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CANADA PROVINCE OF QUEBEC MONTREAL	<b>COURT OF KING'S B</b> (Appeal Side)
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**16**

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.

CANADIAN  
LAW  
LIBRARY

**GATINEAU POWER COMPANY,**

(Defendant in the Superior Court)

Appellant and Cross-Respondent,

and

**FREEMAN T. CROSS,**

(Plaintiff in the Superior Court)

Respondent and Cross-Appellant.

---

**FACTUM**

of

**RESPONDENT and CROSS-APPELLANT**

---

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INSTITUTE OF ADVANCED  
LEGAL STUDIES

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

- COURT OF KING'S BENCH -  
(Appeal Side)

Nos. 655 & 664

GATINEAU POWER COMPANY,

Appellant and Cross-Respondent,

- and -

FREEMAN T. CROSS,

Respondent and Cross-Appellant.

FACTUM OF RESPONDENT AND CROSS-APPELLANT.

This is an appeal by the above named Appellant (hereinafter called "the Appellant") and a cross-appeal by the Respondent (hereinafter called "the Respondent") from a judgment of the Superior Court dated the 28th day of June, 1933, fixing the "just and fair" compensation to be awarded to the Respondent for all his properties and rights "taken for or affected by" the Appellant's power development and its operation up to elevation 321.5 at Chelsea Falls on the Gatineau River. The case is now governed by a Special Act (22 George V, Chapter 128) assented to on the 19th February, 1932 applicable solely to the present action, which was en délibéré before Mr. Justice de Lorimier when the Special Act was passed.

This Special Act was passed as a result of two Bills introduced into the Legislature at the instance of the Appellant.

Judgment. Case Vol. 13, p. 153, lines 3-18.

Agreement as to facts, Vol. 9, p. 114.

Bills 170 and 171 with certificate of Clerk of Legislative Assembly, Vol. 3, pages 134 and 139.

The preamble to the Act refers briefly to the situation existing between the parties when it came to be passed, and to understand the Act it is pertinent to review the history of this litigation as shown by the record.

On March 23rd, 1926, the Canadian International Paper Company submitted plans for a hydro-electric development at Farmers Rapids and Chelsea Falls in the Gatineau River (Exhibit D-7, Special Exhibit Book No. II). On March 24th, 1926, a plan showing the properties to be taken was registered in the Registry Office at Hull. On May 21st, 1926, these plans were approved by Orders-in-Council (D-1 and D-2, Case Vol. 4, pages 1 and 3) but without prejudice to the rights of riparian owners or third persons.

The Chelsea project consisted in erecting a dam at Chelsea Falls which would back up the waters of the Gatineau River for a distance of some fifteen miles from the Falls, thereby obtaining a total head of some ninety-six feet at an elevation of 318 and giving Chelsea the benefit of the head existing between the actual site at Chelsea and the upper end of the huge pond created by the dam.

At that time, the Respondent was the owner of the upper portion of the Cascades waterfall about eight miles from Chelsea; a lumber business situated at Farm Point at the mouth of Meach Creek, a tributary of the Gatineau; branches of that business at Mileage 12 below Cascades, and at Alcove; timber limits and dams serving his mill, land and buildings, including some 29 workmen's

as well as other cottages, a hotel and two churches at Farm Point. In fact, he was the owner of everything in the Village at Farm Point. There he also had his own residence.

A general description of his undertaking at Farm Point is contained in the Order of the Public Service Commission, Exhibit D-65, Vol. 4, p. 225, line 41 et seq.

He also owned and operated a hydro-electric plant at Meach Creek, where he developed electricity which he distributed in Kirk's Ferry, Cascades, Farm Point, Wakefield and Alcove, and which he also used to operate his branch sawmills. He also supplied the residents of Farm Point with water from an aqueduct which he owned.

On March 24th, 1926, the Legislature (at the instance of the Appellant) amended the Public Service Commission Act by adding Section 28 (k) (16 Geo. V, Ch.16, Sec. 6). Under the Water Course Act, R. S. Q. Ch. 46, Section 18, it is submitted no expropriation could take place of a water power of over 200 H.P. or to the prejudice of an existing industry.

"28k. In any case where the Province or any person, company or corporation is authorized to construct a dam and where such construction will have the effect of submerging any water-power of not more than a permanent force of two hundred horse-power, the Commission shall have the power to authorize the expropriation thereof, upon the application of the party so authorized to construct. Upon receipt of such application and upon proof that the submersion of such water-power is indispensable for the construction and maintenance of the proposed work, the Commission shall make an order authorizing the expropriation of such water-power of less than two hundred horse-power which will be so submerged notwithstanding the restrictions enacted by the Water-Course Act (Chap. 46).

The offer of compensation and the immediate possession, the expropriation proceedings, the fixing of the compensation and the other formalities shall be subject to the analogous provisions in the Quebec Railway Act (Chap. 230), except that the sole arbitrator shall be the Quebec Public Service Commission."

On the 17th December, 1926, the Appellant obtained approval for the expropriation of a number of properties belonging to the Respondent. This approval was granted under Section 23 of Division III of the Water Course Act (Exhibit D-3, Vol. 4, p. 5.).

On the 5th day of January, 1927, relying on and invoking this amendment (28 (k)), the Appellant Company applied to the Public Service Commission for permission to expropriate in part the industrial establishments of the Respondent at Farm Point up to elevation 325. Notices of expropriation had also been served in connection with his other properties at Farm Point, his undeveloped water power at Cascades and for part of his property at Mileage 12. But no petition for possession was ever made and no further proceedings were made respecting these latter properties, and the Appellant submerged them on the 12th March, 1927.

On the 22nd April, 1927, the Public Service Commission held that the amending Section 28 (k) did not apply to an existing industry operated by hydraulic power but only to an undeveloped water power, and therefore Cross' industries at Farm Point could not be expropriated. The Appellant appealed to the Court of King's Bench, but the appeal was refused on the ground that the Court had no jurisdiction (46 K.B., p. 65).

The Appellant further appealed to the Supreme Court of Canada, which held on the 28th May, 1928 that it had no jurisdiction to interfere with the judgment quashing the appeal to the Court of King's Bench (1929 S.C.R., p. 35).

In the meantime, the Company completed its dam at Farmers Rapids and Chelsea Falls, and on the 12th March, 1927, without any permission from the Courts and in spite of the above mentioned refusal of the Public Service Com-



mission, it backed up the waters of the river and submerged and destroyed in whole or in part the Respondent's properties at Mileage 12, Cascades, Farm Point and La Pêche and appropriated the benefit of the use thereof to itself. This flooding was done in spite of the protest of Respondent, as proved by McCarthy (Vol. 6, p. 86 - Exhibit P-44, Vol. 2, p. 114). From March 12, 1927, the water has remained raised above the natural flow of the river in heights varying from 20 feet or more at the Mileage 12 sawmill site; some 14 feet at Cascades, and 6 or 7 feet at Farm Point. In fact, Appellant admits in paragraph 31 of its Plea that it has refused to operate its dam in a manner to allow the waters of the Gatineau to resume their natural level.

In April 1929, the Respondent filed with the Public Service Commission a petition asking it to fix an indemnity of \$600,000 for the undeveloped water power site at Cascades and the lands connected with it, based on the raising of the water to elevation 318. In December 1930, the Appellant filed an Answer to this Petition offering \$1,290.00 for the Cascades property but denying Respondent's title to a portion thereof.

In view of this plea in denial of his title, the Respondent desisted from the proceedings before the Public Service Commission, inasmuch as the Commission appeared to be without jurisdiction to deal with the matter, and the Respondent paid the costs on the desistment.

On the 2nd day of March, 1931, Respondent instituted the present petitory action in the Superior Court, asserting his ownership and asking for a lowering of the waters down to elevation 304 at Cascades, unless the Appellant chose to pay therefor its value, namely,

\$600,000.00. He alleged also that its value to the trespassing Appellant was at least \$900,000.00.

The case was heard in September and November 1931 and further heard in January 1932, when it was taken under advisement.

During the hearing of the present action, Appellant fyled a petition to the Public Service Commission asking it to assess the damages caused to properties of the Respondent at Cascades, Farm Point and La Peche, offering \$1,290.00 for Cascades and \$10,427.00 for Farm Point and La Peche (Vol. 1, p. 23). At the same time, Appellant moved for permission to fyle a Supplementary Plea, referring to the fact that the new proceedings were now pending before the Commission to fix the indemnity for all damages suffered by Respondent by reason of the flooding "of the property of the said Plaintiff as set out in the present action". (Vol. 1, p. 21, line 19).

Upon cross-examination of Woollcombe, who signed the affidavit in support of the motion, it was ascertained, as appears by his deposition (Vol. 7, p. 381 et seq.) that the properties "as set out in the present action" were not the whole of the properties at Cascades to which Respondent claimed ownership in his action. Thus the Public Service Commission once more would have had before it a contestation as to Respondent's title at Cascades over which it is submitted it had clearly no jurisdiction.

The motion was taken under advisement and finally rejected, as appears in Vol. 1, p. 22, line 30.

On the 3rd February, 1932, without notice to the Respondent, Public Bills 170 and 171 were introduced into the Legislature at the instance of the Appellant to amend the Public Service Commission Act by deleting Section 28 (k) and to amend the Water Course Act by

authorizing the Public Service Commission to permit the expropriation of water powers of over 200 H.P. and existing industries, notwithstanding Sections 16, 17 and 18 of the Water Course Act, which permit any owner of a waterpower of over 200 H.P. to develop and expropriate in connection with his development but does not permit the expropriation of established industries (P-116 and P-118, Vol. 3, pp. 134 and 139).

In effect, this legislation, as will be shown later, would have rendered ineffective a favourable judgment for Respondent in the pending action. This legislation would also have deprived the Respondent from receiving a price for his non-expropriable properties and rights which would take into account all the elements of value and advantages which they possessed when they were taken from him by the raising of the waters in March 1927. The basis of valuation would have been 1932 prices for the properties and rights in this submerged state.

The preamble to the Special Act and the original Bills 170 and 171 and the evidence of Aimé Guertin, M.L.A., (Vol. 10, p. 191) show that the Legislature was made aware of all these circumstances and that these bills were opposed. It rejected Bill 171 and amended Bill 170 in everything but its number and provided "by special legislation," i.e., the Special Act, that the Appellant shall not be disturbed in the operation of its said power development and that fair compensation to Cross shall be assessed in his favour and awarded to him by the Court in the said pending case (Vol. 3, p. 1).

It should be noted that by the Special Act, Appellant was not to be disturbed in its operation of the development up to elevation 321.5 above sea level at Farm

Point, that is,  $3\frac{1}{2}$  feet higher than the elevation of 318 referred to in the conclusions of the pending action. 318 had been the elevation to which the water had been more or less held by the Company though, from time to time, it had gone up to 319 and 320.

In accordance with the provisions of Section 5 of the Special Act and under the permission of the same Trial Judge dated 10th March, 1932 (Vol. 1, p. 32), Respondent filed a Supplementary Declaration asking for fair and just compensation for all his properties and rights taken for or affected by maintaining the level of the Gatineau River above Chelsea Falls at any controlled elevation not exceeding 321.5, together with interest and the costs, and continued his petitory conclusions asking for the lowering of the water from his properties and such damages as might appear proper to the Court, should the Company fail to pay the amounts awarded. The Appellant again joined issue with the Respondent on the Supplementary Declaration, but this time declared itself willing to pay approximately \$48,000.00 for nine of the items mentioned in Respondent's Supplementary Declaration, plus interest thereon from the 12th March, 1927 on all the items except the costs. However, it made no tender or deposit of this sum. This is shown by the Judgment (Vol. 13, p. 162, lines 12 to 14) -

"CONSIDERANT que la défenderesse n'a ni payé, ni déposé, ni consigné les montants qu'elle a offerts par son plaidoyer du onze mai 1932 (paragraphe 57) privant d'autant le demandeur de l'emploi de ces sommes durant tout le temps du procès."

On these additional issues, the enquête was reopened before the same Judge, and after a total enquête of forty-two days, the case once more was finally taken en délibéré.

THE JUDGMENT

The Judgment found that the Respondent was the owner of the immoveables mentioned in his Declaration and particularly those described in the dispositif of the Judgment (Vol. 13, p. 163). After weighing the conflicting evidence as to "just and fair compensation" for "properties or rights taken for or affected by" the new controlled elevation of 321.5 "and by the operation thereof", the learned Trial Judge found that the different amounts to which the Respondent was entitled, should the Appellant decide to pay and become vested in Respondent's properties up to 321.5, were the following, namely:-

For the undeveloped water power at Cascades.....	\$90,000.00
For the hydro-electric plant and distribution system at Meach Creek and elsewhere.....	60,000.00
For Respondent's lumber business, including Mileage 12 and the lands in connection therewith	115,000.00
For depreciation to timber limits	5,400.00
For the gravel pit (admitted)...	100.00
For gravel transported and lost by reason of the flooding....	<u>1,000.00</u>
	<u>\$271,500.00</u>

In addition, the Court in the exercise of the discretionary powers conferred on it by Sections 4 and 5 of the Special Act, allowed \$76,981.22 for disbursements, fees and costs incurred by Respondent in the action and in connection with the passing of the Special Act.

Further provision was made in virtue of Section 6 of the Act as to lowering the water and damages in the event of failure to pay the said compensation. Interest was allowed on \$271,500. from 12th March, 1927.

ARGUMENT

The Respondent submits first that the findings

of the learned Trial Judge, who in reality sat as a jury, should not be disturbed. He was specially directed by the Legislature to fix a just and fair compensation for 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". In fixing the compensation, he was also ordered to exercise judicial discretion with regard to the disbursements, fees and costs. In effect, the Superior Court was really made persona designata, even though Section 8 of the Special Act does state that the judgment shall be deemed for all purposes of appeal or otherwise a judgment of the Superior Court.

As to the sums awarded, there is nothing in the judgment to show that the Judge in the exercise of the duties imposed upon him by the Act proceeded upon an erroneous view of the law, except in the case of the Cascades water power site, or that there was no evidence upon which the awards could be properly arrived at, or that there was some manifest error leading to the result, or any mistake affecting the result. The principles laid down in the following leading cases are directly applicable.

LACOSTE v. CEDAR RAPIDS (Privy Council - 2nd decision, January 1928) 47 K.B. 271 at page 283:-

"The law and practice of the Province of Quebec governing the procedure of the Court in such matters appear to be in all essentials the same as in this country. Although the appeal is a rehearing, a verdict of a jury or an award of an arbitrator acting within his jurisdiction is not in general set aside unless it is shown that the jury or the arbitrator proceeded on an erroneous view of the law, or that there was no evidence on which the verdict or the award could properly be arrived at, or that there was some manifest error leading to the result. There might also, of course, be some other matter in the conduct of the proceedings such as the wrongful admission or rejection of evidence which might vitiate the result."

Followed in Gatineau Power Company v. Watters,

44 K. B. 557.

S. W. & P. CO. v. GAGNON, 1931, S.C.R. 513 per  
Rinfret, J. (page 520) -

"La preuve faite devant la commission chargée de l'arbitrage a démontré les faits qui précèdent, sauf que le terrain de l'intimée n'était pas suffisamment grand et que, pour les besoins d'une exploitation de ce genre, il fallait y adjoindre la propriété voisine, qui n'appartient pas à l'intimé. L'appelante a admis que cela ne modifiait pas le côté légal de la question et laisse aux arbitres le droit d'apprécier la possibilité d'adaptation du terrain. Lukas vs. Chesterfield Gas & Water Board, 1909, 1 K.B. 16."

RUDDY v. TORONTO EASTERN RY., Privy Council, 33  
D. L. R. 193 -

In this case their Lordships had to deal with an appeal under Section 209 of the Dominion Railway Act, which permits a Superior Court, upon appeal from the award of the arbitrators, to decide any question of fact upon the evidence taken before the arbitrators "as in a case of original jurisdiction".

Lord Buckmaster, pages 193-194:

"Before considering the facts and the merits of the case, it is well to examine what is the real nature of the appeal covered by Sec. 209. In their Lordships' opinion, it places the awards of arbitrators under the statute in a position similar to that of the judgment of a Trial Judge. From such a judgment an appeal is always open, both upon fact and law. But upon questions of fact an Appeal Court will not interfere with the decision of the Judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

McHUGH v. UNION BANK, Privy Council, 10 D. L. R.,  
page 562, per Lord Moulton at page 568:

"Their Lordships are of opinion that the assessment of damages by the learned Judge at the trial should stand. There was evidence on which the learned Judge could come to the conclusion that, by the negligent behaviour of the defendant's agent, the mortgaged property had become deteriorated so that it realized less than it ought to have realized upon sale. The assessment of the damages suffered by the plaintiff from such a cause of action is often

far from easy. The tribunal which has the duty of making such assessment, whether it be Judge or jury, has often a difficult task, but it must do it as best it can; and, unless the conclusions to which it comes from the evidence before it are clearly erroneous, they should not be interfered with on appeal, inasmuch as Courts of appeal have not the advantage of seeing the witnesses - a matter which is of grave importance in drawing conclusions as to quantum of damage from the evidence that they give.

Their Lordships cannot see anything to justify them in coming to the conclusion that Mr. Justice Beck's assessment of the damages is erroneous; and they are, therefore, of opinion that it ought not to have been disturbed on appeal."

HAACK v. MARTIN, 1927, S.C.R. 413, per Rinfret, J. at Page 419:

In this case, the two Plaintiffs were the tenants of a wheat farm. Their lease contained a provision that the Defendant was to receive as rental a share of the crop. Prior to the expiration of the lease, they were evicted without legal justification.

Page 419:

"It is obviously impossible to assess the damages 'with mathematical accuracy' but that is not necessary and such impossibility 'does not relieve the wrongdoer of the necessity of paying for his breach of contract'. (Chaplin v. Hicks (1911) 2 K.B., page 786)."

DUKE OF LEEDS v. THE EARL OF AMHERST, Bevan's Reports, Vol. 20, p. 239:

This was an action brought by the Duke of Leeds against the Executor of his late father by reason of the damage done by him to certain property which was substituted in favour of the Plaintiff.

In the Court of first instance, the Master, on a reference, found for the Plaintiff in the sum of £42,000 arising from the receipts of the Plaintiff's late father from equitable waste and for interest. The Master stated:

"This result did not appear to be supported by precise evidence of the amounts to the above extent actually received from the waste by the late Duke, it seemed rather to be an arbitrary



charging of the late Duke's estate allowing certain deductions therefrom under the head of 'Just allowances'."

The finding of the Master was appealed, and in rendering the judgment in appeal the Vice-Chancellor, in dealing with the difficulty of reviewing with any precision as to the amount of damages, stated:-

"Putting all these matters together and applying them to the present case, what do they amount to but this - that it being unquestionable that the injury has in the first place proceeded from the act of the late Duke of Leeds, and the late Duke of Leeds having left matters in such a state that it becomes hopeless, I may say, by anything like an approach to certainty to determine what was the amount of the mischief done to the Plaintiff, his son, the only rule that can be adopted is this - that the party who had done the mischief shall suffer for the mischief which he has committed and although it may perhaps be not consistent quite with the accurate truth yet that the sum that the Master has found shall be the sum for which the Estate of the late Duke shall be answerable, he having created the difficulty."

INGLEWOOD PULP & PAPER COMPANY v. NEW BRUNSWICK ELECTRIC POWER COMMISSION, 1928 Appeal Cases, page 492:

In this case the arbitrator found, adopting the evidence given by the witnesses for the Respondents rather than that of the witnesses for the Appellants, that there were no special advantages possessed by the land as a water power site. Per Lord Warrington of Clyffe at page 497:

"There being no error in law and sufficient evidence to support the finding, it is clear that the Appeal Division were right in refusing to disturb it."

This case was cited against us in the Superior Court because it was found that no value attached to the property as a water power site. The holding in law, however, confirms our submission that the Trial Judge's finding should not be upset.

Our first submission may be summarized as follows:

1. This Court is not called upon to weigh all the evidence submitted for the purpose of substituting its own conclusions for those of the Trial Judge, but merely to review it for the purpose of determining whether or not (a) the Trial Judge proceeded on an erroneous view of the law; or (b) whether or not there was any evidence on which the award could properly be arrived at; or (c) whether or not there was any manifest error leading to the result.

2. The Respondent's second point is not only that the Trial Judge did not proceed on an erroneous view of the law with the exception of Cascades and that there was evidence on which the award could properly be arrived at and that there has been no manifest error affecting the result, but that in fact all the amounts awarded with the exception of that with respect to the water power at Cascades are amply supported by evidence. That with respect to the water power at Cascades, the Trial Judge in fact apparently disregarded the real nature of the Respondent's rights and based his valuation entirely upon the potential hydraulic power Respondent would have developed ("aurait développée") himself at Cascades (Vol. 13, p. 158, line 44 et seq.) and has erred in not taking into consideration its market value resulting from the special adaptability of the site for inclusion in any larger scheme of development. Therefore an amount very considerably in excess of \$90,000.00 should have been awarded for its special value.

3. We shall take the awards in the order in which they appear in the Judgment. We may say that apart from two questions of law with respect to Cascades, Respondent's ownership of his properties is not in dispute.

CASCADES AND ITS POTENTIALITIES

The Gatineau is one of the most important power rivers in the Province. This is stated by the Appellant's witness Lefebvre (Vol. 7, p. 223, line 4) and confirmed by the Prospectus dated June 15, 1926 (Exhibit P-57, Vol. 2, p. 178, line 5) containing the letter from the President of the Appellant Company, A. R. Graustein, - "It is one of the most important power rivers in Quebec". Prior to its development, the normal unregulated flow of the river was about 5,000 second feet for 300 days in the year with a minimum flow of about 3,000 second feet (MacRostie, Vol. 6, p. 75, lines 28 et seq.) (Lefebvre, Vol. 7, p. 197, lines 27 et seq.). See also the Plan of the Canadian International Paper Company dated March 23, 1926 (D-9, Special Exhibit Book II) which shows the land to be affected by the Chelsea Power Development. This plan gives a low water level elevation which shows "low water level when river discharge is approximately 5,000 sec. ft."

D-122, Special Exhibit Book V - Water Resources Paper No. 58, at page 180.

Particular interest was directed towards the Gatineau River around 1926 as at that time the owners of the Hull Electric Co. had after several years finally assembled the various riparian elements necessary to make possible a development of 100 feet of head at Paugan Falls, 21 miles above Chelsea. As a result of this concentration, Robertson (Vol. 6, p. 136, line 1) says that storage for the river "was surely coming". See also Lefebvre (Vol. 7, p. 188) who says that the Baskatong reservoir was decided upon in the autumn of 1925 and the winter of 1926, which had the effect of increasing the unregulated flow of the river to a regulated flow of 10,000 c.f.s.

A profile plan of the river had been prepared by

the Quebec Streams Commission in December, 1923, P-28, Special Exhibit Book No. 1.

During this period also, the loads of the various power companies had been growing and they were looking around for and acquiring additional power sites (Robertson, Vol. 6, p. 134, line 33). MacRostie, Vol. 6, p. 51, tells how the demand for power had been increasing in the Ottawa district.

Simpson, Chief Engineer of Appellant, Volume 7, page 166, line 31, admits that there were more than 25 hydro-electric companies operating plants of some magnitude and that quite a few undeveloped water powers were changing hands during the last decade.

The above was briefly the situation on the 21st May, 1926, the date with reference to which the valuation and assessment of the compensation shall be made.

CASCADES AND RESPONDENT'S RIGHTS THERETO

Cascades consists of four falls of which it is submitted Respondent owned or controlled the two upper ones. The total head was about 18 feet and Respondent had rights in 7.21 feet. (MacRostie, Vol. 6, p. 48, line 13). He had been the owner since he acquired the property from Dame Bridget Smith (Mrs. Byrne) in October 1916 (Exhibit P-2, Vol. 2, p. 1). It is admitted the Gatineau is a non-navigable, non-floatable river with respect to Respondent's properties (Vol. 6, p. 27, and p. 28). They were granted to Respondent's auteurs prior to 1st June, 1884.

In addition, he was the registered holder from David Caves of a promise of sale with warranty, executed before Louis Bertrand, N.P., on the 20th November, 1916 (P-39, Vol. 2, p. 86) referred to in Vol. 6, p. 60, line 8 and Vol. 6, p. 73, line 4, by which he had the right to

acquire:-

"all the land that said F. T. Cross may flood with the dam he is going to erect across the Gatineau River which lands may be part or the whole of lots 21A, 22A and 22B all in the 15th Range of the said Township of Hull and the South part of lot 22B in the 16th Range of the said Township of Hull".

NOTE: The note of registration dated December 4th, 1916, Number 27342, has been inadvertently omitted in the printing of this Exhibit. It appears on the original filed in the record.

The riparian portions of the land covered by the Promise of Sale are included in the part coloured in yellow on the plan filed by the Appellant, D-13, Special Exhibit Book No. III. They are on the East side of the Gatineau River. These lots also lie to the North of the land coloured red on Exhibit P-61. They include the lands on the East bank of the River at the upper portion of the falls on D-71, Special Exhibit Book No. IV. They also appear on Appellant's Plan D-69, Special Exhibit Book No. III, at and North of the words "Gatineau Power Company" on the East bank of the River.

It is true that Caves was subsequently expropriated by the Appellant on the 20th September, 1927 (Exhibit D-17, Vol. 4, p. 22) but Respondent was not a party to these proceedings and it is submitted that the Appellant did not acquire the rights previously granted by Caves to the Respondent. If the Appellant contends that by expropriation they acquired all the rights of Caves as riparian owner it would be invalid as having been obtained super non domino, as Respondent was not a party to the expropriation. In any event, the subsequent expropriation is irrelevant to the issues herein, as the Court is called upon to fix the value of Respondent's properties and rights as at the 21st May, 1926, when he was the registered owner of rights which carried with

them the right to develop the East half of the upper waterfall.

Respondent was also the holder of various options or agreements from ten riparian owners above Cascades as appears by Exhibit P-38, Vol. 2, p. 83; a Promise of Sale from Levi Reid and also a Promise of Sale from Selwyn of the West side of the Gatineau River at La Peche.

Prior to May 21st, 1926, Canadian International Paper Company, the auteur of the Appellant Company, owned only four riparian properties above Cascades. Appellant itself owned none.

While the head claimed by Respondent is less than that conceded by the Appellant (and we shall refer to this later), it is common ground that Respondent's ownership at Cascades carried with it the ownership of more than 200 H.P. and we contend this gave him the right to develop the site himself and to obtain a head of 14 feet or more from Cascades up to La Peche Rapids, because the ownership gave him the right to expropriate the riparian properties above him for that purpose, there being no owner above him having any water power of over 200 H.P. and no industry or water-works that would be affected, apart from his own business at Farm Point. To appreciate his rights, it is necessary to refer to the Water Course Act, R. S. Q. Chapter 46, Sections 16, 17 and 18:

"16. Every water-power formed by a lake, pond, water-course or river, whether floatable or not, belonging to any person, is declared to be a matter of public interest, and the owner thereof may proceed to expropriate the required lands so as to allow him to utilize such water-power in the manner and subject to the conditions mentioned in this division. R. S. (1909) 7287.

