net total .....		250.00
	Crib work and rollway .....	\$ 2,000.00	
	Salvage .....	275.00	
		<hr/>	
	Net total .....		1,725.00
	Land .....	\$16,730.00	
	Salvage .....	4,930.00	
		<hr/>	
	Net total .....		11,800.00
	Mileage 12 as claimed .....		13,913.00
		<hr/>	
20	Total .....		<u>\$97,090.25</u>

It will be noted that there is a statement in Exhibit P-122 to the effect that if Plaintiff did not develop the water power at Cascades, then the sum of \$24,000.00 should be added, representing land submerged up to level 318. Presumably this is because in the foregoing Respondent did not claim anything for the land in the delta in the bed of the creek and immediately adjacent to it up to the level 318, because to be consistent with his Cascades claim, which was made on the basis of a pretended development there, this land up to 318 would have been submerged.

The area of this land up to 318 is approximately 16 acres and consequently it will be observed that in addition to the \$97,090.25 referred to above, Respondent expects to be paid for the land up to 318 if he is not allowed an indemnity at Cascades on the basis of a development.

The Appellant, of course, in its estimates of land and property damage, to which reference will be made later, includes this land below 318 and offers to pay for it on the basis of the proof made by Appellant's witnesses, Mr. Paul Beique and Mr. Bedard, Chief Assessor of the City of Hull, which estimate is considerably less than \$2,000.00 for all land affected at Farm Point up to elevation 318.

This reference to \$24,000.00, which is at the rate of \$1,500.00 per acre for the land up to 318, flooded yearly, is merely a statement



set down in the exhibit and is unproven and it is obviously absurd and out of all reason.

It will be observed, therefore, that even taking the Respondent's absolutely extravagant valuation of all the assets affected and not affected at Farm Point and Mileage 12 at about \$97,000.00, as indicated in the foregoing, the Court in allowing \$115,000.00 has exceeded the amount of even these valuations.

10 It is further to be noted that the learned Counsel, in referring to this figure of about \$115,000.00, stated that other Counsel for Respondent would give details, but the argument of other Counsel at Bar throws little or no light on the subject. Both parties, however, filed factums before the lower Court which form part of the record, but have not been printed for this Appeal, and for this reason and in order to get information bearing on this subject it is necessary to refer to the statements made in the factum of the Plaintiff in the Court below (Plaintiff's Factum in the Superior Court, pp. 59-61) as follows:

20 " In paragraph 27 of the Supplementary Declaration, Plaintiff claims the sum of \$165,112.78 as the replacement value of the physical assets comprising the sawmill and its accessories, together with \$100,000.00 as for the good-will, or, in other words, the value of the business as a going concern.

30 The Plaintiff has not proved, nor does he claim the said replacement value of \$165,112.78, but has proved and does claim for the fair value of the physical assets as in 1926 and for the business as a going concern. Such fair value is set out in detail in Exhibit P-122, and it will be noted that this exhibit contains not only a valuation of the physical assets of the lumber business but also those of the electrical business, so that the following, selected from P-122, appertain to the lumber business only:

	Fair Value	Salvage Value
Machinery in mill .....	\$12,000.00	\$ 4,000.00
Buildings .....	52,500.00	8,900.00
Dam at Meach Creek (of which approximately only one-half can be attributed to the lumber business, viz., \$10,851.00) .	10,851.00	.....
40 Part penstock and saddles .....	2,450.00	.....
C.P.R. siding .....	3,001.00	.....
Private roads .....	2,000.00	500.00
Four wells .....	300.00	50.00
Cribwork and rollway .....	2,000.00	275.00
Mileage 12 .....	13,913.00	.....
	<u>\$99,015.00</u>	<u>\$13,725.00</u>

“ On P-122 there is also the item ‘ Land, per Exhibit P-99: Replacement Value—\$16,730.00; Fair value—\$16,730.00.’ This item will be dealt with separately hereafter.

10 Mr. MacRostie’s evidence as to the fair value of the items above set out is found at pages 33 *et seq.* of Volume II, Plaintiff’s Evidence. The buildings covered by the item ‘ \$52,500.00 ’ are valued by the witnesses Hazelgrove (page 328, Volume II, Plaintiff) and Adamson (page 349, Volume II, Plaintiff), and it will be noted that they together made their valuations in March and April, 1926, and they state that the value of the buildings in 1926, after deduction of depreciation, was about \$53,000.00. The depreciated values *in extenso* are shown on Exhibit P-109.

20 It is submitted that the valuations placed by these witnesses who went over each building by itself in 1926 must be taken as establishing the proper value to be allowed for the buildings, as against the values placed thereon by the Defendant’s witnesses who examined them only in 1932, six years later.

30 The Defendant contends that only certain of these buildings, to wit, numbers 5, 6, 9, 10 and 30, being below contour line 324.5, need to be paid for by the Defendant, but the Plaintiff’s contention is, and it has been set out fully elsewhere herein, that the flooding of Plaintiff’s properties up to 321.5 has had the effect of totally destroying his lumber business and that these cottages had been built for the purpose of housing the employees engaged for the lumber business, the continuance of which has been prevented by the operation of Defendant’s development at Chelsea.

The Plaintiff, in Paragraph 27 of the Supplementary Declaration, gives a credit as follows:

‘ Less assets that would have been lost had Plaintiff himself raised the water to 318, as per list filed as Plaintiff’s Exhibit P-67 . . . . . \$53,000.00 ’

40 P-67 gives the *replacement value*, but Plaintiff is obliged to deduct only the fair value. P-114 gives the fair value of the same items for which P-67 gives the replacement value. The assets in P-114 appertaining to the lumber business are:

\$ 6,426.00—Fair value of cottages nos. 5, 6, 10 and 30  
24,000.00—Land loss  

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\$30,426.00

In addition, there should be deducted the sum of \$8,500.00 as the mean of the estimate given by MacRostie (page 713, Volume II, Plaintiff) for remedial work to the piling ground prior to any flooding. The total reduction is \$30,426.00 plus \$8,500.00, which equals \$38,926.00. \$38,926.00 deducted from the fair value of the assets, viz., \$99,015.00, leaves a balance of \$60,089.00.

10           Moreover, the Plaintiff concedes that the total destruction of the lumber business may entitle the Defendant to a reduction for the salvage value, consideration being given to the fact that \$6,426.00 has already been deducted as the fair value of cottages nos. 5, 6, 10 and 30.”

20           From the foregoing it will be noted that the balance arrived at is \$60,089.00 after giving credit to the Appellant for various properties which it is presumed would have been affected by Respondent’s proposed development at Cascades up to the level 318, and from this sum of \$60,089.00 Respondent concedes that further indefinite deductions should be made.

          It is stated at page 93 of the factum that a sum of \$13,913.00, the amount in full claimed for Mileage 12, is included in the total amount for physical assets shown in the tabulation on page 59.

30           Proceeding further to examine the references in the factum in order to get light upon the statement of Counsel at bar that the details of this sum of \$115,000.00 would be given by other Counsel, it is necessary to refer to the same factum (Page 95) under the heading “ Value of lumber business as a going concern ” as follows:

          “ The amounts proved for the value of the physical assets and the depreciation thereof are as follows:

40                     \$46,364.00—as set out on page 61 as the fair value of the mill, machinery, buildings and accessories of the lumber yard at Mileage 12—after deduction of depreciation, salvage and allowance for a development by Plaintiff at Cascades.  
                          \$54,725.00—depreciation of timber limits.”

and at page 99 (last lines) and page 100:

          “ The sum of \$11,150.00 represents the value of the land flooded up to 321.5 to be vested in the Defendant Company in full ownership (upon payment) as well as the depreciation suffered by the land above 321.5.”

The substance of the summing up as given in the last two quotations from Plaintiff's factum in the Court below leaves the situation as follows:

	Total amount claimed for physical assets affected and unaffected at Farm Point and Mileage 12, after deducting depreciation, salvage and allowance for a pretended development at Cascades	\$46,364.00
10	Total of land up to 321.5, as well as depreciation suffered above that level	11,150.00
	Total	<u>\$57,514.00</u>

As has been stated, the foregoing observations and citations from the factum in the Court below have been made in an attempt to discover the figures which the learned Counsel stated would be given by other Counsel to justify the amount of about \$115,000.00 upon which the judgment is based and Appellant respectively submits that they show definitely that Respondent does not attempt to justify to within \$57,000.00 of the amount awarded by the judgment, even for all the physical assets affected and unaffected of the lumber business, and it indicates also that the judgment has been rendered upon the bare statement of Counsel without any reference whatever to the evidence, and even without any reference to the resumé of the whole matter which Counsel stated would be made later.

#### MILEAGE 12

30 It is here necessary to refer briefly to the property referred to as Mileage 12 for which \$13,913.00 is claimed. This is a plot of land of about  $3\frac{1}{4}$  acres several miles down the river from Farm Point. It had a spur from the C.P.R. main line running into it. The C.P.R. right of way at this point had to be moved slightly at this point owing to the Appellant's operations and the C.P.R. consequently instituted expropriation proceedings against the Respondent for part of the property required for this purpose. These expropriation proceedings are still pending.

40 As the Appellant would eventually have to reimburse the C.P.R. for any indemnity awarded to Respondent on that expropriation, the Appellant has declared its readiness to compensate Respondent for the whole of this small property at Mileage 12 to the amount of its full proven value, and Appellant respectfully requested that the learned trial judge in disposing of this item in his judgment should indicate whether or not Appellant was being condemned to pay for the whole property or only the part affected in order that Appellant

would not be subject to the possibility of having to pay twice over in case a further indemnity was allowed in the railway expropriation.

No reference, however, has been made to this matter in the judgment and this Mileage 12 property is included in the award without any reference whatever as to its value as indicated clearly in the evidence.

10 This property has already been mentioned in this factum and the facts are that, out of about  $3\frac{1}{4}$  acres, 1.3 acres were submerged. Respondent's witness MacRostie (Case 9, p. 145) states that he did not make a value of the site, including land and works at Mileage 12, but he filed an estimate of the buildings as Exhibit P-101, giving as their fair value \$1,915.00, which includes seven structures, although he states at page 145 that there are only one or two sheds affected. This evidence was given on October 6th, 1932. Later in his evidence (Case 10, p. 241) he estimates the land at the absurd figure of \$2,000.00 an acre.

20 The character of the structures on this site are clearly shown on the Exhibits D-183 to D-186 inclusive, and as already stated, the portable mill had been removed before the flooding took place.

Mr. Beique for Appellant produced a sketch plan of the property filed as Exhibit D-194 (Book 3) and in his evidence (Case 12, p. 235) testified to a valuation of \$3,572.00 for the property, including land and buildings, which sum also includes a \$500.00 allowance for the siding and 10 per cent for disturbance.

30 The foregoing summary of the Respondent's valuations, including as they do practically everything which Respondent owns at Farm Point, without any reference to the effect of the water, is respectfully submitted as indicating how exaggerated is Respondent's claim and how greatly the Appellant would be prejudiced by a condemnation based upon the amount ultimately contended for by Respondent, and when it is noted that the judgment accords to Respondent many thousands of dollars more than the actual amount contended for, the Appellant respectfully submits that there is no justification in law or in fact for the finding of the learned trial judge,  
40 which has apparently been made without any reference whatever to Appellant's evidence.

#### *Appellant's Valuation of Damage to Lumber Property*

Appellant has throughout endeavoured to eliminate irrelevant matter from its evidence as to what would constitute a just and fair compensation to the Respondent for the damage to the lumber prop-

erty at Farm Point and, as has already been stated, it has produced an accurate plan (Exhibit D-160) of all the property physically affected to the level 324.5.

10 The parties appear to be on common ground to the effect that a considerable part of the property affected at Farm Point is not essential to the lumber business and this part could not form the basis of a claim for the total value of the business itself. The Appellant believes it is justified in stating that these, what may be called unessential properties, are shown on the Plan D-160 as being all of parcel "A" except the portion coloured in red, and all the other parcels B, C, D, E-1 and E-2 shown on the same exhibit. None of this land is piling ground and it is admittedly on loss of piling ground alone that Respondent's claim for the industry is based.

20 Appellant's evidence as to the value of this unessential property is given by three witnesses as follows: Mr. E. Bedard, Chief Assessor of the City of Hull (Case 12, pp. 168-187). This witness embodies the result of an independent and disinterested valuation in Exhibit D-181 (Case 5, p. 150).

30 He deals with land values in each of the parcels at pp. 168 to 171 and testifies to a total land damage up to elevation 324.5 of \$4,267.00 for 28.67 acres (p. 171). He discusses the buildings at pages 171-173 and gives their value in 1926 as \$5,046.77 (page 173). His total valuation for all land and buildings is \$9,314.67. This is, of course, exclusive of piling ground. Mr. Bedard in the foregoing was valuing the five groups of buildings affected and, questioned as to the total of all 40 buildings under reserve of Appellant's contention that only five are affected, he gave the total 1926 value of all buildings as \$35,681.39 (p. 174).

40 Appellant's witness, James Gillespie, a contractor of Ottawa, testified as to building values alone. He produced Exhibit D-182 as a summary of his evidence. He finds the 1932 replacement value of all buildings to be \$6,928.00 and the 1926 replacement value to be 10 per cent higher, \$7,600.00-\$7,700.00 (p. 190). This compares with Mr. Bedard's figure of \$7,209.68 as replacement value at that time. He estimates the depreciation at approximately 30 per cent all around. The witness, who is a building contractor, stated that he would reconstruct new all the five buildings affected for \$6,928.03.

Mr. Paul Beique, for Appellant, examined and reported upon both land and buildings, and Appellant respectfully draws the attention of the Court to the fair and logical manner in which Mr. Beique's valuations were arrived at (Case 12, pp. 210 to 261).

Mr. Beique produced a duplicate of Plan D-160 as Exhibit D-189 and he has set out in different colours on this plan various portions of the individual parcels A to E with clear reasons for his various valuations. He deals with land values at pp. 214 to 226 and with building values from pp. 226 to 229. His total land valuation, apart from piling ground, is \$6,184.90, and his valuation of all the buildings actually affected is \$4,944.99 as of 1926. This was taking into consideration a rate of depreciation of 40 per cent allowed by Respondent's witness MacRostie. He produced a summary of his  
10 evidence, Exhibit D-188 (Case 5, p. 156).

It is noted that the items having to do with the lumber business on this summary are items (a) lands at Farm Point, (b) buildings at Farm Point, (c) damage to lumber industry, (d) Mileage 12 property. (The reference to an elevation of 321.5 is obviously in error, as Mr. Beique's evidence throughout refers to the level of 324.5.) This witness also produced Exhibit D-191 giving most minute details of the items entering into the valuation of his buildings.

20 Appellant's evidence as to unessential lands and buildings may therefore be summarized by the following statement: Mr. Bedard's total for land and buildings is \$9,314.67. Mr. Gillespie—buildings only about \$5,300.00 (*i.e.* \$7,600.00 replacement value in 1926 less 30 per cent depreciation). Mr. Beique—land and buildings, \$10,-779.89.

Appellant's evidence as to the damage to the piling ground and the industry is given by the following witnesses: Mr. Marshall Small,  
30 an independent lumber operator of long experience (Case 12, pp. 90 to 136) definitely gives the capacity of the mill as 1,800,000 feet per year plus 40,000 ties. He states (p. 102) that, running at capacity, the profit should be about \$6,000.00 a year and believes that one would expect a return of at least 15 per cent on one's money having in view the risks of the business, and he testifies (p. 103) that in his opinion the capitalized value of the whole industry at Farm Point is approximately \$40,000.00, which would include timber limits (p. 103). He states (p. 104) that reasonable compensation in so far as  
40 the industry is concerned would be the cost of raising the piling ground so that it would not be affected by the water in the river and that an allowance of \$500.00 over that cost for inconvenience would be sufficient.

Mr. Boyle, another old lumber operator (Case 12, pp. 155 to 162), estimates the cost of putting the piling ground into condition at between \$9,000.00 and \$10,000.00 (p. 158). The evidence of Mr. Chadwick of the Foundation Company, Mr. W. S. Lee and Mr. C. E.

Ralph with respect to the cost of replacing the piling ground have already been referred to in the foregoing part of this factum. They are unanimous in giving figures in the neighbourhood of \$10,000.00.

Mr. Paul Beique deals with the piling ground at pages 229-232 in his evidence and he arrives at a total figure of \$10,310.00, which covers the cost of filling in the ground, raising the spur line, removing and replacing the lumber piles in order to make way for this fill, rearrangement of the wood conveyor, rip-rapping the shore line and  
10 raising the railway spur. The sum of \$10,310.00 also includes an item of \$1,000.00 for contingencies and inconvenience.

The Appellant therefore respectfully submits that the clear proof which it has made indicates that the total of fair and just compensation to the Respondent for damage to the lumber properties at Farm Point is represented by the totals of between \$10,000.00 and \$11,000.00 for land and buildings and between \$10,000.00 and \$11,000.00 for piling ground, making a total of approximately \$21,000.00, and for the small property at Mileage 12 a just and fair  
20 indemnity would be \$3,600.00, which is slightly more than the amount indicated by Mr. Beique as item E of his summary, and that the grand total for the lumber property, including Mileage 12, would be not more than \$25,000.00.

#### TIMBER LIMITS

For the item timber limits the Court has awarded the sum of \$5,400.00. This is stated by the learned Judge to be 10 per cent of the amount claimed by Respondent's counsel. It is the respectful  
30 submission of the Appellant that there is nothing in the record of this case which justifies any allowance whatsoever for timber limits.

