

62, 1936



APPELLANT'S CASE

In the Privy Council.

No. 41 of 1935.

ON APPEAL FROM THE COURT OF KING'S BENCH OF THE PROVINCE OF QUEBEC (IN APPEAL).

BETWEEN

FREEMAN T. CROSS (Plaintiff) - - - - *Appellant*

AND

GATINEAU POWER COMPANY (Defendants) - *Respondents.*

CASE FOR THE APPELLANT.

10 **1.** This is an appeal from two judgments of the Court of King's Bench for the Province of Quebec (Appeal Side) dated the 28th December, 1934, reducing the compensation and costs awarded to Appellant by the Superior Court under the provisions of a Special Act of the Quebec Legislature, "for all his properties and rights taken for or affected by" the Respondents' power development at Chelsea Falls on the Gatineau River in the Province of Quebec from \$348,481.22 to \$157,493.89 and dismissing the cross-appeal taken by Appellant with respect to the compensation awarded for one of his properties.

Record.
Vol. 14, pp. 1 & 6.
Vol. 14, p. 14.

20 **2.** The 21st May, 1926, is the date as on which the valuation is to be made for assessing compensation. At that date Appellant, a lumberman who lived at Farm Point near Ottawa, owned the upper portion of the Cascades, a water power situated about eight miles above Chelsea Falls on the Gatineau River, which he had purchased in 1916; a lumber business established about 1903 at Farm Point, some two miles further up the River; branches of that business at Mileage 12 and Alcove on the same River; timber limits and dams serving his mill; lands and buildings at Farm Point including some 29 employees' and other cottages, a hotel and his residence. Since 1912 Appellant had owned at Farm Point a hydro-electric plant situated at Meach Creek, a tributary of the Gatineau River, where he generated electrical energy and, through a growing

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Vol. 4, p. 225,
l. 42 & p. 226.
Vol. 9, p. 110, l. 18.
Vol. 6, p. 218,
ll. 13-24.
Vol. 9, p. 110,
l. 18 to p. 111,
l. 41.
Vol. 9, p. 4,
ll. 17-20.
Vol. 5, p. 35.

Record.

distribution system, was selling electricity in 1926 to some 308 customers along the Gatineau. This power plant was also used to operate Appellant's sawmill at Mileage 12. Appellant had also established an underground aqueduct from which he supplied the residents at Farm Point with water.

Vol. 10, p. 212,
l. 43 & p. 213 ;
Vol. 9, p. 200
i. 23 & p. 201 ;
Vol. 9, p. 49, l. 37.

3. Evidence was given on behalf of the Appellant that his industries were intimately related in their situation and operations and that the loss of one prejudicially affected the others.

4. Respondents are a joint stock company incorporated under the Quebec Companies Act with the object of generating, producing and selling electrical energy as a private commercial enterprise. 10

Sp. Ex. Bk. II.

5. On the 23rd March, 1926, the Canadian International Paper Company, also a joint stock company and subsequently the owner of the capital stock of Respondents, submitted plans to the Lieutenant Governor-in-Council for a hydro-electric development at Farmers Rapids and Chelsea Falls on the Gatineau River. The latter project consisted in erecting a dam over 96 feet high at Chelsea Falls which would back up the waters of the Gatineau River for a distance of about thirteen miles, thereby giving the Power Company the benefit of the fall existing between the actual site at Chelsea and the upper end of the pond created by the dam and having the effect of flooding out Appellant's water power site at Cascades as well as submerging and affecting a number of his other properties at Farm Point and elsewhere. These plans were deposited in the proper Land Titles office on the 24th March, 1926 and were approved by the Lieutenant Governor-in-Council under the provisions of the Water Course Act, R. S. Q. Chapter 46, on the 21st May, 1926. The approval contained the following condition : 20

Vol. 4, pp. 1 & 3.

Vol. 4, p. 1, l. 41.

“ 1. Cette approbation est donnée sans préjudice aux droits des propriétaires riverains ou de tierces parties pouvant être affectés d'une manière préjudiciable par l'érection, le maintien, ou l'exploitation des travaux projetés ; ” 30

Vol. 4, p. 5.

Vol. 4, p. 6, l. 6.