17. The following alone shall be subject to expropriation under this division:-

1. Immoveable properties or any part thereof, and riparian rights necessary for

the establishment of factories, manufactories and their dependencies, or for the construction and maintenance of dams, dikes, canals, pipes and sluices, and all immoveable properties or any part thereof susceptible of being affected by such establishment, construction or maintenance;

2. ....

3. ....

18. No expropriation under this division shall take place except in the case of a water-power of an average natural force of at least two hundred horse power, and large enough for industrial purposes, nor shall such right in any case be exercised to the prejudice of an industry already established or of water-works supplying a municipality wholly or in part, R.S. (1909) 7289".

Thus Cascades was in a key position, because any person or company wishing to utilize the potential head on the Gatineau River to its fullest extent would be obliged to acquire Cascades to make use of its head and the head above it. The fact that the Appellant Company, subsequent to the 21st May, 1926 and the flooding, did purchase or expropriate lands above Respondent is irrelevant, because all of the lands above Respondent up to La Pêche were always subject to expropriation by him - he being the owner of the only non-expropriable properties.

RESPONDENT'S TITLE TO CASCADES

Two questions of title were raised with respect to Respondent's ownership of Cascades: (1) whether the boundary lines of the South half of Lot 21 extended across the River; and (2) whether the Canadian Pacific Railway, by reason of its ownership of its right-of-way, also owned a portion of the Cascades waterfall.

The title situation is as follows:-

The Respondent's title goes back directly to

Letters Patent from the Crown dated November 11, 1867, in favour of David Moore granting to him the south halves of lots 20 and 21 of the 15th Range in the Township of Hull, The terms of the grant are clear (Exhibit P-4, Vol. 2, p. 5, lines 29-40) -

".....and by these Presents do grant, sell, alienate, convey and assure, unto the said David Moore, his heirs and assigns FOR EVER all that Parcel or Tract of Land, situate, lying and being in the Township of Hull, in the County of Ottawa, in Our said Province, containing by admeasurement Two hundred acres, be the same, more or less, together with the usual allowance for highways; which said Parcel or Tract of Land may be otherwise known as follows, that is to say:

The South halves of lots numbers Twenty and Twenty-one, in the Fifteenth Range of the Township of Hull aforesaid."

By Deed of Donation executed on the 17th August, 1875, David Moore gave to his son Thomas Moore the same property with the exception of a few emplacements previously sold by the donor and which are not relevant to the present issues. This deed was registered in the Registry Office for the County of Hull under the number 10222 and re-registered in the same office under the number 5398. (P-5, Vol. 2, p. 7).

The said Thomas Moore by his Will bequeathed all his property to his wife Dame Bridget Smith, constituting her his universal legatee. This Will with probate is registered under the number 8852. (Exhibit P-6, Vol. 2, p. 13, line 45).

By Deed of Sale executed on the 11th October, 1916, before Louis Bertrand, N.P. and registered under No. 27165, Dame Bridget Smith (then wife of Michael Byrne) sold to the Respondent lot 21B in the same 15th Range of the same Township and parts of Lots 20C, 20D, and 21C all in the same range. "The present sale includes also all rights



to water power and to the bed of the River owned by the Vendor". (Exhibit P-2, Vol. 2, p. 1).

P-19, Special Exhibit Book No. 1, which is a copy of the expropriation plan of the Appellant, shows in red the riparian land acquired by Respondent less a small portion at the northerly end of 21C. The plan does not indicate, as we submit that it should have done, that the ownership of the river bed was also sought to be expropriated.

In passing it should be noted that by Deed of Rectification executed by the said Dame Bridget Smith and the Respondent on the 5th January, 1931 before Louis Bertrand, N.P., and registered under No. 62597, it was declared that by error the above mentioned Deed of Sale contained mention of Lot 20D - "it having been the intention of the parties thereto that lot 21D in the said 15th Range in the Township of Hull should be conveyed". (Exhibit P-3, Vol. 2, p. 3). Thus 21D replaces 20D in the above mentioned sale.

The Appellant Company accepted the Respondent's apparent ownership of 21D, as appears by its expropriation plan and the description attached to it prepared by Farley, when the Company intended to expropriate from Respondent (Exhibit P-19, Special Exhibit Book No. I - Exhibit P-54, Vol. 2, p. 156, line 37). It is submitted that the judgment is well founded with respect to it.

Having now given the Respondent's chain of title to the Cascades site, apart from the rights he acquired from David Caves, we submit that a further examination of the situation shows that the boundary lines of lot 21 extend across the Gatineau River and that such being the case Respondent owns all the portions of the bed and banks of the River within the boundaries of the South half of lot 21. This appears from the following documents:-

1. Proclamation of His Majesty George III creating the Township of Hull, 3rd January, 1806, Vol. 2, p. 30. This Proclamation shows that the Township of Hull was divided into 16 ranges at equal distances of 80 chains, 75 links, numbered from the South on the Ottawa River towards the North, 1 to 16 inclusive. It further shows that the Ranges were subdivided into lots 26 chains in breadth numbered from East to West. It is of particular interest to note that the 15th Range with which we are concerned is stated to contain 28 lots of 26 chains wide, each lot containing 200 acres. (Vol. 2, p. 32, line 4 et seq.).

2. The official diagram of the Township of Hull signed by Joseph Bouchette appears as Exhibit P-12, Special Exhibit Book No. 1. The instructions for surveying and subdividing the township appear in Exhibit P-13, Vol. 2, p. 47.

It will be seen that the Township is laid out and the lines of the Ranges and lots established without regard to any rivers or waters therein except the Ottawa River to the South.

It was established by the evidence of G. J. Papineau, Q.L.S. (Vol. 6, p. 3, line 35) that the lots with which we are concerned, namely, 21B, 21C and 21D in the 15th Range, form part of the land described in the said Letters Patent issued by the Crown to David Moore on the 11th November, 1867, that is they were included and form part of the South half of lot 21 in the 15th Range of the Township of Hull. This is further established by the Official Book of Reference (vide certified extract filed as Exhibit D-74, Vol. 4, p. 250, line 20 et seq.) which states that lots 21B, 21C and 21D form part of lot 21 in the 15th Range of the primitive subdivision of Hull.

It will thus be noted that the Crown grant to

David Moore of the south half of lot 21 included the Gatineau River within the boundaries of the south half of this lot, and therefore the 100 acre grant included the portion of the bed of the Gatineau River within the boundaries of the south half of lot 21, as shown in red on P-61, Special Exhibit Book No. 1.

The matter is made clear by the following decision of the Supreme Court of Canada dealing with the ownership of lot 3 in the Third Range of the same Township and involving the river bed of the Brewery Creek in the case of The Attorney General for Quebec and the City of Hull and Janet Louisa Scott, et al., 34 S. C. R. p. 603. It was unanimously held confirming the judgment of the Court of King's Bench and of the Superior Court -

"That as there was no reservation of the lands covered with water in the original grant by the Crown in 1806, the bed of the creek passed to the grantee as part of the property therein described, whether the waters of the creek were floatable or not".

The Chief Justice, Sir Elzear Taschereau, rendering the judgment of the Court says at page 615:-

"I would however be of opinion with the Superior Court and the majority of the Court of Appeal that whether this creek is floatable or not the Letters Patent of 1806 included the bed of it as part of the land within the limits of the land granted to Wright. To read out of these Letters Patent the bed of this creek is to find therein a reservation thereof which the Crown did not make and must be held not to have intended to make, by the very fact that it did not make it and left Wright and his representatives in possession for nearly one hundred years under the authority of these Letters Patent. The grant to Wright without reservation is an express grant of every inch contained in the lots granted, covered with water or not."

So also when the Crown granted to David Moore the South half of lot 21 consisting of 100 acres, it was, in the language of the Supreme Court - "an express grant of every inch contained in the lots granted, covered with water or not". Consequently the whole of that portion of the bed of the

Gatineau River within the boundaries of the South half of Lot 21 passed to David Moore and through him to Thomas Moore, his son. For this reason we submit that Appellant's Exhibit D-69, Special Exhibit Book No. III, put in by the witness Beique, does not correctly show the title situation. This plan is based amongst other things on the erroneous assumption that the south half of lot 21 did not include the bed of the river.

As we have said before, Dame Bridget Smith inherited from Thomas Moore the South half of lot 21. So that in her turn she became the owner of the river bed within the boundaries of the South half of lot 21.

It is our submission, therefore, that the Respondent in turn acquired from Dame Bridget Smith (then Mrs. Byrne) in 1916 all of the bed of the river within the boundaries of the South half of lot 21.

#### C. P. R. SITUATION

It is submitted the foregoing really disposes of the second challenge to the Respondent's title, namely, that the C.P.R., as successor in title to the Ottawa and Gatineau Valley Railway Company, also owned one-half of the upper waterfall at Cascades on the West bank of the River and being that portion shown on Beique's Plan D-69, Special Exhibit Book III, rectangular in form and on which appears the wording beginning "by agreement dated May 6, 1926, Canadian Pacific Railway ..... for Canadian International Paper Company." We submit this contention is unfounded for many reasons.

On the 11th April, 1891 Thomas Moore, who then owned the bed of the river within the boundaries of the South half of lot 21, sold to Ottawa and Gatineau Valley Railway Company a strip of land 40 feet on either side of

the centre line of the Railway forming parts of lot 21C and 22C-1 and 20D "with a continuous width of 80 feet, 40 feet on each side of said centre line and measured off square thereto and further bounded as follows:-

.....North-easterly partly by the remaining North-easterly portions of said lots numbers Twenty-one C (21C) .....and Twenty-two C-1 (22C-1), partly by the Gatineau River and partly by the Hull and Wakefield Macadamized and Gravel Road Company's property....." (Vol. 2, p. 68 - P-24).

The Ottawa and Gatineau Valley Railway Company was incorporated by the Act of Legislature of the Province of Quebec 42-43 Victoria, Chapter 51. The Charter was amended by the Act of the Legislature 50 Victoria, Chapter 69, on the 18th May, 1887. Later in the same year the Company's Charter was enlarged and confirmed by an Act of the Dominion Parliament 50-51 Victoria, Chapter 74. Section 5 declares the provisions of the Railway Act "shall, except insofar as they are inconsistent with the said recited Acts of the Legislature of the Province of Quebec, apply to the Company".

The Quebec Consolidated Railway Act (1880) 43-44 Victoria, Chapter 43, was in force at the time of the deposit of the plan for the right of way.

The plan was deposited on the 18th April, 1888 and is fyled as Exhibit P-25, Special Exhibit Book No. 1 and the Book of Reference as P-26, Vol. 2, p. 71.

Section 9 of this Act declares that the lands which may be taken without the consent of the proprietor cannot exceed 33 yards in breadth except in certain specified accepted cases not applicable here.

Sub-section 2: "The extent of the public beach or of the land covered with the waters of any rivers or lakes

in this Province taken from the Railway Company shall not exceed the quantity limited in the next preceding subsection". That is it shall not exceed 33 yards.

The Book of Reference shows that the plan and Book of Reference were examined and certified by the Assistant Commissioner of Public Works with the proviso that the land for the right-of-way - (Vol. 2, p. 73, line 24) -

"le terrain marqué sur le livre de renvoi pour le droit de passage aussi bien que pour stations, etc., ne devant en aucun cas excéder les 33 verges ou 99' autorisés pour la largeur de la voie sur tout son parcours par le dit acte des Chemins de Fer."

It will be noted that the properties acquired from Thomas Moore are included in the Book of Reference and consequently the Railway's ownership is limited in any event to 99 feet even though the properties were not expropriated as mentioned in Section 9 of the Railway Act.

Therefore, when Thomas Moore sold to the Ottawa and Gatineau Valley Railway Company on the 11th April 1891 a strip of land forty feet on each side of the centre line with a continuous width of 80 feet there was no conveyance to the middle of the Gatineau River of that portion of the bed of the River to a distance of 400 feet from the shore. In other words it was not a case for the application of the rule ad medium filum - remembering always that Thomas Moore was at that time the owner of the bed of this non-navigable and non-floatable stream at this point.

At the trial Appellant asserted rights in the bed of the River under the Contract D-51, Vol. 4, p. 122.

This is a contract between the Canadian International Paper Company and the Canadian Pacific Railway dated May 6, 1926 and deals with the raising of the level of the water whereby certain surrounding lands will be flooded "particularly a part of the lands of the Railway Company.....which will necessitate a deviation of its line

and an alteration in its tracks". The Contract provides that at certain points the Railway Company will relocate the tracks and at others merely raise the right-of-way. This is all to be done at the cost of the Paper Company and, moreover, the Paper Company is to pay the Railway Company One dollar per annum "for the right to flood the lands belonging to or occupied by the Railway Company". Subsequently on September 25, 1929 (Vol. 4, p. 127) the Paper Company assigned such rights as it might have under this Contract D-51 to the Appellant. It is quite obvious that the purpose of the Contract was merely to deal with the interference by the flooding of the Railway Company's line and it does not purport in terms to grant any rights in the bed of the River. The reliance placed upon it before the Superior Court is another indication of how impracticable it would have been to have attempted to have these matters disposed by the Public Service Commission.

Our case is that the Railway Company had no rights of ownership in the bed of the river or any rights whatsoever beyond the strip of 80 feet in width, and it is quite apparent that the Railway Company never attempted to assert or exercise any such rights on its own behalf.

The Canadian International Paper Company made this Contract with the Railway Company for a purpose entirely different from that for which its successor the Appellant is now attempting to use it, and as a matter of fact when the general conveyance in notarial form by the Canadian International Paper Company to the Appellant was made on the 26th August, 1926 (D-57, Vol. 4, p. 136) neither party to this sale had yet thought that this contract might be invoked as a title to land and no land to which Exhibit D-51 might apply was included in the conveyance.

It was only afterwards in an attempt to minimize the importance of the properties taken from the Respondent

that it was attempted to deny a portion of his title by invoking this as an adverse title.

As a further indication of what was understood and intended by the parties to the Contract D-51, we beg to call attention to clause 7 thereof on page 125 of Volume 4; to replace the properties flooded the Paper Company undertook to acquire for and convey to the Railway Company a strip having a minimum width of 80 feet, that being, we submit, the extent to which the Railway Company's auteur had acquired a title under the Moore deed.

It is further submitted that under its charter and the Mortmain Laws the Ottawa and Gatineau Valley Railway Company was also limited to the acquisition of lands for the purpose of its undertaking and that to acquire a rectangular block of land extending some 400 feet into the river at Cascades was no part of its charter powers.

AYER HARBOUR TRUSTEES vs. OSWALD (1883) 8 Appeal Cases, 623, at pages 634 and 640. This case was followed by S. E. Railway Company and Wiffins Contract (1907) 2 Ch. 366.

In the Superior Court the Appellant referred to the case of Massawippi Valley Railway Company v. Reid, 33 Supreme Court Reports, 457.

It is submitted that an examination of the Judgment will show that it is clearly distinguishable; in that case the provisions of the Railway Act do not appear to have been raised as has been done here. There was not the limitation of a definite purchased "continuous width of 80 feet" for the right-of-way extending 40 feet each side of the centre line and, moreover, the original grant from the Crown does not appear to have included within the lines of the grant, as in this case, the land covered by water; the lands acquired by the predecessor's title of the Massawippi Valley Railway Company have been described as bounded by the river and the Court held that that extended the boundary out into the middle



of the stream. Here the land in question acquired by the Railway Company was not described by metes and bounds but by a specific number of feet extending from the centre line of the Railway regardless of whether or not that number of feet stopped short of the river bank or extended out beyond it.

On the whole, therefore, it is submitted that the judgment a quo was correct in finding the Plaintiff the owner of the properties at Cascades described under the heading "Premièrement" in the Judgment, Vol. 13, p. 163, which are shown coloured red on Exhibit P-61, Special Exhibit Book No. 1. As pointed out above Respondent was also the holder of the registered promise of sale from David Caves dated the 20th November, 1916 (P-39, Vol. 2, p. 86) of the rights with respect to the riparian land therein mentioned to the North of and up-stream from lot 21B.

VALUE OF CASCADES

On May 21, 1926 it is submitted that Respondent was in this position. Respondent had the rights and advantages of an owner.

1. His properties and rights were specially adaptable for inclusion in a larger scheme of development such as that undertaken by the Canadian International Paper Company at Chelsea or Farmers. Should he sell to any developer lower down the River he was in a position to transfer to the latter the right to 14 feet or more additional head of water plus an additional length of pondage of 4 3/4 miles. This is what he had to sell to any would-be developer lower down.

2. The owner of Cascades could have joined forces with the Canada Cement Company who were the owners of the lower half of the waterfall and the joint enterprise would have commanded a head of some 25 feet.

It should be noted when consulting the Appellant's aeroplane Photograph D-71, Special Exhibit Book IV, that the

lower half of the Cascades Fall is shown mainly on lots 20B and 20C on each side of the River as belonging to Gatineau Power Company. We must remember, however, that this Company only acquired from Canada Cement Company on July 10, 1926, Exhibit P-43, Vol. 2, p. 103. Thus on May 21st, 1926, which is the date with reference to which valuation shall be made, Respondent and Canada Cement Company had full ownership and control of the whole of Cascades. The same remarks apply to Appellant's Exhibit D-69, Special Exhibit Book Number III.

3. He could have developed Cascades himself and generated some 14,000 continuous H.P.

MacRostie, an engineer with considerable experience on the Gatineau, called by the Respondent, Vol. 6, pp. 59 and 60, values this undeveloped water power in the neighbourhood of \$40.00 per H.P. based on 14 feet head and 10,000 c.f.s. flow.

He says:-

"Q. You mentioned \$40.00 per horse power as your estimate of the value of this development. Was that for the purpose of individual development, or for the purpose of inclusion?

A. It was a price for either individual development or a price which he might secure in the open market.

Q. In your opinion as an Engineer, which would be the preferable way to handle this property? Would it be alone or as part of a bigger scheme?

A. As part of a bigger scheme, most certainly.

Q. With what other parties?

A. Either with the Canada Cement or as it is being used today."

In Cross-examination, Vol. 6, p. 81, he says that the most scientific way to utilize Cross' properties at Cascades would be to include them in a larger scheme. This only goes to show that the market value of the non-expropriable rights of Cross at Cascades carrying with them the right to acquire property up to elevation 318 and

higher had very real and substantial advantages in 1926 for use in inclusion with any hydro-electric undertaking lower down the river and that these advantages considerably enhanced the value of the properties to the owner at the material date - May 21, 1926 - when, as has been shown above, the C. P. R. had made possible the development of Paugan Falls.

Mr. Robertson, Vice-President of the Southern Canada Power Company, was called by the Respondent. He has been connected with hydraulic enterprises all his life and is the only independent power company executive officer who testified in the whole case. He gives a similar valuation (Vol. 6, p. 136). He also says Cascades lent itself for inclusion in a larger scheme of development lower down the river.

Both MacRostie and Robertson refer to actual sales to support their opinions. Amongst these sales two were purchases by the Appellant and one a sale by a subsidiary, or affiliated company.

We submit that the prevailing market values for undeveloped power sites as tested by actual sales where a buyer who did not have to buy paid to a seller who did not have to sell, should be considered and applied and they all show that the amount awarded for Cascades is far too low.

The following examples, amongst others, show the prices actually paid to the owners of other raw water powers or for their undivided interest in water powers:-

1. 14th August, 1925 - Sale from Lefebvre et al. to Shawinigan Water and Power Company for \$125,000.00 cash of Ste. Ursule Falls, an undeveloped and still undeveloped power site on the Maskinonge River. (P-50, Vol. 2, p. 136). It was a non-regulated river and

the amount of raw power involved was a little less than 3,000 H.P. "which could have been developed perhaps", Vol. 6, p. 138, line 38, and the price realized \$44.00 per H.P. (line 41). Robertson knows the river and says the storage facilities are practically impossible (p. 138, line 25).

The Maskinonge is a small non-regulated river and at certain seasons of the year it is practically dry (Vol. 6, p. 202, line 20).

2. 27th April, 1928 - Sale from Dorwin

Falls Improvement Company Limited to Gatineau Power Company represented by G. Gordon Gale, Vice-President and General Manager (P-48, Vol. 2, p. 122). The sale was entered into pursuant to agreement dated 27th May, 1927 (P-49, Vol. 2, p. 133) and the purchase price was \$200,000.00 cash for an undeveloped water power on the Ouareau River, a small non-regulated stream flowing into l'Assomption River (Robertson, Vol. 6, p. 136, line 29). The position of the site is shown on the map (Exhibit P-127, Special Exhibit Book IV). The undeveloped water power involved was some 4,000 H.P. which is equivalent to \$50.00 a H.P. (Vol. 6, p. 136, line 43). If storage were provided the regulated flow would be only 550 c.f.s. (Lefebvre, Vol. 7, p. 221, line 41). The unregulated flow is between 175 and 200 c.f.s. (Lefebvre, Vol. 7, p. 222, line 30). Dorwin Falls has never been developed and "the development of these would have to be on a very much larger property". (Robertson, Vol. 6, p. 137, line 26). He has examined the river on behalf of a prospective purchaser (p. 136, line 38). It is to be remembered that the minimum flow on the Gatineau was 3,000 c.f.s. and the regulated flow, 10,000 c.f.s.

3. In 1926 - Sale by the C.P.R. owners of the Hull Electric to Gatineau Power Company or Canadian

International Paper Company of Paugan Falls for \$4,750,000.00 of which \$750,000.00 is attributable to the value of the system of the Hull Electric Company in Hull and \$4,000,000.00 for a head of 100 feet at Paugan Falls on the Gatineau River (Robertson, Vol. 6, p. 139 lines 20 and 43) which is equivalent to \$40.00 a H.P. on a regulated flow of 10,000 second feet. At that time the regulation was only under construction.

If it is treated on the basis of a normal flow for 300 days of 5,000 c.f.s. the price would be equivalent to \$80.00 a H.P. On the basis of a minimum flow of 3,000 c.f.s. the price is \$133.00 per H.P.

4. 14th August, 1929 - Sale from Montreal Cotton Company acting by its President, C. B. Gordon to Beauharnois Light, Heat and Power Company. The Vendor leased for 70 years the right to divert a flow of 13,000 c.f.s over a head of 10 feet at Valleyfield to be used at Melocheville over a head of 80 feet. The consideration was \$2,000,000.00 cash - 8,000 H.P. to be delivered to the vendor free of charge until the year 2003 A.D. with the further option of 4,000 H.P. at \$15.00 H.P. (i.e. \$15.00 under the Montreal market price for power); and the Purchaser assumed the three Dominion Government rentals, (Wilson, Secretary-Treasurer of Montreal Cotton Company, Vol. 6, p. 56, Exhibit P-41, - Vol. 2, p. 89).

In Volume 6, p. 147, Mr. Robertson quite properly points out that in diverting this flow of 13,000 c.f.s. over a head of 10 feet to be used further down over a head of 80 feet it becomes eight times as efficient. He says that the amount of power which the Beauharnois Company could realize from this diversion would be something like 104,000 H.P. He values the sale for the vendor

at \$4,700,000.00 and he is not contradicted. This makes the price to the purchaser \$45.00 per H.P. using this water over an 80 foot head. Naturally the price which was paid to the Cotton Company for selling their flow over their ten foot head would be eight times \$45.00 per H.P. or \$360.00 per H.P. In addition the purchaser assumed the Government rentals.

This case is a good illustration of the value of a leased water power suitable for inclusion in a larger scheme - a fortiori a fully owned water power carrying with it the right to expropriate is more valuable.

5. June 4, 1930 - Sale by Gatineau Company Limited, represented by J. B. White, Vice-President (also Vice-President of Canadian International Paper Company) - to James MacLaren Company Limited of an undivided one-third of a water power site on the Lievre River (Exhibit P-37, Vol. 2, p. 79 - See also MacRostie, Vol. 6, p. 52, line 49) for \$200,000.00 cash (Kenny, Vol. 6, p. 54, line 35). At this point the Lievre has three channels and the one involved in the transaction is the easterly channel through which 32% of the water went down, (MacRostie, Vol. 6, p. 52, line 30 et seq.). The channel is that seen opposite the transmission tower in the photograph P-47, Special Exhibit Book No. IV. (MacRostie, Vol. 6, p. 129, line 14).

The Lievre River runs into the Ottawa River about 13 miles from the mouth of the Gatineau and is shown on Plan P-127, Special Exhibit Book No. IV.

According to Mr. Kenny, Manager of the Vendor Company (Vol. 6, p. 55, line 10) the head involved in that piece of property according to their estimate was a shade under 30 feet (also MacRostie, Vol. 6, p. 52, line 40).

Certain lands were also involved which were valued by MacRostie (Vol. 6, p. 122, line 34) at \$25,000.00. This leaves a net price for the power site of \$175,000.00. MacRostie (Vol. 6, p. 53, lines 12 to 25) on the basis that the regulated head would eventually be about 4,000 c.f.s. says that would mean 4,000 H.P. were involved in the 30 feet of head above the Railway bridge. On this basis the Gatineau Company Limited with eventual storage were selling 4,000 H.P. at \$175,000.00. This would be \$43.00 to \$44.00 per H.P. Vide also Robertson, Vol. 6, p. 148, lines 11 to 23.

Kenny says that this purchase was made for utilization in connection with a larger scheme (Vol. 6, p. 55, lines 10 et seq.).

The unregulated flow of the Lievre was only from 900 to 1500 c.f.s. (Lefebvre, Vol. 7, p. 223, line 14 et seq.). If the unregulated flow of the River were taken to be 1200 c.f.s. instead of 4,000 c.f.s. the purchase price per H.P. would be about \$146.00 per H.P.

Appellant tried to show by the Plan D-6, Special Exhibit Book III, and the evidence of Farley, that the inclusion of a part of a triangular water lot in this sale made the transaction one involving a 60.7 foot head and 10,500 H.P. and said this would result in \$19.60 per H.P. instead of \$40.00 on a regulated flow of 4,000 c.f.s. Vide Defendant's Factum in the Superior Court, pp. 36 and 37. (Incidentally this would make Cascades' potentialities taken only on a basis of 14,000 H.P. on a regulated flow of 10,000 c.f.s. worth about \$274,000.00).

It is submitted that an examination of Plan D-6 and the examination of Farley, Vol. 7, p. 60 et seq. and his cross-examination at page 88 et seq. will show the fallacy of this pretension.

The only part that could be used independently was the part above the bridge (Farley, Vol. 7, p. 86, line 41) and it is obvious that from the Plan and the evidence the owner of this irregular triangle would not control any potential H.P. development. Even the flow above the bridge could not be used without joining forces with the MacLarens. Vide Simpson, Vol. 7, p. 161. He only speaks of developing above the bridge. Therefore no 60 feet of head could be used.

6. 10th July, 1926 - Agreement with Canada Cement Company (P-43, Vol. 2, p. 103; Robertson, Vol. 6, p. 140 et seq.).

It is most instructive to see the consideration given by the Appellant to the Canada Cement Company who owned about nine feet of utilizable head on the lower part of Cascades Falls.