These limits are of course entirely unaffected by the water and they are miles from Farm Point (Case 9, p. 60). Respondent's Supplementary Declaration, paragraph 20, states that owing to the destruction of the lumber business the timber limits suffer depreciation of \$77,800.00. This was later reduced to about \$54,000.00. The various limits are set out under letters (a), (b), (c), (d), (e) and (f) in paragraph 20 of the Supplementary Declaration (Case 1, p. 73).  
40 The item (b)—400 acres freehold adjacent to Alcove—was struck out by Respondent and the limits referred to at (a) and (c), making a total of 1,400 acres, were reduced to 877 acres (Respondent on Discovery, Case 9, pp. 57-58).

Respondent's evidence as to where he purchased the limits claimed for and the amounts paid for these properties is set out in his Examination on Discovery (Case 9, pages 57-65).



Under reserve of Appellant's objections as to the remoteness and irrelevancy of all this claim for timber limits, Appellant remarks as follows:

Under items (a) and (c) the balance left after Respondent's reductions consist of 877 acres, of which 577 acres were apparently received by Respondent from William Cross and 200 acres from Mrs. John O'Rourke, the latter in 1908, and the price paid was \$1,150.00 cash, being at the rate of \$5.75 an acre.

10

Included in the 877 acres was also 100 acres apparently purchased from James Hammond in June, 1927, after the water was raised, and they did not belong to Respondent in 1926. The price paid was \$1,000.00, which was at the rate of \$10.00 per acre. Details of the various timber limits are given in Exhibit D-125 (Case 5, page 49).

The 200 acres adjacent to Farm Point as set out in (d) of paragraph 20 of the Declaration are referred to under (b) Exhibit D-125. Of these 200 acres, 150 acres under this item appear to have been  
20 purchased from Mrs. John Murphy in December, 1928, the price paid in the Deed, Exhibit D-129, is \$400.00, which is at the rate of \$2.66 an acre; the other 50 acres being purchased from Martin Hendricks in July, 1928, at the rate of \$18.00 an acre.

The last item of timber limits, apart from Crown licenses, is item (f) in paragraph 20 of the Declaration referred to as (d) in Exhibit D-125, namely, 520 acres under timber lease from private individuals. In support of this acreage a Deed of Declaration, D-133, is filed  
30 (Case 5, page 66).

This Declaration, D-133, is a curious document, executed on March 19th, 1932, and purports to set forth various agreements which existed between Respondent and Wyman Cross and their father, William Cross (although the latter is not a party to the agreement), regarding cutting rights on certain lots owned by Wyman Cross. In conjunction with it is filed a Deed of Donation, D-132, whereby William Cross gives to Wyman Cross three and one-half lots comprising in all 350 acres. In the last paragraph of the deed  
40 an attempt appears to be made to bring under the agreement the balance of this acreage to make up 520 acres referred to in the Declaration.

The balance of timber limits referred to in paragraph 20 of the Declaration comes under (e) of paragraph 20 of the Declaration, namely, 5,120 acres of timber under Crown leases. In justification of these Crown leases the Respondent has produced Exhibit P-131 (Case 5, page 60), the documents forming part of this Exhibit D-131

emanate from the Department of Lands and Forests, Quebec, and are all dated April, 1932, and it would appear that between 1919 and 1928 these yearly licenses were not in force.

Concerning the Crown limits, Respondent claims depreciation on eight square miles, or eight times 640 acres, making a total of 5,120 acres. He uses the figure of "eight square miles more or less" set out in the license. This Crown limit is open to settlers, as set forth in the lease, Exhibit D-131, and the Respondent admits that at  
10 least 200 acres have been taken up. The area given is an arbitrary one, as shown by the details of lots and ranges, and the total shown is only  $33\frac{1}{4}$  lots, or about 3,325 acres. Appellant's witness, Mr. Pepler, who is a forest engineer and who examined the limits, states (Case 12, page 61) that the area of the limit containing merchant-  
able timber is about 200 to 250 acres. This limit is many miles from Farm Point. Mr. Pepler made a complete cruise of all Respondent's timber lands and carried on his work pursuant to the rules laid down in such cases. He produced Plan D-177 and the estimate of available  
20 wood, D-178, which shows a total estimate of slightly over 3,000,000 feet board measure at all the limits shown on the plan. This total would scarcely be sufficient to keep the Farm Point mill going for two years. In any case, clearly Respondent had depleted his wood to the point of practical exhaustion before claiming for the value of his lumber industry from Appellant.

Respondent attempted in rebuttal to make evidence of a supposed minute cruise for one lot of 100 acres and the witnesses McCuaig, Hamilton and Racine were examined to show the result of  
30 this cruise. The Appellant draws attention to the unsatisfactory evidence given in cross-examination. In particular the witness Racine stated that he never measured standing timber before in his life.

But apart from all that and even assuming for the sake of argument that the estimates made by Pepler should be five times greater than they are, even then there would not be sufficient wood upon the limits to keep the Farm Point mill in operation more than five or six years and Respondent's own witness Omanique has stated that  
40 it is necessary to have a supply of wood for twenty years to make it of any value.

With regard to the freehold lots it is to be noted that these are all ordinary lots of land in a more or less settled part of the Gatineau District, in the Township of Hull, and not far from Ottawa, and they cannot really be designated as timber limits in the common and accepted meaning of the term.

Finally, the extraordinary nature of the claim for depreciation appears from the following evidence of Respondent himself on Discovery (Case 9, page 107):

10           “ Witness: On the west side of the river we are much closer. I have timber within eight miles of Ottawa. On the bush alone, for a corded proposition, I would sell it out at \$40.00 or \$50.00 an acre, acre by acre—just to a wood man—no lumber at all. They could go right to the bush, and make four or five trips a day with a truck.

Counsel (continuing):

Q.—Then, how have they become depreciated by \$25.00 an acre, if you can sell them at any time on account of their proximity to Ottawa? You think they could be sold at any time for \$40.00 an acre?

A.—Yes.

20           Q.—Then how could they be depreciated to the extent of \$25.00?

A.—I am in the lumber business. I am not in the wood factory business.

Q.—If their original value was \$40.00, and you can still sell them for \$40.00 . . . .

A. (interrupting)—You ask me the value, and how I came to get the value for it. I say you are getting good value at \$40.00 an acre.

Q.—In other words, you think you could sell it for \$40.00?

30           A.—If I was in the business I could probably go out and sell them. They have been paying as high as \$50.00 an acre for wood for a corded proposition.

Q.—This land is still there, and you can sell it at any time you want to sell it?

A.—I am not in the business now.

Q.—Do you swear you are not in the lumber business now?

A.—I swear I am not in the lumber business.”

40           It is to be noted with respect to the last answer of the Respondent that his witness, Mr. Plante, stated that in 1931 Respondent's tie contract with him ran out, which indicates that he was in the business at least up to that time, which is four years after the water was raised and five years after the date of valuation given in the Special Act. In addition, the present litigation in no way affects his mills and lumbering business at the various other places mentioned herein.

*Remarks as to Lumber Business*

It will be observed from the foregoing that the Appellant has been condemned to pay Respondent for all physical assets at Farm Point, whether affected or unaffected, at an approximate figure mentioned by Respondent's Counsel in argument, which figure is in excess of the estimates made by Respondent's own witnesses as to the value of those assets, and that on this one item of lumber business alone the judgment is for a sum greatly in excess even of that con-  
10 tended for by Respondent in his factum in the Court below for practically all the physical assets regardless of the effect of the water upon them.

Apparently no consideration whatever has been given by the learned trial judge to the evidence of the Appellant, and under this item it would appear that the Court below has again penalized the Appellant and has granted Respondent all and more than he has asked for.

20 The Appellant again refers to the fact that it was not a trespasser nor was it in bad faith (*Dorchester Electric vs. Roy, already cited under Cascades item*). The Appellant was in possession of statutory authority and acted throughout in a manner absolutely in accordance with the law and the jurisprudence of this Province in making a development declared by that law to be in the public interest. It was in possession of an Order-in-Council authorizing the taking of such property of the Respondent as was affected, and having been prevented from so doing by an unappealable order of a non-judicial and merely administrative body, The Quebec Public  
30 Service Commission, it proceeded to raise the water in the manner contemplated by Section 12 of R.S.Q., 1925, Chapter 46, and its right to do so has been declared by the Supreme Court in the case of *Breakey vs. Carter*, to which reference has already been made, to be a legal servitude subject only to the payment of damage caused.

Further, Appellant in good faith met Respondent in the arbitration proceedings, which Respondent himself provoked under the article in question, and stood prepared to pay whatever indemnity was declared against it in those proceedings. As has been noted,  
40 Respondent desisted from these proceedings after they had been pending for nearly two years and thereafter instituted a petitory action by which he endeavoured to force Appellant to pay an enormously exaggerated indemnity for the Cascades property under threat of causing Appellant to withdraw the water four years after its plants had been operating and after it had made contracts for its output and, if withdrawal had been ordered, it is obvious that most serious losses would have occurred to the public generally whose

money was invested in this enterprise, to say nothing of the losses to those depending on the power generated.

Having been defeated in this move by the Special Act, Respondent obviously realized from the proof which had already been made in the petitory action, which was then *en delibere*, that he had failed entirely to show that he had a water power at Cascades, or that his property there had any special value, and he consequently added the further sum of over half a million dollars to his claims by the supplementary declaration which followed the passing of the Special Act.

Throughout these proceedings there has been no explanation given of why the claim for the totality of the lumber business and of the electric business should have been withheld for five years after the water was raised and six years after the filing of Appellant's development plans, and the judgment appealed from herein refers to the fact of this enormous increase as being unexplainable.

The Appellant at no time has attempted to avoid responsibility for the damage which it has done to Respondent and it made every attempt to compensate him for the damage caused to his property at Farm Point before it raised the water, although, as has been noted, the Respondent himself made no claim for these damages until the year 1932.

The Respondent had built up a small lumber business at Farm Point and was operating his small electric plant, and Appellant, while not desiring to criticize the policy which Respondent has apparently adopted in his relations with the Appellant, nor his shrewdness in his dealings with Appellant, or to impugn his good faith in this connection, still Appellant, in seeking some explanation of Respondent's withholding of these claims for so long, draws attention to the following:

(a) In 1926, after the plans of the Appellant had been made public by registration, it is clear that the situation at Farm Point both in regard to the lumber business and the electrical business offered no justification for a claim on the part of Respondent that his industries had been rendered valueless. At that time he was operating these industries in a way which would be affected very little by the projected development of the Appellant.

Insofar as the lumber business is concerned, he was operating in a well settled district with only a small quantity of wood behind him, and he perceived, as shrewd lumbermen did, in 1926 that the lumber business, insofar as small operators were concerned, was becoming more hazardous each year, and it is the Appellant's sugges-

tion that Respondent consequently pursued a definite policy which he felt would result in his securing in the end an indemnity based on the total destruction of his business instead of compensation adequate to offset the actual injury which would be done him. In support of this suggestion the Appellant submits the following facts:

10 1. That the photograph Exhibit D-187 clearly shows that had Respondent put forward claims in 1926, or before the water was raised to its present permanent operating level as authorized, he would then have been unable to show that any essential part of the land connected with his lumber business, as then carried on, was affected.

2. That after the water was raised he built a trestle for piling lumber on the other side of the road running past the power house and piled quantities of lumber below this road, thereby fixing it as a piling ground for actual lumber as against odd lots of slabs and cordwood.

20 3. That although the annual returns made by Respondent to the Government in respect of wood operations appertaining to the Farm Point mill for the five years preceding 1926 only shows a total of 168,850 feet board measure, and the total referred for the same period for his Picanock and his other mills far away was approximately 6,556,000 feet board measure, Respondent completely reversed the situation, beginning with the year 1926, and these returns show that for five years after 1926, during four years of which the water was at its permanent operating level, the mill operations at Farm Point were stimulated up to 5,500,000 feet board measure, 30 while the other mills, which are not in question here, were depressed to 1,600,000 feet board measure (witness Blue, Case 12, p. 268, Exhibits D-196-203).

40 It must, in fairness, be said that some returns are missing for the years 1921 and 1926, in respect of wood, but the fact remains that by law Respondent was obliged to make these returns and no evidence has been brought forward to explain why they were not made, or to vary the figures given in such returns as are available, and it is significant that no returns are missing after the year 1926.

Evidence bearing on the matter has been made by the witness Plante for Respondent, who states that he had a contract with Respondent for ties to be delivered at Farm Point and that a considerable number of ties were delivered under that contract during the last ten years. There is no reason to doubt the truth of this statement because in the stimulated years Respondent actually had delivered 168,000 ties in addition to the lumber for that period, and

if he were delivering ties under that contract before 1925 the wood for the manufacture thereof was probably coming from the Picanock River. It is also significant to note that the witness Plante states that this tie contract came to an end in 1931 and that the depression commencing in 1929 very seriously affected the lumber business through curtailment of the use of ties by the railways (Case 13, p. 9).

4. The Exhibit D-141, which is the Auditor's Statement for 1925, shows the total fixed assets at Farm Point to be less than the  
10 fixed assets of Picanock and other points not concerned in this case. Whereas the 1926 statement, Exhibit D-142, dated after the Order-in-Council approving the Appellant's plans, shows a considerable increase in the assets of Farm Point and a depression in the assets in other points.

5. The witness Pepler produced the Plan Exhibit D-177 and the estimates of available wood, D-178, showing a total of slightly over 3,000,000 feet board measure available to Respondent at all the  
20 limits on the plan, which would scarcely be sufficient to keep the Farm Point mill going for more than a year or two, and it indicates that Respondent had apparently depleted his limits to the point of practical exhaustion commencing with the year 1926.

6. In 1926 the Respondent apparently engaged Messrs. Adamson and Hazelgrove to make a valuation of all his buildings on a replacement basis. As has already been remarked, this valuation was in no way reflected in Respondent's Auditors' statements for 1926, dated six months after the valuation was made, and the record of  
30 these valuations only appeared in 1932, six years after they were made.

The Appellant submits the foregoing facts as reasonably demonstrating that there is no unfair assumption involved in the statement that Respondent has pursued a policy of withholding his claims for six years in order to get the utmost he could out of his lumber business before attempting to force the Company to pay for it as a going concern at a grossly exaggerated figure.

ITEM C

DAMAGE TO ELECTRIC POWER PLANT AND  
DISTRIBUTION SYSTEM

10 The Respondent's electric power plant is at Farm Point and is operated by water from Meach Creek, carried down in a penstock from the top of the hill behind the sawmill. The power house (group number 11) is the small white concrete building on the low level to the left of the piles of lumber on the photograph Exhibit D-187.

20 The sawmill half way up the hill behind the power house is not now, nor has it ever been operated by electric power. It uses a water wheel, and when it operates, the water it uses goes off into Meach Creek and cannot again be utilized as a source of power for the electric plant below, and consequently it is only when there is sufficient water going down through the penstock to enable both the sawmill and the power plant to function that they can be simultaneously operated.

As will be observed from the photograph D-187, Meach Creek is a very small stream. Its dependable minimum flow has been definitely proven without contradiction to be in the nature of six cubic feet of water a second (Scovil, Case 11, p. 72).

30 From this small power house Respondent has a pole line running to the right of the picture and the wires are carried out to the main Gatineau Road which runs parallel to the river. The line then turned northward on this road and served in 1926, and still serves, residents along the way up to Wakefield which is about five or six miles up the river. It also serves Alcove and other small settlements in that vicinity.

40 In 1926 Respondent also had a line running down the river from Farm Point to the Village of Kirk's Ferry five or six miles down the road. A portion of this Kirk's Ferry section of the line is the only part of the distribution system which has been affected by Appellant's operations.

The flooding from Appellant's development affected the settlement known as Kirk's Ferry, and also submerged a portion of the Gatineau to Maniwaki Provincial highway which had to be relocated on higher ground further back from the river. The relocated road rejoined the old road at Cascades a short distance below Farm Point and from there northward Respondent's distribution system operates



today as it always did. The only part of the road upon which Respondent's lines were affected was from Cascades down to Kirk's Ferry, a distance of about three or four miles.

10 It will be observed from the photograph P-31, which shows the situation in 1928 after the water had been raised to its full operating level, that the power house itself is not flooded, but a water level of 321.5, as mentioned in the Act, would come within a few inches of the power house floor. In connection with this electric power plant the question of seepage does not arise because the damage is caused by reduction in operating head available for the purposes of the plant, and this head is the difference in actual water elevation between the level of the creek at the top of the hill and the level of the tail water at the point of discharge from the power house below.

20 Long before the water was raised and under natural conditions then existing, the elevation of the tail water at the point of discharge from the power house was determined by the Quebec Public Service Commission engineers at 313.9 feet and from this point to the top of the hill, where the water of the creek entered the penstock there is a difference in elevation of 74 feet, which represents the normal head available to this plant under natural conditions. Therefore a water elevation of 321.5 in the creek takes  $7\frac{1}{2}$  feet, that is to say 10% off this head, and the reduction in power is in the same ratio as this loss of head; in other words the only loss of power from this plant brought about by the operations of the Appellant is a loss of 10% of what it could produce at any given time under natural conditions according to the water available from the creek above (MacRostie, Case 6, 30 p. 105).

In addition to this 10% loss of power, the only other element of damage is the necessity for raising the power house somewhat to obviate the disadvantage of having the water so close to the floor. As will be referred to later, this is a work of very minor importance. For both the 10% loss of output and raising the power house the Appellant has offered what it believes has been shown to be ample compensation to the Respondent.

40 The only other item of damage caused by Appellant is damage to the portion between Cascades and Kirk's Ferry of the Respondent's transmission line running down the road from Farm Point to Kirk's Ferry, and before the water was raised the Appellant requested Respondent to advise as to the disposal he desired made of this line. The Appellant did the same with the Bell Telephone Company whose poles and wires were on the same piece of road and the latter Company immediately co-operated with Appellant and all its

lines and services were relocated entirely at the expense of the Appellant. The Respondent, however, made no reply to Appellant and left the poles on this section of road to be submerged. The Appellant offers adequate compensation for all the poles and wires of the Respondent affected on the piece of road in question.