6. On the 17th December, 1926, Respondents as assignees of the Canadian International Paper Company, obtained an Order-in-Council from the Provincial Government purporting to authorize the expropriation of a number of Appellant's properties, “ suivant la section III, du chapitre 46 des Statuts Refondus de la Province de Quebec, 1925, . . . ” which subjected the Respondents to the following among other restrictions :—

“ 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 40

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.”

Record.

7. Such rights to expropriate are further subject to Section 28k of the Public Service Commission Act, as enacted on the 24th March, 1926, and which read as follows :—

10 “ 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). 16 Geo. V, c. 16, s. 6.

20 “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.”

8. In February, 1927, Respondents petitioned the Quebec Public Service Commission under this Section 28k for permission to include in the expropriation the power house and certain lands of Appellant at Farm Point to elevation 325 above sea level. Vol. 4, p. 224.

9. Respondents also served notices of expropriation for the other properties belonging to Appellant included in the Order-in-Council. Vol. 4, pp. 130-135.

30 **10.** Respondents' Petition was contested by Appellant who contended that Section 28k applied only to an undeveloped water power of not more than 200 horse power and not to established industries such as Appellant owned at Farm Point.

11. While the Petition was still under advisement before the Public Service Commission, Respondents on the 12th March, 1927, by means of their dam at Chelsea Falls, raised the level of the Gatineau River by backing up the waters from the Chelsea dam regardless of Appellant's rights of ownership, thereby flooding out his water power site at Cascades and his

Record.

lands held in connection therewith, including a gravel pit ; submerging part of his properties at Farm Point and Mileage 12, and seriously affecting his established industries at those points.

12. It will be submitted that this was in direct contravention of Articles 1589 and 407 of the Civil Code and of Section 24 of the Water Course Act, which are as follows :—

“ 1589. In cases in which immoveable property is required for purposes of public utility, the owner may be forced to sell it or be expropriated by the authority of law in the manner and according to the rules prescribed by special laws.” 10

“ 407. No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.”

“ 24. The expropriating party may not take possession of the property expropriated, nor exercise the servitude until after the award of the arbitrators is rendered and the indemnity paid. But the court or a judge thereof may grant immediate possession of the land to be expropriated in conformity with the provisions of section 112 of the Quebec Railway Act (Chap. 230).”

Vol. 7, p. 48,
ll. 14-27.

13. No such order was ever obtained with respect to Appellant's 20 properties.

Vol. 4, p. 224.

14. On the 22nd April, 1927, the Public Service Commission rendered judgment denying Respondents' petition for authority to expropriate.

Q.R. 46, K.B. p. 65;
1929 S.C.R. p. 35.

15. Respondents appealed to the Court of King's Bench where it was held on the 10th November, 1927 that there was no appeal from the decisions of the Commission in expropriation matters and a further appeal to the Supreme Court of Canada was quashed on the 28th May, 1928.

Vol. 6, pp. 85-88 ;
Vol. 2, pp. 114-116.

16. On the 6th May, 1927, Appellant through his solicitor, and upon the instructions of his Counsel, personally served a formal written protest against the flooding upon Mr. Gale, the Vice-President of the Respondents, 30 and called upon Respondents to desist from the flooding and trespass and pay the damages already suffered.

Vol. 6, p. 37,
l. 35 ; Vol. 7,
p. 169, l. 29 ;
Vol. 9, p. 119, l. 30.

17. Despite this formal protest, however, the water has ever since been held at elevations varying from 315 to 320. This means twenty-five feet or more above the natural level of the River at Mileage 12 and from about three to eight feet above the natural level at Farm Point.

18. Subsequently on the 5th April, 1929, Appellant petitioned the Quebec Public Service Commission to have compensation assessed for his water power at Cascades, claiming \$600,000 as its value. Respondents in their Answer offered \$1,290 for the Cascades property but denied in part Appellant's ownership.

Record.

Vol. 1, p. 9, l. 41 ;
Vol. 1, p. 13, l. 47.

19. Appellant, being advised that the Public Service Commission (appointee of the Provincial Government) was without jurisdiction to deal with the question of title to property, desisted from his proceedings before that body, paid the costs, and on the 2nd March, 1931 instituted a petitory action (action in trespass to land) before the Superior Court. By this action Appellant asked that he be declared the owner of his properties at Cascades, Farm Point and La Peche and that Respondents be ordered to lower the waters of the Gatineau River to their natural level—

Vol. 6, p. 204, l. 43.