H. L. Doble, Vol. 6, p. 84, a Vice-President of the Canada Cement Company was called by Respondent and produced a Deed of Conveyance (Exhibit P-42, Vol. 2, p. 95) between the Cement Company and the Gatineau Power Company dated October 10th, 1928. This deed conveyed the Cement Company's properties in the lower half of Cascades to the Gatineau Company.

The deed further stated that the sale was made in conformity with the terms of an agreement entered into between the same parties on the 10th July, 1926. This latter agreement was fyled as Exhibit P-43, Vol. 2, p. 103.

Mr. Doble states, Vol. 6, p. 85, line 18, that the agreement was the only consideration of the Deed of Sale.

We would again call attention to the fact that



while the Canada Cement Company had a greater head of fall on their own properties than had Respondent, their property was absolutely useless for development per se as Respondent being immediately above them and owning over 200 H.P. they could not expropriate him and obtain any pondage for a development, whereas Respondent, by reason of his ownership of the upper part of the fall could expropriate up to the foot of the La Peche and obtain at least a 14 foot head and pondage. Appellant did not even suggest that the Canada Cement property could be developed per se.

Consequently the Canada Cement rights at Cascades consisted entirely of potentialities, such as their suitability for combination with Respondent or inclusion in a development lower down the river.

We find, on examining Exhibit P-43 and by referring to Robertson's testimony (Vol. 6, p. 140) that the agreement of the 10th July, 1926 provides for a supply of 3,000 electric horse power at a price of \$10.00 per H.P. delivered at Chelsea or Farmers Rapids.

Article 19 says that "Delivery of power under this Agreement shall begin on April 1st, 1930 and shall continue for a term of fifteen years". Provision is then made for a continuation of the contract in perpetuity unless cancelled by the Cement Company.

Paragraph 26 says that if during the life of the agreement, the Cement Company desires additional power, then the Power Company shall be bound to supply such additional power "at the lowest rate at which the Power Company is then selling or offering to sell power to any customer other than the Cement Company....."

Paragraph 31 provides that neither this agree-

ment as a whole nor any part of the power supplied under it shall be sold to any other party unless the same is first offered to the Power Company at the same prices at which it could be sold to some other party.

Then follows a very important clause which confirms what we have submitted above as to the potentialities of Cross' holdings at Cascades and his right to expropriate above:-

"36. The Cement Company agrees that if the Power Company is unable to secure at prices satisfactory to it, rights necessary to enable the Power Company to develop to elevation 318 feet above mean sea level, then this Agreement may be cancelled within two months after the date of execution."

This Agreement is signed by Mr. A. R. Graustein, the President of the Appellant Company.

This shows, of course, that the Power Company on the 10th July, 1926 evidently considered that the Cement Company's properties at Cascades did not have much value unless the Power Company was able to acquire the right to develop up to elevation 318 feet. In other words, the Appellant or any other company developing Cascades realized the advantage of being able to go to 318.

Mr. Robertson, Volume 6, p. 140, line 29, values this contract at about \$450,000.00 to the Cement Company, i.e., the owner:-

Line 36:

"A. I would place a differential between the price to be paid under this agreement and the price they would have to pay on the open market at at least \$10.00 a horse power, which means 3,000 horse power saving and I would capitalize the \$30,000.00 a year to mean about \$450,000 of capital."

At page 142, Vol. 6, Robertson says:-

"Q. Referring once more to that contract between the Canada Cement Company and the Defendant, the Gatineau Company, and assuming that the Canada Cement Company had a head at Cascades of first of all 9 feet, what would that work out that they received per horse power?

A. Of the order of \$50.00, a little more.

Q. If the Canada Cement Company had 11 feet of head at Cascades, how much would it work out at Cascades?

A. That would be just about \$40.00."

That is based on Mr. Robertson taking the market value for power at \$20.00 per horse power as against the contract price of \$10.00.

At Vol. 6, p. 141, line 1, Mr. Robertson says that the market price for horse power in Montreal about that time would be not less than \$30.00 a horse power and it was proved by Parker at page 37, Vol. 12, that the Montreal Light, Heat and Power were getting \$35.00 a horse power for electricity sold to the Napierville Company. The Respondent in order to supply his remaining lighting customers has to pay Appellant about \$40.00 a H.P. While this is for a smaller quantity of power, it is indicative of prevailing prices in that district and shows that Robertson's market price of \$20.00 is reasonable. Even though Simpson, an employee of the Appellant speaks of \$17.00 and \$18.00 per H.P. being the price prevailing - Simpson Vol. 7, p. 137, line 37 et seq., Vol. 7, p. 153, line 3. Simpson virtually accepts the Canada Cement purchase as being the open market price for a site that could not be developed per se.

It is true that Mr. Binks filed as Exhibit D-113 Vol. 4, p. 298 a further agreement between the Cement Company and the Gatineau Power Company executed in August 1928, whereby the Power Company undertook to build a transmission line and to make delivery at the Canada Cement Company's plant in Hull at an additional charge of 17 3/10 cents

per Kilowat. This would amount to some \$4,646.04 to be added to the \$30,000.00 per annum payable by the Cement Company (Binks, Vol. 7, p. 308, line 15). However, it is submitted that this does not contradict Mr. Robertson's conservative estimate, because it is a fair inference that if any other power company had had to deliver power to the Cement Company's plant at Hull it would have made an extra charge just in the same way as the Gatineau Power Company did.

Binks, Secretary of the Gatineau Power Company Limited, Vol. 2, p. 306, produced a photostatic copy of a power contract between the Ottawa and Hull Power and Manufacturing Company and the Canada Cement Company running from April 1, 1920 to April 1, 1930. It is filed as Exhibit D-112, Vol. 4, p. 292. It is entirely different from the contract between the Canada Cement Company and the Gatineau Power Company with respect to the conveyance of the lower part of Cascades, and Mr. Binks, after mentioning that \$307,000.00 had been paid by the Cement Company over a period between 1920 and 1930 does not know how many years the Cement Company were operating during that period and says, Vol. 7, p. 310, that he did not care to enter into the calculations which this contract, Exhibit D-112, calls for.

"Q. As a matter of fact, you would not be in a position to say what it works out to per horse power?

A. No." (Vol. 7, p. 310, line 13).

At page 159, Volume 6, Robertson in cross-examination by Mr. Montgomery, makes it clear that his valuation of the site at Cascades with its potentialities was the value to Cross -

Line 11:

"Q. You did not put any value to the Gatineau Company for the extra 15 feet?

A. No. I placed the value of \$600,000 on it which is the value to Cross."

"Q. Which is the value contained in Plaintiff's Declaration?

A. Yes."

Robertson, Vol. 6, p. 141, line 40 and p. 142, shows why the Cross property was more valuable than that of the Canada Cement.

7. April 13, 1922 - Sale from Mrs. R. W. Reford to J. A. Brilliant of a power site on the Metis River, the purchase price being \$85,000.00 (Exhibit P-51, Vol. 2, p. 142; P-52, Vol. 2, p. 148). The regulated flow of the river is only 350 c.f.s. (Lea, Vol. 7, p.232, line 40) and the amount of installed horsepower is now 3,500 H.P. (Robertson, Vol. 6, p. 199, line 8). This amounts to a price of \$24.00 per H.P. and it will be noted that regulation of the stream flow was only put into effect in April 1925 (Special Exhibit Book No. V, p. 338).

8. 26th August, 1926 - Sale by Canadian International Paper Company to Gatineau Power Company (Exhibit D-57, Vol. 4, p. 136) of the Farmers and Chelsea power sites and certain additional properties and constructions erected thereon. Respondent tried to ascertain the price. Roy Campbell, a witness for the Appellant and Secretary of the Canadian International Paper Company (Vol. 7, p. 318, line 42) was asked by the Court to ascertain the real consideration received for these power sites by the Canadian International Paper Company from the present Appellant in July 1926. On the 12th day of November, 1931, he was still unable to give the information from the minute book and on the 11th January, 1932 he failed once more to produce the minute book of which he, as Secretary, was custodian. Respondent was then obliged to put in the prospectuses issued by the Appellant, and it is submitted, therefore, that it is a proper and fair inference from the letter of

Mr. Graustein, President of the Appellant Company, contained in the prospectus fyled as Exhibit P-55, Vol. 2, p. 157, that the real consideration for the sale of Farmers, Chelsea, Paugan and Kippawa was at least \$25,000,000 plus the value of 500,000 shares of no par value stock. Vide cross-examination of Roy Campbell (Vol. 7, p. 316, p. 319 and p. 388), also the prospectuses P-57 to P-60 inclusive (Vol. 2, pp. 157 to 210).

We submit that the foregoing transactions in water power sites amply confirm Messrs. Robertson and MacRostie who valued Cross' potentialities at \$40.00 a H.P., which on a 14 foot head on a regulated flow equals \$600,000.00.

It is submitted that none of the engineers called by the Defendant really attempted to put a value on the special adaptability and potentialities of the Cascades site for inclusion in a larger scheme of development.

e.g. Simpson (Vol. 7, p. 146, line 20) states there is no possibility of any kind of economical development on Mr. Cross' property nor would it be possible to make an economical development at any time in the future.

Lea, adopting the design and estimates of Mr. Simpson, one of the Company's engineers, says, Vol. 7, p. 233, line 34:

"A. From an engineer's point of view, it is not worth anything to Mr. Cross to develop by himself. Any value that it may have above that, due to the fact that some other people want it, or may want it, is in a sense speculative."

Then, at page 234, line 37, he says:

"Well I think I said in the testimony that has already been noted, that we could establish a minimum value for the power by determining what it is worth to the owner to develop himself."

At page 234, line 9, he refers to the present absence of the element of competition by reason of the fact that the Appellant has by now acquired the other powers and rights on the River. It should be noted that he is not asked to put a value on the consideration received by the Canada Cement Company for the sale of their ownership in the lower part of Cascades in July 1926 and, further, that that sale was made contingent upon the Appellant being able to acquire the right to develop up to elevation 318.

At page 238, line 28:

"Q. And made no calculations as to the possibility or otherwise of an economic development which would have included 11 feet of the Canada Cement and 12 or 13 feet above that?

A. No."

Surveyer, Vol. 7, p. 242, line 26:

"Q. Do you agree with Mr. Simpson that the most favourable circumstances under which a development could be made would leave a loss to Mr. Cross?

A. I agree that he could not sell power and make a profit in Hull, and that consequently his property has no special value as it does not constitute a commercial water power development."

Thus neither Surveyer nor Lea attempts to give any value for the special adaptability.

In Vol. 7, p. 245, line 21, Surveyer says that during the last ten or fifteen years the Carillon Power site is the only sale of which he had personal knowledge, in the Province of Quebec.

Vol. 7, p. 245, line 31:

"Q. You heard about these other instances that were mentioned by Mr. Robertson in his evidence?

A. I was very much surprised at the prices paid.

Q. You did not know of any yourself?

A. No."

Vol. 7, p. 247, line 1:

"Q. And you made no estimate as to the possible combination of the Canada Cement property with eleven or twelve or fourteen feet above it?

A. No."

Olivier Lefebvre, Chief Engineer and Secretary of the Quebec Streams Commission. Although a salaried public official, he admitted in cross-examination (Vol. 11, p. 108, lines 35-45) that he expected to be paid by the Appellant for his professional services as a witness on their behalf. Apart from everything else, this puts him into the same category as any other expert witness called by the Appellant.

In any event, Mr. Lefebvre, retained by the Appellant, undertook to give theoretical opinion evidence as to the value of water powers on the Gatineau River in 1926. He adopts a rule of thumb method which may be recognized in engineering text books but which entirely ignores the market value or going value which owners of underdeveloped water powers either capable of development per se or suitable for inclusion in a larger scheme were receiving during this period.

Vol. 7, p. 222, line 43, he says he knows these prices were obtained but he "regrets" them in many instances. It is submitted that this opinion evidence can have no bearing on the value of Cascades to Cross in 1926, or to any purchaser who might choose to develop Cascades by itself and include the pondage above it to a height of fourteen feet, or to the going value of Cascades by reason of its suitability for inclusion in a larger scheme. In other words, Cascades had a market value to the owner which must be recognized and tested in accordance with the pre-



vailing prices around that time for similar properties and rights.

As regards the potentialities of Cascades for inclusion in a larger scheme, Mr. Lefebvre, Vol. 7, p. 199, line 25, says:

"Whenever we meet the condition that we have a head that is less than 20 feet, it means it has to be included with other developments....."

Although he does admit further that heads under 20 feet are susceptible of being used, but says that the modern trend is to include them in a larger concentration. Vol. 7, p. 199, line 32:

"And a lot of them are used in a small way for just local purposes. I must say, however, that the trend of water power development today is all in the direction of high head development.

In fact I do not think low head development for the purpose of distributing power has been developed in the Province in the last fifteen years. No central electric stations have been lately developed under low head developments."

This means, of course, that a raw power site which carries with it the right to develop up to a further 14 feet of head or more with its additional pondage has a special adaptability for inclusion in a scheme and therefore has a special value.

Vol. 7, p. 222:

"Q. Would it be a fair inference from your evidence to say that, in your opinion undeveloped raw horsepower has very little value, and that the various transactions Mr. Robertson mentioned in his evidence were made at too high prices?

A. Yes, that is my opinion.

Q. But, you are not disputing the fact that they were so made?

A. I am accepting the fact. I am regretting it, in many instances, for the public.

Thus he accepts the market prices established by Respondent's witnesses. It is our submission, therefore, that the Trial Judge should also have accepted these prices and applied them to the Cascades water power in fixing just and fair compensation.

Mr. Lefebvre says throughout his testimony that no one water power can be compared with another, and with respect to a valuation of \$300.00 per foot of head at Cascades he is asked (Vol. 7, p. 221, lines 33 to 40):

"Q. So the basis you were asked to assume and on which you found the figure of \$300.00 is not in your opinion a proper basis?

A. That is one way of putting it and it is right. It is not a proper basis. I do not admit any proper basis to compare raw power sites.

Q. And the \$300.00 was merely made up on that basis which in your opinion is not a proper basis?

A. That is absolutely correct."

Mr. Beique (who valued Cascades at \$11,000.00 if the C.P.R. did not own to the middle of the upper Fall) makes the following admission at page 365, line 1, Vol. 7:

"Q. Have you had occasion to make a valuation of many water powers?

A. Officially, no. We have in our practice any number of things. Sometimes we advise clients but I cannot remember every instance. You may take it as nothing if you want to."

He then says that he knew about the Cedars Rapids case through one of his partners.

Mr. Beique, Vol. 7, pp. 343-345, appears to base his values of Cascades largely on Exhibit D-119, which is an agreement with respect to Pagan Falls, entered into between the Respondent and the Hull Electric Company on the 7th September, 1917 (Vol. 5, p. 28). It is submitted that the consideration of this document is entirely in-

applicable for the following, amongst other reasons:

1. In the first place, the agreement is an option dated September 7, 1917 and the date upon which a valuation must be placed upon Cascades is May 1926. At this latter date, the whole situation on the Gatineau River had entirely changed.

2. The transaction between the Respondent and the Hull Electric Company, as appears on its face, is not a sale at all in the ordinary sense of the word. The Company obtained an option and if it exercised that option before the 31st December, 1917, then Respondent was obliged within thirty days to obtain and exhibit options or promises of sale or other documents showing that he would be in a position to convey the water powers or properties or to have them conveyed to the Company.

Upon these documents being exhibited, the Company was to make a survey to determine the extent of the water powers and the properties required for the purpose of securing a head of 100 feet. After the survey, Respondent was to obtain and secure options, promises of sale or other documents which would enable him to convey to the Company all the water powers and properties, if any, which might be found necessary to secure a 100 foot development.

3. Then comes the provision for payment and a further provision for paying Cross \$3,333.00 for each additional foot of head. It was evidently the intention that Cross should pay for these options out of the purchase money payable under the agreement, and particularly out of the first \$100,000.00.

4. What the alleged sale by Cross to the Hull Electric of the Pagan Falls property amounted to, therefore, was this: Respondent did not sell these properties since he

never owned them. All he did was to act as an agent for the Hull Electric Company in going out and acquiring the necessary properties for a development, which presumably he could do more cheaply than the Company. The Company could have sent out one of their officials to purchase the properties on their own account or in the name of some third party. In other words, all Respondent undertook to do was to assemble together for the Company various properties and power rights at Paugan for a remuneration which could leave him something over and above the cost of procuring the properties for the Company. At that time, there was no storage on the Gatineau whatsoever and the river had not been recognized as a power river.

When the Hull Electric Company had, through Respondent, assembled together the various elements necessary to make possible a development of 100 feet of head, the whole situation changed, as Mr. Robertson says at Vol. 6, p. 135, line 5, because it meant that the Hull Electric Company owned by the C.P.R. was committed to a power development at Paugan Falls of a very extensive character and interest was concentrated in the Gatineau River. Thus the value of other water powers on the River was thereby enormously increased, and, as said above, storage became inevitable (Vol. 6, p. 135, line 44).

Beique himself, Vol. 7, p. 364, line 2, tells of increased value of water powers between 1917 and 1927.

Robertson's evidence is supported by the fact that Paugan Falls was ultimately sold by the Hull Electric Company to the Gatineau in 1926 for \$4,750,000.00 of which \$750,000.00 Robertson attributes to the value of the Hull electric system, and \$4,000,000.00 to Paugan on a 100 foot head, i.e., \$40.00 a horse power. In this he is not contradicted.

It is respectfully submitted, therefore, that the agreement of September 7, 1917 (D-119, Vol. 5, p. 28) affords no criterion whatsoever in placing a valuation on the potentialities of Cascades in May 1926.

As regards the second decision of the Privy Council in the Cedars Rapids case reported in 47 K.B., page 271, it is interesting to note that the Company offered \$1,700.00 for the reserved rights over Pointe du Moulin; \$2,800.00 for Isle aux Vaches, and the award of the arbitrators confirmed by the Privy Council was \$75,000.00 for Pointe du Moulin and \$45,000.00 for Isle aux Vaches, i.e., a total of \$120,000.00. This was based on the special adaptability and potential values in 1911 and not in 1926 when there had been an increased market for power and a consequent enhancement in value of power sites, including those heads which lend themselves for inclusion. The deBeaujeu Estate did not own the bed of the St. Lawrence.

As to whether Respondent would have done better by developing Cascades himself, entering into an agreement with the Canada Cement Company or selling for inclusion in a larger scheme of development lower down the River, that is a matter which as owner he had the right to decide for himself.

POSSIBILITY OF DEVELOPING CASCADES.

Mr. Boaubien, an hydraulic engineer of great experience, made an exhaustive study of the subject, accepting the figures of Appellant's chief engineer, Simpson, as to flooding damages, cost of relocating and raising the railway and highways, and so forth.

He filed several graphs and his statement of

estimated costs as Exhibit P-62, Special Exhibit Book No. IV.

His evidence is at Volume 8, page 5 and following.

He came to the conclusion, using the Appellant's engineers' own figures, that it would be possible at a cost of \$2,892,045.00 to make a development consisting of installed machinery of 23,800 H.P., which would deliver at all times 20,000 H.P. at 70% load factor or 14,000 H.P. at 100% load factor. This development could be made without affecting the tail waters of Appellant's power plant at Paugan.

The capital cost per H.P. installed would be \$121.00; per available H.P. at 70% load factor, \$144.60; which comes within the usual figure of cost of development. (Vol. 8, p. 19, line 1)

He had to make careful studies to test the evidence of the experts for the Appellant (Simpson and Scovil) who had pointed out that the available head varied with the increase in flow, but he was able to establish that a plant which would operate at 20,000 H.P. 70% load factor at a flow of 10,000 c.f. per second would deliver the same amount of power under a head of only 10 feet when the flow reached the flood stages of 20,000 c.f. per second or more, and thus that such a development was physically feasible and in his opinion was economically sound.

The Appellant had criticized the economical possibilities of the site, but if we look at its own financial set-up as evidenced by Exhibit P-56, Vol. 2, p. 169 et seq., we find that Mr. Beaubien's scheme would compare favourably with the Appellant's own undertaking as to cost.

Exhibit P-56 consists of a letter signed by Mr. Graustein as President of the Appellant, setting out the

facts upon which it was intended to sell to the public further bonds secured on the Company's properties as developed. It appears on page 169, line 16, that the Company's installed generating capacity in the Ottawa region was 565,519 H.P. and in New Brunswick 80,000 H.P. (p. 169, line 41). On page 170, line 7, it appears that 436,000 is on the Gatineau River, and at line 16 that 129,519 H.P. is on the Ottawa River and tributaries. At page 172, it appears that the bonds secured on these properties amount to \$90,138,222.00, and the other liabilities to the public exclusive of share capital to \$8,229,942 - \$98,367,000.00 for 645,519 H.P. - practically \$152.50 per installed H.P., whilst Mr. Beaubien's cost would only amount to \$121.00. The installed H.P. at Chelsea was 136,000 H.P., whilst the water power available at 100% load factor would only amount to 96,000 H.P., so that the comparison conclusively shows that if the Appellant's own undertaking is economically sound the development considered by Mr. Beaubien would be even more so.

May we point out right here that under the Act the Superior Court was to fix fair and just compensation to the Respondent for his properties and in that respect it is our contention that the compensation is to be ascertained by taking into consideration all the factors which would enter into the fixing of a price for his properties in a free sale (in the same way that the Canada Cement Company was treated on a free sale or open market basis, as explained by the witness Simpson, p. 153, line 3, Vol. 7). Mr. Beaubien's calculations show the intrinsic value of the property in itself. The taking thereof by the Appellant, thus enabling them to concentrate at Chelsea 96 feet of head that would not otherwise have been possible, shows that it has increased by  $14\frac{1}{2}\%$  the potential power at

that point, apart from the increase in saleable power available by reason of the increase in pondage. Without flooding the Cross property, the head at Chelsea would have been kept down to 82 feet.

Now in the \$98,367,000.00 of borrowed capital, Chelsea represents 136,000 H.P, over 645,519 H.P., or, roughly, 20%.  $14\frac{1}{2}\%$  of 20% (or 2.9%) of the total development is therefore realized through the flooding of the Cross property, so that \$2,852,643.00 of the Company's total borrowed capital is attributable to the 14 feet of head now taken by means of the flooding of the Respondent's property. This checks very closely with Mr. Beaubien's estimate of \$2,892,045.00 as the cost of an independent development on the Cross property.

It was very strongly urged in the Superior Court that the amounts claimed by the Respondent as just and fair compensation were grossly exaggerated. It may not be beside the question thus to point out that of the \$98,367,000.00 invested in the Appellant's undertaking in addition to \$25,000,000.00 of preferred stock and \$2,500,000.00 of common shares, 2.9% can be justified only because 14 feet or more of water have been and are being held over the Respondent's properties in question.

In addition to the foregoing, we submit that the question of whether Cascades is capable of development is one of fact, which appears by the judgment to have been decided in favour of the Respondent.

#### PONDAGE.

Amongst the potentialities of Cascades was the great value it had as a source of pondage to any would-be developer further down.



Robertson, (Vol. 6, p. 143, line 10 et seq.; p. 145, line 20 et seq.) says it renders available something like 60 or 70 thousand H.P. for 10 hours every day - p. 145, line 37:

"that would mean that the Company could store water at night which would make something like 60 thousand or 70 thousand H.P. available to them the next day and the first value of that would be enormous. It would mean an item of \$700,000.00 a year. It is a very large figure.

Q. And the Farmers Development?

A. I have added that in in making my calculation."

As regards the value to the Appellant in being able to have a 96 foot head instead of an 82 foot head at Chelsea, he gives a value of \$1,500,000.00 more or less (Vol. 6, p. 146, line 3 et seq.).

#### STORAGE DAMS

A great deal of evidence was put in by the Appellant as to the cost of storage for the two dams erected on the upper reaches of the Gatineau River. In the first place, we would point out that according to the evidence of Lefebvre, Vol. 7, p. 188, plans for these dams were being undertaken in 1925 and 1926 and when erected would benefit all owners of power sites on the River.

At that time, it will be remembered the C.P.R. through the Hull Electric, had acquired the necessary elements to make up the Pagan Falls site and these storage dams would benefit all power users on the River who would, of course, pay their annual rentals for the increased power made available for them. Finally, it will

be noted that many of the sales of raw power above quoted are based on sales of unregulated raw power with the knowledge that regulation would follow. Others of the sales quoted were made with no immediate prospect of storage. It is in evidence that ultimately even the Montreal Island Power Company on the Back River and any development on the Ottawa River below the Gatineau, e.g., Carillon, would have to share in the charge for storage (Lefebvre, Vol. 7, p. 208).

Simpson attempted to show that the Appellant Company was losing money by developing from 306 to 320 because the Company now has surplus power which it is selling for steam at \$3.40 per H.P. per year and which he says it will sell later at \$14.00. It is submitted this is irrelevant, particularly as the Appellant went ahead with its Paugan development and developed still more power. Moreover, it is absurd that any surplus of power should be taken only from the pond between 306 and 320 (Vide Simpson, Vol. 7, p. 151, line 30; D-100 to D-103, Vol. 4, p. 285 et seq.).

The Appellant has testified to the value of the site and its potentialities by deliberately taking and holding it and the other properties of the Respondent in defiance of the Civil Code (cf, per Lord Warrington of Clyffe in the second decision of the Privy Council, in the Cedars case, 47 K.B., at page 276, line 9).

It is submitted that the Trial Judge confined himself in his valuation of Cascades to the electrical energy which the Respondent might have developed himself.

He says, Vol. 13, p. 158, line 44 et seq. -

"Quoiqu'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.)

"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;

Il est vrai que le demandeur n'a pas fait preuve qu'il avait ou aurait pu avoir les moyens de financer cette affaire et de la mener à bonne fin; en effet, avant d'arriver au succès, dans ces grandes entreprises, il y a beaucoup d'aléa et de grands risques à courir;

Cependant, il est reconnu que les forces hydrauliques aux Cascades ayaient de la valeur pour le demandeur à la date de l'ordre en conseil du 20 mai, 1926;

D'ailleurs, tous les faits prouvés dans la cause au sujet de la valeur du pouvoir d'eau aux chutes Chelsea, le démontrent."

It will be noted he has found as a fact that the Appellant itself had paid higher prices for water powers less important than those of the Respondent.

We submit that the learned Judge should have applied these and the prevailing market prices to Respondent's properties and rights at Cascades in fixing just and fair compensation to him. As shown above, the witness Lefebvre accepted these prices and the Respondent should not be compensated on the basis of an ownership that was limited to making use of his rights or realizing them in one particular way, namely, by a development at Cascades.

The Respondent was entitled to make use of Cascades in any one of three ways - (a) by selling Cascades for inclusion in a larger scheme; (b) by developing it himself; and (c) by selling to or combining with the Canada Cement Company.

Undoubtedly its chief value lay in its special adaptability for inclusion in a larger scheme lower down the River.

At the argument in the Superior Court, Respondent's counsel, when dealing with the intrinsic value of the Cascades site for independent development, suggested that it might be proper to base the calculation on elevations that would provide 14,000 continuous H. P. at 10,000 c.f.s. and declared their client's willingness to accept as Compensation therefor the sum of \$420,000.00, based upon 14,000 H.P. at \$30.00 per H.P.