10 All the balance of the Respondent's electrical system remains intact, and was operated as formerly up to 1930, in which year, owing to the poor service which Respondent had been giving to the people of Wakefield, and other places, the Quebec Public Service Commission on complaints made by these customers ordered him to give adequate service and from that time he has been purchasing power from Appellant Company. The Appellant submits that it has been clearly shown that the inadequacy of this service did not result from the flooding. The proof of the foregoing matters will be dealt with later in this factum.

*The Judgment on Item C—Electric Business*

20 The wording of the judgment on this item is as follows (Case 13, p. 159, line 43):

“ Les montants des autres items mentionnés à l'allégation 27 de la déclaration amendée, ont été résumés à la page 113 du factum du demandeur comme suit:

‘ Value of the hydro-electric plant et distribution system \$80,000.00 less \$9,237.10 ’ (voir ladite page 113 du factum);

30 Etant donné la preuve contradictoire, la Cour est disposée à accorder au demandeur la somme de \$60,000.00 comme étant une juste et équitable compensation pour la perte subie à tout le système hydro-electric;”

As has already been noted, the factums filed in the Court below have not been reprinted here, but they form part of the record, and for convenience sake, in view of the wording of the judgment the following is quoted from page 113 of Respondent's factum in the Court below as follows:

40 “(2) Value of hydro electric plant and distribution system \$80,000.00, less \$9,237.10, the amount to be deducted if Cross had developed at Cascades to elevation 318 referred to on page 57 hereof, and plus whatever salvage value there was in the hydro electric generating plant and accessories.”

Again in this item the trial judge has apparently accorded to

Respondent an indemnity based upon a statement of Respondent's Counsel, and without giving any weight whatever to the very clear evidence made by Appellant as to the actual damage and the indemnity payable in respect thereof.

10 The amount awarded by the judgment under this item is \$10,000.00 more than was claimed in Respondent's declaration for the physical assets of this business. Paragraph 27 of the Supplementary Declaration (Case 1, p. 42) claims for the electric light and power business \$50,000.00 for physical assets as set out in Exhibit P-65 and \$100,000.00 for good will. On the item of good will there is no proof whatever, and it has to all intents and purposes been abandoned by the Respondent. Indeed, it is obvious that the matter of good will could not be considered because, as has been stated, Respondent has never ceased to operate his distribution system in all its parts except the small part between Cascades and Kirk's Ferry, and the customers which he lost (about 29 in number) on that part of his line were practically all persons whose houses and lands were  
20 purchased and paid for and the houses removed by Appellant, as being affected by the flooding. Regarding these persons it is the respectful submission of the Appellant that it should not be obliged to pay an indemnity to Respondent for loss of revenue which might have been derived from these customers, as this was a normal hazard of the business of Respondent and no *lien de droit* exists between the parties in this connection. Nevertheless, under reserve of this submission, Appellant respectfully refers to the evidence of Mr. Paul Beique who deals with this particular phase of the matter in discussing the general damage to the electric business and to which  
30 evidence reference will be made later.

1. *Reduction in power output of Respondent's Farm Point power plant*

The first item of damage caused to Respondent's Electric System is the reduction of the output of the small power plant at Farm Point, and to determine this reduction it is necessary to examine the evidence as to the head and flow available at this site. It is of course obvious that the flow of water to the power house has not been inter-  
40 ferred with in any way by Appellant's works. The water originates in the high land above, and it is only the head under which this water is operated which is affected.

As has been stated, the tail race elevation below was definitely determined by the engineers of the Quebec Streams Commission, and it was later determined by the Quebec Public Service Commission before the water was raised.

Mr. Massue, Engineer of the Streams Commission, established the tail race elevation in 1926 as being 313.8 (Case 11, p. 266), and Mr. Boisvert, Engineer of the Public Service Commission, established the elevation in 1927 as 313.9 (Case 11, p. 16). The latter witness also fixed the upper level elevation at 388 feet (p. 16), making the operating head the difference between these two elevations, namely 74 feet, under which head the plant was then operating (p. 2). The raising of the tail water to 321.5 would therefore cause a reduction of  $7\frac{1}{2}$  in this normal head (i.e. the difference between 321.5 and 313.9) (p. 4) and this is equal to 10% of the total head.

The ordinary minimum flow of the creek is six cubic feet a second (Scovil, Case 11, p. 72) and this flow under a head of 74 feet would give 40 horse power (Scovil, p. 73), but as the witness pointed out, the flow in low years goes as low as two c.f.s., and this happened for three months in 1931. The available horse power with a flow of two c.f.s. is 13 horse power (p. 74). Mr. Scovil's testimony is corroborated by Dr. Lefebvre, Chief Engineer of the Quebec Streams Commission (Case 11, pp. 102-3).

To run at full capacity the sawmill requires 30 c.f.s. of water, and the power plant requires a further 25 c.f.s., making a total of 55 c.f.s. for full operation (Scovil, p. 74). This flow of 55 c.f.s. is only available about one-third of the time (p. 75).

Taking the ordinary minimum flow of six c.f.s., the total of more or less dependable power is 40 horse power, and the loss of 10% of the head causes a loss of 10% of this power, i.e. about 4.1 horse power (Scovil, p. 75). As has been stated above, this reduction is on the basis of water actually at 321.5 in Meach Creek, but as a matter of fact the reduction from the point of view of operation of this plant is somewhat less because the normal operating level of the water caused by the Appellant's works varies between 318 and 320. On the other hand, to be fair to Respondent, it must also be noted that while this 40 horse power is all that could be generated from the ordinary dependable minimum flow, there were periods during the year when he could generate more than 40 horse power, and the above evidence shows that for short periods during the year, totalling in all about 30% of the year, he could operate the electric plant at its full capacity of 150 horse power.

Mr. Paul Beique discusses this point in his evidence and assumes an outside average loss of 12 horse power. Appellant believes that this average is very much greater than Respondent actually suffered, and Appellant submits that a generous average lies midway between

five horse power and 15 horse power, that is about 10 horse power in all.

Respondent's chief witness MacRostie is in agreement that there is only a loss of 10% in the output of electricity from this plant as a result of the Appellant's works (Case 6, p. 105). The witness also admits (p. 105) that the water ordinarily came up to the power house floor every spring.

10       The Appellant submits that the following facts with regard to the capabilities of the electric plant appear uncontradicted from the evidence:

(a) That the plant's dependable minimum output in ordinary years was approximately 40 horse power of electrical energy, without the sawmill being in operation.

20       (b) That for varying periods this horse power increased up to a point where for about 30% of the time Respondent could get 150 horse power at the electric plant, with the sawmill running at the same time.

(c) That even a constant water level of 321.5 causes a reduction of only 10% in the power susceptible of generation at any given time, and that reduction represents about 4.1 dependable horse power, varying up to 15 horse power for 30% of the time.

30       (d) That the mean or average between say five horse power and 15 horse power is 10 horse power, which is considerably more than the average Respondent would actually lose in his normal operations.

(e) That to make up this loss to Respondent he should receive a capital sum of about \$7,500.00, which at 6% would yield him sufficient to purchase 10 horse power at the retail price of \$44.00 per horse power for small amounts of energy to be taken or not taken at varying times as required. (Simpson, Case 11, pp. 83-89). (Beique, Case 12, p. 233, allows \$8,800.00 but bases his calculations on an outside maximum of 12 horse power.)

40

## 2. *Readjustments to Power House*

The second item of damage to the electric system concerns readjustments which may be required to the small concrete power house. As a matter of fact this power house and the machinery can, and did, function for several years after the water was raised to its present

permanent operating levels, the only effect being the 10% reduction in its output referred to in the foregoing.

10 However, the theoretical elevation of 321.5 provided for in the Special Act and to which level Respondent is to be compensated would bring the water to within a few inches of the power house floor, and although it would not prevent the power house operating, subject to the above reduction in output, it would nevertheless render the situation inconvenient for carrying on in the ordinary way, and the power house should consequently be raised somewhat in order to meet the new conditions.

The witness Simpson gives a detailed estimate of the cost of readjustments in the power house amounting to \$1,450.00 (Exhibit D-153, Case 5, p. 136). His evidence in this connection is as follows (Case 11, p. 82):

20 “Q.—Would you be good enough to state what the total cost of that re-arrangement would be?

A.—I estimate the total cost of re-arranging the penstock, power house and the adjustments to the machinery at \$1,450.00.

Q.—I suppose that is quite a physical possibility?

A.—Oh, yes.

Q.—With an adjustment made, is there any adverse effect on this power plant apart from the loss of capacity due to the reduction of the tailrace?

A.—I would say there is none whatever.”

30 The witness Boisvert testifies to the same effect (Case 11, p. 5).

The evidence of Mr. Lefebvre on the same subject is as follows (Case 11, p. 105):

“Q.—What would be your idea with respect to making it perfectly convenient? What could be done to eliminate that inconvenience?

40 A.—The thing to do is simply raise the power house floor and raise the turbine and generator, something which can be done rather easily.

Q.—It is not much of a job? It is a physical possibility?

A.—Yes, it is quite easy to do that.

Q.—Have you examined Mr. Simpson’s estimate of the cost of raising the power house?

A.—Yes.

Q.—Would you consider that was a fair estimate?

A.—That is a fair estimate of the cost of doing that work.

Q.—And with that cost extended (expended?), the other adverse effect would be the effect only in loss of power due to loss of head through the raising of the tailrace?

A.—That would be the only factor decreasing the amount of power to loss of head.

Q.—That would be the only physical effect on that power plant whatsoever?

A.—Yes.”

10 The evidence of Mr. Scovil, another leading hydraulic engineer, is to the same effect (Case 11, p. 76):

“ Q.—Have you any suggestion to make with respect to the remedying of that condition in the physical power house itself? Could the power house be raised?

A.—There is no reason at all why it could not be. Both the units and the floor could be raised.

Q.—Sufficiently to bring them above the level of the water?

A.—Yes.

20 Q.—And the various wheels, penstocks, saddles and so on adjusted to the new level?

A.—It would be a very simple matter.

Q.—Would it be a costly matter?

A.—I do not believe so. I have not made an estimate of it, but I do not believe it would be very costly.

Q.—Would the raising of the power house in any way effect a loss of power, or bring about an additional loss of power, or anything of the kind?

30 A.—No additional loss other than the first loss brought about through raising the tailwater and reducing the head.

In other words, raising this water to 321.5 would not in any way interfere with or necessitate the shutting down of the power house; it would only mean a loss of approximately 10 per cent in the power output.”

The evidence of Respondent's witness MacRostie is as follows (Case 9, p. 187):

40 “ Q.—Is there any reason at all from a scientific point of view why that power house should not be working now?

A.—You can run the water through it.

Q.—And you could generate electricity?

A.—Yes.

Q.—And there is just as much electricity as was produced before, with the exception of that which is taken away by reason of this rise in Meach Creek tailrace?

A.—Yes.”

Respondent's witness Robertson states it is not a matter of importance (Case 10, p. 212).

The Appellant therefore submits that the evidence is uncontradicted, that in so far as the power house itself is concerned renovations can be made at a cost of not more than \$1,500.00 and that after such renovations the entire power plant can operate in a manner to produce 90 per cent of the power which it produced under natural conditions.

10

3. *Damage to distribution system on submerged portion of road between Cascades and Kirk's Ferry*

The third and last item of damage caused to Respondent's electric system by the flooding operations of the Appellant is the loss of the poles and wires and accessories on the short portion of Respondent's lines running from Cascades down to Kirk's Ferry.

20 The Appellant again respectfully points out that by law its entire work of development is in the public interest and was approved by Government authority and this involved the submersion of considerable tracts of land on the river, including a portion of the Provincial highway which ran quite close to the river for some distance. The submersion of this road was indicated on Appellant's approved plan, and Appellant also had the approval of the Quebec Minister of Roads for the submersion (Exhibit D-64, Case 4, p. 222).

30 Before flooding the road in any way, Appellant removed and re-located at its own expense the lines of the Bell Telephone Company which were on the road and requested Respondent by a letter addressed to his then solicitor and produced as Exhibit D-121 (changed to 121A) to advise what disposal he desired made of his electrical lines on the road. No reply was received by Appellant to this letter. Appellant was and has always been prepared to pay Respondent the value of this line so submerged and has offered in its Plea the sum of \$4,500.00.

40 The witness Parker for Appellant values the line at \$4,100.00 to \$4,300.00, that is to say, he gives it a replacement value of \$6,450.00 less depreciation of between 30 and 40 per cent (Case 11, p. 25).

Mr. Paul Beique for Appellant accepts Mr. Parker's valuation, but adds 10 per cent, making it \$4,576.00. Mr. Beique increases this sum by \$1,424.00 if loss of clientele on this part of the line is to be allowed. In this connection, his evidence is as follows (Case 12, p. 234):



“ Q.—You spoke about loss of customers. Would you mind telling us just what you mean by that? You have made an estimate on the basis that if the Gatineau Power Company were obliged to pay for loss of customers. Are you referring to customers who had to leave because of the Company buying out their property?

10 A.—Yes. The Company has flooded the road along which the transmission line was running, and along which there were certain lots. I understand the houses were removed to other locations. The figure I have mentioned represented, in a sense, customers that have been lost to Mr. Cross because they are not taking electricity any more from him.

Q.—Do you think it fair to ask the Gatineau Power Company to pay for loss of customers if the Company has bought the land and those customers have gone away?

A.—I think that is a matter for the Court to decide.

20 Q.—You have given the figure you consider fair, in the event his Lordship comes to the conclusion that Mr. Cross has to be compensated for the loss of customers. In the event that he is not entitled to such compensation, then your other figure applies?

A.—I am trying to give the Court what I consider to be fair tools to use to appreciate the damage under one assumption or the other.

Q.—You are speaking now of the transmission line between Cascades and Kirk’s Ferry?

A.—Yes.”

30 The evidence of MacRostie for Respondent is as follows (Case 9, p. 189), in answer to a question by the Court:

“A—The statement for the Kirk’s Ferry portion was \$7,060.44, of which I stated yesterday I allowed an average depreciation of thirty-five per cent. That would be sixty-five per cent on \$9,060, around \$6,000.

BY MR. KER:

40 Q.—That is pretty high per mile?

A.—You cannot put it on a mileage basis on the four and a half miles, because there are a lot of other loops going in, and that includes the transformers. There were nine transformers that are included in that. There is \$1,214.00 for transformers included in that.

Q.—There seems to be no difference of opinion between the Plaintiff and Defendant as to the fact that the Company may

pay for that line, and the Company offers \$4,500.00 for it, and you say it should be \$6,000.00?

A.—Yes.

Q.—I was not so much concerned with that, but what I wanted to get at was this, that out of the whole distribution system as it existed before the Company came on the river, the only part which has been destroyed by the Company is that part between Cascades and Kirk's Ferry?

A.—Yes.

10 Q.—And the balance of the system is still operating and has been operating continuously ever since?

A.—Since then.

Q.—But still we are asked to pay \$100,000.00 for the goodwill of the system?

A.—Again, I have nothing to say about the goodwill.

Q.—And we are asked to pay for \$50,000 of physical assets in addition?

A.—What item is that?

20 Q.—We are asked to pay for the power house, and to pay for everything.

A.—As I told you, I valued the physical assets.

Q.—P-65 shows the physical assets of the electric power business are \$50,000, and goodwill of \$100,000; now because we have submerged this little piece down to Kirk's Ferry, which you admit is the only part of the distribution system which is at all affected by us, we are asked to pay all this, is that correct?

A.—The statement speaks for itself."

30 The Appellant respectfully submits that the foregoing is a reasonably complete résumé of the evidence with respect to the physical damage done to Respondent's electric plant and distribution system by the Appellant's works, and that the three items of damage are the only items which Respondent can reasonably expect to claim with respect to his electrical business, and that the total of these three items, namely, \$7,500.00 plus \$1,450.00 plus (at the outside) \$5,000.00, totalling the sum of \$13,950.00 in all, represents just, fair and equitable compensation to the Respondent for the property and rights affected and that the payment of that sum would leave him  
40 in a better position than he was before.

*Respondent's claim for the whole Electrical Business*

Again under this item, the Respondent does not desire to be compensated for the actual property affected, but as he has done in the lumber business he makes a claim for the whole business and asks \$50,000.00 as the full physical value of the whole system, and

in addition he asks for \$100,000.00 for the supposed goodwill of the system (Supplementary Declaration, para. 27, Case 1, p. 42).

No attempt has been made to prove the item of goodwill and to all intents and purposes the item has been abandoned. This fact needs little comment, for the Respondent must be well aware of the peculiarities of the electric distribution business under the laws of this Province and elsewhere, and that the only element giving value to an electrical distribution system is the element of actual earnings.

10 The poles and wires, designed as they are for one purpose, are of little value unless they serve customers and produce revenue, and the accepted method of valuation of a distribution system or of any part thereof (independent of its power supply) is on the basis of a capital sum equal to a given number of times its dependable gross earnings.

This principle is very clearly explained by the witness Parker, who has been manager of the distribution system of the Appellant Company for several years and had previously been with the Ontario

20 Hydro Electric Commission for ten years (Case 11, pp. 25-30).

Mr. Parker has produced records of every distribution system comparable to that of Respondent which has to his knowledge changed hands under open market conditions in this Province in recent years. The principle which he has illustrated is accepted by the Quebec Public Service Commission (p. 27) and it is also admitted by the Respondent's witness Robertson in his testimony as follows (Case 10, p. 223):

30 "Q.—I am told that it has become fairly well standardized in this Province on a basis of four times the annual gross revenue?