Vol. 1, p. 2.

“ unless the Defendant shall prefer to pay Plaintiff as and for the value of the said properties flooded to elevation 318 of the said Geodetic Survey Datum the sum of \$600,000 with interest thereon from the 12th March, 1927, at 6 per cent. per annum—which amount and interest Plaintiff hereby declares his willingness to accept in full settlement for the said properties up to elevation 318 of the said Geodetic Survey Datum and all damages past, present and future resulting from the said illegal use made thereof by the Defendant ; the said option thus given to the Defendant to be exercised within fifteen days from the date of the judgment herein, and in the event that the said Company Defendant shall not exercise the said option, that it be further adjudged and condemned to pay Plaintiff the sum of \$144,000 with interest from the date of service and with costs.”

Vol. 1, p. 11, l. 13.

20. Respondents pleaded to this action admitting the flooding of property belonging to Appellant although again denying in part his title, and declaring their willingness and right to have compensation assessed by the Public Service Commission, which, as already stated, was in the opinion of Appellant's Counsel, without jurisdiction to decide questions of title.

Vol. 1, p. 11, l. 41.

21. The trial began in September 1931, continued in November 1931 and was concluded on the 15th January, 1932 ; 28 witnesses were heard, 184 exhibits filed, and the hearing lasted for 17 days. Volumes 2 to 8 of the Record comprise this evidence, both documentary and oral, apart from the plans and maps filed.

Vol. 1, Index.

22. On the 2nd February, 1932, while the case was still under advisement before the trial Judge, Respondents caused public bills 170 and 171 to be introduced into the Quebec Legislature, providing for amendments to the Water Course Act and the Public Service Commission Act which would have nullified the effect of any judgment maintaining Appellant's non-expropriable ownership and his prayer for relief from the trespass.

Vol. 9, p. 114 ;
Vol. 3, pp. 134,
136 & 139.

Record.

These bills, if adopted, would have enabled Respondents to expropriate Appellant's properties despite the existing provisions of the Civil Code, the Acts above mentioned, and the judgment of the Quebec Public Service Commission. In addition Respondents could have had compensation assessed for Appellant's properties seriatim at their 1932 values and in their flooded condition.

Vol. 10, pp. 191-194.

23. Appellant was notified by telegram by the sitting member for his constituency of the introduction of these Bills and they were actively opposed by Counsel on his behalf. Bill 171 was finally rejected by the Public Bills Committee and Bill 170 was replaced in everything but its number by the Special Act (22 George V, Chapter 128) assented to on the 19th February, 1932, and reading as follows :—

“ CHAPTER 128.

An Act respecting certain water-powers on the Gatineau River.

(Assented to, the 19th February, 1932).

Preamble.

WHEREAS the Gatineau Power Company has developed certain water-powers at Chelsea Falls, on the Gatineau River, and has, by its works erected for that purpose, raised the level of the river above the said Falls and thereby submerged in whole or in part, since the 12th of March, 1927, certain properties of which one Freeman T. Cross claims to be the owner and with respect to which he claims to have suffered serious loss and damage :

Whereas the said Cross has instituted in the Superior Court, in the district of Montreal, a petitory action against the said company with respect to some of the said properties, which action is still pending ;

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 ;

Whereas the said company has expressed its desire to expropriate the said properties ;

Whereas it appears that the parties are unable to agree as to what would be fair compensation ;

Whereas it appears proper, under the circumstances, to provide by special legislation that the said company shall not be disturbed in the operation of its said power development and that fair compensation to the said Cross shall be assessed in his favour and awarded to him by the Courts in the said pending case ;

Therefore, His Majesty, with the advice and consent of the Legislative Council and of the Legislative Assembly of Quebec, enacts as follows :

1. The Gatineau Power Company shall not be disturbed by the said Cross, his successors or assigns, in the operation of its power development at Chelsea Falls by maintaining the level of the Gatineau River above the said Falls at any controlled elevation not exceeding 321.5 feet above sea level at Farm Point as determined by the geodetic survey bench mark on the church of the United Church of Canada at Wakefield Village, provided fair compensation to the said Cross shall be assessed and paid as hereinafter determined. Undisturbed operation of power development.
- 10
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. Proviso.
3. The date with reference to which valuation shall be made shall be the date of the Order-in-Council approving the plans for such development. Compensation.
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. Date of valuation.
- 20
5. Such compensation shall be assessed and awarded to the said Cross 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. Costs, etc.
- 30
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. Award by Court.
- 40
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. Matters to be determined by Court.
- Effect of payment.