For these reasons, Respondent respectfully submits that with respect to Cascades the appeal should be dismissed and that the cross-appeal should be allowed and the judgment appealed from should be varied by increasing the just and fair compensation for Cascades to \$420,000.00.

#### THE SPECIAL ACT

As to the Special Act, assented to on the 19th February, 1932, Respondent's submission in short is that under the Special Act the Appellant is bound to take and pay for, in money, all lands and rights taken or affected by the raising of the water of the Gatineau River to a controlled elevation not exceeding 321.5. Not only does this appear from sections of the Act, but it is made still clearer from the provisions in the preamble.

The first paragraph of the preamble refers to the raising of the level of the River above Chelsea, thereby submerging, in whole or in part since the 12th March, 1927, certain properties of which the Respondent claims to be the owner and with respect to which he claims to have suffered serious loss and damages.

Reference is then made to the petitory action

against the Appellant with respect to some of the said properties, which action is still pending.

The third paragraph of the preamble reads as follows:

"Whereas the said Cross has opposed certain proposed amendments to the Water Course Act as being apt to affect the rights asserted by him in the said petitory action, but has expressed his willingness to allow the said Gatineau Power Company to acquire all of his said properties submerged or affected by the said development provided he be paid fair compensation".

The next paragraph states that the Company has expressed its desire to expropriate the said properties.

Then it is stated that the parties are unable to agree as to what would be fair compensation.

Finally, the Legislature, as master of the situation, says that "it appears proper, under the circumstances, to provide by special legislation that the Company shall not be disturbed in the operation of its power development and that fair compensation shall be assessed in favour of Cross and awarded to him by the Court in the said pending case".

Then follows the Act itself.

Section (1) says the Company shall not be disturbed by the Respondent by maintaining the level of the River at any controlled elevation not exceeding 321.5 feet, provided fair compensation shall be assessed and paid to Cross as thereafter determined.

(2) "The Gatineau Power Company shall make just and fair compensation to the said Cross for all his properties and rights taken for or affected by the said development up to the said elevation and by the operation thereof".

(3) The date for the purposes of making the valuation has been proved to be the 21st May, 1926.

(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".

(5) "Such compensation shall be assessed and awarded to the Plaintiff in his said pending case against the Company, with such interest as the Court may deem proper, and the parties to the said case may, under the control of the said Court, make such amendments to their pleadings, and/or file such supplementary pleadings and submit such further evidence with respect to the new issues raised thereby as may appear proper to the said Court to give full effect to the provisions of this act".

(6) "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".

(7) "On payment or deposit in full of the amount awarded, the said properties and rights shall be vested in the Company and the compensation shall stand in lieu of such properties and rights".

In other words, Section 2 carries out the expressed willingness of the Respondent as stated in the third paragraph of the preamble to receive just and fair compensation for all his properties submerged or affected by the said development up to 321.5.

The Special Act contains no provision that the Company may take anything above 321.5, and Section 1 declares that Cross shall not disturb the Appellant for maintaining a controlled elevation not exceeding 321.5, provided just and fair compensation is paid to him in accordance with the directions of the Act.

Thus, up to and including 321.5 will belong to the Company upon payment.

In order to enable the Appellant to take less than up to 321.5 it would have been necessary to have had a special provision in the Act.

In Section 6 the determining of the properties means merely the describing, in accordance with Article 2168 of the Civil Code, of the properties and rights which, on payment of "the said compensation" up to elevation 321.5, shall become vested in the Appellant. It will be remembered that there was and is a dispute as to the extent of Respondent's ownership and rights in Cascades, and naturally the Legislature could not insert in the Act a description of what was a matter of fact in issue.

As regards Farm Point, the description of the properties and rights taken up to elevation 321.5 and which are to be vested in the Appellant after payment must be determined by the Court after proof as to where the contour line 321.5 ran through the properties at Farm Point.

Hence this direction to the Superior Court to determine or describe the properties to become vested after deciding as a matter of fact what actually belonged to the Respondent.

But our submission is that this does not give the Court any jurisdiction to allow the Appellant to return to Respondent any properties and rights taken or affected by the raising of the water for the purpose of reducing the fair and just compensation which Section 2 says he shall receive from the Appellant for raising the waters to elevation 321.5.

Furthermore, only an owner can grant a servitude and the Appellant is not at present the owner of such properties as may be found by the Court, as a question of fact, to belong to Respondent and to be below 321.5 at Farm Point, and therefore the Appellant cannot grant any servitude on what it does not now own and may never own if it does not pay the compensation awarded. Moreover, the offering of a servitude by the attorneys of the Appellant is obviously an after-thought and in consequence admits an ultimate vesting in the Appellant up to 321.5 should they pay the said compensation, i. e., for taking up to 321.5.

Section 6 of the Special Act is clearly governed by Section 1 and Section 2, and the Special Act applies to all properties up to 321.5. The obligation to make compensation under Paragraph 2 is for all properties or rights taken or affected by the said development "up to the said elevation and by the operation thereof".



It will be noted that the petitory conclusions of Respondent's case are recognized because when the Court has found as a question of fact what properties and rights belong to Respondent below 321.5 they shall only become vested in the Appellant on payment of the "said compensation", i.e., for taking up to 321.5. The Act cannot mean that the Court has jurisdiction to vest the Appellant in full ownership in some properties up to 321.5 and with respect to other properties up to 318.

Bill 170 (P-116, Vol. 3, p. 34), as originally introduced at the instance of the Appellant, provides, in the third paragraph of Section 1, that the Public Service Commission may prescribe "such terms and conditions as it may deem proper to secure the continuation or replacement of an existing public service". As pointed out before, no such provision appears in the Special Act as finally passed by the Legislature. Had the Legislature intended that the Appellant could return any properties or rights in mitigation of the just and fair compensation for a taking up to elevation 321.5, it would have said so.

The jurisdiction of the Court is governed entirely by the Special Act and it contains no such provision as appears, for instance, in the Dominion Railway Act, R.S.C. 1927, Chapter 170, Section 222, which permits a Company governed by the Act to give an undertaking to abandon or grant to the owner any portion of the lands being taken or any easement or servitude in respect of the same, or to construct and maintain any work for the benefit of such owner or person interested, and then says:-

"and if such owner or person interested, by writing filed with the arbitrator, consents to accept what is so undertaken, or if the arbitrator approves thereof in the award, such undertaking shall be binding upon the Company and the compensation or damages shall be fixed in view of what is so undertaken and the undertaking may be enforced by the Board or damages may be recovered for the breach thereof in any court of competent jurisdiction".

This special statutory provision was introduced for the first time in the Dominion Railway Act, 9-10 George V, Chapter 68. It is commented upon in the 'Railway Law of Canada', MacMurchy and Denison, 3rd Edition, at page 311, where the editors point out in a foot note to the new Section 222 that prior to that time the Company was not enabled to offer, as part of the compensation, land not required for the purposes of its Railway, nor to force a resale to the land owner nor to offer an easement or servitude over the Railway lands.

This new section in the Dominion Railway Act appears to be based on Section 31 of the Dominion Expropriation Act, R. S. C. Chapter 64, Section 31, which empowers the Court to take into consideration the abandonment of any portion of the land taken from the claimant or the granting of an easement and enables the Crown to give an undertaking to construct additional works, to abandon the portion of the land taken or to grant an easement and that the damages shall then be assessed in view of such undertaking. A comparison of these statutes with the Special Act shows the situation to be quite different here because the Special Act confers no such power or jurisdiction on the Court in the present case. It remains petitory in its nature throughout and unless the Appellant

pays the said compensation within fifteen days the waters must be lowered.

Therefore, it is perfectly clear that in view of the remedial provisions contained in original Bill 170, and in view of the special provisions contained in the present Dominion Railway Act and in the Dominion Expropriation Act above referred to, that the Legislature of the Province of Quebec never intended that any servitude or easement might be offered in mitigation of the just and fair compensation for a taking up to elevation 321.5.

Moreover, a reference to the pleadings shows that the issues were joined on our interpretation of the Act. Respondent claims a certain amount in compensation for his properties and rights and states in his conclusions in the supplementary declaration (Vol. 1, p. 44, line 25) that upon payment or deposit of the amount awarded all properties and rights of Respondent described in said original declaration and the supplementary declaration and being below elevation 321.5 and the right to affect the properties up to 325 shall become vested in the Company Appellant, and that, upon Appellant's failure to pay the amounts awarded, Appellant be ordered to lower the level of the river on or opposite the properties at Farm Point to elevation 312 and at Cascades to elevation 304 and at Mileage 12 to 304.

In the third paragraph of its Supplementary Plea Appellant avers, with reference to Bill 170, "that the passing of the said Act indicated that Defendant's contentions before the said Committee were upheld to the effect that the Defendant was

entitled to be vested with Plaintiff's properties and rights affected upon paying fair compensation therefor"; that is obviously up to 321.5, which is the only elevation referred to in the Act (Vol. 1, p. 49, line 18).

Paragraph 37 of the Supplementary Plea refers specifically to the maintenance of a water level of 321.5 (Vol. 1, p. 52, line 23).

Paragraph 38 does the same thing (Vol. 1, p. 52, line 34).

Paragraph 41 admits that a water elevation of 321.5 would have an adverse effect on the hydro-electric plant belonging to Respondent (Vol. 1, p. 53, line 15).

It is submitted, therefore, that the declaration made by counsel for Appellant in Vol. 13, page 149, et seq., regarding a servitude, is contrary to the terms of the statute; is not binding on the Appellant because no joint stock company can alienate or abandon real property or create a servitude in the manner of such a declaration; is illegal because it is made with respect to property which Appellant does not and may never own, and, finally, it confirms the foregoing submission as to the proper interpretation of the Act because, as counsel for the Appellant says, "the idea is merely to fill a technical gap, so to speak, left by Section 6 of the Act, because no doubt my learned friends will contend we cannot do anything of this kind but that we have to take all the Plaintiff's properties"; that is, of course, up to elevation 321.5 (Vol. 13, p. 150, line 47).

Our submission is fully confirmed by the Privy Council in the leading case of The Quebec Improvement

Company v. The Quebec Bridge and Railway Company, 1908  
Canadian Reports, Appeal Cases, page 212 (also reported  
in 1908 A.C., page 217) which is directly applicable:

"The Quebec Improvement Company were owners of three lots near the City of Quebec. The Quebec Bridge and Railway Company required these lots for their purposes. The Companies being unable to agree as to the price of the lots, the matter was referred to arbitration, it being declared that the arbitrators should act as mediators (amiables compositeurs) but should be bound to conform to the provisions of Article 161 of the Railway Act 1903. The arbitrators, in lieu of valuing one of the lots in money, ordered that part of the lot should be returned and that the Quebec Bridge and Railway Company should construct a road on their adjoining land and maintain the same in perpetuity for the benefit of the Quebec Improvement Company.

HELD: That the arbitrators were not bound to adhere strictly to legal formalities and mere irregularities would be excused, but, as the arbitrators had exceeded the terms of submission, an error in that respect would vitiate their whole award."

The judgment of the Court of Appeal, which was confirmed, is reported in 16 K.B. 107.

We refer the Court particularly to the judgment of Mr. Justice Cimon in the Court of Appeal and to the argument of Messrs. Stuart, K.C. and Taschereau, K.C. for the Respondents, at pages 226 and 227. It will be noted that the arbitrators were also acting as mediators under Article 1436 of the Code of Civil Procedure, but they were bound to conform to the provisions of Article 161 of the Railway Act (1903) 3 Edward VII, Chapter 58, and at that time there was no provision for allowing an easement or servitude in mitigation of the damages as is permitted under Section 222 of the present Dominion Railway Act, R. S. C. 1927, Chapter 170.

At page 230 Lord Macnaghten says:

"On October 5, 1906, the Court of King's Bench delivered judgment in favour of the railway company on the ground that the award went beyond the powers conferred on the arbitrators in that - (1) it awarded (in lieu of valuing in money the third lot of land) that the railway company should, after the construction of the line of railway and the bridge, be bound to restore it in good order to the Improvement Company; and (2) that it imposed a servitude of way in perpetuity over the land of the railway company, and that the award was, therefore, void in toto and illegal.

Their Lordships see no reason to differ from the judgment of the Court of King's Bench. As regards the third lot of ground, it is obvious that the arbitrators have not followed or attempted to follow the directions contained in the submission or deed of compromise. Arbitrators who are also appointed mediators are not obliged to adhere to legal formalities - mere irregularities are excusable - but they cannot disregard the instructions given them in the deed under which they purport to act."

In the Court of Appeal, Cimon, J., in delivering the unanimous judgment of the Court says  
(16 K.B. at page 112) -

"Le Conseil Privé, dans la cause de Rolland & Cassidy, a exprimé son opinion sur les pouvoirs des amiables compositeurs, et il a déclaré qu'ils ne pouvaient agir arbitrairement. Or, ce serait agir arbitrairement lorsque le compromis disant qu'un terrain doit être exproprié et demandant aux arbitres d'évaluer ce terrain et de fixer l'indemnité pour les dommages (qui doit être un indemnité en argent), les amiables compositeurs, au lieu de faire ce qui leur est demandé, ordonnent à la compagnie du Pont de remettre à la Quebec Improvement Company, après la construction de sa ligne de chemin de fer et en bon ordre, ce terrain; et c'est aussi agir arbitrairement lorsque, en sus de l'évaluation des autres terrains, en argent, et de l'indemnité pour dommages, les amiables compositeurs ordonnent à l'appelante d'établir à perpétuité sur son terrain un chemin pour l'usage de l'intimée."

Vide also Ayer Harbour Trustees v. Oswald, (1883) 8 Appeal Cases, 623, at pages 634 and 640.

This case was followed by S. E. Railway Company and Wiffins Contract, (1907) 2 Ch. 366.

#### CONCLUSION

We respectfully submit, therefore, that the learned Trial Judge has properly exercised the duties conferred on him by the Special Act where, after condemning the Appellant to payment of a sum of money for all losses suffered by the Respondent, he vests the Appellant, upon payment, in ownership of the properties at a controlled elevation not exceeding 321.5 feet, in the following terms (Vol. 13, p. 163, line 10 et seq.):

"....déclare attribuer à la défenderesse, sur paiement par elle au demandeur des susdites sommes et intérêts, la pleine propriété, avec les droits s'y rapportant, des immeubles ci-après désignés qui lui sont dévolus par ledit 'géodetic survey datum' et tel que voulu par ladite loi spéciale, c'est-à-dire en par la défenderesse maintenant le niveau de la rivière Gatineau au-dessus desdites chutes à toute élévation contrôlée n'excédant pas 321.5 pieds au-dessus du niveau de la mer à Farm Point, tel que déterminé par le point de repère (bench mark) géodésique établi sur l'église de l'Eglise-Unie du Canada, au Village de Wakefield, à savoir:

Premièrement:

Deuxièmement:

Troisièmement:

Quatrièmement:

Cinquièmement:

Sixièmement:

These paragraphs contain descriptions of the properties in which the Appellant will become vested upon payment up to a contour line not exceeding 321.5.

Finally, it is our submission that the Act gave the Superior Court exceptional discretionary powers in determining the just and fair compensation to be paid. It also entitles the Court to consider all elements, including the value to the taker and the value to the owner, in fixing the compensation.

FAIR AND JUST COMPENSATION FOR THE HYDRO-ELECTRIC SYSTEM.

Paragraphs 6, 7, 8, 9, 10 and 11 of Respondent's Supplementary Declaration (Vol. 1, p. 37) allege that his power plant has been and will be put out of commission, his distribution system partially destroyed and the remainder rendered useless for profitable operation.

The learned Trial Judge's finding is as follows: (Vol. 13, pp. 159 and 160). Considerant.....p.155:-

"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 less \$9,237.10' (voir ladite page 113 du factum);

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 been said before, it is naturally not possible to assess the loss with absolute mathematical accuracy, but there is ample evidence to support this finding, which is essentially one of fact.

In 1912, Respondent built his hydro-electric



plant on Meach Creek at Farm Point and generated electricity, which he distributed and sold in the adjoining territory. By 1926 the communities he supplied with light and power were Kirk's Ferry, Cascades, Farm Point, Wakefield and Alcove and the adjacent rural communities. He also supplied his portable sawmill with power generated from the same source. It used 80 H.P. (Cross, Vol. 9, p. 81). He had gradually extended his system until in 1926 he was supplying some 308 light and power customers (Exhibit P-122A, Vol. 5, p. 35). He had some thirty-one miles of transmission and distribution lines, poles and transformers (Vol. 9, pp. 187 and 195). The location of the system will be found on the map Exhibit P-10 (Special Exhibit Book No. 1).

The hydro-electric plant had a generator with a rated capacity of 125 Kilowatts or about 165 H. P. Marchand, Electrical Engineer of Ottawa and an independent witness, (Vol. 10, p. 1), made an examination of the power plant in August 1926 and found that on that day the consumption of H. P. measured and delivered reached as high as 154 H.P. (Vol. 10, p. 5, line 32). The system carried a full load (Cross, Vol. 9, p. 81, line 9). In the daytime he used part of the load for the sawmill (Vol. 9, p. 81).

WHAT HAS HAPPENED AND WILL  
BECOME OF THE PLANT AND SYSTEM

Let us now see what has happened and what will happen by reason of the raising of the waters of the Gatineau River and the vesting of the properties in the Appellant up to elevation 321.5 in virtue of the Special Act.

First: Under the Special Act and upon payment, all the land on which the power house is situated becomes vested in the Appellant Company and with it the power house erected on this land.

The Plan of MacRostie, who is a Dominion and Ontario Land Surveyor (P-93, Special Exhibit Book No. 1), shows clearly that the 321.5 contour line on the ground takes in not only the whole of the site of the power house but also land behind it.

It is in evidence that the water at a controlled elevation of 321.5 will submerge not only the foundations of the power house (which are 5 or 6 feet below the surface of the soil, Beique, Vol. 12, p. 257, line 20 et seq.) but goes up to or over the level of the floor which is at elevation 321.47 or 321.48 - according to MacRostie (Vol. 9, p. 185, line 8; also p. 186, lines 2 et seq.). VIDE also Simpson, Vol. 11, p. 80, line 45. Boisvert, an engineer of the Public Service Commission, and called by the Appellant, says, Vol. 11, p. 4, line 42:

"Q. At 321.5 the water would come close to the floor of the power house, I take it?

A. There might be a few inches maybe on top of the floor. It would be to the level of the floor because the sill of the power house is at 321.5."

In other words, the power house floor is awash at a water level of 321.5.

It is obvious from the uncontradicted testimony just referred to that everything below the surface of the power house floor is below 321.5.

Appellant's plans are not clear as to the location of the 321.5 contour line. The Appellant's Plan D-10 (Special Exhibit Book No. II) was prepared by the Appellant's

witness S. E. Farley, a Land Surveyor, and is dated the 23rd March, 1926. It does not show 321.5 but it shows elevation 321 marked thus "\_\_\_\_\_". It will be seen on this plan that 321 runs right through the middle of the power house. Farley's Plan D-72 (Special Exhibit Book No. III) shows the power house floor at elevation 321.1.

Appellant's Plan D-160, also prepared by Farley and dated April 1932, shows 321.5 coming only three feet inside the corner of the power house and the floor at elevation 321.55 (Special Exhibit Book No. III). Beique, Vol. 12, p. 256, line 40. (D-189 is a copy of D-160).

It is further obvious that by Appellant's own Plan D-10, about one-half of the power house is taken by elevation 321 and by D-160, 321.5 comes three feet inside the corner. And the building is on foundations 5 or 6 feet below that elevation. So even Appellant's own plans show a taking of the substructure and the land on which the building rests. As above stated, P-93 shows inclusion of the whole of the power house and D-72 shows that the level of the floor of the power house is 321.1, i.e., below the water level of 321.5. It should also be noted that in the order of the Public Service Commission dated the 22nd April, 1927, denying permission to expropriate the Cross properties at Farm Point, it is found that -"Le plancher de l'usine electrique de l'intimé se trouve a la hauteur 321.1" (Vol. 4, p. 226, line 25).

Second: The Appellant company has permanently flooded and destroyed about  $4\frac{1}{2}$  miles of transmission line between Kirk's Ferry and Cascades. This is admitted. (MacRostie, Vol. 9, p. 187, line 46; Cross, Vol. 9, p. 84). And it was done without any permission from or compensation to the Respondent (Vol. 9, pp. 82-84).

There is evidence that through this Cross lost about sixty customers (Frederick, Vol. 9, p. 302, line 4). At Cascades, he served 54 buildings and more than half were affected by the raising of the water (Frederick, Vol. 9, p. 302, lines 20 to 23). MacRostie (Vol. 9, p. 195, lines 30 to 40), says there was easily a loss of 10 miles of the system, including the loops to customers. In addition, he lost about forty employee customers at Farm Point, through the loss of his lumber business, by reason of the same flooding. This will be shown later.

Third: As a result of the raising of the waters of the Gatineau to elevation 318 and occasionally to elevation 319 and 320 (and 321?), the Respondent began having trouble in supplying his customers because of the submergence of the draft tube in the generating plant, entailing a loss of head and generating capacity. This has led to the shutdown of the plant since 1930. Cross, Vol. 9, p. 10, line 8, and p. 52, line 24: "The dam at Chelsea affected my tailrace. I could not give service".

MacRostie (Vol. 9, p. 116, lines 36 et seq.), says:-

"Q. What effect did the raising of the water of the Gatineau River have upon the power plant at Farm Point?

A. It has ultimately been put out of commission.

Q. How did it affect the power plant at Farm Point?

A. It flooded out the tailrace and reduced the amount of available power.

Q. By what means was the power that was to be produced at the plant replaced?

A. We are purchasing it from the Gatineau Power Company since the summer of 1930.

Q. At what price?

A. Approximately at \$250.00 to \$275.00 a month."

Cross (Vol. 9, p. 51, line 43), speaking of the effect of the dam at Chelsea, says: "It put the whole thing on the blink".

e.g., He lost the MacLaren mill at Wakefield as a power customer (Vol. 9, p. 10, line 6).

There was ample evidence before the trial Judge to show that prior to the flooding Respondent had operated successfully and satisfactorily since 1912. For example, Dr. Chabot, an Ottawa physician, who occupied a summer house at Farm Point from 1916 to 1926 (Vol. 9, p. 231, line 9), says:

"Q. Pouvez-vous nous dire, docteur, de la qualité du service électrique que vous était fourni par M. Cross?

R. Très satisfaisant, quant à la lumière et pour le poêle électrique."

Incidentally, he says of Respondent (Vol. 9, p. 232, line 10): "C'etait un homme très respecté dans cette région".

Mrs. Cox of Ottawa - Had a summer home at Farm Point.

(Vol. 9, p. 239, line 18):

"Q. What have you to say about the kind of service that was supplied to that system?

A. We had a very good service. We were satisfied."

Rufus Chamberlain, Merchant of Wakefield.

(p. 245, line 2):

"Q. What have you to say with regard to the quality of the service?

A. We had very good service."

In cross-examination, p. 245, line 34:

"Q. How about the current? How about the light? How was the voltage?

A. It was very fair.

Q. Was it not up and down some of the times?

A. About the same as it is now."

See also: Donald Morrison, of Wakefield (Vol. 9, p. 246, line 28).

Gerald A. Poole, Secretary of the Village of Wakefield (Vol. 9, p. 247, line 28).

Philip Trowse, Blacksmith (Vol. 9, p. 259, line 28).

George Nesbitt, Real Estate Agent of Wakefield (Vol. 9, p. 261, line 5):

"We were well satisfied."

At line 32, he adds he was well pleased with the service up to the time the Company started to build their dam at Chelsea.

NOTE: It should be noted that after hearing this last witness, counsel for Appellant objected to the evidence because more than five witnesses were called upon to testify to the quality of the service. Consequently the remaining customers were not examined by Respondent upon this point.

Cameron, Bell Telephone Supervisor, (Vol. 9, p. 268, line 42), says, speaking of Mr. Cross' transmission line between Kirk's Ferry and Wakefield:

"Q. What was the condition of the transmission line?

A. From visual inspection, it was good."

At page 272, line 5, he says:

"Up to 1926 we had pretty good service."

Marchand (Vol. 10, p. 2, line 19) says the electric generating system was operating "first class".

VALUE OF THE GENERATING PLANT AND  
DISTRIBUTION SYSTEM TO THE RESPON-  
DENT IN MAY 1926.

While Respondent kept no books, as it was entirely a one-man business, the following testimony (largely uncontradicted) establishes an annual revenue or value of the system both for light and power in the neighbourhood

of \$9,700.00 in 1926.

Sixteen of his 1926 customers were called to testify as to the amounts paid (Vol. 9, pp. 230 to 276). The amounts they said they were paying annually in 1926 came to \$1,092.00. Later, G. H. Earle, a blacksmith and motor car dealer, testified (Vol. 10, p. 151, line 38) that he was paying \$136.00 a year. This confirms Cross, who said (Vol. 9, p. 279, line 24) that Earle was paying over \$100.00 a year. Levy Reid (Vol. 10, p. 79, line 21) also confirms Mr. Cross' testimony that he paid about \$50.00 a year.

In order to avoid the expense of calling further witnesses as to revenue and to save time and to overcome the protests of Appellant's attorneys (as appears from the objection made by Respondent's counsel, Vol. 9, pp. 262, line 1, 283, line 41, and 284), Respondent gave the names and amounts paid by the remaining 53 customers, who were paying over the minimum rate, and showed that they were paying in 1926 over \$3,875.00 (Cross, Vol. 9, p. 278 et seq.). They included Sully and MacLaren, power customers, paying respectively some \$500.00 and \$200.00 a year. In addition to that, the remainder of the customers, namely 239, were stated to be on the minimum rate, which was \$18.00 a year for all the year round service less 10%, and \$12.00 for the ordinary summer cottage.

The evidence does not show how many were summer cottagers, though Cross says (Vol. 9, p. 12) that about one-third were summer customers, but even if we divided the remainder on a basis of \$15.00 per customer, we get a revenue from them of \$3,685.00. The sums of \$1,092.00, \$3,875.00 and \$3,685.00 give a total of \$8,662.00, which was approximately the annual revenue for the power and

light distributed from this system, apart from the 80 H.P. which Cross generated and supplied to his own portable sawmill for certain periods of the year, for which he made no charge against his lumber business. If we take the 80 H. P. at \$45.00 per H.P. per year, purchasing it by the month (which MacRostie, Vol. 9, p. 127, lines 9 et seq., says would be the rate), we get a figure of \$1,200.00 for four months' use per annum for the sawmill power, or \$900.00 for three months. Taking \$1,050.00 as the mean, and adding this to \$8,662.00 gives a total revenue or value to him of \$9,712.00 per annum for his generating plant and system.

There is evidence that the number of customers was even higher, because Frederick, his man in charge of the system, said they supplied 424 buildings in 1926 (Vol. 9, p. 300, line 42). Frederick says that every loop counted as a customer (Vol. 9, p. 301, line 24). However, we have based ourselves on the lower figure of only 308 customers.