A.—If you suggested that four was an average between the most parsimonious standards and the most liberal standards, I would say you were not far away, but as a matter of fact from three to six."

and again on the same page, line 24, Mr. Robertson answers:

40 "Assuming that other things were normal, the minimum price might be as low as three or four times, and the highest price would be five or six. I have seen properties bought on a basis of six times the gross revenue, and I have also seen them bought for three times the gross revenue, but the general opinion of the people who buy is that they are worth somewhere around five times the gross, in normal times."

Respondent's principal witness on this point therefore accepts in principle the basis of valuation referred to by Mr. Parker as used generally for the purchase and sale of distribution systems as going concerns, and agrees that the dependable basis for gauging the going concern value of such a system (apart from its power plant) is that the whole system is worth in the open market the sum represented by about four times its gross earnings. This going concern value includes poles, wires and other accessories, customers' contracts, and franchises, if any, and if there can be any goodwill attached to a  
10 business of this kind it is, of course, included also.

As a concrete illustration of the operation of this principle, the witness Parker produced deeds covering sales of distribution systems as follows:

Hudson Heights Municipal Distribution system (D-149, Case 5, p. 114);

20 The Vankleek Hill system—Exhibit D-148 (Case 5, p. 109);

L'Orignal system (Exhibit D-150), (Case 5, p. 122);

Argenteuil lumber system at Morin Heights—Exhibit D-151 (Case 5, p. 126);

St. Jovite system—Exhibit D-152 (Case 5, p. 130).

30 All these systems are directly comparable to that of Respondent in the matter of physical assets and number of customers and all were purchased as distribution systems pure and simple, complete with lines, other physical assets and customers, and they were all open market transactions between a willing seller and a willing buyer, and none included the power supply plant itself, and they are all on the basis of four to one or less, except the St. Jovite system, which is at five to one, due to special circumstances explained by Mr. Parker at pages 29-30 of his evidence (Case 11, p. 30).

40 An attempt was made in cross-examination of Mr. Parker to show that the Napierville system was purchased for a higher figure which worked out at about eight to one, but it was conclusively shown that this system was not comparable to the others mentioned nor to Respondent's system, inasmuch as the Napierville system was a 25,000-volt line and the Company owned and still has a most valuable license permitting it to export electricity to the United States, and the sale included immoveable properties and valuable rights-of-way on private property.

The same and other characteristics making for dissimilarity were found to exist with regard to the Bonhomme system and the Papineauville system and others which were referred to in cross-examination of Mr. Parker. In these cases valuable developed water powers and other immoveables were included in the sales.

10 In the face of these facts and of the fact that Respondent's distribution system is still operating with all its customers, except those whose properties were bought by the Appellant, it is not surprising that Respondent has not attempted to make evidence of the item of goodwill.

*Number of Customers and Revenue from Electric System*

20 In paragraph 11 of Respondent's Supplementary Declaration (Case 1, p. 38), statement is made that prior to the raising of the water the electric distribution business had for many years been yielding Respondent an annual net profit in the neighbourhood of \$8,000.00. There is nothing whatever in the evidence to warrant this claim, nevertheless, although entirely unproven, this imaginary sum is assumed not only in the declaration but in the examination of Mr. Robertson, and it is apparently upon this assumption that reference has been made to a going value of \$80,000.00 in the notes taken from Respondent's factum in the Court below and cited in the foregoing under remarks made with regard to the judgment on this item.

30 The following citation from the evidence-in-chief of Mr. Robertson is the only apparent justification for a reference to a going value of \$80,000.00 (Case 10, p. 212):

30 " Q.—Do you know that Mr. Cross had a gross revenue from his customers of some \$9,000.00 a year, and knowing that he used part of the electricity for his portable sawmill, can you give us some idea of the valuation you would place upon his system as a going concern, say, in 1926? Before answering that question, I might say that it is in evidence that his operating expenses were very low, that he had a superintendent who got a free house and free light, and he was paid varying amounts by Mr. Cross each year of something on the order of \$100 a year.

40 A.—In a general way, if a man had an electrical business which showed a gross revenue of about \$9,000.00 a year and with operating expenses, as low as suggested in the question, which would mean only about a thousand dollars, leaving a net of about \$8,000.00, one would say that the business was worth about ten times that amount, or \$80,000.00, because 10 per cent return on the investment after everything had been provided for, except interest, would be an attractive business."

In connection with the above, it has been pointed out that the electric distribution system is admittedly not an ordinary business, and the witness himself, as already quoted herein, has in cross-examination definitely acquiesced in the well-established valuation rule of between three and six to one which, even on a hypothetical and entirely imaginary earnings basis of \$8,000.00 a year, would, at five to one, amount to only \$40,000.00.

10 Again the witness is asked the following in cross-examination (Case 10, p. 230):

“ Q.—You were asked by Mr. Scott to assume a gross revenue of \$9,000. You do not know anything about that personally?

A.—I do not.

Q.—Nor do you know anything about his operating expenses?

A.—No, I do not.”

20 Again the witness appears to repudiate any such revenue from the system, for at page 223, line 13, his evidence is as follows:

“A.—Three to six times the gross revenue. *The gross revenue in his case was about \$4,000.*”

30 Every effort was made in examination-on-discovery of Respondent himself to find any real record of his earnings in 1926 without result. In fact, if he is to be believed himself, he knows nothing at all about whether he made anything or not about that time and in the years previous. The unsatisfactory character of his evidence will be seen by reference to page 33 of his examination (Case 9), as follows (speaking of the electric business):

“ Q.—Did you make any money in the year 1925?

A.—I do not know. When you speak of the electric system I do not know.

Q.—Did you make any money in 1924?

A.—I do not know.

40 Q.—When did you begin purchasing power from the Defendant Company?

A.—About three years ago.

Q.—In what year?

A.—I do not remember.

Q.—Was it in the year 1929?

A.—I do not know.”

Endeavour was then made to find how many actual customers the Respondent had in 1926 and Respondent produced as Exhibit

D-122 (changed to 122A) (Case 5, p. 35), a supposed list of his customers in 1926; and as Exhibit D-123 (page 42) a supposed list of his customers in 1931.

The 1926 list contains 308 names, and the evidence with respect to its compilation is at pages 19-22 of Respondent's examination-on-discovery (Case 9), although it is not easy to determine from this evidence the real facts of the matter.

10 In any event this list of 308 supposed customers is found on further examination of the Respondent to contain the names of some forty persons at Farm Point who paid him nothing for their electricity (Case 9, p. 14).

20 The Appellant submits that it is unfair to include these forty names as real customers in order to show as large a customer list as possible in 1926, especially when they do not appear to have been included in the list of the 1931 customers, amounting to about 190, when it is, of course, in Respondent's interest to show as few customers as possible. Consequently if these forty names be taken from the list of 308, the number of 1926 customers falls to about 268.

30 But this is not the only deduction which must be made from that list, because it will be observed that on further questioning (beginning at page 26), in approximately twenty instances the names of customers have been duplicated, the explanation being that they were operating more than one meter. The Appellant submits this again is an unreasonable method of preparing a list purporting to be an enumeration of an actual number of separate customers by name, and if the Exhibit D-122A is supposed to represent individual customers, independent of how many meters they had (for which purpose the list was produced), then a further deduction of at least twenty names duplicated should be made from that list and the number of individual customers paying revenue in 1926 falls to something in the neighbourhood of 248.

40 The 1931 list (Exhibit D-123) indicates 190 customers and consequently the difference between 1931 and 1926 taken on the above basis is approximately sixty customers. The Respondent, however, on page 5 of his examination-on-discovery (Case 9), having been asked to pick out the customers who had been on his Kirk's Ferry branch, and who had been lost by their properties being bought up by Appellant, was only able to pick out 29 in all. These customers are the ones having a "k" against their names in Exhibit D-122A. There is consequently a discrepancy of about thirty customers, whose loss has not been satisfactorily accounted for, and in respect of whom there is no evidence that they were lost by the Appellant's opera-

tions, and in view of the unsatisfactory way in which the original list was prepared, it seems doubtful whether they ever existed at all or not.

Further, it is a most significant fact that Respondent states at page 311 of his examination (Second Hearing, Case 9) that he had 200 meters in 1925, and that these meters were all taken out in that year and left out for two years, and he testifies as follows with respect to the situation two years after the water was raised (Case 9, p. 314):

“ Q.—You had two hundred, and you had to buy thirty-eight more?

A.—I think thirty-eight, to the best of my knowledge.

Q.—So everybody was on a meter then?

A.—Yes.

Q.—So you had 238 customers at that time?

A.—Yes.

20 Q.—That was two years after the water was up?

A.—About that.

Q.—Two years after the water was up, you had 238 customers still going on in your system?

A.—Yes.”

The foregoing represents the situation according to Respondent's own statement about two years after the Kirk's Ferry section had been cut off. It is clear, then, from his own admission that if he only has between 190 and 200 customers on his line at present, the reduction from 238 which he had after the water was raised is not attributable to Appellant.

40 The foregoing indicates how uncertain and unsatisfactory is the evidence as to the number of customers he had before the flooding and how many he has now, and the only thing which seems to remain clearly proven is that Respondent on his own statement has not lost more than thirty customers on his whole system and that these customers were lost because their properties were purchased by Appellant and the service was consequently discontinued. These customers would not have been available to Respondent even if his line between Cascades and Kirk's Ferry had not been submerged, because the people had moved away, and it may be inferred that Respondent realized this and preferred to let his poles and wires be flooded out and get an indemnity for them rather than let the Appellant relocate them at its expense, as Appellant was willing to do.



*As to revenue from the system*

It is important to note that although Respondent in his examination-on-discovery was unable to give any idea of what his earnings on his electric system were, still when he was called as a witness on his own behalf he undertakes to give from memory over several pages of his deposition various amounts that were being paid to him by individual customers who are still on his lines, and he makes the extraordinary statement (Case 9, p. 278) that probably 90 per cent  
10 of his customers would pay him in a "dicker", labour and material.

It is obvious that the Appellant, as any other litigant would be, is at a disadvantage in attempting to control the verbal statements of such a witness because of the entire lack of books of account or other writings kept by Respondent, but in the only instance where Appellant's Counsel was able to control the witness' statement, by reference to the one and only list of meter readings which was produced (Exhibit P-106), it was found that the figures given by Respondent from his memory were exaggerated out of all proportion  
20 to what these meter readings actually show (Case, pp. 316-319).

A great number of witnesses were brought forward by Respondent to say what they were paying to Respondent for electric service. It is difficult to understand why Respondent should have felt it necessary to bring so many witnesses to make this proof, seeing that all these witnesses are still taking service from him and have apparently never been off his lines, but no doubt they will all be taxed with expenses against the Appellant for attendance from the Gatineau district to give evidence which throws no light of importance  
30 upon the matter.

In particular the Appellant believes this evidence to be unimportant because of the direct statement of Respondent's chief witness MacRostie, that the annual revenue when he gave his evidence was \$3,800.00 from 190 customers, that is to say, an average of slightly over \$20, which coincides almost exactly with the estimate given by Appellant's witness Parker of what the revenue per customer from such a system should be, based on the experience derived from the rural lines of his own company and that of the Ontario Hydro.  
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It is further submitted, as above stated, that the question of loss of goodwill cannot possibly be an element in this litigation, and that what Respondent is contending for is reimbursement of what he claims to be the total value of the physical assets of the electric business, and that for these physical assets he claimed in his declaration \$50,000.00, and the judgment has granted him \$60,000.00.

The foregoing discussion as to the going concern value of Respondent's electrical business is under reserve of the objection respectfully submitted by the Appellant that there should be no question whatever in this case of compensating the Respondent on the basis of destruction of his electric business as a going concern, and under the same reserve the Appellant points out that in Respondent's own statement produced by his auditor for the year 1926 as Exhibit D-142 (Case 5, p. 95), to which reference has already been made in this factum, the value of Respondent's electric plant and  
10 power house as depreciated is given at \$18,750.00, whereas in Exhibit P-65 (Case 3, p. 5), what appear to be the same items are valued at \$13,410.29, and \$36,389.71 is added for 31 miles of transmission line, with poles and transformers, to make up the round sum of \$50,000.00 claimed.

The Respondent, however, does not even attempt to justify the \$50,000.00 claimed in the declaration, for his chief witness Mac-Rostie (Case 9, p. 198) states definitely that his total fair value for Exhibit P-65 is \$33,127.60, and he later, by Exhibit P-122, reduced  
20 this to \$25,427.60 by deduction of \$8,000 salvage (Case 10, p. 240).

In the face of these facts, the Appellant very respectfully submits that the judgment for \$60,000.00 on this item, which is \$10,000.00 more than claimed in the declaration and nearly \$35,000.00 more than even the Respondent's estimate of the total fair value (after deduction for salvage) of all the assets of the electric business (which is still functioning with nearly as many customers which it had before) is unjustifiable and oppressive and like the judgment rendered upon the other two items of the Cascades and the  
30 Lumber Business it is unprecedented in the records of the jurisprudence of this Province.

*Inadequacy of Electric Plant under normal conditions*

It is clear from the evidence reviewed in the forepart of this factum dealing with the electric business that for 70 per cent of the time Respondent was unable to operate his sawmill and his power plant simultaneously at their capacities and it follows that one or  
40 other had to suffer. Light is thrown on the question as to which of these services under the circumstances by witness Dr. Geggie, who is a physician resident in the district and who has no connection with the Appellant. His evidence is as follows (Case 11, p. 113):

“ Q.—Could you give me from your own personal knowledge any idea of the attitude Mr. Cross adopted with respect to the lighting service before the Gatineau Power Company

came up there? Did his sawing operations seem to have any effect in the lighting system?

A.—Well, yes. I think sawing was his primary occupation and he used what he had for his logs and gave us the rest.”

and again at page 110:

10 “ Well, if there was enough water we got light and if there was not we did not.”

The evidence of the witness Ralph is to the same effect, as follows (Case 7, p. 269):

“Q.—I take it you have been in that locality a good deal in the last number of years?

20 A.—Yes, I have been on the Gatineau ever since I have worked for the Gatineau Power Company. I have been on the Gatineau certainly three times a week during the last two years, and I lived there the first two years. I lived at Cascades the first fourteen months.

Q.—Have you had occasion to judge of the lighting capabilities of that plant from your residence there?

Witness: In what respect?

Counsel: As a resident. The type of service it has been giving?

30 A.—When I first went onto the railway and highway work, I boarded at Kirk’s Ferry, a point four miles below Cascades. We worked all day, of course, on our survey work, and every night plotted up our notes. The lights went out every night at ten o’clock for three months, as long as I was there, and for a period of at least two weeks, it may have been longer, we had no lights at all. I bought lamps for my men.

Q.—In what year was that?

A.—That was in January, February and March of 1926.

40 Q.—That was, of course, long before there was any rise in the water?

A.—Oh, yes. We were doing our preliminary work. That was one year before any water came up.”

And again (p. 270):

“Q.—Can you account for that in any way?

A.—Lack of water to run his power house. I presume he

would save what water he could all day, and by ten o'clock it was all gone."

It is clear from the photographs which have been produced showing the site under natural conditions that Meach Creek is not really a dependable stream, nor one which could consistently furnish adequate and efficient electrical service, especially as the water wheel running the sawmill was fed from the same stream.

10 No doubt Respondent was doing the best he could with the water he had available to supply current to his customers up to 1926, and his customers were naturally content to have such service as he could give them rather than no service at all.

20 It is perfectly natural that when Respondent's customers found there was a large development to take place on the river, they felt that the time had come when they were entitled either to adequate and efficient service from Respondent or else to get service from the new development. A trading position had been established in their favour by the advent of a new source of supply, and whereas complaints in the past had led nowhere, it was evident that complaints thereafter would produce results under the provisions of the Quebec Public Service Commission Act (R.S.Q., Chap. 17) because one of the most important functions of that Commission is to protect the consumer, and it is empowered to give arbitrary orders touching the service to be given by any person or corporation purporting to operate as a public utility.

30 No one knew better than the Respondent himself the inadequacy of the service he was giving his customers, and he also knew that this was due to a cause over which he had no control, namely shortage of water and general inadequacy of his equipment which it was physically impossible for him to remedy in spite of any complaints that were made, and he perceived, as was natural, that before long he was going to be in difficulties apart from any physical effect which the raising of the water might have on any of his properties. The conditions he faced in this respect were brought about by the ordinary progress of industry and in connection with them Appel-  
40 lant respectfully urges there was no fault or blame whatever attributable to it.

Finding himself in this position in 1926, after Appellant's plans were made public by registration, and knowing that he could only show that the effect of Appellant's operations would be to reduce his output of power by 10% which would give him no right to ask the Appellant to pay for the whole industry, the Respondent, after

having defeated the Appellant's right to expropriate, as has been outlined in the remarks on the history of this litigation, Respondent (as he did with the lumber business) pursued the policy of making no claim upon the Appellant at that time, nor did he make any claim when he provoked arbitration before the Quebec Public Service Commission, from which he later desisted, nor did he make any claim in 1931 when he took a petitory action against the Appellant, but he let matters develop over a period of five years during which time he knew that his operations would be called in question by the Public Service Commission by reason of complaints made by his customers, and he surmised that he would be able to show that the time he began to get into difficulties was coincident with the time the water was raised, and he has thereby attempted to shift the responsibility for his troubles from a set of circumstances for which Appellant was in no way responsible to a set of circumstances from which it might be inferred that Appellant was responsible.

The subsequent course of events showed the judgment of the Respondent in these respects to be justified, for complaints were made to the Quebec Public Service Commission, whose engineer was sent to investigate Respondent's plant, and found it inadequate due to lack of water under normal conditions and ordered him to put it into shape to give service. Exhibits D-5 (Case 4, p. 7); D-145 (Case 5, p. 102); D-146 (Case 5, p. 105). These Exhibits are orders of the Quebec Public Service Commission dated respectively September, 1929, November, 1929, and February, 1930.

The first order states that the flow of the creek does not seem to be sufficient to run the water wheel and generator, which explains why only a nightly service was given during the few weeks preceding the order. (Admittedly this in no way concerns Appellant.) The order also cites the fact that the operation of the plant is being affected by the water backing up into the tail race. This clearly has reference to the flooding from Appellant's development. It states that the plant is not receiving the attention that it should, and that with the system, the public could not be supplied with good and reliable service, and that it would be best for the Respondent to buy power from the Gatineau Power Company or elsewhere. The order goes on to give particulars of the state of disrepair in which the system was found.

The next order D-145 states that it was found that Respondent's generating plant did not produce sufficient power to ensure a proper service for his clients; that the distribution line was not in good order and was not properly maintained; that it had been suggested that the Respondent provide himself with sufficient power by pur-

chasing from the Gatineau Electric Light Company. It refers to the fact that although Respondent had arranged to take power from the Gatineau Company he was making use of this power through his own generator. It was stated that this was not a proper system, but it was left to the Respondent to operate as he pleased provided he gave service to his customers.

10 The next order D-146 again referred to the disrepair and inadequacy of the system, and that the power plant which had been abandoned while power was being bought from Gatineau Power Company had again been started, and was then supplying all the energy to the electric system notwithstanding the order of the Commission. It was stated that little repairing had been done to the distribution system and that it was in general in very bad condition.

20 The same conditions as were described in these orders had obviously existed before 1926, and the fact that the Respondent lost 10% of his power through the operations of Appellant is clearly not the reason for the inadequacy of his plant as described in these orders of the Public Service Commission. This fact is indisputable when it is realized that since 1930, following the order of the Quebec Public Service Commission, the Respondent has been purchasing from the Appellant Company 80 horse power at in the neighbourhood of \$20.00 a horse power, plus a consumption charge. It is assumed that he is not taking more than he needs for his system, and consequently that the system must always have required at least 80 horse power to function, and the loss of 10% of his power is clearly not the reason  
30 that the plant was inadequate, because its original dependable output was only 40 horse power.

It is to be remarked that if the system now requires 80 horse power, the offer of Appellant to compensate Respondent to the extent of 8 or 10 horse power is a generous allowance, because it is 10% of a block of continuous twenty-four hour power, all the year around, whereas Respondent could not have got 80 horse power out of his own plant for more than a short period each year.

40 Finally, there is to be noted the inconsistency in the position contended for by Respondent, because if, as he pretended, he had 308 customers in 1926 and has only 190 customers now, his power consumption would normally be decreased by more than one-third, whereas the power derivable from his plant at Meach Creek has only been decreased by one-tenth, and thus on the basis of his own calculations, he should have power to spare by continuing to operate his own plant.

The Appellant, therefore, repeats that it is acting under statutory authority and was not a trespasser and that Respondent should not be permitted to create damage in the manner he is attempting to do, and that a fair, reasonable and equitable compensation for the electric business would be the sum of not more than \$14,000.00, which, it has been shown, would be more than sufficient to reinstate Respondent in the position in which he was when the flooding took place, and Appellant offers to pay interest upon this sum from the date the water was raised, namely the 12th March, 1927.

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ITEM D

FEES, DISBURSEMENTS AND COSTS

Under the above item the judgment condemns Appellant to pay the sum of \$76,981.22. The wording of the judgment is as follows (Case 13, p. 161) :

10 “ En vertu de ces dernières dispositions, nos législateurs imposent encore à la Cour l’obligation d’accorder, avec l’indemnité réclamée ce qu’elle jugera équitable en autant que les déboursés, honoraires et frais encourus en cette cause sont concernés, le tout au taux d’intérêt qu’elle considérera à propos de fixer;

Le demandeur a prouvé, l’item de \$52,512.64 mentionné à l’allégation 28 de sa déclaration supplémentaire amendée;

20 Il a également prouvé jusqu’à concurrence de \$24,468.58 l’itm de \$26,568.58 de l’allégation 28a de la même déclaration; ces deux montants se montent à la somme totale de \$76,981.22;

La différence entre \$24,468.58 et \$26,568.58 représente \$2,100.00 montant du compte de George B. Langford qui n’a pas été établi par une preuve satisfaisante, qui n’a pas été assermenté par ledit G. B. Langford (voir pp. 1119 et s. deposition Cross, vol. 2 de la preuve du demandeur);

30 La preuve de la somme de \$76,981.22 n’a pas été contredite par la défenderesse, en sorte que la Cour, ne peut mettre de côté des comptes qui ont été assermentés par des témoins qui n’ont pas été contredits par la défense et décider que ce qui a été régulièrement établi sans preuve contraire n’est ni légal ni équitable;”

The authority for the granting of any costs over and above the ordinary taxable costs is contained in paragraph 4 of the Special Act (Case 1, p. 30) as follows:

40 “ 4. In fixing the compensation to be awarded to the said Cross, the Superior Court shall include such amount as it deems just for the disbursements, fees and costs incurred in such pending action and in connection with the passing of the present act.”

The pending case referred to in the above was instituted on



March 2nd, 1931. It was a completely new action taken four years after the water had been raised to its permanent normal operating levels, and in its essence it concerned only the Cascades property. It was a petitory action demanding the withdrawal of the water unless Appellant paid Respondent the sum of \$600,000.00.

10 These facts are of importance in their relation to the terms of the Act which permits the Court to grant Respondent an allowance for fees, etc., in connection with the " pending case ", especially when paragraph 4 of the Act is read in conjunction with the latter part of paragraph 5 concerning amendments to pleadings, filing of supplementary pleadings, and the submission of further evidence.

The preamble of the Act refers to the fact that Respondent had objected to certain proposed amendments to the Water Course Act as " being apt to affect the rights asserted by him in the said Petitory action ".

20 The Appellant submits that the only logical interpretation of the Act in respect of this item is that it was intended to permit the Court to make a reasonable allowance to Respondent for such monetary loss as he might show he had sustained in fees, disbursements and costs by reason of his action having been changed in its technical nature by special legislation from a petitory action to an action in damages, and including a reasonable allowance for expenses incurred in demonstrating his position to the Legislature.

30 It is submitted that there can be no reasonable inference drawn from the Act that it was intended to do more than change Respondent's status as a litigant in the manner stated, and, as flowing from this change, to grant Respondent a reasonable and fair allowance for the expense involved before the Court and the Legislature. When provision has been made for such an allowance there is nothing in the Act to indicate further concessions beyond the ordinary to Respondent, or any other improvement in his position at Appellant's expense, and after compensation for this change, he is in the same position as he would have been as an original litigant in a damage  
40 action.

In the light of the foregoing let it be assumed for argument sake that the action had been one in damages in the first place, would Respondent then have been entitled to expect judicial costs on the huge scale allowed by the judgment? The Appellant believes that he would not.

There is undoubtedly precedent for the view that a litigant may

claim reasonable compensation for the services of some technical witness required to assist in the preparation of his case, but he must make claim for this in his pleadings. The Courts have frequently granted a reasonable allowance when so demanded by claimants, having in view the nature of the services rendered and their usefulness in respect of the determination of a fitting indemnity.

10 It is to be noted, however, that what was to all intents and purposes a damage action had been taken by Respondent before the Quebec Public Service Commission in April, 1929, two years after the water was raised, and it remained pending before the Commission until January, 1931, and three days before the hearing, after Respondent had prepared his case, and certainly after Appellant had prepared itself at considerable expense, Respondent desisted, notwithstanding Appellant's emphatic objections. Neither in these proceedings nor in the petitory action which followed the desistment does Respondent appear to have considered the question of special costs sufficiently important to request an allowance, and Appellant 20 believes it reasonable to suppose that all the investigation, resulting in such evidence as Respondent made in the petitory action, had already been done in preparation for the Quebec Public Service Commission proceedings which were abandoned.

Not only has the Respondent received by the judgment the full amount (and even more) than he demanded for these fees, etc., in the pending case, but he has in addition received a further allowance of \$24,768.58 (being the total less one item) demanded in an amended supplementary declaration as representing fees, etc., having 30 to do with the supplementary hearing, in which he brought forward for the first time his lumber and electric business claims, which had not been in issue in the pending case, and which could not have been contemplated by the Legislature in its reference to the amendments and supplementary pleadings which references were clearly intended to apply in a manner to bring only the then pending issues into regular legal form as a claim in damages.

The Appellant, therefore, submits that the entire amount of \$24,768.58 should be deducted from the amount of \$76,981.22 allowed 40 by the trial judge under this item C because they are not contemplated either by the letter or spirit of the Act. The attention of the Court is directed to the formal objection made to the production of these accounts and the evidence regarding them (Case 13, pp. 105-107).

The judgment states that the Plaintiff has proven the item of \$52,512.64 mentioned in allegation 28 of the supplementary declara-

tion. It is to be noted that there is no reference to this sum in paragraph 28 of the declaration, but the sum mentioned therein is \$54,104.21.

It would appear, however, that the learned judge has granted without question the sum of \$52,512.64 as set out at page 110 of Respondent's factum in the Court below. This enumeration of items in the factum leaves out a number of items from which Respondent desisted, and which were mentioned in paragraph 28 referred to in  
10 the judgment.

As an illustration of the fact that this statement appears to have been prepared, and the judgment rendered thereon, without accurate reference to the evidence and exhibits, the attention of the Court is incidentally drawn to the account of Mr. MacRostie for \$10,437.42, in which is included the item of expenses of \$1,513.17, although on reference to Exhibit P-71 the detailed expenses amount to \$1,088.32, leaving a direct mathematical error in favour of Respondent of  
20 \$424.85 which is included in the judgment.

Again the item of E. J. Dery, photographer, of \$271.65 and the item of Maxwell, \$15.50, are merely accounts filed in the record with no evidence made by the persons who rendered them. The Dery account, Exhibit P-85, dates back to 1926, although the account is dated March 1st, 1932. These are of course only trifling matters, but they indicate how unjustifiably Appellant has been condemned under this item of fees and disbursements, as well as other items concerned.

30 Under reserve of its objections as to the interpretation of the Act on this whole item D Appellant respectfully refers to some of the individual accounts rendered as shown in Respondent's factum (unprinted) at pages 110 and 111 as follows:

1. The accounts of Mr. Robertson—total \$9,390.50.

Two accounts were filed as Exhibits P-69 and P-149 respectively. Exhibit P-69 is for \$7,500.00 dated March 7th, 1932 (after the sanction to the special act). This account runs from the year 1928 (Case  
40 10, pp. 231-2). A further account is embodied in this Exhibit under the same date amounting to \$7,650.00 designated as representing "services from November 4th, 1930, up to completion of trial."

The pending case was not instituted till March, 1931, and the reference to services rendered from 1928 clearly applies to services rendered even before the matter was before the Quebec Public Service Commission in 1929 and 1930. Mr. Robertson, who is a hydraulic

10 engineer, was examined as a witness in the first hearing and it might have been expected that he would have given definite technical evidence as to the capabilities of the Cascades property, if in his opinion any existed, especially as his work, according to the account, was concerned with investigation of that property. His evidence, however, was almost entirely devoted to an enumeration of various water power properties, none of which were in any way comparable to Respondent's property, and his evidence was made in an endeavour to support a value of \$40.00 a horse power in the raw. His evidence was entirely discredited on practically every fact on which he testified, and he did not testify on any matter which could not have been prepared in a day or two. After the Special Act he claims for and has been allowed 12½ days in Court at \$150.00 a day and he was finally examined in the second hearing at his house. Nevertheless he has been allowed a further sum of \$1,890.50 (p. 149), making a total payable under the judgment for this witness alone of \$9,390.50.

20 The Appellant refers to the cross-examination of this witness as to his accounts as indicating how unjustifiable they are as a charge against Appellant (Case 10, p. 213 and pp. 230-31, and Case 13, pp. 105-111).

Appellant respectfully submits that there is no justification whatever in fairness or in equity in allowing \$9,390.50 to this witness, and that a generous allowance against Appellant for his services would be \$500.00.

2. Accounts of Mr. Beaubien—total \$8,658.80.

30 Mr. Beaubien has been allowed \$6,369.10 (Exhibit P-70) for the first hearing and a further sum of \$2,316.70 for the second (Exhibit P-150), including fourteen days in Court on the first hearing and 16½ days in Court on the second hearing.

40 The Appellant respectfully refers to the remarks made earlier in this factum on the Cascades item with regard to Mr. Beaubien's evidence. He was only examined in rebuttal at the first hearing and his evidence was taken under reserve of Appellant's objections in this respect. He brought forward new theories not claimed for in the action and he contradicted his fellow witnesses. His evidence, which Appellant contends should never have been admitted, served no useful purpose whatever. In the second hearing he was only briefly examined, nevertheless Appellant has been condemned to pay \$8,658.80 for his services.

The Appellant submits that a liberal allowance would be \$500.00.

3. Accounts of Mr. MacRostie—total \$16,551.17.

This witness has been allowed \$10,437.42 on the first hearing, plus \$6,113.75 on the second hearing (Exhibits P-71 and P-151). As has been remarked, the above sum is \$424.00 more than the amount of the account he renders, and, like the foregoing, his accounts were not rendered until after the Special Act was passed.

10 Notwithstanding the attempted explanation given by this witness in cross-examination (Case 9, p. 150 *et seq.*), Appellant believes that there is included in this account, made up after the Act, at an obviously exaggerated figure, every item of service rendered to Respondent from 1926 to 1932, although no account was ever rendered before the latter year (Case 9, p. 153).

20 He is an engineer, but not a hydraulic engineer, and a large portion of his business is land surveying. He has obviously been the chief adviser of Respondent for many years in connection with the relations between the parties to this case.

The Appellant respectfully submits that nothing can justify the condemnation made against it for this huge sum. The claims which he has sponsored have been shown to be exaggerated beyond all reason and his contention as to the possibilities of the Cascades property and as to the destruction of the lumber and electrical businesses are in no way justified by the evidence, or in common sense.

30 The Appellant believes that an allowance of not more than \$1,000.00 should be made to this witness.

4. Accounts of Mr. St. Laurent, K.C.—total \$8,217.90.

40 These are set out in Exhibits P-73 and P-159, being \$4,927.24 and \$3,290.60 respectively. Mr. St. Laurent stated (Case 10, p. 142) that his charges are on a basis of \$150.00 per day, and in principle Appellant takes no exception whatever to a daily charge of \$150 for the services of this eminent Counsel. The Appellant very respectfully submits, however, that this charge of \$8,217.90 should not be adjudged against the Appellant. Examination of Exhibit P-73 indicates that a considerable portion of the services were rendered in 1930 and 1931 in connection with the abandoned arbitration before the Quebec Public Service Commission. It is also to be noted that all the evidence made at the first hearing on the petitory action also served, without addition, for the final claim in damages, and, as has been remarked above, if the Respondent would not have been entitled to any such allowance if his action had been one in damages

in the first place, then the Appellant submits that there should only be adjudged against Appellant such reasonable portion of Counsel's charges for the first hearing as may be applicable to the technical advice and services rendered in connection with the petitory conclusions as such. While this is difficult to determine with any degree of accuracy, the Appellant submits that it would be fair and equitable to condemn Appellant to pay \$1,500.00 for fees applicable to the pending case plus \$500.00 for services before the Legislature, making a total of \$2,000.00, and that no part of the learned Counsel's account for the supplementary hearing should be adjudged against Appellant.

5. Accounts of W. L. Scott, K.C., of Ottawa—total \$1,601.58.

The details of these accounts are given in Exhibits P-74 and P-154. While Mr. Scott is stated to be the Ottawa agent of Respondent's Counsel of record, he also acted on behalf of Mr. Plaunt, of Ottawa, mortgage creditor of Respondent (Case 9, p. 255). Mr. Scott's account dates back to 1930, long before the "pending case" was instituted, and an examination of the items contained in the account (P-74) and the testimony of the learned Counsel (Case 9, pp. 255-258) shows how foreign the major part of his work was to the issues herein, and how unfair a charge it is against the Appellant. The Appellant submits that it should not be called upon to pay any part whatever of Mr. Scott's accounts.

6. Accounts of Messrs. MacDougall, Macfarlane & Barclay—total \$24,241.84.

The details of these accounts are given in Exhibits P-76 and P-155. The fees and disbursements on the first hearing and legislation amount to \$15,836.42, and in the supplementary hearing to \$8,405.42.

It will be observed from the account P-76 that the same dates back to November, 1930, while the matter was still before the Quebec Public Service Commission. The disbursement account alone shows fifty long distance calls or telegrams before the pending case was instituted, and later (January 11th, 1932) there are as many as seven long distance calls to Ottawa or Wakefield in one day. The total daily rate of charge is stated to be \$175.00 in Court and \$100.00 per day for office work (Case 13, p. 136). There were three members of the firm occupied with the case, who with Mr. St. Laurent make four attorneys.

Again, the Appellant does not desire to criticize the scale of charges adopted by this eminent firm, but Appellant very respectfully submits that the greater portion of the services represented by

these accounts cannot in fairness or equity be adjudged against Appellant under the provisions of the Act, and that the real issues between the parties, is now, and should always have been, solely the determination of what may be a just and fair compensation to Respondent for damages to several pieces of property, and that Appellant has sought since before the water was raised in 1927 to have these damages assessed, and the legal complications and irrelevancies which have been brought into the matter by the Respondent's abandonment of the arbitration proceedings, and the taking of a petitory action, involving only a part of his property, are in no way attributable to the fault of Appellant, and it is again submitted that it was not the intention of the Legislature to penalize the Appellant by subjecting it to so unprecedented a burden of costs. Appellant submits that a sum of not more than \$5,000.00 should be adjudged against it in respect of these accounts.