It is true that included in this revenue would be the allowance of the minimum rates for his sawmill employees at Farm Point who were receiving their electricity free. However, Cross says in his examination on discovery (Vol. 9, p. 14) that this was reflected in their wages: that is to say, their wages were less by reason of the fact that they received free electricity. So that these employees had a money value to him as customers.

The operating expenses were low. In addition to Cross and his son Frank, there was a superintendent-electrician called Frederick (Vol. 9, p.299) who looked after the power house and the line and received a free house, water, light and wood and was paid about 50 cents an hour for attending to any trouble on the line. The balance



of Frederick's remuneration came from customers; for wiring jobs, plumbing, sale of washing machines, etc. (Vol. 9, p. 300, line 29 et seq.). Cross said he paid him between \$100.00 and \$200.00 a year (Vol. 9, p. 18).

It is impossible to fix the exact net revenue of Cross, but if we take \$8,000.00 as a minimum annual revenue or value to him of the light and power business, it is obvious that from the evidence adduced we are treating the annual value of his electric plant and distribution system on a very conservative basis.

It is submitted that there was ample evidence to support the sum of \$60,000.00 awarded by the Trial Judge for compensation. Robertson, Vice-President of the Southern Canada Power Company and an engineer of great experience, puts a valuation on the system of \$80,000.00, assuming a gross revenue of \$9,000.00 and a net revenue of \$8,000.00 (Vol. 10, p. 212). If we capitalize \$8,000.00 at 6% (as is done by Respondent's witness Beique with respect to a partial loss), we get a valuation of some \$128,000.00.

MacRostie puts the replacement value of the system, less depreciation, that is, the fair physical value of the power plant, transmission lines, poles, wires and transformers in 1926 at \$33,427.00 (Vol. 10, p. 240), Exhibit P-122, Vol. 3, p. 143.

Marchand (Vol. 10, pp. 2 and 3) values the equipment apparatus in the plant alone at \$4,095.00 in August 1926.

Parker, General Manager of the Distribution Division of the Gatineau Electric Company Limited, put a valuation on the distribution system. He had not seen the line before the flooding and based himself on an assumed total of 265 customers only, paying \$20.00 a year

or \$5,300.00 per annum. On this hypothetical assumption, his valuation is \$21,200.00. Nor did he attempt to give, and admitted that he did not know, what extra value should be given by reason of the fact that Respondent developed his own power. And he based himself on an arbitrary assumption that a system should be purchased on a 4 to 1 ratio. This ingenious theory will be dealt with later. (Parker, Vol. 11, p. 30).

We have already shown that Cross is now paying upwards of \$40.00 per H.P., or \$3,300.00 a year for 80 H. P., supplying some 197 customers; so if \$3,300.00 is capitalized at 6%, it will show that the extra value attaching to the system is about \$55,000.00. So if we add to \$55,000.00 the sum of \$22,200.00 for Parker's value of the distribution system alone based on 265 customers paying \$20.00 a year at a purchase price to yield 25% gross, we get the sum of \$77,200.00, which is approximately the same as Mr. Robertson's value of \$80,000.00. Parker admitted he did not know the revenues which Cross received, and if we take them at \$9,000.00 gross instead of \$5,300.00 gross it will be seen that Mr. Parker's appraisal would reach \$81,000.00, i.e., four times \$9,000.00 (\$36,000.00) added to \$55,000.00.

Furthermore, it is obvious that the plant was furnishing much more than 80 H.P. in 1926 - vide references in Vol. 10, p. 5, line 32, and Cross, Vol. 9, p. 81, line 9.

Parker's evidence shows that there was an active market for the purchase and sale of distribution systems during 1926 and 1927. Vide the map (Exhibit P-127) put in by him (Vol. 12, p. 37, line 13), Special Exhibit Book No. IV.

An analagous sale was that of La Compagnie d'Eclairage de Napierville to Gatineau Electric Company Limited effective as from the 31st October, 1927 (Vol. 3, p. 145). The purchase price was \$140,080.00. There were 318 customers. The vendor company did not generate its own electricity but was buying 93.7 H.P. from the Montreal Light, Heat and Power Company at \$35.00 per H.P., i.e., \$3,279.00 per annum.

Parker does not know the annual gross revenue of the system when possession was taken in 1927 (Vol. 12, p. 39, line 28). For the twelve months from November 1927 to October 1928, it was \$17,174.12 (Vol. 12, p. 39, line 35). But by that time, however, the Company had added to its customers (Vol. 9, p. 36, line 12).

Speaking of the acquisition, he says (Vol. 12, p. 36, line 3) - "A. There were 318 customers at that date and they increased very rapidly". The witness attempted to explain away the amount of the purchase price by saying that the Napierville Company had an export licence to sell power to a customer in the United States (Vol. 12, p. 42), but he admitted that the sole American customer ceased taking power about the 1st October, 1925 (Vol. 12, p. 46, lines 1 to 10). Since that time, the Company had merely had the licence renewed.

In any event, the plans approved for the Chelsea and Farmers developments of the Appellant Company contain a special provision reading as follows:-

"8. L'énergie produite par les travaux faisant l'objet de la présente approbation ne devra pas être exportée en dehors des limites du Canada."

Parker, in his examination in chief, said that a power company liked to purchase a distribution system on a price equal to four times the gross revenue. That is on a basis of 25% gross revenue. No doubt they did. He filed certain deeds for the purchase of distribution systems, namely, Hudson, Vankleek Hill, Argenteuil Lumber Company, L'Orignal and St. Jovite, which he claimed supported this as a basis for appraisal. However, the Napierville deed above mentioned and the purchases by his Company of the Bon'homme properties for \$100,000.00 (Exhibit P-126, Vol. 3, p. 152) and the Papineau Electric for \$200,000.00 (Vol. 12, p. 39) show that this ratio is exceeded. Robertson (Vol. 10, p. 223), says a purchasing company naturally likes to purchase on a basis that will give them a return of 20%, but, as in any other business, they are frequently buying on a basis of a much lower yield.

The witness Beique, who never saw the system before the flooding and only visited the plant and the property one day in April 1932, that is, five years after the flooding, estimates only a loss of 10% of the capacity of the hydro-electric plant and values that loss at the sum of \$8,800.00 (Vol. 12, p. 233). So taking our submission that the evidence satisfied the Trial Judge that the raising of the waters to elevation 321.5 and their operation of the Chelsea power development at that level have destroyed the Respondent's system, except for its salvage value, Mr. Beique's estimate of 10% loss as being \$8,800.00 gives a higher total value than \$80,000.00 given by Mr. Robertson (Vol. 10, p. 212).

COMPENSATION OFFERED BY APPELLANT

Appellant admitted that a water elevation of 321.5 would have an adverse effect on the hydro-electric plant, but says the reduction in power would not exceed 10% and certain re-arrangements to the power house should be made to meet the new conditions (Paragraphs 41 and 57B of the Supplementary Plea, Vol. 1, p. 53 and p. 56).

As compensation, Appellant offered in its Supplementary Plea:

(a) \$1,500.00 with interest from the 12th March, 1927 to provide for the cost of raising the power plant at Farm Point by three feet for operation with the water level at 321.5.

Simpson, Chief Engineer of the Appellant, speaking of the ability of the plant to operate with the water at the level of the power house floor, recommends raising the power house by 3 feet. (Simpson, Vol. 11, p. 81, lines 1 to 18; p. 82, lines 3 to 18).

He estimates that the cost of raising the roof, walls, floor, adjustment to machinery and penstock would be \$1,450.00 (Exhibit D-153, Vol. 5, p. 136). He admitted that he had never examined the plant until the summer of 1931, that is,  $4\frac{1}{2}$  years after the waters of the Gatineau had been raised and when the plant was no longer operating (Vol. 11, p. 95, lines 4 to 14).

Beique, an engineer called by the Appellant, includes in his estimate of \$14,876.00 for damages to the electric power business, a similar item of \$1,450.00 as "allowance for re-adaptation of machinery in Power House to new conditions". (Exhibit D-188, Vol. 5, p. 156).

It may be noted in passing that Mr. Beique only visited the site on one day in April 1932.

It will be noted at once that this remedy and these estimates contemplate merely re-arranging the power house on a site that will be vested in the Appellant Company upon payment of the award. Neither Simpson nor any witness for the Appellant made any evidence that it was economically feasible to build a new plant further up the hill above elevation 321.5 nor as to the further loss of power capacity that a new site would entail.

It is submitted that the offer to raise the power plant on property which is to become vested in the Appellant, as a means of lessening the compensation payable, is outside the terms of the Special Act and cannot be accepted as a means of reducing the value of the property taken.

Realizing that an offer to pay \$1,500.00 for the cost of raising the power house on a site which will belong to the Appellant when it pays was irrelevant to the pleadings and not an answer to the directions of the Special Act, the Appellant's attorneys, at page 94 and again at page 105 of their Factum in the Superior Court, made the following submission:-

"It is consequently submitted with respect to the power house site that the same should remain vested in Plaintiff and that a real servitude be established upon the property permitting Defendant to affect it by water elevation of 321.5, or alternatively, if the Defendant be vested with the land to 321.5, at this point, Defendant be condemned to pay Plaintiff the sum of \$1450 for the remedial work, and be ordered to create a real servitude of right of use to ensure that Plaintiff may be able to retain his power house on the site."

It is respectfully submitted that the Special Act does not permit the Appellant to make any such offer with respect to lands taken for the said development up to elevation 321.5 for the purpose of reducing "the just and fair compensation" which Section 2 says the Appellant shall make to the Respondent for the lands so taken.

Only an owner can grant a servitude and the Appellant is not at present the owner of the power house or the power house site and cannot grant any servitude on what it does not now own and may never own, if it does not pay the compensation awarded.

Moreover, this suggestion in the Factum is only supported by a declaration fyled by attorneys for the Appellant at the end of the case (Vol. 13, p.149), November 21st, 1932, and is not binding upon the Appellant because no joint stock company can alienate or abandon real property or create a servitude in such a manner.

In the alternative, the submission is tantamount to an admission of an ultimate vesting in the Company Appellant up to 321.5 should they pay the said compensation, that is, for taking up to 321.5.

Section 2 of the Special Act says:

"The Gatineau Power Company shall make just and fair compensation to the said Cross for all his properties and rights taken for or affected by the said development up to the said elevation and by the operation thereof."

Our submission is confirmed by the decision of the Privy Council in the leading case of The Quebec Improvement Company v. The Quebec Bridge and Railway Company, 1908 Canadian Reports, Appeal Cases, p. 212 (also reported in 1908 A.C., p. 217), which is directly applicable:

"The Quebec Improvement Company were owners of three lots near the City of Quebec. The Quebec Bridge and Railway Company required these lots for their purposes. The Companies being unable to agree as to the price of the lots, the matter was referred to arbitration, it being declared that the arbitrators should act as mediators (amiables compositeurs), but should be bound to conform to the provisions of Article 161 of the Railway Act, 1903. The arbitrators in lieu of valuing one of the lots in money ordered that part of the lot should be returned and that the Quebec Bridge and Railway Company should construct a road on their adjoining land and maintain the same in perpetuity for the benefit of the Quebec Improvement Company.

HELD: That the arbitrators were not bound to adhere strictly to legal formalities and mere irregularities would be excused, but as the arbitrators had exceeded the terms of submission, an error in that respect would vitiate their whole award."

The Judgment of the Court of Appeal, which was confirmed, is reported in 16 K. B. 107.

Our submission with respect to the interpretation of the Special Act is referred to at length at page of our Factum, where this judgment is also quoted at greater length.

(b) Then Appellant's Supplementary Plea expresses a willingness to pay \$2,500.00 for reduction in the power output of Respondent's generating plant. This was increased by their witnesses Simpson and Beique to \$3,200.00 and \$8,800.00 respectively.

Here again all the Company's evidence dealt with a loss of head and generating capacity in the plant at the present site which is taken from the Respondent by the said development. Consequently, it is not relevant because the Special Act directs that the Appellant shall pay compensation for all Respondent's property taken up to elevation 321.5, and when it is taken and paid for and vested in the Appellant it becomes immaterial to consider whether with its tailrace flooded and its floor awash it could have been operated in a manner to maintain his light and power



customers and run the portable sawmill.

Nevertheless, as Appellant's estimate of the damages to the system was all based on the fallacy that Appellant could mitigate the compensation by allowing Respondent to remain upon property which becomes vested in them on payment, we shall refer to it.

Although there is a conflict of testimony on this point, our submission is that the weight of evidence is in favour of the Respondent. MacRostie (Vol. 9, p. 219, line 36 and p. 220, line 20) says that prior to the flooding the base of the draft tube to the power plant was at elevation 311; so that with a vesting up to elevation 321.5 the loss of head is  $10\frac{1}{2}$  feet out of a total head of 74 feet. Massue, an engineer called by the Appellant (Vol. 11, p. 266), says the base of the draft tube prior to the flooding was at elevation 313.81 and Boisvert (Vol. 11, p. 16, line 5) says it was at elevation 313.91. According to them, the loss in head was only  $7\frac{1}{2}$  feet.

Simpson (Vol. 11, p. 82, line 38 and p. 83, line 10) takes the reduction in power as proportional to the percentage of reduction of head, that is 10%, though the rated capacity of the wheel with a reduction of  $7\frac{1}{2}$  feet would be  $86\frac{1}{2}\%$  of the capacity at 74 feet head. (Vol. 11, p. 81, line 43). Basing himself on the testimony of Appellant's witness Scovil of a minimum dependable output of 40 H.P. in the power house, he therefore estimates a reduction of 4 H.P. due to loss of head, estimating that this can be furnished by the Gatineau Power Company at \$48.00 a year, that is \$192.00 for 4 H.P. He would capitalize \$192.00 to arrive at the capital value of that amount of power as being the compensation to Respondent for the loss (Vol. 11, p. 83, line 39 et seq.).

It should be noted that Scovil's figure of a

dependable flow of 6 c.f.s. at Meach Creek is not based on measurement but only on estimates (Vol. 11, p. 72), and Scovil's own testimony showed that in his opinion for 30% of the year there would be a flow of 55 c.f.s., that is, over nine times as much, i.e., over 360 H.P. (Vol. 11, p. 74). For the power plant, which he said required 25 c.f.s. flow for full output, he did not know how much of the year Cross would have this 25 c.f.s. available. It would be more than 30% of the year and less than 100%, so that it was all guess work on his part (Scovil, Vol.11, p. 74, line 11; p.75, lines 2 and 10).

Cross was able to use the water in the sawmill in the day time and give the whole stream flow to the power plant when the big lighting load came on in the evening.

Beique (Vol. 12, p. 233), basing himself on the  $7\frac{1}{2}$  feet loss of head, takes a loss of 10% on Mr. Scovil's testimony that the rated capacity of the generator is 160 H.P. Again accepting Mr. Scovil's estimate of 40 H.P., he finds 10% would be 4 H.P. But taking into consideration the circumstances in which the Respondent operated and the way he could make use of his power, he believes the loss should be taken at the equivalent of 12 H.P. dependable power. He then takes \$44.00 a H.P. for 12 H.P. and capitalizes the annual charge of \$528.00 at 6% to arrive at the sum of \$8,800.00 as the capital sum representing the loss of head. Beique, Exhibit D-88, Vol. 5, p. 156.

In cross-examination, Simpson (Vol. 11, p. 94) says he never owned a power plant or generated and distributed electricity himself (p.94, lines 6 to 18). He admits that if the loss of head were  $7\frac{1}{2}$  feet the maximum rated capacity of the wheel would be reduced to  $86\frac{1}{2}\%$ .

If the head were reduced by  $10\frac{1}{2}$  feet, the maximum rated capacity of the wheel would be approximately 82%. Then at page 94, line 36:

"Q. You do not know what load was on that system?"

A. No."

Page 95, line 3:

"A. I have never examined the distribution system."

Lines 20 to 30, he says he has never had occasion to examine a plant similar to Mr. Cross' where the water has been raised in just such a way as it has been raised in Mr. Cross' case. Line 26:

"A. I would say that a condition like this is somewhat exceptional."

Then he goes on to say he does not know the effect of the loss of  $10\frac{1}{2}$  feet of head on a fully loaded system.

At page 95, line 44:

"Q. Assuming Mr. Cross suddenly lost ten and a half feet of head in 1926, and assuming that his system was fully loaded at that time, that his distribution system was fully loaded at that time, I think we can take it that it would not have a beneficial effect on his ability to serve his customers, would it?"

A. No. On the other hand, the characteristics of the load would have a bearing on that, and under some circumstances....

Q. You don't know the characteristics?"

A. I don't know the characteristics, but under some circumstances there would be a very sharp peak where the ten and a half feet head would not make much difference, and under other circumstances there would be the sustained peak for a considerable length of time, under which circumstances the reduction in head might have a bad effect.

Q. And you, of course, quite frankly tell us you do not know what the characteristics of his load were at that time, you never having seen them?

A. I don't know what the characteristics were at all.

Q. Supposing he had a loss of seven and a half feet of his head in 1926, the same answer would apply, you do not know what effect it would have on his load?

A. It would be the same answer."

So apart from giving an estimate of the loss of capacity of generated power, the witness does not know the characteristics of the load on that system.

Beaubien (Vol. 10, p. 248, line 36 et seq.) says that with 11 feet reduction in head he calculated that the water wheel would lose 25% of its capacity. Line 44:

"Q. What effect would that have upon a distribution system of that type - a loss of 25%?

A. If it was loaded nearly to its capacity before, it would be absolutely unfit to take care of the load afterwards."

And we have shown above from the evidence of the Respondent that the system was fully loaded.

Page 251, line 4:

"Q. You gave us your opinion as to the loss of capacity at some 25% if 11 feet of head were lost; if 10½ feet of head had been lost would the percentage of loss vary very much?

A. Not very much."

It is obvious that if the load called for the full capacity of the plant, even a reduction of 10% would render it useless for supplying customers. It is the difference between solvency and insolvency. The brutal fact is that it did put the system out of business and in reality the Trial Judge finds this to be the fact.

Apart from the question that our submission that the Special Act does not permit the Appellant to lessen the

compensation for the taking in the manner above indicated, the offer of a capital sum to replace lost H.P. is also fallacious.

In the first place it has been shown that the Respondent was using every bit of power he had. Consequently, a loss of 25% or even 10% of capacity might (as in fact it did) render the system unfit to take care of the load.

The Appellant suggested that this loss of capacity of 25% (or at least, of 10%) might have been made up by purchasing an appropriate amount of power from some other source, to supplement the diminished output of his power house. This, however, would not have been feasible.

Mr. Beaubien, Vol. 13, p. 48, says: (Line 11)

"You cannot economically inject a fixed amount of power from a larger station into a smaller system."

At page 48, line 20, to page 49, line 3, he gives his reasons and says he has never known of it having been done or attempted.

Simpson (Vol. 13, p. 111), when called in sur-rebuttal by the Appellant, attempted to contradict this, but it is submitted that his evidence does not really answer the explanation given by Mr. Beaubien (Vol. 13, p. 48, lines 20 et seq.) where he shows that this cannot be done economically.

Simpson does not recall any comparable situation in Canada (p. 112, line 26). At most, it is a matter of conflicting opinion of two engineers.

In the next place, what guarantee would the Respondent have that the Appellant Company, the only power company in that territory, would be willing to supply power to him at any fixed price? There is nothing in the Public Service Commission Act, R.S.Q. 1925, Chapter 17, which obliges a public utility company to supply power to a com-

petitor. Even counsel for the Appellant said in answer to the Trial Judge (Vol. 11, p. 88, line 37) - "Frankly, there is a query upon that point as to whether you can be obliged to supply to a person who is already in competition with you". Although Simpson (p. 87, line 45) says they would not refuse to give him that power (p. 98, line 40 et seq.), he admits that under some circumstances he has decided to whom the Company sells, and then says (p. 99, line 7):

"A. Sometimes the decision is with the Branch Manager and sometimes with Mr. Parker and sometimes with Mr. Gale."

Moreover, such a suggestion cannot be seriously entertained, when the Respondent's hydro-electric system has been put out of commission entirely since 1930.

By taking a part of the system, the Company becomes responsible for the damages caused to the remainder.

There is nothing to show at what price the Respondent could purchase this power in the future.

Incidentally, it may be pointed out that Mr. Simpson's evidence of a loss of only 4 H.P. is based on Mr. Scovil's estimate that the system is only capable of producing 40 dependable H.P. We refer the Court to our criticism of this estimate on page            of this Factum. Apart from everything else, it is obvious that this premise is wrong, because Respondent is now purchasing about 80 H.P. per annum from the Company to serve his remaining customers not exceeding 200 in number, and is not able to operate his portable sawmill, which alone, when operated, used 80 H.P.

It should be noted that in the Superior Court Appellant in its Factum at page 94 says that if the plant had only been capable of functioning by the expenditure of \$3,700.00, the Court "would be justified in making the

Defendant take it and pay its value mentioned".

The mere poles and wires are of little or no value unless they serve customers and produce revenues. This is obvious, and is admitted quite frankly by the Appellant's attorneys - Vide page 83 of transcript of Mr. Ker's second argument.

On the whole, therefore, it is obvious that on a purchased power basis the Respondent is entirely at the mercy of the Appellant, and, from reading the record, it is not hard to imagine what he could expect. The present order of the Public Service Commission with respect to supplying of power is, of course, only a temporary arrangement.

Amongst the various experts called by the Appellants was Mr. Boisvert of the Public Service Commission, who said (Vol. 11, pp. 3 and 4) that the Commission did not consider that small systems gave good service. But the fact that the Public Service Commission does not like these smaller distribution systems is not evidence that they did not possess a going value in 1926. In any event, this evidence is not really relevant because the question in issue is not the quality of the service rendered by the Respondent after the crippling of his plant but the value of it to him as a going concern on the 21st May, 1926. Boisvert (Vol. 11, p.18) says small systems can be operated more profitably by an individual than by a large company.

If Respondent had developed Cascades himself, he would have impaired the efficiency of his generating plant at Farm Point, and in the Respondent's Factum in the Court below, credit was given to the Appellant for this contingency in the sum of \$9,237.10 (Factum, p.113). Deducting \$9,237.10 from \$80,000.00 left \$70,762.90.

Moreover, MacRostie's evidence (Vol.10, p.247, line 2) shows an allowance is made for the salvage or scrap value of the distribution system and everything else of \$8,000.00, though much of this becomes vested in the Appellant because erected on land below the 321.5 level. The Court, after taking all the conflicting evidence into consideration, arrived at the figure of \$60,000.00, Respondent naturally retaining only that part of the system erected on land above the 321.5 level.

This further appears from the judgment (Vol.13, p.163, lines 10 et seq.), where the learned Trial Judge -

"..... déclare attribuer à la défenderesse, sur paiement par elle au demandeur des susdites sommes et intérêts, la pleine propriété, avec les droits s'y rapportant, des immeubles ci-après désignés qui lui sont dévolus par ledit 'géodetic survey datum' et tel que voulu par ladite loi spéciale, c'est-à-dire en par la défenderesse maintenant le niveau de la rivière Gatineau au-dessus desdites chutes à toute élévation contrôlée n'excédant pas 321.5 pieds au-dessus du niveau de la mer à Farm Point, tel que déterminé par le point de repère (bench mark) géodésique établi sur l'église de l'Eglise-Unie du Canada, au Village de Wakefield, à savoir."

To sum up, therefore, we submit that there was ample evidence upon which the learned Trial Judge could come to the conclusion, as he did, that \$60,000.00 was a just and fair compensation for the loss suffered to the whole hydro-electric system.



LUMBER BUSINESS

Paragraphs 12, 13, 14, 16, 18 and 20 of the Supplementary Declaration (Vol. 1, p. 38) contain the allegations setting up Respondent's claim under this heading. Paragraph 27 (Vol. 1, p. 42) states at lines 11, 25 and 31 the amounts with respect thereto. The learned Trial Judge awarded the Respondent the sum of \$115,000.00 as the value of his lumber business. The considérant of the judgment at p. 160, Vol. 13, is as follows:-

"Quant à la valeur de l'industrie de bois du demandeur, (y compris 'Mileage 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);

La Cour accorde au demandeur ce dernier montant de \$115,000.00;"

As has been said before, it is naturally not possible to assess the loss with absolute mathematical accuracy, but there is ample evidence to support this finding, which is essentially one of fact.

It should be noted that in the argument of M. St. Laurent to which the Trial Judge refers, the sum of \$115,000.00 was submitted as the value of the physical assets comprised in the properties at Farm Point and Mileage 12 and those used in connection with the lumber industry, apart from the going value of the Undertaking. Respondent's claim is for a constructive total loss as well as for damages to certain buildings and land that did not form part of the lumber business.

In 1904, William Cross, the father of the Respondent, gave to his son the larger portion of the property

presently owned by him at Farm Point. Immediately thereafter, the Respondent commenced his lumbering operations and erected a sawmill thereon.

In 1912, as has already been mentioned, the Respondent started to generate electricity from Meach Creek. By 1926, the Respondent had carried on business so successfully that Farm Point had become a small village, with two churches, a school, post-office, and hotel, all owned by the Respondent. The population was composed of employees of the Respondent, who occupied some twenty-nine cottages which he had erected. For the purpose of utilizing the waterpower of Meach Creek, the Respondent constructed a dam on his property on the Creek at a point having an elevation of 74 feet above the natural level of the Gatineau River. From this dam, he ran a large pipe or penstock to his electric generating plant. Just below the dam, there was an off-shoot of the penstock which ran a portion of the water into his sawmill to operate it. The penstock was so constructed that the water to the sawmill could be cut off when it was not in operation.

The photographs P-29 and P-31, Special Exhibit Book No. IV, show the situation of the sawmill and the penstock. In addition to the development and expansion of his two businesses (electric and lumber), the Respondent acquired land in the vicinity as sites for summer cottages. Many of these were sold and cottages erected thereon by residents of Ottawa for occupation during the summer months. At the time of the raising of the Gatineau River through the erection of the Chelsea dam, 12th March, 1927, the Respondent still owned two cottages and a number of vacant sites suitable for summer cottages.

He acquired large tracts of timber limits both

behind the Farm Point property and on the opposite side of the Gatineau River. For the purpose of getting the timber from those portions of his limits not so accessible to the mill at Farm Point, the Respondent acquired sawmill sites at Alcove, about four miles higher up the Gatineau River from Farm Point, and at Mileage 12, about five miles down the River from Farm Point. For operations at Alcove and Mileage 12, the Respondent had a portable sawmill, which he used alternately at these places, operated by electricity generated by the hydro-electric plant at Farm Point.

Considerable time and money had been spent by the Respondent in improving the flowage and driving qualities of Meach Creek by the erection of storage dams, notably those at Carmen Lake and Spring Lake (Vide Dougherty, Vol. 10, p. 73 et seq.).

It is quite evident, from the development which took place at Farm Point between 1908 and 1926, that Respondent had been particularly successful in business and had continued to put his profits back into further expansion. That he was justified in improving and expanding the business at Farm Point is evident from the natural advantages which the site there had, particularly for the lumber business. These natural advantages are the following:

1. Direct conveyance of logs from the timber limits to the mill and by a short floatage down Meach Creek;
2. Operation of the sawmill by the natural power furnished by the waters of Meach Creek;
3. A large, dry, and level piling ground area situated below the mill with the advantage of a downgrade thereto;
4. The C.P.R. line from Hull to Maniwaki is only a few hundred yards away and is connected to the Respondent's property by a short spur line which runs through the piling ground;
5. The main highway to Ottawa (15 miles away) is

only a few yards beyond the C.P.R. right-of-way.