7. Account of G. Papineau, Land Surveyor, \$1,271.63 (Exhibit P-77).

20 A large part of the work included in this account, and practically all the expense items, were incurred while the subsequently abandoned Quebec Public Service Commission proceedings were still pending. The witness was briefly examined in the "pending case" and produced a plan which provided for a division of the river bed at Cascades, which division is entirely at variance with the clear jurisprudence on the subject as established by this Court in the case of *Restigouche vs. Wyers*, to which reference has already been made. The Appellant submits that not more than \$100.00 should be ad-  
30 judged against it in respect of this witness.

8. Account of F. Major, Advocate, Hull—\$57.55 (Exhibit P-78).

This Exhibit is a receipt for \$57.55 for alleged professional services, researches and correspondence stated to refer to this case. The nature of the services is not explained, nor is the date given when they were rendered. Appellant submits that this account should not be adjudged against it.

40 9. Account of Hazelgrove & Adamson, \$1,250.00 (Exhibit P-84). It has already been remarked in this factum that this account is for services performed in 1926, although no account was rendered till 1932, and it is for commission at the rate of 1½ per cent on the estimated replacement value of all buildings (about forty in number) at Farm Point, although only six are affected. The commission is based on an estimate not even claimed for by Respondent, and it

is submitted that there is no justification whatever for the allowance of this account against Appellant.

10        10. Accounts of E. J. Dery, photographer, \$271.65 (Exhibit P-85) and A. Maxwell (Exhibit P-86). Neither of these persons were examined. The Dery account runs back to 1926, for which year alone \$180.00 is charged, and the whole account except \$23.25 is for items before the case was instituted. No proof has been made on the account and Appellant submits that it should not be allowed.

The account of A. Maxwell is for alleged services rendered in 1930 while the matter was in arbitration, and it is submitted that it should not be allowed against Appellant.

11. Accounts of F. T. Cross, Respondent, \$1,341.90 (Exhibits P-88 and P-152).

20        From the amount of \$1,190.15 shown on Exhibit P-88 Respondent withdrew a sum of \$195.40 (Hull Registry Office) and the total of both exhibits is \$1,341.90. It is to be noted that although a total of \$995.00 is shown on Exhibit P-88 (after deduction of \$195.00) and included in the judgment, the Exhibit D-134 produced on discovery only indicates \$675.00 (Case 9, p. 94 et seq).

The Appellant submits that there is no justification for allowances to Respondent on this scale, and that a generous allowance would be \$200.00, which would be at the rate of \$5.00 per day for the days of trial.

30        12. Accounts of Kenehan & Bush, Court Stenographers, total \$2,552.90.

These accounts were for daily transcriptions of evidence and arguments for both hearings, ordered by Respondent's attorneys. The Appellant submits that there can be justification for this charge against Appellant.

40        13. The last item adjudged against Appellant is \$168.00 stated to be expense incurred by Respondent towards scalers and their assistants. No account is rendered or proven, and the only reference to it is made by Respondent's Counsel (Case 13, p. 138 et seq). It is supposed to represent the work of about 25 wood scalers who were not examined. The attention of the Court is respectfully drawn to the argument at the pages cited above, with regard to this item, and it is submitted that it should not be allowed against Appellant.

As has been stated, the judgment grants all the foregoing items



to the full amount set out at pages 110 and 111 of Respondent's factum in the Court below, the only item claimed for in that factum and not allowed being the charges of Mr. Langford, the Geologist, examined by Respondent.

10 The learned trial judge has remarked in the judgment that there has been no contradictory proof brought forward against the foregoing accounts, but Appellant respectfully submits that under the circumstances there could be no counter-proof available to Appellant, and no means at its disposal of controlling the sworn statements of witnesses as to services and accounts submitted. Appellant believes it proper to infer that no such accounts as those now claimed would have been rendered to Respondent in the ordinary course, without the Special Act, and that under the Act their allowance against Appellant cannot be justified.

20 Finally, apart from the atmosphere which has been created around this litigation by the putting forward of claims in hugely exaggerated figures, there is really nothing in the issue in damages which required the prolonged investigation of technicians, or the introduction by Respondent of so much entirely irrelevant material in the way of evidence and exhibits, all of which has required counter-proof and explanation by Appellant. The Appellant has offered in its plea the sum of \$10,000.00 under this item and it is submitted that this sum is a generous allowance.

*Property and rights to be vested in Appellant*

30 Clause 6 of the Special Act (Case 1, p. 31) is as follows:

40 "The Court shall in the judgment to be rendered in the said case determine what properties and rights shall, on payment of the said compensation, interest and costs, become vested in the Gatineau Power Company, and make such order for the lowering of the level of the said river on or opposite the properties of the said Cross and for the payment of damages, interest and costs as may appear to be proper in the event the said Company should fail to pay the amounts awarded as full compensation, interest and costs."

The Appellant respectfully refers to the declaration made by Counsel on its behalf in the lower Court as reported (Case 13, pp. 149-150) as follows:

"Whereas the Act 22 George V, Chapter 128, provides the Court shall determine what property or rights shall, upon pay-

ment of the indemnity to the Plaintiff, become vested in the Defendant in this case;

10 Now, therefore, should this Honourable Court find with respect to Plaintiff's claims that a just and fair compensation, or any part thereof, would be a sum sufficient to enable Plaintiff to carry out remedial works, filling in or work of reconstruction upon any property in a manner to restore same in whole or in part, the Defendant declares it abandons in favour of Plaintiff any right of ownership upon any such property as may be so  
20 made the subject of any such remedial works, and limits its rights thereon to a right of real servitude permitting Defendant to maintain the level of the Gatineau River upon the said properties at any controlled elevation not exceeding 321.5 above mean sea level as set out in the Act 22 George V, Chapter 128; or, alternately, in case of such finding by this Honourable Court on the subject of remedial works and the right of ownership of property found to be susceptible to such remedial works to be granted to the Defendant, then Defendant undertakes to create upon such land a real servitude permitting the use thereof for  
the construction and maintenance of such remedial works, filling in or renovation, and the use and enjoyment of said property to the Plaintiff and his successors in perpetuity."

30 In connection with the foregoing, it is respectfully submitted that the only manner in which Appellant requires to affect the property of Respondent is by the flooding resulting from the normal operation of its plant, which is a work in the public interest, and consequently the Appellant is prepared to limit itself to such rights upon the property as may minimize to the greatest possible extent the inconvenience or damage caused to Respondent consistent with proper protection to Appellant enabling it to operate its plants, without being called in question later by Respondent or by his successors in title to his property.

The above declaration was made and is repeated here in order that the Court, pursuant to the authority given in the clause of the Act mentioned, may decide what property or rights on property should become vested in the Appellant.

40 This is particularly significant in respect of the actual site of the power house and the 1.9 acres of piling ground affected, for Appellant submits that it would be unjust to compel Appellant to take these small pieces of property where it has been clearly shown that remedial works would be done upon them which would leave them in a better condition than formerly, and it is submitted that Respondent should not be allowed to magnify his damages in the way

he is attempting to do, by refusing to permit remedial works and insisting upon Appellant actually taking the land.

10 With respect, therefore, to the power house site, if Appellant is condemned to actually take the land up to the level 321.5, which would include a portion of the plot upon which the power house is actually located, then Appellant offers to establish or to have the Court establish upon such plot a perpetual and real servitude permitting the retention of the small power house upon such portion of the plot as is affected.

Again with regard to the 1.9 acres of piling ground, if Appellant is condemned to take the same in ownership it declares its willingness to create, or have the Court create upon such plot, a perpetual real servitude to enable the Respondent to make and maintain remedial works upon the plot in question.

20 The Appellant submits, however, with regard to both of these plots that Appellant may be limited to a servitude for flooding purposes, and that the land above the level 318 in both instances may be left in ownership to the Respondent, subject to the servitude mentioned in favour of the Appellant.

#### CROSS-APPEAL

30 There has been filed by Respondent a cross-appeal to the present main appeal against this judgment. As far as is known, no steps have been taken to prepare a record for the same, and Appellant believes that Respondent cannot be serious in urging a cross-appeal in circumstances where judgment has been rendered in his favour for amounts greater than contended for by Respondent on practically every item.

If, however, such cross-appeal is prosecuted, the Appellant relies upon the present factum for such cross-appeal.

#### LAW AND AUTHORITIES.

40 The Appellant's memorandum of law and authorities is appended hereto.

The whole respectfully submitted.

MONTREAL, May, 1934.

BROWN, MONTGOMERY & McMICHAEL,  
*Attorneys for Appellant.*

ADDENDA ON LAW AND AUTHORITIES

1. As to division of the river bed at Cascades:

At page 18 of this factum reference was made to the case of *Restigouche Salmon Club vs. John L. Wyers*. This case has not been reported and consequently the Appellant submits herewith a reprint of certified copies of the judgment in the Superior Court and in the Court of King's Bench as follows:

10

Province of Québec,  
District of Gaspé,  
County of Bonaventure,

Superior Court  
(New Carlisle)

Le quatorzième jour de juin, 1916—

20

PRESENT:

L'Honorable Juge Auguste Tessier, J.C.S.,

No: 3056.

THE RESTIGOUCHE SALMON CLUB, a corporation incorporated by and in virtue of the laws of the Province of Quebec, and having its domicile in the township of Restigouche, in the  
30 county of Bonaventure, in the district of Gaspé,

*Demandeur,*

—v—

JOHN L. WYERS, of Campbellton, in the province of New Brunswick, lumberman,

*Défendeur,*

LA COUR, ayant entendu la preuve et les parties par leurs  
40 avocats sur le mérite de la présente action en bornage inscrite pour enquête et mérite, et examiné toutes les pièces du dossier et délibéré:

ATTENDU que le demandeur allègue en substance: qu'il est le propriétaire en possession du Lot N° 28 dans le 3ème rang du canton de Patapédia et que le défendeur est en possession à titre de propriétaire du Lot N° 27 dans le 3ème rang du dit canton; que les deux dits lots sont contigus et ont leur front sur la rivière Resti-

gouche qui coule sur et en front des dits lots, et qui est non navigable et non flottable; que les dits lots se prolongeant au milieu de la dite rivière ' usque ad médium filum aquæ ' ; qu'étant propriétaires riverains, les dites parties respectivement sont propriétaires des droits de pêche appartenant aux dits lots; que la ligne séparant les dits lots et droits de pêche n'a jamais été établie par un bornage et les parties ont été incapables de s'accorder sur les lignes indiquées par les arpenteurs qui sont allés sur les lots pour placer ces lignes, et le demandeur conclut à ce qu'il soit procédé à un bornage  
10 des dits lots et droits de pêche conformément à la loi, et suivant les titres et possession des parties à partir de la ligne médiane de la dite rivière sur toute la distance où les dits lots et droits de pêche sont contigus, et que la ligne médiane de la dite rivière soit déterminée par un arpenteur, et que la ligne tirée delà à la terre ferme à angle droit jusqu'au point où la ligne de division entre les deux lots rencontre l'eau de la dite rivière et delà suivant la ligne séparant les deux propriétés sur toute leur étendue, et que des bornes et des marques de division soient placées en conséquence;

20 ATTENDU que par son plaidoyer le défendeur allègue en substance; qu'il est propriétaire en possession du dit lot N° 27, que les lots 27 et 28 mentionnés en l'action sont contigus, que la ligne séparant les dits lots et les droits de pêche n'a jamais été fixée par un bornage, qu'il a toujours été prêt à tirer la ligne de division, mais que les parties ont été incapables de s'accorder sur la direction de la dite ligne, le défendeur prétend que la véritable ligne de division entre les lots Nos 27 et 28 est la continuation de la ligne séparant les dits lots sur la terre ferme, prolongée suivant la même  
30 course;

ATTENDU que ce Tribunal, a nommé L'Honorable J. P. B. Casgrain, arpenteur, de la cité de Montréal, arpenteur expert en la présente cause, avec instructions de prendre connaissance du dossier, d'examiner les titres des parties et la preuve produite, de procéder à l'examen des lieux et de faire un plan des lieux avec rapport contenant les prétentions respectives des parties, indiquant la ligne de division suivant les conclusions de l'action du demandeur, aussi la ligne de division suivant les prétentions du défendeur, de plus quelle  
40 devrait être la ligne de division dans l'opinion du dit arpenteur, avec le résultat de ses opérations et ses raisons à l'appui;

ATTENDU qu'en conformité au jugement susdit, le dit arpenteur expert, a, le 4 octobre, 1915, produit le rapport de ses travaux et opérations avec plan des lieux;

CONSIDERANT qu'il appert au dit rapport et du dit plan

que suivant l'opinion du dit arpenteur Casgrain, la ligne de division entre les deux propriétés contigues des parties en cette cause, mentionnées en l'action et la défense, devrait être celle indiquée sur le dit plan par les lettres " R ", " M ", " V " ;

10 CONSIDERANT que les parties semblent être d'accord sur la ligne de division entre les dits lots sur la terre ferme, savoir la ligne marquée " R. M." aux plan et rapport de l'arpenteur Casgrain, et que la difficulté ou divergence n'existe que pour fixer la ligne de division dans la rivière;

20 CONSIDERANT que dans l'opinion du dit arpenteur expert Casgrain, la ligne de division des droits riverains des parties en cette cause devrait être la ligne marquée au dit plan " M.V."—, et indiquée par une ligne noire, portant du rivage, à l'intersection de la ligne des hautes eaux moyennes avec la ligne de division sur la terre ferme, entre les lots Nos. 27 et 28 au point " M "—, cette ligne " M.V." se prolongeant jusqu'au milieu de la rivière Restigouche dans une direction Sud 78 degrés et 31 minutes Est (S. 78° 31'E) une distance de 316 pieds au point " V " ;

30 CONSIDERANT que les raisons données dans le dit rapport de l'arpenteur Casgrain rédigé en langue anglaise sont les suivantes: " Because the owner of land bordering a non-navigable stream has riparian rights to the middle of the stream and at right angles thereto. Because the lines defining riparian rights as far as the middle of a stream are not governed by the directions of the lines of the upland approaching the shore. Because the extent of riparian rights depends on the lateral contact of the water of a river, *i.e.* the length of the bank bordering the stream. Because on a concave shore the overlapping right angles must be divided proportionately. Because the line ' M.V.' bisects exactly the overlapping right angles. Because the lines ' M.V.' is at right angle at the point ' V ' to a line following the middle of the river Restigouche. Because the line ' M.V.' in my opinion divides equally the rights of the party as far as the middle of the river Restigouche."

40 CONSIDERANT que notre loi ne contient aucune disposition spéciale sur le partage et la division du lit des rivières non navigables entre les propriétaires riverains voisins, mais les autorités et la jurisprudence française semblent être d'accord avec la jurisprudence anglaise et des Etats-Unis pour déclarer que la ligne de division dans une telle rivière doit être perpendiculaire à l'axe de la rivière, c'est-à-dire la ligne de division doit être prolongée dans la rivière de manière à frapper à angle droit la ligne médiane représentant le centre de la rivière;

CONSIDERANT que l'adoption de la ligne de division indiquée ci-dessus est le moyen le plus pratique et le plus équitable de diviser entre riverains voisins le lit d'une rivière non navigable;

CONSIDERANT que cette Cour approuve le rapport du dit arpenteur Casgrain, elle accorde la motion du demandeur à l'effet d'homologuer le dit rapport et elle homologue le dit rapport et déclare que la ligne de division entre les shéritages de parties en cette cause, savoir: entre les Lots Nos. 27 et 28 dans le 3ème rang  
10 du canton de Patapédia est celle indiquée au plan et au rapport de l'arpenteur Casgrain par les lettres " R.M.V. "; Ordonne que des bornes et des marques de division suivant l'usage et la loi soient posées sur les lieux, par un arpenteur autorisé, savoir par l'Honorable J. P. B. Casgrain, ci-dessus mentionné, de la cité de Montréal, arpenteur, entre les dits héritages des parties dans la ligne " R.M.V. " susdite, et que cette ligne serve de division et de bornage à toutes fins; que le dit arpenteur redige en conséquence un procès-verbal de ses opérations définitives et en rapporte le procès-verbal en  
20 minute à ce tribunal;

CETTE COUR adjuge de plus que les frais d'expertise et du bornage ainsi que ceux d'une action non contestée sont communs et également divisés entre les parties en cette cause, le surplus des frais résultant de la contestation du défendeur dont les prétentions sont rejetées sont à la charge du défendeur qui est condamné à les payer au demandeur.

(Signé) Auguste Tessier, J.C.S.,

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Province de Québec,  
District de Gaspé,  
Comté de Bonaventure,

Je soussigné Protonotaire dans et pour le comté de Bonaventure, district de Gaspé, de la Cour Supérieure pour la Province de Québec, certifie que ce qui est ci-dessus écrit et sur les 2 feuilles précédentes, est une vraie copie du jugement rendu en la cause y  
40 mentionnée, portant le numéro: 3056 des dossiers de la Cour Supérieure, à New Carlisle, et dûment enregistré en mon bureau, suivant la loi.

DONNE à New Carlisle, bureau du Protonotaire, ce trentième jour du mois de novembre, en l'année de Notre Seigneur mil neuf cent trente et un.

T. A. BLANCHET,  
P.C.S.,

Canada—  
Province de Québec,  
District de Québec.

COUR DU BANC DU ROI  
(EN APPEL.)

Québec, vendredi le douzième jour de janvier mil-neuf-cent-dix-sept.

10 Présents: L'hon. Juge-en-Chef SIR HORACE ARCHAMBAULT.  
“ “ “ LAVERGNE,  
“ “ “ CROSS,  
“ “ “ CAROLL,  
“ “ “ PELLETIER.

No. 156—

20 JOHN L. WYERS, of Campbelton, in the Province of  
New-Brunswick, Lumberman.  
Défendeur en Cour Supérieure.  
*Appelant.*

—vs—

30 THE RESTIGOUCHE SALMON CLUB, a corporation  
incorporated, by and in virtue of the law of the Province  
of Quebec and having its domicile in the township of  
Restigouche, in the County of Bonaventure, in the dis-  
trict of Gaspé.  
Demanderesse en Cour Supérieure.  
*Intimée.*

LA COUR, après avoir entendu les parties par leur procureur respectif, sur le fond de l'appel, après avoir examiné le dossier et la procédure tant en Cour de première instance qu'en appel et après avoir sur le tout murement délibéré;

40 Considérant qu'il n'y a pas mal jugé dans le jugement final rendu par la Cour Supérieure siégeant à New Carlisle dans et pour le district de Gaspé, le quatorze juin mil-neuf-cent-seize et dont est appel;

CONFIRME ledit jugement, avec dépens contre l'appelant en faveur de l'intimée.

VRAIE COPIE

ADRIEN FALARDEAU,  
Greffier des Appels.



2. As to the rights of C.P.R. in first rapid at Cascades:

*Massawippi Valley Railway vs. J. B. Reed*, 33 Supreme Court Reports, page 457. (See page 19 of this factum.)

*McLaren vs. Attorney-General*, 15 D.L.R. (1913), page 855. Lord Moulton, page 862.

10 3. Right of Appellant to flood subject to payment of damages fixed by arbitration:

C.C., Article 503, referring to Chapter 51, Consolidated Statutes Lower Canada.

Statutes of Quebec, 1856, Chapter 104, carrying through to R.S.Q., 1925, Chapter 46, Article 12 (Q.P.S.C. made sole arbitrator 1928).

20 A legal servitude is established in favour of Promoter.

*Breakey vs. Carter*, Cass. Dig., 2nd Ed., page 463.

*Jean vs. Gauthier*, 5 Q.L.R., page.

*Demers vs. Germain*, 11 Q.L.R., page 143.

*Brown vs. Holland*, 11 Legal News, page 378.

30 *Ducharme vs. Houle*, 18 K.B., page 219.

Bouffard "Traite du Dumaine", page 123, Section 168.

And Appellant is not a trespasser.

*Dorchester Electric Co. vs. Roy*, 49 Supreme Court Reports, page 344.

4. *Just and fair compensation*:

40 The Statute provides by Section 2 that the Appellant shall make just and fair (just et equitable) compensation to Respondent for all his properties and rights taken for or affected by the said development up to the said elevation, and by the operation thereof. The principles on which just and fair compensation should be assessed are now thoroughly well settled by the Courts.

*Cripps on Compensation*, 6th Edition, page 108:

“ The basis on which compensation for lands taken is to be assessed is the value of the lands to the owner as it existed at the date of the notice to treat and not their value, when taken, to the promoters. (*Cedars Rapids vs. Lacoste* (1914) A.C. 569; *Lucas & Chesterfield* (1909), 1 K.B. 16; *Fraser vs. Fraserville* (1917) A.C. 187.)

10

“ The increased value of lands by reason of any advantage over and above the bare agricultural value is merely the price which possible intended undertakers would give. That price must be decided by the imaginary market, which would have ruled had the land been exposed for sale before any undertakers had secured any powers or acquired the other subjects which made the undertaking as a whole a realized possibility. In assessing the value of any probable future advantages, it is the present value alone of such advantages that falls to be determined.”

20

*Cedars vs. Lacoste* (1914) A.C. 569, at page 576:

“ The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board* (1909) 1 K.B. 16.

30

“ For the present purpose it may be sufficient to state two brief propositions: (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

40

“ Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton, L.J., in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed

for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.”

Page 579:

10 “ The real question to be investigated was: For what would these three subjects have been sold, had they been put up to auction without the appellant company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers? . . . If the situation be naturally favourable to the establishment of power works like those of the appellants, then it is possible that the respondents and others might have been prepared to offer an enhanced value on this account, taking the chances of a situation in which they might or might not obtain the requisite parliamentary powers to work out a commercial scheme. But the value emerging through a grant of such powers having been  
20 actually given cannot after the event be taken into account. Also with regard to the reserved water rights there must be no confusion made. It is not that the water power of the appellants will be *derived* from the reserved water rights, but it is that a water power like that of the appellants could not be developed and located to such advantage without extinguishing the reserved water rights of the respondents. These considerations, however, point to the possibility of something more being given for the subjects than the bare value; or, in other words, that if they had been put up to auction as before said, there was a probability of a purchaser who was looking out for special advantages  
30 being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realized scheme.”

*Lucas & Chesterfield* (1909) 1 K.B. 16, page 28:

40 “ . . . It appears that the umpire has treated the *probability* and the *realized probability* as identical for the purposes of valuation, he has gone on a wrong basis, and that we ought to send the award back to him in order that he may value the possibility of the site going into the market as being required for the enlargement of the waterworks, and not on the basis of a realized possibility, or on account of the promoters having obtained from Parliament compulsory powers.”

*Fletcher Moulton, L.J.*, page 29:

“ The principles upon which compensation is assessed when

land is taken under compulsory powers are well settled. *The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form.* But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.”

Page 32:

“ I have said that the existence of competition entitles the arbitrator to take special adaptability into account in arriving at the quantum of compensation. But the extent and the imminence of such competition must have an important bearing on the weight to be given to it as affecting the quantum of compensation . . . ”

*Buckley, L.J.*, page 38:

“ Further, as Vaughan Williams, L.J., has pointed out, it is the possibility, and not the realized possibility, of the site being required for the purpose for which it is specially adaptable which ought to be considered.”

*Sidney vs. North Eastern Railway* (1914) 3 K.B. 629—Rowlatt J., page 636:

“ It is quite clear that special adaptability for the purposes of the particular scheme may be taken into consideration where it can be said that there might have been other competitors for it for that purpose, and to the extent that the competition of such possible purchasers with each other and with the promoter would raise the possible price that might have been obtained in the market.”

Page 637:

“ Now, if and so long as there are several competitors including the actual taker who may be regarded as possibly in the

10 market for purposes such as those of the scheme, the possibility of their offering for the land is an element of value in no respect differing from that afforded by the possibility of offers for it for other purposes. As such it is admissible as truly market value to the owner, and not merely value to the taker. But when the price is reached at which all other competition must be taken to fail, to what can any further value be attributed? The point has been reached when the owner is offered more than the land is worth to him for his own purposes and all that anyone else would offer him except one person, the promoter, who is now, though he was not before, freed from competition. Apart from compulsory powers the owner need not sell to that one, and that one would need to make higher and yet higher offers. In respect of what would he make them? There can be only one answer,— in respect of the value to him for his scheme. And he is only driven to make such offers because of the unwillingness of the owner to sell without obtaining for himself a share in that value. Nothing representing this can be allowed.”

20 *Approval required:* Respondent had no power to erect any dam whatever on the Gatineau, much less to flood the property above him without first obtaining the approval both of the site and of his plans from the Lieutenant-Governor-in-Council. *Water Course Act, R.S.Q., Cap. 46, Sec. 5.*

30 In this respect the case is similar to *Cedars vs. Lacoste*, except that there the river being a navigable one, the approval of the Department of Public Works of Canada was required. He also would have had to obtain the approval of the Lieutenant-Governor-in-Council in order to expropriate any properties above. R.S.Q., Cap. 46, Sec. 22. *Cedars vs. Lacoste*, page 575:

“ The river being a navigable river the bed belongs accord-  
“ ing to the law of Canada to the Crown and no riparian owner  
“ can construct works in the bed without the consent of the  
“ Crown.”

Page 579:

40 “ Here there are three subjects detached, and the value  
“ which the witnesses attribute to them is only reached by join-  
“ ing them up, a process which depends on powers obtained not  
“ from the claimants, and for the enhanced value of which re-  
“ sult the claimants have no right to be compensated . . . Also  
“ with regard to the reserved water rights there must be no con-  
“ fusion made. It is not that the water power of the appellants  
“ will be *derived* from the reserved water rights, but it is that

“ a water power like that of the appellants could not be developed and located to such advantage without extinguishing the reserved water rights of the respondents.”

Section 3 of the Special Act in this case says that:

10 “ The date with reference to which valuation shall be made shall be the date of the Order-in-Council approving the plans for such development.”

Even if potentialities had existed in connection with the scheme (which is definitely not the case), they had certainly disappeared in toto at that date since there was then no possibility of Respondent getting his plans approved, in fact, he had already made his representations to Québec unsuccessfully.

20 The Respondent is not entitled to compensation based upon the results of the storage works carried out by Appellant as part of Appellant's scheme of development, thus increasing the dependable flow from 1,900 cubic feet per second to 10,000 cubic feet per second, upon which latter figure he bases his claim to 14,000 horse power. It is at the most only the added value which the possibilities of such a scheme would give to the lands if put up for sale which could be considered. This point was definitely decided by our Provincial Courts as well as by the Privy Council in the case of *Fraser vs. Fraserville*, 21 R. de J., page 104, Belleau J., at page 115, Superior Court:

30 “ La valeur à donner aux Grandes Chutes n'est pas celle qu'elles peuvent avoir pour la Cité ou pour toute autre partie qui a, ou qui peut obtenir, les pouvoirs nécessaires pour le développement des énergies hydrauliques réalisées par la demanderesse, mais celles qui résultent du fait que les Grandes Chutes dans leur condition naturelle sont susceptibles de ce développement. L'incertitude est et doit rester un élément dans l'appréciation de cette valeur. Le fait que ce développement est réalisé ou en voie de l'être peut servir d'argument pour prouver qu'il était possible, mais pas plus. Sa réalisation ne peut entrer en ligne de compte. La propriété peut être susceptible de faire partie d'un système de développement d'énergie électrique qui apporterait de gros bénéfices à son propriétaire ou de toutes autres exploitations également rémunératives; et c'est un élément qui doit entrer dans l'appréciation de sa valeur, mais à condition que cette possibilité reste à l'état de possibilité et ne soit pas devenue une réalité. La question à se poser et à résoudre est celle-ci. Quelle était la valeur de la propriété avec toutes ses perspectives de développement dans l'état où

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elle était lorsque la Cité a décidé d'exercer les pouvoirs que lui donne sa charte pour l'établissement d'un système d'éclairage électrique, et d'acquérir les Grandes Chutes pour cette fin; et quel prix auraient pu réaliser ses propriétaires en la mettant alors en vente?"

*King's Bench decision*, 25 K.B., page 106, Archambault C.J., at page 111:

10 Cites *Cedars Rapids vs. Lacoste* and also *Lucas and Chesterfield*. Goes on to state basis upon which arbitrators should have valued and decides that they did not follow it. They had capitalized the net revenues at 5 per cent, forming \$39,500, and added to this \$32,200 for the real value of the Grandes Chutes power of 300 H.P. and for the lands and buildings expropriated.

20 " Le tout forme le montant de \$75,700 accordé comme indemnité aux propriétaires pour la valeur de la propriété expropriée. Cette manière de procéder, quant à l'estimation de la valeur potentielle de la propriété, est clairement illégale. Les arbitres n'ont pas pris en considération la valeur potentielle de la propriété avant l'obtention par la cité de ses pouvoirs d'expropriation. Ils ont basé leurs calculs sur la valeur de l'augmentation de pouvoir après l'exécution des travaux. Il n'y a là ni égalité ni équité dans cette manière de fixer la valeur de la propriété prise par la cité. Les propriétaires doivent recevoir *une juste indemnité*, mais rien de plus. Ici, ils reçoivent une proportion de profits dans l'exploitation d'un pouvoir additionnel, sans contribuer aux dépenses qui ont été encourues pour créer cette nouvelle force. *La règle posée par les tribunaux en Angleterre est absolument juste et équitable, et basée sur les principes de notre Code civil*. Il existe deux principes à cet égard dans la loi, le premier veut que personne ne puisse être exproprié pour cause d'utilité publique, sans recevoir *une juste indemnité*. C'est en vertu de ce principe que la valeur potentielle de la propriété doit être prise en considération. Autrement, la partie expropriée ne recevrait pas toute la valeur de sa propriété. L'autre principe veut que personne ne puisse s'enrichir aux dépens d'autrui et c'est en vertu de ce principe que la valeur potentielle qui doit être prise en considération est celle que la propriété possédait avant l'obtention des pouvoirs d'expropriation que la partie expropriante a obtenus; en d'autres termes, c'est la valeur de la propriété pour l'exproprié, et non cette valeur pour la partie expropriante".

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Cites *Lucas and Chesterfield*. Goes on to point to similarity in

*Cedars Rapids vs. Lacoste* case and quotes extensively from Dunedin's judgment.

*Privy Council decision Law Reports* (1917) A.C. (Appeal Cases), page 187: Lord Buckmaster at page 189:

10           “ The appellants are the owners of the banks and lands adjacent to the waterfalls of the riviere du Loup, known as the Grandes Chutes . . . the value of these falls for industrial enterprise has long been recognized, and as far back as 1881 William Fraser, the predecessor in title of the present appellants, granted a lease of the falls and the adjacent lands to a paper pulp company for twenty years at the rate of 30 dollars per year. This lease was extended from time to time, and in 1896 a final extension was granted to the then holder of the original lease for a period of ten years. In 1905, one year before the expiration of this lease, the then lessees, who had used the water to carry on a business of electric lighting, sold the lease and the business to 20 the city for the sum of 60,000 dollars. . . . In 1906 an offer was made by the city to William Fraser for a new lease of twenty-five years, but though this offer was accepted, no formal lease was executed, and William Fraser died in 1908 with the matter still in abeyance. On July 10, 1907, the respondents adopted a by-law authorizing them to construct a reservoir higher up the river in order to regulate the flow of water and also to expropriate all the necessary land for the purpose of this enterprise. At certain falls lower down the river there was at this time another mill established for the purpose of pulp manufacture, and 30 the lease of the falls and adjacent land, which was of long duration, was held by a company known as the Riviere du Loup Pulp Company, Limited. The riviere du Loup is fed by four tributary streams, which run down through valleys whose natural construction readily permits of the waters being dammed in reservoirs. It is of course obvious that if such reservoirs were constructed it would be possible to regulate the flow of water over the falls of the river so as materially to increase the amount of horse power available at each fall throughout the year.”

40           The City entered into an agreement with the Pulp Company for the building of the reservoirs, the Company agreeing to pay four-fifths of the cost, the maintenance to be divided one-third and two-thirds. On an arbitration the arbitrators divided two to one and on two actions, the one to set aside the award and the other on the award, Mr. St. Laurent, one of the majority, testified as to the basis: “ He divided the subject-matter into two heads—the value of the lands and the water power in the



10 physical condition in which they were found at the date of the valuation, and the value of the possibilities of development of those waterfalls by storing and regulating the waters through the medium of reservoirs. In doing this, their Lordships are of opinion that he was clearly right. The possibility of an added utility for any expropriated property due to existing possibilities of development is, subject to limits to which their Lordships will refer, a right and proper subject for consideration in ascertaining the compensation to be paid on expropriation. But in the method which was adopted by Mr. St. Laurent for arriving at what he regarded as the measure of this compensation he did not, in their Lordships' opinion, fix, as he was bound to do, the value of the immoveable he was appointed to determine, but the value of another thing which was altogether outside his powers."

20 "It is unnecessary to examine the evidence upon this point in close detail, because the statement of Belleau J. in the Superior Court in these words—". Quotes Belleau as well as the Chief Justice, showing that the arbitrators had valued not a power of 300 horse power but the one-half of the additional 1200 horse power due to the realization of the storage. ". . . the value which Mr. St. Laurent fixed was the value of the property to the person who was buying, and not to the person who was selling, and it was not this value that he was appointed to determine."

30 "The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those in *In re Lucas and Chesterfield Gas and Water Board* (1909) 1 K.B. 16, *Cedars Rapids Manufacturing & Power Co. vs. Lacoste* (1914) A.C. 569, and *Sidney vs. North Eastern Ry. Co.* (1914) 3 K.B. 629. The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case. It is this that the Courts have found that the arbitrator has failed to do, and it follows that his award cannot be supported."

40 (These principles were subsequently cited with approval by the House of Lords—*Swift & Co. vs. Board of Trade* (1925) A.C., page

520, at pages 534-5, and in the same case on another issue in the Court of Appeals in 1926, 2 K.B., pages 153, 158 and 159).

10 *Vide* the case of *Inglewood Pulp & Paper Company vs. New Brunswick Power Commission*, where the Judgment of Leblanc J. was confirmed by the Court of Appeals of New Brunswick, 3 D.L.R. 1927, page 967, and by the *Privy Council Law Reports*, 1928 Appeal Cases, page 492. This was a case concerning the expropriation of certain power sites owned by the Company. Leblanc J., whose judgment was confirmed by the Court of Appeals, as well as by the Privy Council, found in the result that the cost of development was excessive and disallowed the claim for special advantages, reducing the Company's claim from \$640,000 to \$42,500. He said:

20 “ The principle adopted by the company of ascertaining value of Musquash lands and power rights by capitalizing the net profit of the realized project is in defiance of *Fraser vs. City of Fraserville* decided by the judicial committee of the Privy Council in 1917, 34 D.L.R., p. 211. A witness stating that such valuation is value to the owner and not to the taker does not help it. The fact remains that the owner becomes participant in the gain produced by the taker's investment in the developed project, and that is exactly what he should not be permitted to do.

30 “ The law governing proceedings of this kind is clearly stated by the judicial committee of the Privy Council in *Cedar Rapids Mfg. & Power Company vs. Lacoste*, 1914, D.L.R., p. 168:

‘ The value to be paid for on the compulsory expropriation is the value to the owner as it existed at the date of the taking, not the value to the taker. The value to the owner which the taker must pay on compulsory expropriation consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.’