This advantageous natural situation was commented upon by the witness Plaunt, an experienced lumber merchant of Ottawa, at Vol. 13, p. 5, line 16.

Omanique, a large sawmill operator at Barry's Bay was of the same opinion as to the situation at Farm Point. He says, at Vol. 10, p. 236, on cross-examination:

"Q. You think that is a desirable place for the sawmill at Farm Point?

A. I do not think. I know it is as far as that goes.

Q. And you have elements of advantage there that you would not be able to find anywhere else?

A. I do not see how you would.

Q. You have water coming down capable of operating your mill by waterpower, and you have a nice hill which gives a good head of water, and close to the C.P.R.; all these elements are elements which would add to the value apart entirely from the piling ground?

A. Well sure, and if the piling was not there what would you do?

The layout of Farm Point may be seen on the plan Exhibit P-93, Special Exhibit Book No. 1. This shows the sawmill, the spur line from the C.P.R. right-of-way, Meach Creek, and the various buildings in small blocked rectangles, The extent of property to be vested in the Appellant Company, upon payment of compensation, up to elevation 321.5 and the effect on the property by the holding of the waters at a controlled elevation of 321.5 to the further elevation 325 is also seen from the contour lines drawn on this plan. Exhibit P-97, Special Exhibit Book No. 1, is a copy of Exhibit P-93, except that no contour lines are shown and the buildings are all numbered.

Exhibit P-91, Special Exhibit Book No. 1, shows blocked in red the Respondent's freehold timber limits on

the West side of the Gatineau. From it may be seen the situation of the timber limits with respect to the Farm Point and Mileage 12 mills. The course of Meach Creek also appears as it leaves Meach Lake and flows through the timber limits to join the Respondent's dam at Farm Point. Respondent's limits held under Crown license were on the East side of the Gatineau.

At an elevation of 321.5, some 29 acres of the level land in front of the workmen's houses below the sawmill will be covered with a body of water varying from  $9\frac{1}{2}$  feet deep tapering down to nothing as it extends inland. Appellant admits an adverse seepage effect for a distance of 3 feet further, that is, up to elevation 324.5. Included in the area thus covered with water, and which will become vested in the Appellant upon payment, is practically all the piling ground formerly used by the Respondent and certainly all the piling ground necessary for the operation of his sawmill which had an output of from three to four million feet a year.

In paragraph 18 of the Supplementary Declaration, it is alleged that the damming of the water has utterly destroyed the Respondent's land, property and business at Mileage 12, and has prejudicially affected the mill property and business at Farm Point, which will be utterly destroyed by the maintenance of the water at a controlled elevation of 321.5.

The Appellant's answer to this allegation is contained in Paragraph 37 of its Plea to the Supplementary Declaration, wherein it is said that none of the operations of the sawmill industry at Farm Point nor the property directly appertenant thereto can or will be affected by the maintenance of a water level of 321.5 "save and except

a small area of less than three acres of land at times used by Plaintiff for the piling of lumber and the said piling ground has always been low-lying land and was land which had been in part filled in by the Plaintiff for said purpose, and the measure of compensation due to Plaintiff in respect thereof is a sum representing the cost of filling in and reclaiming of the said area and the raising of the railway spur thereon.....".

In sub-paragraph (e) of Paragraph 57 of the Plea, the Appellant offers as compensation \$6,000.00 for the work of reclaiming the portion of the piling ground shown edged in red on D-160, Special Exhibit Book No. III, and to remedy the effect on the railway spur.

By a reference to the plan put in by Appellant's witness Farley as D-160, it will be seen that the area edged in red consists of only 1.9 acres. Even by Appellant's contour line of 321.5 taken on the top of the sawdust fill which was put in after the flooding, it will be noted that the Southerly or lower side of this area commences at elevation 318 and that the 321.5 contour line practically cuts even this limited area in half. For reasons which will be explained later, the true contour line as it existed in 1926, before this ground had been filled in with sawdust and other material, ran close to the upper or Northerly boundary of the red-edged area. In the meantime, we merely point out that the remedy proposed by the Appellant contemplates a gravel fill over an area that will be vested, on our submission, practically wholly in the Appellant Company upon payment of the award. Realizing that an offer to pay \$6,000.00 (later increased to \$10,000.00) for the cost of filling in a piling area of 1.9 acres was not an answer to the directions of the

Special Act, the Appellant's attorneys, at p. 106 of their Factum in the Superior Court, said as follows:-

"If the Defendant were vested with this land up to elevation 321.5 the filling in would be approximately one-half on land of Plaintiff and one-half on land of Defendant which would not be desirable for either party and the Defendant therefore submits:

(1) That Defendant should not be vested with any of the land above the 318 level comprised in the piling ground shown coloured red on plan D-160, but be granted a real servitude permitting it to affect same by submersion and/or seepage resulting from a water elevation of 321.5.

(2) In the event of Defendant being vested with the ownership up to 321.5 at this point, then it is submitted that Defendant should be granted a real servitude covering the seepage effect from 321.5 to 324.5 on Plaintiff's land, and Plaintiff should be granted a servitude on the portion from 321.5 to 318, ensuring him the right to carry out the filling in and remedial works on same and the right to utilize same for all purposes of his business."

For the reasons mentioned at page 84 of our Factum in connection with the electric light business and for the reasons submitted with respect to the interpretation of the Special Act, Respondent submits that the Appellant is not permitted to make any such offer in mitigation of the "just and fair compensation". The decision in the case of the Quebec Improvement Company v. The Quebec Bridge and Railway Company, 1908 Canadian Reports, Appeal Cases, page 212, also reported in 1908 Appeal Cases, page 217, is directly applicable.

#### NECESSITY FOR PILING GROUND

It is not disputed by the Appellant that a piling ground is indispensable to a sawmill business. In fact, its Plea and the plan D-160 accept this. The Respondent established this fact by the evidence of the lumbermen

MacDonell (Vol. 10, p. 48), Omanique (Vol. 10, pp. 57 and 58), Morrison (Vol. 10, p. 64) and O'Neill (Vol. 10, p. 204).

Through the piling ground ran the C.P.R. siding or spur line to the mill. Its extent was between three and four acres (MacRostie, Vol. 9, p. 178, line 29). In fact, the piling ground in constant use by the Respondent was on either side of the spur line. Beyond contour lines 324.5 and 325, to the North of the red edged area, were large outcroppings of rocks at different elevations running up to 337.8 (Vol. 13, p. 25, line 20). To the West the ground rises precipitously up the hill to an elevation some seventy feet above the Gatineau River.

ELEVATION 321.5 AT THE PILING GROUND AREA  
BEFORE THE FLOODING.

Considerable confusion was caused owing to the Appellant's surveyor Farley (who drew practically all the plans of Farm Point produced by the Appellant) having taken his levels at the piling ground on top of the sawdust fill placed by the Respondent since the flooding in order that he might carry on some of his lumbering operations. On the other hand, MacRostie, who drew the plans of Farm Point produced by the Respondent, took his elevations on the natural ground as it existed prior to the flooding.

The different results arrived at by Farley and MacRostie will be seen by a reference to the plan Exhibit P-129, Special Exhibit Book No. 1. This plan was prepared by Farley and is a duplicate of Exhibit D-160. As it was drawn to the same scale as MacRostie's own plans, MacRostie was able to trace on P-129 in yellow pencil the 321.5 line as found by him based upon levels taken on the natural ground prior to the flooding (MacRostie, Vol. 13, p. 25, last line, and p. 26). This yellow line is identi-



fied by the letters "A" at the beginning and "B" at the end. The first line marked 321.5 below MacRostie's yellow line is Farley's line, based, it is submitted, upon elevations taken on top of the sawdust fill.

The Respondent respectfully urges the Court to bear this difference in mind in dealing with Farley's elevations and contour lines with respect to the piling ground at Farm Point.

Before undertaking to point out the importance of the different results arrived at by the two surveyors, we shall proceed to deal with the proof which, we submit, establishes:-

1. That MacRostie's elevations were taken on the natural ground;
2. That the sawdust fill was placed on the piling ground after the raising of the water of the Gatincau River by the Appellant's dam at Chelsea;
3. That Farley's elevations were taken on top of the sawdust fill;
4. That elevations taken on the natural ground are the proper ones.

1. That MacRostie's elevations were taken on the natural ground (MacRostie, Vol. 13, bottom of p. 25):

"Q. Will you file as Exhibit P-129 the copy our friends were good enough to lend us of Exhibit D-160?

A. Yes.

Q. This is a copy of Mr. Farley's plan D-160?

A. Yes.

Q. And the dotted line is your contour line?

A. No. The solid yellow line marked 321.5 is the contour line.

Q. Is that their contour line or yours?

- A. It is mine. I put my initials under it. This is based on the natural soil.
- Q. Before the filling?
- A. Before the fill was put in.
- Q. And that is the yellow line?
- A. Yes.
- Q. Will you please put the letter "A" at the beginning of this contour line and the letter "B" at the end of it?
- A. I put the letter "A" at one end and the letter "B" at the other end."

At page 27, under cross-examination, line 39:

- "Q. I understand on Exhibit P-129 you have assumed to trace what in your opinion was the 321.5 contour?
- A. What in fact was the 321.5 contour on the ground.
- Q. What in your opinion was the contour?
- A. No; what in fact was the contour.
- Q. That is taken under natural ground conditions?
- A. Under natural ground conditions.
- Q. Under the level of the existing condition of the ground?
- A. No, at the surface of the ground.
- Q. Under the present surface of the piling ground at it actually exists?
- A. No. Perhaps I could clear the whole thing up for you if you will allow me.
- Q. Perhaps you might let me clear it up in my own way. Let us call the surface of the piling ground that portion of it which is exposed to the air at the present time.
- A. Very well.
- Q. Your level is not taken from that surface?
- A. My level is not taken on the top of the sawdust. I would like to say also that we checked out the 321.5 contour as shown on Mr. Farley's plan on top of the sawdust and it agrees with what he has.

Q. What I am saying is that his plan shows the contour as taken from the surface and your contour is not taken from the surface.

A. Mine is taken from the surface of the ground.

HIS LORDSHIP: The surface of the ground under the material that was added to it?

MR. KER: Under the material which covers it. I do not know whether it was added to it or not."

2. That the sawdust fill was placed on the piling ground after the raising of the water of the Gatineau River by the Appellant's dam at Chelsea:

That the temporary expedient of placing sawdust and debris on the piling ground to permit the continuance of some of the operations was done since the flooding has been definitely established by Respondent's witnesses, with no contradictory proof.

Cross, examination on discovery, Vol. 9, p. 38, line 25:

"Q. Was any of your piling ground filled in before the Gatineau Power Company came on the River?

A. Not the piling ground."

MacRostie, Vol. 13, p. 201, lines 16-28:

"Q. I think I understood you to say something about a fill being put over the yard?

A. Yes, there has been a great deal of fill placed in the yard - sawdust, pieces of broken wood, chips, bark and so on - refuse from the mill. It has been placed particularly over the area on the North side of the siding. From 1 to 3½ feet of fill have been placed in there since 1926.

Q. In order to ameliorate conditions?

A. I presume so."

Jeffrey, C.P.R. road-master, who stated that he had charge of the siding at Farm Point, Vol. 13, pp. 53, 54 and 55, and particularly on p. 54, lines 1-13:

"Q. Are you familiar with the conditions surrounding the spur before and after the flooding with respect to the sawdust fill which Mr. Cross is stated to have put on his piling ground?

A. There was no sawdust fill or no tramway made for men to work on. The ground was dry enough so that we could work in and out of it without any sawdust fill or plank platform which had to be put there after the water was raised. I have ridden on engines in there myself many a time. After the water was raised, I made it my personal business to go in and examine the track and I found it in such a condition that I prohibited the engines from going in there. We arranged with Mr. Cross to have his cars drop from the mill to a point where we could reach them, sometimes with a car behind our engine."

The plank platform erected to ameliorate conditions is shown on the photograph D-170, Special Exhibit Book No. IV.

Riddell, C.P.R. conductor, Vol. 13, p. 37, line 46, and p. 38:

"Q. Had the area of land around that spur or siding been filled in with sawdust by Mr. Cross prior to the flooding?

A. Not to the best of my knowledge. In fact, the piling had been done on the South side of the track as well as the North side."

Ralph, the Appellant's engineer, Vol. 12, p. 209, line 21:

"Q. Is the present surface the natural surface or is there some sawdust and mill refuse there?

A. Most of it has a layer of sawdust and slabs but I would put my fill right on top of it."

3. That Farley's elevations were taken on top of the sawdust fill:

Farley, the Appellant's surveyor, during his cross-examination, in Vol. 11, page 166, was asked what elevations he had actually taken himself on his contour line 321.5, and he said only from the East end of the elevated trestle and West from there. He was then asked to mark a point which he considered to be the East end of the elevated trestle, which he did by marking an "X" in lead pencil on Exhibit D-160, Special Exhibit Book No. III. He is then asked, at page 167:

"Q. In arriving at that elevation, were your instruments on top of the sawdust or refuse?

A. Not for this particular elevation, no.

Q. Not for the particular elevation marked "X"?

A. No.

Q. You went down to the natural ground?

A. Yes."

Later at page 167:

"Q. Personally, you did not take any elevations along this contour line of 321.5 between the point marked "X" and the upward or westerly portion?

A. No, I took ground elevations from that point. I was not following the contour line 321.5 except I wanted to see if I could get where it intersected the natural ground."

This answer, in itself, shows that Farley's 321.5 line on D-160 is not based on the natural ground but on the sawdust

fill, as if his line was based on the natural ground there would be no question as to where it intersected the natural ground, as it would be at the same level.

Farley, however, says that at the point marked "X" he went down to the natural ground, and it appears from the evidence generally that this is the only point at which he did so. Attributing only literal truthfulness to Farley, he was not in good faith in making this evidence. It is quite possible that at the point "X" or in the neighbourhood there was an isolated hummock or a small rise in the ground, which, if his instrument were placed thereon, would give an elevation of 321.5 and which would not be included in MacRostie's 321.5 line, which follows the general level of the natural ground.

The Attorneys for the Appellant, in their Factum for the Court below, took an absolutely mistaken conclusion from Farley's point "X" and assumed that it had been taken at the point where Farley's 321.5 line crosses the siding or spur line, and, while noting that MacRostie's 321.5 line crosses the siding 185 feet away in a westerly direction, concluded that MacRostie's elevations must have been incorrect. As has just been stated, the point "X" is not where Farley's 321.5 line intersects the siding, so that the conclusion drawn by the Appellant is not justified.

With a view to establishing that Farley's elevations were correct, the Appellant produced another land surveyor, Farley's partner Cassels, who deposed that he had checked the lines drawn by Farley on Exhibit D-160. He stated at line 29, p. 50, Vol. 12, that he verified the line 321.5 and answered "Yes" to the question: "You were basing yourself in taking your elevations on the actual condition of the ground as it stands now?" This question and answer

definitely establish that Cassels' check of the elevations taken by him were based on the sawdust fill spread over the natural ground to a depth of 1 to  $3\frac{1}{2}$  feet. This is further established by the question at the bottom of page 50, Vol. 12:-

"Q. In any event, what I am getting at is that you have taken your elevations on the existing surface on the ground as indicated in the piling ground whether it may be filled in or not; that is what you have taken it at?

A. Well, on the surface as it exists."

At page 52, line 41, in cross-examination, he is asked:

"Q. You did not at any of these points attempt to determine whether or not there was overburden or there was fill that had been placed within recent years?

A. No."

On re-examination, Cassels produced as Exhibit D-176, Special Exhibit Book No. III, a sketch plan made by him showing lines 324.5 and 321.5, and stated these lines coincided closely enough with Farley's lines to justify him in saying that Farley's plan is correct. The Respondent sees in this practical coincidence of Cassels' lines with those of Farley additional proof that Farley's 321.5 line is based upon elevations taken on the sawdust fill. Nowhere does Cassels state that any of his elevations were based on the natural ground and in fact he says specifically that his elevations were taken on the ground as he found it a short time before he gave evidence.

The Appellant, in instructing its surveyors to base their elevations on the surface of the piling ground as it existed in 1932 made the mistake of assuming that the fill had been placed prior to the elevation of the water. The Appellant chose to assume this, although it was quite evident

why the fill had been placed on the piling ground, and in any case any investigation would have revealed the true fact. Possibly the Appellant did not wish to have its surveyors take their elevations on the natural ground, realizing the result would be to show the vesting, in accordance with the Special Act, of practically the whole of the piling ground.

MacRostie, Vol. 13, p. 28, when under cross-examination, insisted that the elevations taken by him were not taken on top of the sawdust, and he says at line 11:

"I would like to say also that we checked out the 321.5 contour as shown on Mr. Farley's plan on top of the sawdust and it agrees with what he has."

In other words, MacRostie took a series of levels to determine the 321.5 line based on top of the sawdust and found that the line so traced by him coincided with Farley's.

MacRostie, Vol. 13, p. 13, was asked a question by Appellant's attorney in which a reference is made to evidence already given by Farley. It will be seen that the reference in the question is quite incorrect.

"Q. Mr. Farley deposes the line also crosses the siding under natural ground conditions. I have asked you the difference between the point you find as natural ground and the point he finds as natural ground and you say it is 185 feet.

A. I do not agree with Mr. Farley on that point because the siding has about 2 feet of ballast under it."

The Appellant's attorney was under a misapprehension. Farley did not say that his 321.5 line crossed the siding under natural ground conditions. All he did was to mark at the point "X" on D-160 a place not on the siding at all, to represent the East end of the elevated trestle. (Farley, Vol. 11, p. 166, line 12). This point "X" on D-160 as seen by reference to the plan is far from being



on the 321.5 line where it crosses the siding, being 45 feet West therefrom.

4. That elevations taken on the natural ground are the proper ones:

The Special Act ordains a vesting of Respondent's property up to elevation 321.5. The first paragraph of the preamble to the Act mentions the raising of the level of the Gatineau River by the Appellant Company and states that it "thereby submerged in whole or in part since the 12th March, 1927 certain properties of which one Freeman T. Cross claims to be the owner....."

Section 3 of the Act reads:

"The date with reference to which valuation shall be made shall be the date of the Order-in-Council approving the plans for said development."

The date of the Order-in-Council referred to was the 21st May, 1926.

Elevation 321.5 was inserted in the Special Act as being the highest point to which the Chelsea development could maintain the water of the Gatineau River and was therefore chosen as the elevation up to which the Respondent would be entitled to compensation. It was not contemplated, at the time the Act was framed, nor can the Act be interpreted as meaning that any sawdust, debris or constructions placed by Cross on his land at Farm Point, and particularly on the piling ground to ameliorate conditions caused by the flooding, would reduce the area to be vested in the Appellant.

The sawdust fill placed by the Respondent on his piling ground was merely a temporary expedient and would in no way deter the waters of the Gatineau River from finding their way up to an elevation of 321.5 on the natural ground below the fill. It is submitted, therefore, that MacRostie's

321.5 line as traced on the various plans produced by the Respondent, and particularly that traced by him on P-129 (a copy of Appellant's plan D-160) must be taken to show the area to be vested in the Appellant, upon payment of compensation, in virtue of the Special Act.

The Appellant, at the second hearing, affected to plead ignorance of the fact that the sawdust fill had been placed on the piling ground after the flooding. It is quite evident, however, that it was aware of the expedient of placing sawdust and debris on the piling ground, for, in Paragraph 37 of its Plea to the Supplementary Declaration it says that none of the operations of the sawmill industry at Farm Point would be affected by the maintenance of a water level of 321.5 "save and except a small area of less than three acres of land at times used by Plaintiff for the piling of lumber and the said piling ground has always been low-lying land and was land which had been in part filled in by Plaintiff for said purpose....."

It may be the Appellant chose to be mistaken as to the time when the sawdust fill was put on the piling ground, seeing that it would be to its advantage to assert the filling had been done prior to the flooding.

IMPORTANCE OF DIFFERENCE BETWEEN ELEVATIONS BASED ON NATURAL GROUND AND THOSE ON THE SAWDUST FILL.

It is quite clear, from the plan Exhibit P-129, that a vesting of the Respondent's property up to the yellow line on the piling ground, that is, MacRostie's elevation 321.5, deprives Respondent of practically the whole of his piling ground. It can be seen that the portion remaining to him of the piling ground is that between MacRostie's yellow line and the red line indicating the end of the piling ground, and it is evident that this, from its size and shape, can be

of no use. MacRostie, Vol. 9, p. 122, line 1:

"Q. What effect has the raising of the water to control (a controlled) elevation 321.5 had on the Farm Point mill?

A. It has totally destroyed the piling ground or it will totally destroy the piling ground. The raising of the water to 321.5, that is a permanent controlled elevation, will completely destroy the piling ground."

MacDonnell establishes the same fact as MacRostie Vol. 10, p. 49, line 1:

"Q. Speaking of Farm Point, you know the waters have come up over a large portion of that ground?

A. Well, that was pointed out to me, to the railway tracks or spur line that goes into the mill. It was pointed out where the water was raising up to that spur line and beyond a little bit.

Q. Supposing that water had been two or three feet higher than when you saw it during the summer months at Mr. Cross' ground going up to elevation 321.5, what would you say?

A. I would say it was absolutely out of commission. The ground would be absolutely out of commission for any purposes."

NO OTHER PILING GROUND AVAILABLE.

It having been established that an elevation of 321.5 as determined by MacRostie deprives Respondent of practically all his piling ground, we shall now refer to the evidence to the effect that there is no other land at Farm Point available for use as a piling ground.

In considering this evidence, the situation of Farm Point should be borne in mind, namely, that a few hundred yards from the Gatineau River the land rises precipitously to the Meach Creek dam and that the land on either side of the valley, formerly the piling ground, rises quite steeply.

Omanique, Vol. 10, p. 58, line 16:

"Q. Is there no other ground there that you could suggest as being suitable to replace it as piling ground?

A. I did not see any.

Q. You looked about?

A. Yes, I did."

MacRostic, Vol. 9, p. 126:

"Q. Then what is your statement with respect to the effect of maintaining the controlled elevation of 321.5 upon the lumber business at Farm Point?

A. It is that it takes all the land practically to the foot of the hill, all the land which is, or could be, used for a piling ground, right to the foot of the hill, and from there up the ground is very precipitous, and is used for his cottages, and he has no remaining land which he can use as a piling ground.

Q. Are we to take it from that, that your statement is the controlling of the elevation 321.5 destroyed Farm Point as a site for his lumber business?

A. Yes."

Exhibit P-94, Special Exhibit Book No. 1, shows the valley at Farm Point formerly used and available as piling ground, and, by means of consecutive contour lines, indicates how the ground rises on either side, until it reaches the sawmill.

Although not pleaded the Appellant sought towards the end of the trial, through the witness Small, to point out another area for use as a piling ground. This was the rocky area to the north-east of the former piling ground (Small, Vol. 12, p. 128, line 4). He said there would be an acre and a third there to pile 1,120,000 feet. However, Appellant's witness Beique in Vol. 12, p. 232, line 43, testified that the area available there would only be one acre.

Small suggested that the cost of relocation of the piling ground would be about \$3,000.00 not including the spur railway, p. 129, lines 18 to 35.

The witness Beaubien, for the Respondent, an engineer, at Vol. 13, p. 49, line 3 et seq., after making estimates showed conclusively that it would entail removal of 21,800 yards of rock and cost \$44,000.00 plus \$16,000.00 for the relocation of the spur line, and that did not include the cost of obtaining a portion of the property of a third person adjacent to the main C.P.R. line, so as to run the siding into the new piling ground at a curvature acceptable to the C.P.R. Even then the area available would only be about 1 1/4 acres. In cross-examination (Page 50) Appellant's counsel seems to accept the proposition that it is not a suitable piling ground. The figure of \$16,000.00 for the relocation of the spur line was given by Stenhouse, C.P.R. engineer in Vol. 13, p. 40.

The Appellant's witness Ralph then produced a plan, D-204, Special Exhibit Book No. III, to indicate how a spur line could be run into the area suggested by Small to avoid the complication of purchasing land for such purpose from a third party. Ralph, however, in cross-examination, admitted that both the spur line suggested by Stenhouse and his own were absurd. Ralph, Vol. 13, p.122, line 1:

"Q. You have not made any estimates to build a level piling ground there?

A. No, I have not."

Page 122, line 25:

"Q. You told us very frankly you were not wedded to Mr. Stenhouse's spur line and you are not wedded to your spur line. Let us be perfectly frank.

A. That is the truth. I think they are both absurd."

Thus by spending \$60,000.00 Respondent would only have one acre (according to Beique) which even Appellant's witness Small said would pile only 1,200,000 feet instead of the yearly output of three to four million feet. It will be

recalled also that Small estimated a piling capacity of 1,200,000 feet on 1 1/3 acres, although Beique stated only 1 acre would be available.

Beique, who says he appraised all of Respondent's properties at Mileage 12, Farm Point, Alcove and across the Gatineau, after a one day inspection on April 29th, 1932, apparently found time to scrutinize and plot out an area just below the sawmill, which he puts forward as suitable for a piling ground. This is the portion in blue marked "R" on D-193, Special Exhibit Book No. III. It will be seen this area is very irregular in figure and through it runs the railway spur.

Beique calculated the total area of this irregular piece of land as comprising .54 of an acre, and then produced a plan, Exhibit D-192, Special Exhibit Book No. IV, being a sketch of a theoretical rectangular piling ground neatly divided off into sections. On this he estimates the quantity of lumber which could be piled on one acre. He does, however, admit that the Respondent could not use the irregular area coloured blue on D-193 with the same facility as he applies his calculations on D-192. Beique says, in Vol. 12, p. 232, after mentioning the quantity of lumber which could be piled on a rectangular acre:

"Of course this would be over the mark as applied to Mr. Cross' piling ground, because the piling ground shown on my diagram would be square or rectangular and not irregular as the piling ground of Mr. Cross, so something would have to be deducted from those figures to arrive at the exact quantity that could be piled on Mr. Cross' piling ground."

Either in error or by design, the witness uses the expression "Mr. Cross' piling ground" with reference to the portion under discussion coloured blue, when the evidence shows that only the lower part of it could be used.

Moreover, he made no reduction for the area

occupied by the spur line until, upon cross-examination, he subtracted 1500 sq. ft. therefor. An additional area should also have been deducted by Beique, six feet on either side of the spur as Jeffery the C. P. R. roadmaster testified the Railway required such space so as to give room for its men to work. (Jeffery, Vol. 13, p.54, line 45; p. 55, line 53). Also, though the sketch Exhibit D-193 does not show it, there is a branch of the spur line which also takes up considerable space and which has not been taken into account. This branch is shown on D-160, and if D-193 is applied to D-160 it will be seen that this spur runs through the area. In addition, on the other side of the main spur line ran the elevated trestle not shown on D-193 but appearing on D-160. This elevated trestle was for the purpose of conveying the lumber from the mill to the piling ground.