40 That value is described as whatever amount above or over the bare land value sometimes called agricultural value, a person would be willing to pay for some special advantages possessed by the land, but not a proportionate part of the assumed value of the whole developed undertaking. If it were put up at public auction what would a purchaser pay for such advantages if they did not exist, over and above the bare price of the land.

“ If there are any special advantages to the land over and

above the bare agricultural value, a fact which under the evidence I cannot find, such special advantages must be infinitesimal. I think they would be fully paid for by the amount which I am about to allow.”

These decisions have been consistently followed by our own Courts ever since in assessing compensation under The Railway Act, under The Cities' & Towns' Act, The Expropriation Act and any special Acts.

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*Lachine, Jacques Cartier & Maisonneuve Ry. Co. vs. Mitcheson*, 47 Que. S.C., page 3:

“ The law of Canada, in matter of expropriation as regards the principles upon which compensation for the land taken is to be awarded is the same as the law of England. The indemnity to be paid for land is the value to the owner as it existed at the date of taking, not the value to the taker. The value to the owner consists of all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. When there is a special value over the bare value of the ground consisting in a prospective value on account of certain undertaking, the value is not a proportional part of the assessed value of the whole undertaking, but is merely the price enhanced above the bare value of the ground, which possible intending undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects, which made the undertakings, as a whole, a realized possibility.”

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*C.N.R. vs. Perrault*, 24 K.B., page 78:

“ 1. Bien que les arbitres en expropriation doivent prendre en considération, pour déterminer l'indemnité qu'ils accordent au propriétaire, la valeur future du terrain exproprié avec tous ses avantages présents et futurs, néanmoins, c'est la valeur actuelle du terrain ainsi augmentée qu'ils doivent considérer, et non une valeur à venir douteuse, incertaine, ou improbable.”

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*Cross J.*: “As regards valuation, it has been laid down that: ‘ The value to be paid for is the value to the owner as it existed at the date of the taking—not the value to the taker ’, and that: ‘ The value to the owner consists in all advantages which the land possesses, present and future, but it is the present value

alone of such advantages that falls to be determined.' *Cedar Rapids Co. vs. Lacoste*, 30 T.L.R. 293."

*Raymond vs. The King*, 16 Exch., page 1. Affirmed 59 S.C.R., page 682:

10 "Where property is taken by the Crown for a proposed public work, in assessing compensation to the owner, it is not proper to treat the value to the owner both of the land, and rights incidental thereto, as a proportional part of the value of the proposed work or undertaking when realized; but the proper basis for compensation is the amount for which such land and rights could have been sold had there been no scheme in existence for the work or undertaking. On the other hand, regard must be had to the adaptability of the property for such a use and the possibilities of the same being realized. *Cunard vs. The King*, 43 Can. S.C.R. 99; *Lacoste vs. Cedars Rapids Company* (1914) A.C. 569; *Lucas vs. Chesterfield Gas and Water Board* (1909) 1 K.B. 16; and *The King vs. Wilson*, 15 Ex. C.R. 282 referred to. 2. 'Special adaptability' as used in expropriation cases does not denote something detached or separable from the value of the land in the market, but on the contrary, signifies something that enters into and forms part of the actual market value. *Sidney vs. North-Eastern Railway Co.* (1914) 3 K.B. 629 applied."

20 *Green vs. Can. Northern Ry. Co.*, 19 Can. Ry. Cas. 139, 22 D.L.R. 15:

30 "On the expropriation of land for railway purposes the value to be paid is the value to the owner as it existed at the date of the taking and not the value to the taker; such value is the present value alone of the advantages which the land possesses whether present or future. (*Cedars Rapids vs. Lacoste*, 16 D.L.R. 168 (1914) A.C. 569; *R. vs. Trudel*, 19 D.L.R. 270, 49 Can. S.C.R. 511, followed.)"

40 *The King vs. Trudel*, 49 Supreme Court Reports, page 501:

Page 510, *Duff J.*: "I think the learned judge has fallen into some misapprehension in appreciating the evidence offered in support of the defendants' claim. The principle of compensation is, of course, well settled. It is stated very clearly in the following passage from the judgment of Moulton L.J. in *Re Lucas and Chesterfield Gas and Water Board*, 1909, 1 K.B. 16, at page 29:

‘The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the land he gives up their equivalent, i.e., that which they were worth to him in money. His property is, therefore, not diminished in amount, but, to that extent, it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser.’

10 “Where future advantages are in question, the principle to be applied is that expounded by Lord Dunedin in the *Cedar Rapids case*, 30 Times L.R. 293. His Lordship says, at page 294:

‘For the present purpose it was sufficient to state two brief propositions. 1. The value to be paid for is the value to the owner as it existed at the date of the taking—not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantage that falls to be determined.’

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“The point to be determined, therefore, in this case is: How much was the property worth to its owners in July, 1908, taking into account the possibilities of future use, but estimating those possibilities at their value as of that date?”

*Town of Montmagny vs. Letourneau*, 55 S.C.R., Duff J., at page 547.

30 *Belanger vs. The King*, 1919 Ex. C.R., page 444:

“And it is now settled law that in assessing compensation for property taken under compulsory powers it is not proper to consider as part of the market value to the owner, such value as land taken may have to the party expropriating when viewed as an integral part of the proposed work or undertaking. But the proper basis for compensation is the amount for which such land could have been sold, had the present scheme carried on by the Crown not been in evidence, but with the possibility that the Crown or some company or person might obtain those powers and carry on the scheme. And in the present instance, who, outside of the Crown, could undertake such colossal works? *The Cedar Rapids Co. vs. Lacoste*, 16 D.L.R. 168 (1914) A.C. 569; *Sydney vs. North Eastern Ry. Co.* (1914) 3 K.B. 629;

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“The scheme must be eliminated, notwithstanding works

had been started, subject, however, to what has just been said. *Fraser vs. City of Fraserville*, 34 D.L.R. 211 (1917) A.C. 187.

10 “When Parliament gives compulsory powers and provides that compensation shall be made to the person from whom property is taken, for the loss he sustains, it is intended he shall be compensated to the extent of his loss; and his loss shall be tested by what was the value of the property to him, not by what will be its value to the party acquiring it. *Stebbing vs. Metropolitan Board of Works* (1870) L.R. 6 Q.B. 37.”

The Respondent is not entitled to have his lands valued on the basis of what individual building lots may have been sold for. *The King vs. Trudel*, 49 Supreme Court Reports, page 501:

Page 503: Fitzpatrick C.J. quotes rules laid down in *Cedars Rapids vs. Lacoste*:

20 “That price must be tested by the imaginary market which would have ruled had the land been exposed for sale (at the time notice of expropriation was given).”

Page 505: “It is impossible, in my opinion, to say that, if, at the time the land was expropriated, it had been put up for sale, it could have been sold for building purposes, and, if sold at public auction in the open market, it would not have brought anything like the price awarded by the judge of the Exchequer Court.”

30 Page 507—*Idington J.*:

“To say that the market price for a block of ninety-three lots, not to be selected by way of picking them out, but by virtue of an arbitrary line drawn directly across a survey of over two thousand such lots cut out of a recent wilderness to form part of a future city, must be measured by the prices got for isolated sales of a few single lots a year, spread over a period of years, seems to me unsound.”

40 *The King vs. Frost*, 1931, Ex. C.R., page 177:

Page 178: “Much stress has been laid by Counsel for the Crown on establishing the compensation on the valuation of other properties in the neighbourhood. That class of evidence has been held by the courts to be quite cogent, but has been much criticized by some text writers on the subject of Eminent

Domain. Such evidence must be approached with care and be regulated with reasonable judgment by the Court, because that evidence cannot be based on common rumour or from hearsay, and only when the witness has actual knowledge of the price paid and the circumstances of the sale. That class of evidence is only helpful when all the circumstances of such sale are clearly and exhaustively disclosed. Otherwise, it introduces a multitude of collateral issues, as no two pieces of land or property are ever exactly the same.

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“ This property must be assessed, as of the date of the expropriation, at its market value in respect of the best uses to which it can be put, taking into consideration any prospective capabilities or value it may obtain within the reasonably near future. But it is only the existing value of such prospective capabilities at the date of expropriation that falls to be determined. (*The King vs. Trudel*, 1913, 49 S.C.R. 501; *The King vs. Falardeau*, 1913, 14 Ex. C.R. 265, at p. 279.)”

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*Green vs. Can. Northern Ry. Co.*, 19 Can. Ry. Cas. 171:

“ 2. The land in question closely adjoined the City of Moose Jaw and there was a likelihood of its being subdivided. Held, that in determining the value of the property evidence should be directed to its value, having in the view the possibility of its being subdivided, and not to the fact that lands surrounding and in the neighbourhood of the land in question had been subdivided and sold at certain prices.”

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*The King vs. Cyr et al.*, 1929, Ex. C.R., page 228:

“ Moreover, the price paid for a small lot cannot be said to establish the market price of large areas of over 200,000 square feet. A larger price is paid proportionately for smaller lot than for such large area, that is commercially well known.”

See also remarks of Brodeur J. in *The King vs. Larivee*, 56 S.C.R. at page 385.

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The Respondent is not entitled to a capitalization of his business profits which is an element only in so far as it affects the value of the land, and the same is true of the capitalization of losses. *Lake Erie and Northern Railway Company vs. Schooley*, 53 S.C.R., page 416. Davies J. at 420:

“ With respect to the additional amount of \$20,000 added

under the head of 'special adaptability' I am of opinion that the arbitrators proceeded upon a wrong principle.

10 " They first found on conflicting evidence that the extra expense of harvesting and selling the ice at the proposed new location would be \$2,000 yearly and they proceed to allow this amount for ten years in addition to the intrinsic value of the property taken. There is no justification in my judgment for such an arbitrary assessment.

20 " The true principle on which they should have proceeded is that laid down by the Judicial Committee in the *Pastoral Finance Association vs. The Minister* (1914) A.C. 1083, namely, that this special suitability of the lands expropriated for the carrying on of an ice business and the additional profits which the owners will derive from so carrying it on, are proper elements in assessing the compensation, but the owner is not entitled to have the capitalized value of those savings and profits added to the market value of the lands.

" Their Lordships say at page 1088 of the report of the above case:

30 " That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that *they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.* Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would, no doubt, reckon out those savings and additional profits as indicating the elements of value of the land to him, and they would

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guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.'

10 " This statement of the law shews clearly that in arbitrarily adding ten times the amount of their estimate of the extra yearly cost of harvesting and selling their ice product, the arbitrators proceeded upon a wrong principle and one which, if endorsed by the courts, would, in many cases (I think in this case) be productive of great wrong."

*Ketcheson and Can. Northern Ontario Railway Co.*, 16 Can. Ry. Cas. 286, 13 D.L.R. 854:

20 " In awarding damages against the railway in eminent domain proceedings in respect of a railway right-of-way across a farm, the inconvenience of transferring machinery and farm implements, and the like, from one part of the farm to another, and the inconvenience in farming and cultivating the land, occasioned by the construction of the railroad, are not separate items to be capitalized on an ascertainment of a prospective annual loss to the owner whose farm is divided, but are to be considered only as factors in fixing the depreciation of the market value of the remaining parts of the farm."

5. *Admissibility of evidence and probative value:*

30 Returns made by Respondent to Department of Lands and Forests and the Department of Colonization and certified by Deputy Ministers. See *Lands & Forests Act*, R.S.Q., Cap. 44, sec. 10:

40 " Extracts from any records, documents, books or papers, belonging to or deposited in the Department, attested under the signature of the Minister or of the Deputy Minister, shall be competent evidence in all cases in which the original records, documents, books or papers would be evidence."  
*Colonization Act*, R.S.Q., Chap. 74, Sec. 12:

"A copy of any document forming part of the archives of the Department, certified by the Minister or the Deputy-Minister as a true copy, shall be authentic and shall have *prima facie* the same legal effect as the original in any court of justice."

As to power of Court to vest the Appellant in a servitude, or right of flowage, in lieu of ownership. *Quebec Improvement Com-*

*pany vs. Quebec Bridge and Railway Company*, 1908, Canadian Appeal Cases, page 212. This was merely a question of the interpretation of an arbitration agreement where the arbitrators were given no powers except to value the lands. They had no such powers such as are conferred by the Court by this Special Act. Section 6:

10 “The Court shall, in the judgment to be rendered in the said case, determine what properties and rights shall, on payment of the said compensation, interest and costs, become vested in the Gatineau Power Company.”

*Ayr Harbour Trustees vs. Oswald*, 8 A.C., page 623:

*Submission of Solicitor General*, page 630:

20 “As to the minute they contended that it was perfectly invalid, and ultra vires; because the appellants, being Harbour Commissioners acting under a public trust, could not impose restraints which would prevent the trustees in all time coming from using their statutory powers as Harbour Commissioners for the public benefit. *They could not, like private individuals or a company working for profit, act as they please.*”

*Lord Blackburn*, page 634:

30 “But in this case the trustees, during the course of the arbitration, endeavoured by a minute to fix once and for all the way in which they and their successors in office would use their powers. And if they could at that time bind themselves by a bargain with Mr. Oswald, if he had agreed to it, and that agreement would prevent his land from being injuriously affected, I should be unwilling to hold that he could, by refusing his assent to that agreement, get compensation for the injury which he might have prevented. As Lord Shand says, ‘he cannot insist on being injured that he may get money.’”

40 The decision in *Southeastern Railway Company and Wiffin’s Contract*, L.R. 1907, 2 Chancery, page 366, turns upon a similar point, namely, the exercise of special statutory powers. In each case the Corporation acquired land specially mentioned in the Statute for a special statutory purpose and it was held that the trustees in office at the time could not forever restrict the use prescribed by statute.

These two cases came up for subsequent consideration in two later cases which did not involve the same statutory restrictions.

*Stourcliffe Estates Company Limited vs. Corporation of Bournemouth*, L.R. 1910, page 12:

Parker J., referring to the two cases above mentioned said:

10 “ In each of these cases the grant or contract precluded the purchaser from using the land for the purposes or some or one of the purposes for which the Legislature said it might be acquired and to which it was in fact dedicated by statute. I have come to the conclusion that the principle involved in the three cases referred to is not really applicable to the covenant in the present case. The land in question was not specified in any Act of Parliament as land which the corporation might acquire for any defined purposes, etc.”

The judgment of Parker J. was confirmed by *Cozens-Hardy M.R.*, page 17:

20 “ But the second point is this: Is the covenant binding upon the corporation? I ask myself, why not? It was a voluntary bargain made between the corporation and the plaintiffs. There is no dedication by Parliament of this particular land to any particular purpose.”

Then proceeds to discuss in detail the Ayr case and the Wiffin case. See also *Buckley L.J.*, page 22, referring to the Ayr case. He says:

30 “ The House only decided that as regards land thus acquired the authority cannot release the powers which the Act of Parliament has attached to those lands.”

*Birkdale District Electric Supply Company Limited vs. Corporation of Southport*, House of Lords L.R. 1926, A.C. 355:

Distinguishing the Ayr case, Lord Sumner says:

40 “ I think the case was supposed to speak for itself and that, in effect, the trustees were held to have renounced a part of their statutory birthright.”  
At page 373:

“ If this is so, there is a wide and more than sufficient difference between the contract of the Ayr Harbour Trustees not to acquire all that they were intended to acquire, and that of the appellants to obtain the transfer of the Order by covenanting among other considerations for something, which obviously is

not, and may never be, incompatible with the fulfilment of all the purposes of the Order and most of the purposes of the company's trading as well."

*Davies and James Bay Railway Co.*, 10 Can. Ry. Cas. 225:

10 "Held, upon the evidence, that the difficulty could be overcome by the construction of a new roadway with a bridge, at an expense of \$3,000, which was an ample allowance in respect of this cause of complaint; and, while it might be true, as stated by the arbitrators, that it was not within their power to compel either the claimant or the contestants to construct the roadway and bridge, yet they were not justified in making an allowance for that particular damage greater than a sum sufficient to enable it to be obviated for all time."

20 As to Respondent's necessity of proving damage, *Duke of Leeds vs. Earl of Amherst* (1850) 20 Beavan, page 239. This is a case of a life tenant who committed numerous depredations to the Estate, tearing down the mansion house, cutting down ornamental trees, etc., and is quite inapplicable to the present situation, and is printed as a foot-note to the case of *Gray vs. Haig*, 20 Beavan, page 219. The foot-note reads:

"This characteristic judgment of Sir Lancelot Shadwell, which has never been reported, is inserted as relating to the principles laid down in the preceding case."

30 also note:

"There was an appeal in this case, which came before the Lords Justices on the 13th and 18th December, 1851, and 12th January, 1852, but ultimately the case was compromised."

The case of *Gray vs. Haig*, to which reference is made, laid down the assumption that

40 "Where the written evidence has been destroyed by the Defendant pendente lite the Court will assume that if forthcoming it would have proved the statement of a single witness."

6. As to costs:

*Decary vs. Montreal West*, 26 S.C., page 16. In this case, although the action was an important one, and took seventeen days to try, the amount of the experts' fees allowed was \$125 in all.

As to the terms of the Special Act it is respectfully submitted that where section 4 refers to “ disbursements, fees and costs incurred in such pending action ” that what they were referring to was the petitory action. The references in the preamble and the sections preceding section 4 clearly evidence this. Under the terms of section 4 they are not entitled to all their costs, but only to such amounts as the Court deems just (equitable) for the disbursements, fees and costs incurred in such pending action. Fees and costs which might be termed de luxe, as well as fees and costs incurred in supporting  
10 claims without foundation, it is respectfully submitted should not be allowed.

MONTREAL, May, 1934.

BROWN, MONTGOMERY & McMICHAEL,  
*Attorneys for Appellant.*

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