From this, it will be seen that Beique's suggested piling ground is intersected by three obstructions - the spur line, the branch spur line, and the elevated trestle - all of which are essential, so that very little space could be found there for piling. The place suggested by Beique is apparently the same space that Ralph found to have some lumber piled on it on the 8th October, 1932. It was marked on D-160 in yellow pencil by the witness and he says its nearest point is 50 feet from the sawmill and about 200 feet away on the further side, (Ralph, Vol. 11, p. 226, lines 28-40; p. 242, lines 9-14) - an insignificant area.

APPELLANT'S OFFER OF \$6,000.00 FOR  
FILLING IN OF PILING GROUND

We now deal with this offer under reserve of our objection that it is not a compliance with the Special Act.

The Appellant, realizing the effect on the Respondent's lumber business as the result of the loss of

his piling ground through flooding and vesting in the Appellant, offered the extremely doubtful expedient of filling it in with gravel (Paragraphs 37 and 57 (e) of the Plea to the Supplementary Declaration). \$6,000.00 was the amount offered for the purpose of the fill and raising the spur line, though Appellant's witnesses testified it would cost \$10,000.00.

It is submitted there is no possibility of filling it in, owing to the fact that the piling ground, through the effect of the water on the surface since the date of the flooding has so saturated and softened the clay that it would not hold the proposed fill and the weight of the lumber piles. Such was the evidence of Langford, the geologist, and the engineers, MacRostie and Robertson, who are definitely and firmly of the opinion that the piling ground cannot be satisfactorily filled in and it is submitted that the Trial Judge in view of their testimony could not properly have subjected the Respondent to a remedy proposed by the Appellant, the effectiveness of which was so seriously questioned by engineers of their ability and standing.

It was MacRostie's opinion that the only way to fill the piling ground would be to drive piles down to rock bottom, but that owing to the number of piles which would be required the cost of doing so would be prohibitive (MacRostie, Vol. 9, p. 125, line 17; Robertson, Vol. 10, p.211).

For the purpose of combating this evidence the Appellant's witness Ralph referred to the C. P. R. embankment, which he stated was constructed on land similar to that which formed Cross' piling ground and he contended that if the embankment could be sustained so also could the lesser weight of the fill and the piles of lumber (Ralph, Vol. 11, p. 209).



Langford's answer to this contention was that the C. P. R. embankment had been erected before any flooding so that its weight compressed the pore space in the clay so as to retard the softening (Langford, Vol. 10, p. 19).

The Appellant produced a geologist, one Gill, who submitted that the clay which forms the piling ground and also the ground upon which the railway embankment is built has always been saturated and that Langford's testimony that the clay was dry when the embankment was erected is not correct. Gill, however, in his investigations drilled only one hole, and it is important to note that the place where he drilled was submerged under 2.3 feet of water (Gill, Vol. 12, p.19, line 25). At page 29, he is asked:

"Q. This is the only hole you bored?

A. Just one."

Gill's theory was that the clay both at the piling ground and under the embankment was saturated, upon the assumption that the water table extends from both sides of Meach Creek and rises slightly away from the Creek, due to the effect of seepage and capillary action. Langford, however, stated he was positive, from the numerous tests he made during a period of many days, that at Farm Point there is a depressed water table, which is 5 or 6 feet under the surface and not close to the surface, as maintained by Gill. Langford's evidence to this effect is based on solid fact. He states that in his borings he went from 5 to 7 feet below the surface before water rose in the holes. (Langford, Vol. 13, p. 15, line 1).

Langford used in his borings an auger (Vol. 10, p. 21, line 40) as opposed to the wash method used by Ralph, the Appellant's engineer, who also made a number of borings. Ralph's method, which consisted of pumping water into the hole

he was boring, would not permit him to determine when he reached the water table, as there was always water in the hole (Langford, Vol. 10, p. 23, line 4). Although Gill also used an auger, the one hole which he bored was at a place where there were 2.3 feet of water on the surface so that neither he nor Ralph could determine when the water table had been reached or whether it was depressed. It should therefore be taken as conclusively proven in fact that there is a depressed water table at Farm Point. The effect of the proof of this depressed water table is to establish as a fact the statement of Langford that the ground under the C. P. R. embankment was dry when the embankment was erected and this nullifies Gill's theory of the saturation of the clay, which is based on the usual assumption that the water table would rise in a gradual slope upward from the creek. (Vol. 13, p. 14, line 33; Vol. 12, p. 25).

Langford says he found from these borings where the surface had not been covered with water a dry, hard crust of from 6 to 8 feet thick by reason of a depressed water table, which crust he said is carrying the C. P. R. embankment and which could have carried the gravel fill and the piles of lumber had the fill been put thereon prior to the raising of the water and the softening effect prevented (Vol. 10, p. 19). In view of MacRostie's opinion that piles would be necessary to support the piling ground it is important to note that when the C.P.R. embankment was built, the part over Meach Creek was bridged upon piles driven down to refusal on either side of the Creek. (Ralph, Vol. 11, p. 237; Exhibit D-167, Special Exhibit Book No. III).

As to the piling ground, the depressed water table allowed it to form a solid support for the piles of lumber, but when the water was raised the pressure from the

depressed water table below was increased and, combined with the downward effect of the surface water, reduced in both directions the thickness of the crust and greatly diminished its carrying power (Vol. 10, p. 25, line 23). That is Langford's reason for saying that while the embankment, laid prior to the flooding, is standing, the piling ground, not having been filled before the flooding, could not be counted on to support the weight of the fill and lumber piles.

It is of importance to note that Langford's evidence as to the depressed water table is based on actual observations, whereas Gill's statement as to the water table is merely theory and an assumption that the water table at the Farm Point delta followed the usual rule, which Langford's borings showed conclusively it did not.

It is submitted that the evidence of Respondent's experts shows it is not possible to fill the piling ground.

The Appellant's witness Ralph filed as Exhibit D-168 his estimate for the cost of "ground filling", Vol. 5, p. 168. The first item thereon is "9,200 cu. yds. ground filling at 70¢ per cu. yd. - \$6,440.00".

At page 219, Vol. 11, Ralph is asked:

"Q. Will you file this as Exhibit D-168?

A. Yes.

Q. That estimate calls for filling with gravel. Is that estimate correct?

A. Yes.

Q. In your opinion, gravel is a proper material to make that fill with?

A. I think it is the best possible material that happens to be available there."

The Appellant's witness Kennedy is asked, at Vol. 12, p. 2, what his firm would charge to do the work of filling in and restoring the piling ground and he says:

"A. Basing the estimate on Mr. Ralph's figures, we would be prepared to do the work for \$10,000.00.

Q. That would include everything?

A. Yes.

Q. Filling with gravel?

A. Yes."

On cross-examination, when questioned as to the cost of relocating the Gatineau Highway, which his firm had done for the Appellant Company, he stated that in 1926 he received \$2.40 a yard for gravel and for the filling on the road, 65¢ a yard. Although Ralph and Kennedy give the impression that the proposed fill on the piling ground would be gravel, it appears that their figures were not for a fill composed of gravel but for a "ground fill".

The use of gravel was emphasized by the Appellant's witnesses because of its weight distributing qualities, as explained by Mr. Chadwick - Vol. 11, p. 274 - but we find on D-168 that "ground filling" is to be used.

From the evidence of Mr. Kennedy, it appears that the material for which he received 65¢ a cu. yd. on the highway job was for a filling of ground or dirt and that for the gravel he received \$2.40 a cu. yd. Again we mention that D-168 provides for "9,200 cu. yds. ground filling at 70¢ per cu. yd. - \$6,440.00". Kennedy is asked at Vol. 12, p. 5, with reference to the highway job.

"Q. You got \$2.40 a yard for it measured in place?

A. Yes.

Q. That is laid down, levelled off and rolled (if it had to be rolled) - or did it require to be rolled?

A. No, it did not require to be rolled. Just put in place and levelled.

Q. Practically the same kind of work as would have to be done here to make the fill?

A. About the same.

Q. And you got \$2.40 a yard from the Provincial Government for that work in 1926?

A. Not from the Provincial Government; from the Gatineau Power Company".

The Appellant's attorneys of course saw that the logical conclusion to be drawn from Kennedy's evidence was that for a pure gravel fill the cost would be \$2.40 a yard, so at p. 6, line 13, he endeavours to repair the damage:

"Q. I understand your work on the highway was done for a price of \$2.40 for the top filling?

A. For the top filling and gravel.

Q. But the main fill which as I say would correspond with what you would do on Mr. Cross' piling ground: how much did that actually cost?

A. 65¢."

Cross-examination, Vol. 12, p. 7, line 9:

"Q. Am I correct that you got \$2.40 a yard for what you had to use gravel for?

A. Yes.

Q. And 65¢ for what you used sand for?

A. Yes."

An explanation of this evidence is that in building roads almost any material is used for the foundation, and on top of that is placed a layer of gravel, so that in 1926 when Kennedy talks of the material which cost 65¢ a cu. yd. he refers to the material under the layer of gravel, and when he talks of \$2.40 per cu. yd., he refers to the gravel surface. But it is gravel itself that the Appellant's witnesses have given the impression would be placed on the piling ground at a cost of between \$8,000.00

and \$9,000.00, though their estimate in D-168 only called for "ground filling", whereas they depend upon a pure gravel fill for the purpose of distributing the weight of the lumber piles. While it is true that \$2.40 a yard was the price in 1926, and no evidence has been adduced to show what is the price of gravel fill at the present time, the 9,200 cu. yds. (D-168) of gravel at the 1926 price of \$2.40 a yard would be \$22,080.00.

The Appellant's witnesses stated the cost of filling would be about \$10,000.00 instead of the \$6,000.00 offered in the Plea. But it will be seen though they based their opinion evidence upon a gravel fill because of the weight distributing qualities of gravel, their estimates as to the cost were based upon a "ground fill".

The Respondent's engineer, MacRostie, is of the opinion that gravel fill would not be suitable, for two reasons: first, the ground would not carry its weight; and, secondly, that the water would seep through the gravel and there would be a wet and damp condition under the lumber piles. He concluded that the only way to fill the piling ground would be to drive piles, the cost of which he stated would be prohibitive (MacRostie, Vol. 9, p. 125, line 6).

None of Appellant's witnesses put in figures for the cost of driving piles.

Apart from our submission as to the clear terms of the Special Act, it may be said that in view of the conflicting evidence, the Respondent should not be selected as the subject of what is at best an experiment when his rights to compensation are to be irrevocably and finally determined by the ultimate award in the present case.

GOING VALUE OF THE LUMBER BUSINESS  
AS AT 21ST MAY, 1926, AND COMPENSA-  
TION FOR PROPERTIES AND RIGHTS TAKEN  
OR AFFECTED.

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We submit that there was ample evidence to support an award largely in excess of that granted by the Trial Judge.

The fact that the Respondent commenced his business career in 1904 with his only asset the land at Farm Point is in evidence (Vol.9, p. 110, line 18, to p.111, line 41). It has also been shown that by his own industry and unaided efforts he found himself in the substantial position he was in in 1926. Fellowes, Manager of the Dominion Bank at Ottawa, where Respondent kept his trading account, testified that during the seven years between 1920 and 1926, inclusive, his deposits of new money amounted to \$1,033,361.00 (Vol. 10, p.108, line 14). His whole record is one of honest industry and effort. As Dr. Chabot said (Vol. 9, p. 232, line 8):

"Q. Connaissiez-vous M. Cross auparavant?

R. Très bien, oui. J'ai été le médecin même de sa famille. C'était un homme très respecté dans cette région.

Q. Il habite là depuis très longtemps?

R. Très longtemps, oui."

Like many another country man, Respondent kept no books, and as a result was not able to produce the statements and books of account which might be expected from a merchant carrying on business in Montreal. Furthermore, payments to him for his products were often made in kind, which would render bookkeeping most difficult.

Such statements and account books as were available were produced by the Respondent through Milne, a chartered accountant, and handed to the Appellant in order

to give it every opportunity of determining the worth of Respondent's properties (Vol. 10, p. 86, line 21). Moreover, Respondent even waived the privilege attaching to Income Tax returns.

It appears that Mr. Milne had succeeded to the practice of one Blatch, who had from time to time prepared statements for the Respondent when he needed them for the purpose of obtaining loans from his Bank. Mr. Milne's evidence is in Vol. 10, commencing at p. 84, where he says that the Respondent kept no books to his knowledge. Respondent had called in Milne to prepare his income tax returns to the Government. For this purpose, Milne made such investigation and obtained such figures as he could find and finally effected a settlement with the Income Tax Department covering a period of years. It was as a result of this that Milne (examined by Appellant) was in a position to shed some light upon Respondent's activities and the profits and income he was deriving from his businesses.

At the instance of the Appellant, Milne produced as Exhibits D-137, D-138, D-139, D-140, D-141, D-142, D-143 and D-144 statements of Respondent's assets and liabilities for the years 1921, 1922, 1923, 1924, 1925, 1926, 1919 and 1920, respectively (Vol. 10, p. 87).

Milne said, at p. 91, line 3, that the statement of September 1919 (Exhibit D-143, Vol. 5, p. 100) shows the Respondent had a surplus of \$169,500.00 and that, eliminating the statements for the subsequent years, that of September 1926 shows a surplus of \$286,026.00, an increase in assets for the seven year period of \$116,526.00 ( $\$286,026.00 - \$169,500.00 = \$116,526.00$ ). Milne then says that for income tax purposes the Respondent was allowed living expenses of \$4,000.00 per annum, a total of \$28,000.00 for the seven year period. He states that there were addi-



tional expenses mentioned to him by Respondent, such as losses he sustained in a toy factory venture at Farm Point, speculations in gold mines, pleasure automobiles, and the actual income tax paid. Milne estimated the total expenses to be between \$60,000.00 and \$70,000.00, which would mean that if those items had not been taken out there would have been a surplus of approximately \$180,000.00 over the seven year period, or a surplus of between \$25,000.00 and \$26,000.00 per annum over that period.

The Respondent, in addition to his sawmill at Farm Point, had other mills at Pickanock (or Perras) and Stag Creek (or Low), and it is true the operations from these mills are included in the statements produced by Milne, and therefore these statements do not reflect the business at Farm Point alone. In this connection, reference is made to the evidence of the Respondent in Vol. 10, p. 122, where, after having made an explanation of his operations at Pickanock, he says:

"I did not figure I had made a dollar at Pickanock."

and to his evidence at p. 126, line 7, where, after having given an explanation of his operations at Low (or Stag Creek), he says:

"I do not figure I made any money at Low. I only figure I made no money at Low, taking in my losses that I had."

Also, at p. 122, line 11, he says:

"Every dollar came from Farm Point, North Wakefield and Mileage 12." (North Wakefield is the same as the place called "Alcove", where Respondent had a branch mill operated by power from Farm Point).

It will be noted that the mill at Pickanock which had been built with the profits from Farm Point, burned in 1922, without there having been any insurance,

and was rebuilt also with profits from Farm Point (Vol. 10, p. 121, et seq.).

If the average annual profit or surplus of between \$25,000.00 and \$26,000.00, as just mentioned, is taken at, say, \$25,500.00 and deduction is made therefrom of the sum of \$8,000.00, a conservative figure for the net profits from the power and electric light business, it will be seen that Respondent's annual profit from his lumber business would be in the neighbourhood of \$17,500.00. The capitalization of the amount required to produce a yearly return of \$17,500.00 indicates that the sum of \$115,000.00 awarded by the judgment for the lumber business is very conservative.

We have already referred in detail to the natural advantages Farm Point possessed as a site for the lumber business. With these in mind, Omanique, an independent sawmill owner, gave a market value to the business of \$200,000.00 as in 1926 (Vol. 10, p. 233, line 51, and p.235). Basing himself on a cut of about 3,000,000 feet a year, he would estimate the profit to be \$3.00 a thousand feet more than if the mill had been back in the woods, or \$9,000.00 a year, which for twenty years' sawing would be \$180,000.00. The balance of profit up to \$200,000.00 is made up of slab wood at \$2.00 a cord.

The value of the advantages possessed by Respondent at Farm Point were emphasized in cross-examination of Omanique:

Vol. 10, p. 236, line 17:

- "Q. You think that is a desirable place for a sawmill at Farm Point?
- A. I do not think. I know it is as far as that goes.
- Q. And you have elements of advantage there that you would not be able to find anywhere else?

- A. I do not see how you could.
- Q. You have water coming down capable of operating your mill by water power, and you have a nice hill which gives a good head of water, and close to the C.P.R.; all these elements are elements which would add to the value, apart entirely from the piling ground?
- A. Well, sure, an if the piling was not there, what would you do?"

At p. 238 (still cross-examination):

- "Q. You are really basing your evidence on what he has told you?
- A. On the work he has got. I figure how much cheaper he could take out his lumber at Farm Point than he could in the woods, because I have had mills all over. I had a small mill I started in 1902, the first little mill I built, and it cost me \$4.00 a thousand just to haul my lumber alone. Where my mill is now it costs me about 45 or 50 cents to load it. That is the difference in handling lumber.
- Q. Usually, the great thing is to move your mill to the most advantageous point to take advantage of your lumber?
- A. Yes, another thing, I use steam and it costs more.
- Q. That is the value of his site?
- A. That is the value of his site, and on the other hand if he was using steam - say he saws 25,000 feet a day - it would take eight cords of wood a day, which I figure his wood there at Farm Point would be worth \$6.00 a cord. I am speaking of hardwood now, and there is another saving he would have which is a very nice saving.
- Q. That is due to his water power?
- A. Due to his water power and his ground below there, being handy.
- Q. It is a fact really that that creek coming down there just happens to be in the right place in relation to his other things?
- A. He must be pretty good to get that."

Through its engineer Blue, Appellant produced copies of certain returns made to the Government of the timber cut by Respondent in different years. This was an effort to minimize the quantity of timber stated by Respon-

dent's witnesses to have been cut annually by him. It will, however, be noted that there are complete yearly returns with respect to the Crown limits only. It is obligatory by law to make returns of timber cut on Crown lands in order that the Government may assess and collect its stumpage dues.

The returns for timber cut from freehold limits are required only for statistical purposes and then only when requested by the Department of Colonization. Those produced by Appellant do not cover Respondent's operations for 1920-21, 1921-22, 1922-23, 1924-25, 1926-27, as appears by letter from the Deputy Minister of Colonization, Exhibit D-197, Vol. 5, p. 167. The Exhibits D-198 (Vol. 5, p. 168), D-199 (Vol. 5, p. 169), D-200 (Vol. 5, p. 171) and D-201 (Vol. 5, p. 171) refer only to operations on Crown limits.

Further evidence as to the capacity of the mill at Farm Point and the profits derived from its operation will be found in the evidence of D. J. MacDonell, one of the superintendents of the J. R. Booth Company at Ottawa, the Respondent himself, F. X. Plaunt, successful lumber merchant of Ottawa, Thomas Satchell, chief tie engineer of the Canadian Pacific Railway Company, D.A. Morrison, Respondent's foreman for twenty-five years, and Thomas Racine, who worked for the Respondent as sawyer.

MacDonell (Vol. 10, p. 55) judged the capacity of the mill at Farm Point to be between 3,000,000 and 4,000,000 feet per year. The Respondent, in his examination on discovery, stated the same figure from his personal knowledge.

F. X. Plaunt had been buying ties from the Respondent for over twenty-five years. He stated (Vol. 13, p. 1) he had bought from Respondent during the period

1920-1926 a varying annual quantity running from a minimum of 25,000 to a maximum of 115,000 ties and that they had been supplied from the mills at Farm Point and Mileage 12. At p. 9, he estimated a yearly average of 45,000 ties. It was to his knowledge that the Respondent also sold ties to other persons. At p. 5, he said:

"Cross' production cost must be very small if his business is well managed. His profit should be good. I would think if Cross makes less than 15¢ a tie profit averaged throughout these years we have been doing business that he is a poor manager, a very poor manager."

Plaint stated that No. 1 standard ties contain 42 feet Board Measure, and No. 2 standard ties 32 feet Board Measure.

Satchell (Vol. 13, p. 58) states that he was called upon from time to time to inspect the ties sawn by Respondent at his Farm Point mill for the C.P.R. and that in some years their number would run up to 100,000 and a little over and in other years, 30,000 or 50,000 or 60,000 and up.

Morrison (Vol. 10, p. 65) states that Cross' annual cut was between 3,000,000 and 4,000,000 feet. That would of course include ties.

With the figures given by the witnesses just mentioned, it is possible to make an estimate of the Respondent's annual profits from his lumber business.

Taking 45,000 as the average annual number of ties sold, at 15¢ per tie, there is a yearly profit of \$6,750.00. 45,000 ties per annum, with each tie containing 35 feet Board Measure (a low average of the 42 feet for No. 1 standard ties and the 32 feet for No. 2 standard ties) gives 1,570,000 feet Board Measure.

Taking 3,500,000 feet as the average yearly cut at Farm Point and deducting the 1,570,000 feet Board Measure for ties leaves an annual average cut of 2,000,000 feet for

lumber. Using the figure of \$2.50 profit per 1,000 feet, as estimated by Appellant's witness Small (Vol. 12, p. 101, line 38), one obtains an annual profit of \$5,000.00 for lumber. The figures of \$6,750.00 for ties and \$5,000.00 for lumber form a total profit of \$11,750.00. That figure capitalized at 6% gives \$195,833.00. It is arrived at from evidence drawn from the Appellant's witness Small, supplemented by Respondent's independent witnesses Plaunt, Satchell and MacDonell, and it checks with Mr. Omanique's valuation of the business as a going concern of \$200,000.00.

In addition, there is the output of the mill at Mileage 12, which Appellant's witness small estimated at 200 ties per ten hour day, or, in lumber, 500,000 feet a year for a year of one hundred and fifty days, yielding profits of \$750.00 per annum equal to an additional capital sum of \$12,500.00.

It is therefore submitted that the Judge's award of \$115,000.00 in this regard is amply justified by evidence of record entirely independent of that made by the Respondent himself and without it being necessary to weigh the somewhat conflicting estimates made by the witnesses as to the values of the physical assets involved and without taking into account the values of the adjacent properties of the Respondent not directly connected with the lumber business and also taken or affected by reason of the flooding. These values were very fully and carefully gone into at the trial, and the learned Trial Judge no doubt had all these elements in mind when fixing this sum of \$115,000.00 to cover both the value of the physical assets and the constructive total loss of this business. We have not cross-appealed on that point and it would serve no useful purpose to set out calculations that would substantially exceed the award.

The following is submitted, however, as a summary of the Respondent's claim in this respect and of which the Trial Judge has allowed only \$115,000.00.

LUMBER BUSINESS

Going value of the lumber business  
at about \$200,000.00

VALUE OF PHYSICAL ASSETS NOT DIRECTLY  
INCLUDED IN THE LUMBER BUSINESS

Value of buildings, exclusive of the mill	\$45,500.00	
Land suitable for building lots	6,110.00	
Two lots built on	2,000.00	
Depreciated value of land on the hill	1,350.00	
5 lots on the east side of the Gatineau River	1,500.00	
Hotel site	1,200.00	
Remaining river frontage	3,920.00	
Mileage 12	13,913.00	
	\$ 75,493.00	
		\$275,493.00

His lordship, in arriving at the amount of \$115,000.00 seems to have felt that he ought not to allow more than \$115,000.00 mentioned by Mr. St. Laurent. He, however, overlooked the fact that the figure suggested by Mr. St. Laurent was for the value of the mere physical assets and did not include the value of the business as a going concern, the value of which he intended to leave it to the judge to estimate.

This amount of \$115,000.00 mentioned by Mr. St. Laurent was based on the following figures -

Machinery and mill	\$12,000.00	
Buildings	52,500.00	
Dam at Meach Creek	21,702.00	
Part penstock and saddles (that is, the part applicable to the lumber business as distinguished from the part applicable to the electric system)	2,450.00	
The railway siding	3,001.25	
The roads in the lumber yard	2,000.00	
4 wells	300.00	
Cribwork and Rollway	2,000.00	
Storage dams and improvements in Meach Creek	6,314.00	
Land, as itemized in Exhibit P-99	16,730.00	
Mileage 12	13,913.00	
	\$132,910.25	or

say \$115,000.00.

We shall merely refer to evidence of value of the physical assets comprised in the lumber business - the buildings and land at Farm Point and the Mileage 12 mill.

In close proximity to the sawmill and piling ground was a number of cottages erected by the Respondent to house the workmen employed in the lumber business. With the loss of the industry there, these became of no further use (MacRostie, Vol. 9, p. 132, line 36).

These workmen's cottages numbered twenty-nine. Their situation is indicated by blocked rectangles on P-97, Special Exhibit Book No. 1; also on Exhibit D-189 enclosed within the two pencilled circles marked by the Appellant's witness Beique. Respondent also had his own residence close to the mill (Building No. 40 on the Plan). Respondent also owned a hotel (Building No. 31) and, on the East side of the Gatineau, two cottages.

Apart from the mill, the value of these buildings and structures is shown on Exhibit P-96, Vol.3,p.103,which contains a valuation for each. The valuation of the mill is \$7,000.00 and the total is \$52,654.00, or the round figure of \$52,500.00 that MacRostie gives in P-122, Vol.3,p.143,which is a summary of the value of the physical items in the lumber business, including the hotel and cottages above mentioned.

Evidence of the value of the buildings and various structures as itemized in P-96 is given by MacRostie in Vol.9, p. 132, et seq. The buildings were also examined and valued by Hazelgrove and Adamson in 1926. Their evidence will be found in Vol. 9, pp. 286 and 297 respectively. Their valuations were higher than those of MacRostie and appear in Exhibit P-66, Vol. 3, p. 6.

It is evident that these buildings and structures (apart from the hotel and the cottages on the East side of



the River) formed an integral part of the lumber business. The Respondent's own residence was included in the claim because it was erected close to the mill to permit the proprietor or manager to be near to the scene of operations. It is not claimed that all are actually and physically affected by the flooding. In fact only houses 5, 6, 9, 10, 27 and 31 have been touched by the water (MacRostie, Vol. 9, page 133).

The hotel - building No. 31 on D-189 - it has been proved was actually affected by the flooding. See the evidence of Mrs. Thomas Howell, Vol. 10, page 111. This witness was a tenant from 1922 to 1928 and testified that following the flooding in 1927 water seeped into the cellar, and through the consequent dampness the lower rooms of the hotel could not be used. Lester Rawson, Vol. 10, page 114, testified he leased the hotel in 1930, 1931 and 1932 and found it considerably affected by dampness. He stated on this account his rental in 1930 was \$300.00, in 1931 \$200.00, and in 1932 \$150.00. His evidence was corroborated by that of his wife, Vol. 10, page 117.

LAND

Except for the land on which the house of the foreman Morrison was situated, none of the land upon which the workmen's cottages stand is included in any valuation on behalf of Respondent, not even that which is below 321.5.

The land which was valued by Respondent's witnesses is detailed in Exhibit P-99, Vol. 3, page 114. The items in P-99 may be summarized and explained as follows:-

Lands suitable for building lots as shown laid out on P-100, Special Exhibit Book No. 1.	\$6,110.00
2 lots, being those upon which the Respondent's residence and the foreman's residence stand. These are also shown on P-100.	2,000.00

20 acres on hill. These are shown on P-119 Special Exhibit Book No. I. It was determined that the Respondent's ownership of this property had been reduced by sales to 13.5 acres. At the depreciation in value of \$100.00 per acre found by MacRostie, Vol. 9, p. 136, line 26, the amount under this item is	\$1,350.00
5 lots on the East side of the Gatineau River at \$300.00 each. These are indicated on the plan Exhibit P-97, Special Exhibit Book No. I. They have actually been affected by the flooding (MacRostie, Vol. 9, p. 143).	1,500.00
Hotel site (MacRostie, Vol. 9, p. 138, line 20 et seq. and at pp. 201 and 202)	1,200.00
Remaining river frontage	3,920.00

MacRostie, who is familiar with real estate transactions in the district referred to many sales of similar land in the vicinity of those above mentioned, to support the valuations placed by him (MacRostie, Vol. 9, p. 139, line 26 to page 143). The amounts for which other lots in the vicinity have been sold, it is submitted, is the proper basis of valuation. The following jurisprudence is applicable.

Falcolner et al and the Queen, 2 Exchequer Court Reports, page 82:

"When lands possess a certain value for building purposes at the time of expropriation but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value."

The King and Murphy et al, 12 Exchequer Court Reports, page 401:

"HELD: In assessing compensation in a case of expropriation of land, the sales of adjoining properties affords a safe prima facie basis of valuation."

The King and McLaughlin, 15 Exchequer Court Reports page 417:

"HELD: (3) The prices paid for properties purchased in the immediate neighbourhood of land expropriated afford the best test and the safest starting point for an enquiry into the true market value of the lands taken."

The King and La Compagnie des Carrières  
de Beauport Limitée, 17 Exchequer Court  
Reports, p. 414:

"HELD: For the purposes of compensation, lands must be assessed as of the date of the expropriation, at their market value, in respect of the best uses to which they can practically and economically be put, taking into consideration any prospective capabilities. The best criterion of the market price is the price at which property in the neighbourhood changes hands in the ordinary course of business."

Mr. Beique was the Appellant's chief witness on land values. To illustrate his evidence, he produced the plan Exhibit D-189, Special Exhibit Book No.III. It cannot be conceded that Beique followed the most appropriate method of valuing land purchased and held for building sites. He never saw the place before the water was raised and then only for one day in April 1932. Apparently he attached very little weight to the amounts for which similar lots in the vicinity were sold.

MILEAGE 12

At a place known as "Mileage 12", fronting on the Gatineau River three miles down the River from Farm Point, the Respondent had a portable sawmill, group of buildings connected with it and a railway spur. This site was used by him to saw the timber which was brought from that portion of his timber limits behind and not easily accessible to the Farm Point mill (MacRostie, Vol. 12, p.244). It was well situated for this purpose, being located at the end of a large gulley which sloped from the timber limits to the mill site and formed a natural passageway along which the logs were easily hauled. (MacRostie, Vol. 9, p.119, line 5 and Vol. 10, p. 243.)

The flooding of the River at Mileage 12 washed out the railway siding, the road which connected with the

main highway, and flooded out practically all the low land of the mill site (MacRostie, Vol. 9, p. 119). The water was raised about 25 feet. The Appellant's witness Beique admitted at Vol. 12, p. 236, line 1, that the value of this property for practical purposes is gone.

The value of the buildings at Mileage 12 is estimated by MacRostie at \$1,915.00, as shown on Exhibit P-101, Vol. 3, p. 115.

The value of the land at Mileage 12 is estimated by MacRostie as between \$10,000.00 and \$12,000.00 (Vol. 10, p. 241). He values the land at about \$2,000.00 per acre on account of its suitability for the lumber business (Vol. 10, p.242). The total value of Mileage 12 for land and buildings as determined by MacRostie is shown on Exhibit P-122 (Vol. 3, p. 143) as \$13,913.00.

The Appellant's evidence as to the value of Mileage 12 is given by Beique. He allows a total sum of \$3,572.00 for the whole property (Vol. 12, p.235, line 42). With regard to the buildings and lumber, he says - "I tried to sense what were the conditions in 1926 from the photographs" (line 38).

It may be remarked that Beique, whose evidence covered the value of each item of the whole of Respondent's lumber business and electric light business and lands, spent only one day on his examination in April 1932 (Vol.12,p.261, line 18). In that one day he, according to his evidence, was able to examine Cascades, all the land at Farm Point, determine the nature of its soil, examine the hotel, determine that the water in the cellar was not from seepage, examine the buildings and arrive at a total cost of the reproduction of five groups of buildings, examine the lumber yard, visit the site at Alcove, cross to the East side of the Gatineau River to examine Respondent's property

there, value the generating plant and distribution system and, finally, to examine the Mileage 12 site.

Appellant, in its Factum in the Superior Court (p. 81), asked the Court to fix compensation for this property on the basis of its total destruction so as to include whatever indemnity the C.P.R. (and in turn the Appellant) might have to pay for the new right-of-way through the property. The Respondent is willing that the award shall be treated on this basis.

.....

MacRostie placed a value of \$24,000.00 upon the land at Farm Point below elevation 318 (P-122, Vol. 3, p. 143, line 26; Vol. 10, p. 247, line 24). This figure has not been included in any estimate of the value of the lumber business, as if Respondent was allowed the value of a 14 foot development at Cascades he would have flooded above Cascades to an elevation of 318. If, however, it is finally determined that Respondent is not entitled to compensation for a 14 foot head development at Cascades, the said sum of \$24,000.00 should be added to the other amounts.

In connection with what has just been said regarding compensation for Respondent's rights at Cascades, it was stated at the trial that should he be given compensation for a development up to elevation 318 there should be deducted from the compensation due him for Farm Point a total of between \$47,000.00 and \$48,000.00. This valuation is made up as follows:

In Exhibit P-114, Vol. 3, p. 131, the damage which Respondent himself would do to Farm Point up to 318 through a development at Cascades is shown to be

\$39,663.10. This sum includes land to the value of \$24,000.00. In addition to the sum of \$39,663.10, there is that between \$8,000.00 and \$9,000.00 which MacRostie stated would be required for remedial work to the piling ground, providing such remedial measures were made before the water was raised (MacRostie, Vol. 10, p. 162).

We have, in the foregoing pages dealing with the lumber business, pointed out the fact that precise proof of the actual profits derived therefrom was, under the circumstances, not possible, but that the Respondent, as the injured party, through the Appellant's having, in the first instance, taken the law into its own hands, should not suffer prejudice thereby. "C'est elle qui a créé cet état de chose en s'emparant arbitrairement de la propriété du demandeur" (Judgment, Vol. 13, p. 159, line 5).

Haack v. Martin, 1927, S.C.R. at p. 419.

Duke of Leeds v. Earl of Amherst, Bevens Reports, Vol. 20, p. 239.

All possible proof of value was produced: any books and statements kept by the Respondent or on his behalf were submitted to the examination of the Appellant's attorneys; the reasonable profits to be derived from an industry of the capacity, resources and inexpensive operation such as the Respondent's were estimated by experienced lumbermen, and, finally, the actual value of the various tangible parts, such as buildings, machinery and land, was estimated by engineers, contractors and real estate experts.

The figures given on page 32 of this Factum show profits which capitalized at 6% give a value of \$195,000.00.

In conclusion, therefore, we submit there was ample evidence upon which the learned Trial Judge could come to the conclusion that \$115,000.00 was a just and fair compensation.

TIMBER LIMITS

Paragraphs 14, 15 and 20 of the Supplementary Declaration dealt with the Respondent's timber limits, their situation, value and depreciation by the destruction of the lumber business.

Again the finding of the Trial Judge is one of fact and the award is as follows: (Judgment, Vol. 13, p. 160, line 17)

"Pour l'item de la dépreciation des limites à bois, maître St-Laurent, dans son même argument (pp. 63 in 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 \$5,400.00."

The correct descriptions of these limits (freehold on the West side of the Gatineau and Crown licenses on the East side) are shown in Exhibit D-125, Vol. 5, p. 49:

"15. That the timber limits referred to in the next preceding paragraph hereof have the following areas and are of the values respectively indicated, namely:-

- |    |                                       |  |                               |
|----|---------------------------------------|--|-------------------------------|
| A. | Adjacent to Mileage 12 and Farm Point | 877 acres freehold.                                    | Formerly worth \$40. an acre. |
| B. | Adjacent to Farm Point                | 200 acres freehold bush farm.                          | Worth \$3,000.                |
| C. | Adjacent to Farm Point                | 5,120 acres under timber lease from the Crown.         |                               |
| D. | Adjacent to Farm Point.               | 520 acres under timber lease from private individuals. |                               |

Total acreage of limits - 6,717.

20. That owing to the destruction of the Plaintiff's lumber business, the values of the timber limits as referred to in Paragraph 15 hereof have suffered and will suffer the following depreciation:-

- |    |                                       |                               |   |
|----|---------------------------------------|-------------------------------|---|
| A. | Adjacent to Mileage 12 and Farm Point | 877 acres freehold.           | Depreciated to the extent of \$25. an acre.<br>Loss - \$21,925. |
| B. | Adjacent to Farm Point                | 200 acres freehold bush farm. | Depreciated to the extent of \$10. an acre.<br>Loss - \$2,000.  |

- |    |                        |  |   |
|----|------------------------|--|---|
| C. | Adjacent to Farm Point | 5,120 acres under timber lease from the Crown.         | Depreciation to the extent of \$5. an acre.<br>Loss - \$25,600. |
| D. | Adjacent to Farm Point | 520 acres under timber lease from private individuals. | Depreciated to the extent of \$10. an acre.<br>Loss - \$5,200.  |

Total depreciation - \$54,725.00."

The basis of Respondent's claim is that having acquired these limits, which are ideally situated with relation to the mills at Farm Point, Alcove and Mileage 12 and had an added value for that reason, the virtual destruction of the mills reduced the value of the limits to the Respondent.

McCuaig, a lumber contractor, of Ottawa, discussed the situation arising through the loss to Cross of his mills (Vol. 10, p. 175), and at page 176 stated there would be a depreciation of from \$10.00 to \$15.00 per acre for the limits taken generally on both sides of the River. He also stated that since the erection of the Chelsea dam the raising and lowering of the water during the winter time prevented the lumbermen from hauling their logs from the East side of the River to their mills on the West side. With respect to winter hauling across the Gatineau, McCuaig's evidence is corroborated by that of Eriksen, who spoke from actual experience, (Vol. 10, p. 82, line 27):

"Q. Since the Gatineau Power Company have raised the waters on the Gatineau River, since they started that power development at Chelsea, will you tell his Lordship what effect that has had on hauling logs across the Gatineau River during the winter time?

A. It is not much good to cross the river. It is dangerous.

Q. Have you had any difficulty yourself crossing the river?

A. I had lots of bother last winter - the three last winters.

Q. What is that due to, according to you?



A. At night, to run the water down, the ice sinks down about 7 or 8 feet, and when you go in the morning with a team of horses there is a big crack in the ice, and you cannot get over. You have to fill it up with logs or something.

Q. Does anything happen in the middle of the river on the ice?

A. And when you come back with a lot of logs in the afternoon, the water is away up, and sometimes the middle of the river is worn away with the ice. It is dangerous to cross there. We drowned two horses last year."

and at page 83, line 11:

"Q. Your mill then being near Mr. Cross' was on the west side of the Gatineau?

A. Yes.

Q. And the lumber you were hauling was on the east side?

A. It was on the east side, but we had quit it. The ice got that bad we could not draw. I had 2,200 logs left over there; we could not draw; we had to give it up".

McCuaig had cruised the Respondent's freehold timber limits on the West side of the River, as shown on Exhibit P-91, Special Exhibit Book No. 1, and at pages 174 and 175, Vol. 10, made his report. He valued the limits, with relation to Cross' facilities for handling them, at \$40.00 to \$50.00 per acre, based upon the return Cross would get from the timber. Respondent valued his freehold limits (on the West side of the River) at \$40.00 per acre (Vol. 9, page 59) and the depreciation at \$25.00 per acre (Vol. 9, page 60).

Hamilton, a lumberman, in Vol. 10, page 196, valued the Respondent's timber limits on the West side of the River at \$20.00 per acre and stated he would deduct about half their value through the loss of the sawmill at Farm Point.

On discovery, the Respondent stated that he could sell certain of his freehold limits for cordwood at \$40.00 to \$50.00 per acre (Vol. 9, p. 107, line 8). The Appellant endeavoured to capitalize this statement and contended there would therefore be no depreciation, but Respondent later said in Vol. 10, p. 126, that when he stated he could obtain \$40.00 to \$50.00 per acre for some of his limits as a cordwood proposition, he referred only to certain of his bush lands adjacent to the highway which were accessible to trucks and through which cordwood could be transported to the City of Ottawa. He stated at page 126, line 26, that not 5% of his timber lands are accessible to trucks. The Respondent valued his timber limits on the East side of the River, that is, those under lease from the Crown, at from \$8.50 to \$10.00 per acre and the depreciation at \$5.00 per acre.

With respect to the quantity of merchantable timber on the freehold limits, consisting of 1,497 acres, the Respondent, in Vol. 9, p.105, estimates them to contain 1,000,000 ft. for each 100 acres, and McCuaig in Vol. 10, p.114, line 40, states the timber on these limits is 75% to 80% hard wood, birch, beach wood and ash and that the rest is hemlock and pine. He states that some of the pine is 25 to 30 years old and will mature in a few years. On cross-examination, at p. 183, line 19, he says that the general run of timber through that section is from 10,000 to 15,000 ft. B.M. per acre and that some of the lots would run from 25,000 to 30,000 ft. B.M. per acre, and he particularly refers to the North half of Lots 24 and 25 in the 5th Range, Wakefield, as having that quantity of feet Board Measure per acre. (Note: In the Township of Hull each lot contains 200 acres).

The Appellant, by the evidence of the witness Pepler, Vol. 12, p. 54, endeavoured to establish that the timber on Respondent's limits was far less than that deposed to by Respondent and his witnesses. Pepler gave a detailed ex-

planation of his method of cruising, known as the "sample method" which, in short, is carried out by going through a timber limit back and forth on parallel lines and at certain distances taking samples of a certain small area. The volume of the samples is then averaged and multiplied by the area, giving the cruiser his total estimate. He admitted, at page 77, that the total number of samples would average out at four samples per lot, that the samples were of quarter acre plots taken every ten chains, that is, a distance of 660 ft., and that he sampled only one acre per 100 acres, which is a sample of only 1%. In short, it is seen that the sample method as used by Pepler may be of use for surveying immense forest areas but is of no practical assistance in determining the actual quantity of merchantable timber on smaller areas. In order to show how useless is the sample method the Respondent carried out an actual count of the trees on Lot 24-A of the 12th Range, Township of Hull, one of the lots in Respondent's freehold limits. (Lot 24-A is one-half of original lot 24).

Hamilton, in Vol. 13, at page 69 et seq., describes at length how every merchantable tree in that lot of 6 inches in diameter and over was actually counted by a squad of twenty-eight men who went through the lot systematically and marked by a blaze each tree counted, so that there was no possible chance of any tree being counted twice. Of these twenty-eight men, fourteen were Government licensed scalers and the remainder were their assistants. Each scaler had a tally card upon which he marked the diameter, height and species of each tree he examined and when the survey was completed the number of Board Feet was calculated on a Government chart. This count over a lot which contained 100 acres showed 839,942 ft.B.M. and definitely established that the evidence of the Appellant's witness Pepler and his sample method respecting the quantity of timber on Respondent's limits must be disregarded as being only a method of sampling and of no assistance whatever as showing the

quantity of timber on the limits in question. It will be noted that in Vol. 12, at page 60, line 43, Pepler stated that there are only 876,000 ft. B.M. on the whole of the timber limits on the West side of the Gatineau River, which comprise 1,497 acres, whereas the actual count of only 100 acres showed a total of 839,942 ft. B.M.

The Appellant recognized the strategic situation of Respondent's mill at Mileage 12 by proving through its witness Pepler the additional cost of hauling timber from the limits appurtenant to Mileage 12 to the mill at Farm Point. Pepler, Vol. 12, page 65, line 31:

- "Q. Supposing you were not utilizing Mileage 12 or were not making those limits contributory to that mill, what would be the difference in distance to bring the timber to the Farm Point mill?
- A. About four miles.
- Q. Can you give me any idea of the estimated cost of bringing into the Farm Point mill instead of to the Mileage 12 mill?
- A. That is a question which is dependent a great deal on the roads, the nature of the roads, the class of equipment, and so on; so I could not give a very definite figure. I would say it would be in the neighbourhood of \$4.00 to \$6.00 a thousand feet. Of course, that is just a round general figure.
- Q. Is that the total cost of bringing the timber from those limits to the Farm Point mill?
- A. No, that is the excess of cost.
- Q. To utilize that wood at the Farm Point mill instead of at Mileage 12 would mean an additional cost of haulage of between \$4.00 and \$6.00 per thousand feet?
- A. That is the idea."

The Appellant was of course assuming that Respondent could be compensated at Farm Point by providing a piling ground on land that will belong to Appellant when it pays the compensation.

In recognizing the claim for haulage costs with respect to the Mileage 12 limits, the Appellant, it is submitted,

admitted the principle upon which the claim for the depreciation of the timber limits is based. Appellant's plan D-194, Special Exhibit Book No. III, shows four 100 acre lots coloured green immediately adjacent to Mileage 12.

The judgment, in Vol. 13, page 160, line 16, awards \$5,400.00 for the depreciation in value of the timber limits. This figure is small when considered in relation to the evidence adduced by the Respondent's witnesses, and particularly with reference to the concession by the Appellant through the witness Pepler as to haulage charges from the limits appurtenant to Mileage 12.

GRAVEL PIT AND COST OF HAULING  
GRAVEL ACROSS THE GATINEAU RIVER

Paragraphs 22, 23 and 24 of the Supplementary Declaration allege the purchase of the gravel pit by the Respondent for the purpose of using the gravel therein in the construction of his dam at Cascades.

Appellant, in Paragraph 57(g) of its Plea, offered the sum of \$100.00 for this gravel bed, which amount Respondent declared at the trial he was prepared to accept.

In Paragraph 25 of the Supplementary Declaration, it is alleged that Respondent in 1924 had a large quantity of gravel hauled from the said gravel pit to the West side of the Gatineau River for the construction of his said dam at a cost of \$2,000.00, and in Paragraph 26 that the raising of the level of the River destroyed it.

The judgment, Vol. 13, page 160, line 22, confirmed the agreement of \$100.00 for the gravel pit and awarded Respondent \$1,000.00 as the cost of hauling the gravel:

"Pour le 'Gravel Pit' les parties consentent à l'évaluer à \$100.00; et enfin la Cour détermine le prix du charvoyage du gravois à la somme de \$1,000.00 (voir même argument de maître St. Laurent et factum du demandeur pp. 106 in fine et s.);"

Note: In Paragraph 57 (h) of its Supplementary Plea, Appellant offered \$500.00 for this gravel.

DISBURSEMENTS, FEES AND COSTS - AMENDED  
SUPPLEMENTARY DECLARATION, PARAGRAPHS  
28 and 28-A (Vol. 1, p. 75).

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Sections 4 and 5 of the Special Act:

"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."

"5. Such compensation shall be assessed and awarded to the Plaintiff in his said pending case against the Company, with such interest as the Court may deem proper, and the parties to the said case may, under the control of the said Court, make such amendments to their pleadings, and/or file such supplementary pleadings and submit such further evidence with respect to the new issues raised thereby as may appear proper to the said Court to give full effect to the provisions of this act."

Under this heading the Superior Court said:-

"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 considérait à propos de fixer;

Le demandeur a prouvé, l'item de \$52,512.64 mentionné à l'allégation 28 de sa déclaration supplémentaire amendée;

Il a également prouvé jusqu'à concurrence de \$24,468.58 l'item 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 le dit G. B. Langford (voir pp. 1119 et s. déposition Cross, vol.2, de la preuve du demandeur);

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;" (Vol. 13, p. 161).

We submit that Section 4 of the Act particularly leaves the amount of these costs to the discretion of the Trial Judge. In effect he becomes persona designata in determining what he deems just.

The case of La Cité de Montréal v. Brossard, 42 K.B. 299, is applicable. In this case the Cross-appellant appealed from a judgment of the Superior Court modifying the judgment of the Trial Judge which awarded certain sums of money to the Cross-Appellant for professional services rendered to the City of Montreal as an advocate in proceedings under Section 5940 R.S.Q. 1909.

The Cross Appeal was sustained for the following reasons:

Page 300:

"Considérant que la preuve a été faite, sans contradiction, de la valeur des services rendus par le demandeur au chiffre de \$15,640.00, et de leur taxation à cette somme par le juge enquêteur."

Per Rivard J. at page 310:

"Pour soutenir leur demande et le jugement a quo, les intimés invoquent la décision du juge enquêteur et la preuve qu'ils ont faite de la valeur de leurs services.

Cette preuve, faite par les demandeurs eux-mêmes, par des avocats, et par le juge enquêteur, n'a pas été contredite. Elle établit que les demandeurs ne seraient que justement rémunérés, s'ils recevaient les sommes qui leur ont été respectivement attribuées par le juge enquêteur, et qu'ils réclament.

Je cherche en vain sur quoi la cité de Montréal peut s'appuyer pour demander à cette cour de réduire les sommes accordées.

D'ailleurs, il appartenait au juge enquêteur de statuer sur les frais et je crois qu'il était la personne la mieux en mesure de juger de la valeur des services rendus. Même en admettant que le juge enquêteur n'aurait dû statuer que sur la responsabilité quant aux frais, il reste encore que son opinion, exprimée dans son rapport, renouvelée dans sa déposition, et appuyée par des témoignages désintéressés, établit sans contradiction la valeur des services rendus."

From the number (10) of experts called by the Appellant in the first hearing and the number (13) called in connection with the supplementary pleadings and from the diligence pursued by the Appellant in promoting Bills 170 and 171 and from the number of technical plans and other exhibits it produced, it is a fair inference that the disbursements, fees and costs incurred by the Appellant greatly exceeded the amount awarded to the Respondent. Otherwise Appellant undoubtedly would have proved that its expenses were lower than those incurred by Respondent.

Appellant submitted that Section 4 of the Special Act only referred to disbursements, fees and costs incurred in the first branch of the case and in connection with the passing of the Special Act. We would point out that Section 4 has to be read with Section 5, which permits the parties under the control of the Court to file supplementary pleadings and submit such further evidence with respect to the new issues "as may appear proper to the said Court to give full effect to the provisions of this Act."

It is obvious that the disbursements, fees and costs incurred in such pending action, with permission to have the pleadings supplemented and further evidence taken with respect to the new issues, cannot be determined until they have been actually incurred. They were not incurred until the conclusion of the enquête in November 1932.

Moreover the first two words of Section 5 are "such compensation"; that is compensation which includes disbursements, fees and costs. The costs incurred on the issues raised by the supplementary pleadings permitted by the Court are still disbursements, fees and costs in the petitory action because the supplementary pleadings are



simply supplementary to the action that was pending when the Special Act was passed and still await a decision, and the action, as the Court will see from the conclusions, has remained the same petitory action throughout. Until such compensation (i.e. compensation which includes inter alia disbursements, fees and costs) is paid for the taking up to elevation 321.5 the petitory action and its conclusions remain and that is the protection that the legislature gave to the Respondent. Or to put it this way, the legislature by Section 5 gave the Court permission to hear further evidence with respect to fair and just compensation as to the new issues permitted by the Special Act. Consequently the Court really had to permit new issues, and realizing that the original petitory conclusions only dealt with a lowering to elevation 304 at Cascades and elevation 312 at Farm Point permitted the supplementary pleadings entitling the Respondent to make proof of the new issues as to fair and just compensation which it deemed proper to be heard and tried for a taking and affecting up to elevation 321.5. There has been no new writ and the supplementary pleadings have been only such as are permitted by Section 5 of the Special Act.

To agree with the facts proved as to the disbursements, fees and costs on the supplementary pleadings, authorized by judgment of the 10th March, 1932, paragraph 28A was added to the supplementary pleadings by judgment rendered on the 25th November, 1932.

The preamble of the Act shows that the legislature intended that fair compensation shall be awarded to Respondent in the said pending case. Reading this with Section 4 which orders the Superior Court to include such amount as it deems just for disbursements, fees and costs incurred in such pending action, it is obvious that the Act intended inclusion of all disbursements, fees and costs, incurred by the Respond-

ent. The Act provides for assessing compensation for all Respondent's property and rights in the pending action (Section 2) and then says that the costs incurred in such action shall be included in the award insofar as the Superior Court finds them to be just. The legislature conferred extraordinary powers on the Appellant provided it paid compensation and all the costs incurred in fixing such compensation. If the legislature intended to limit the Court only to the costs incurred in connection with part of the case it would have said so.

Inasmuch as the Judge has found as a fact that the disbursements, fees and costs were proved and not in any way contradicted, we shall not say anything about the quantum except point out that they are analyzed at pages 109, 110 and 111 of the Respondent's factum in the Superior Court. We also wish to call the attention of the Court to the admission regarding rate and the quantum made by Mr. Ker - Vol.13, p.99, lines 22-30. We would point out that no taxable costs are included in these costs. Interest on the costs runs from the date of the judgment. Here also the Court had the discretionary power conferred by Section 5.

Some criticism was offered by the Appellant in its argument of the necessity of having Messrs. Beaubien and Robertson in Court to advise counsel for the Respondent. Their answer, and a perfectly proper one, was that they were there at the request of counsel for the Respondent, who surely are entitled to have advisers in Court, as did the Appellant, in order to be prepared to meet the vast variety of technical questions that came up from day to day. The Respondent had no engineering staff at the service of counsel such as the Gatineau Company was able to furnish by its engineers, Woollcombe, Ralph, Simpson, Blue and those whom they retained, such as Messrs. Scovil, Beique and

Lefebvre and many others.

For these reasons, our submission is that the costs, fees and disbursements incurred, and for which Respondent has become responsible, should be allowed in full and that such was the intention of the Legislature. It is further submitted the evidence shows that Respondent incurred other substantial costs apart from those that were allowed, e.g., the account of the witness Langford, who was unable to return to Montreal to prove his account. However, in view of the discretionary power conferred on the Trial Judge, we are not appealing under this heading.

CONCLUSION

On the whole, the Respondent respectfully submits that the Main Appeal should be dismissed and the Cross-Appeal should be allowed, and the Judgment appealed from should be varied by increasing the award for Cascades from \$90,000.00 to \$420,000.00; the whole with costs.  
MONTREAL, 6th December, 1933.

(Signed) MacDougall, Macfarlane & Barclay,  
Attorneys for Respondent and  
Cross-Appellant.

CROSS-APPEAL

For the reasons submitted in the Factum on the Main Appeal, Cross-Appellant prays that the Cross-Appeal be allowed in the manner prayed for.  
MONTREAL, 6th December, 1933.

(Signed) MacDougall, Macfarlane & Barclay,  
Attorneys for Respondent and  
Cross-Appellant.