Effect of judgment.

8. The judgment to be rendered in the said case shall be deemed for all purposes of appeal or otherwise a judgment of the said Court.

Coming into force.

9. This act shall come into force on the day of its sanction."

Vol. 1, p. 32, l. 17.

24. On the 10th March, 1932, pursuant to the provisions of the Special Act and with the permission of the same trial Judge, Appellant filed a supplementary declaration asking for compensation for all his properties and rights taken for or affected by raising the waters of the Gatineau River to an elevation of 321.5 feet above sea level (an elevation $3\frac{1}{2}$ feet higher than that mentioned in the conclusions of Appellant's 10
petitory action).

Vol. 1, p. 48.

25. On the 11th May, 1932, Respondents filed a Supplementary Plea offering as partial compensation for Appellant's properties at a water elevation of 321.5, in so far as Appellant's lumber business was concerned, an amount of money alleged to represent the cost of filling in and reclaiming his piling ground and raising his railway spur on its original site. In so far as Appellant's hydro-electric plant at Farm Point was concerned Respondents offered as partial compensation an amount alleged to be sufficient to provide for rearrangements to the power house on its original site; Respondents further offered as full compensation for all Appellant's 20
rights and properties at Cascades the sum of \$9,000, a sum in excess of the bare agricultural value of the lands belonging to Appellant for which Respondents had originally offered \$1,290 in the proceedings before the Public Service Commission. No tender or payment into Court accompanied these or any offers made by the Respondents.

Vol. 1, p. 52,
l. 23; Vol. 1, p. 56,
l. 37.

Vol. 1, p. 53, l. 15;
Vol. 1, p. 56, l. 23.

Vol. 1, p. 56, l. 18.

Vol. 13, p. 162,
l. 12.

26. After a supplementary hearing in October and November, 1932, the case was taken under advisement a second time on the 24th November, 1932. The whole trial occupied 42 days; 97 witnesses were heard and 363 exhibits filed.

27. Judgment was rendered on the 28th June, 1933 awarding the 30
following compensation :—

Vol. 13, p. 152.

For the Cascades water power	\$90,000.00
For the hydro-electric plant and distribution system	60,000.00
For the lumber business including the lands and buildings flooded and affected at Farm Point and Mileage 12	115,000.00
For depreciation of timber limits held in connection with the lumber business	5,400.00
For a gravel pit (admitted)	100.00 40
For gravel already hauled to Cascades and submerged by the flooding	1,000.00

Interest at 5% accruing from the date of the flooding, namely, the 12th March, 1927.

Record.

28. In addition the trial Judge, in virtue of Sections 4 and 5 of the Special Act, awarded \$76,981.22 for disbursements, fees and costs incurred by Appellant in the action and in connection with the passing of the Act.

29. From this judgment Respondents appealed and on the 28th December, 1934, the Court of King's Bench reduced the compensation awarded to Appellant in the following respects:—

Vol. 14, p. 1

- 10 Cascades, from \$90,000 to \$35,000.
 The lumber business, from \$115,000 to \$28,100.
 The hydro-electric plant and distribution system, from \$60,000 to \$16,000.
 Depreciation of timber limits, from \$5,400 to \$1,800.
 Disbursements, fees and costs, from \$76,981.22 to \$75,493.87.

30. At the same time the Court dismissed the Appellant's subsidiary cross-appeal for an increase in the amount awarded by the trial Judge for the Cascades water power.

Vol. 14, p. 6.

20 **31.** Four of the five Judges in Appeal Dorion, Letourneau, Hall and Walsh, JJ. gave written notes of their reasons which will be hereinafter referred to. The fifth member of the Court, Galipeault, J., did not do so.

32. In 1926 Section 16 of the Water Course Act (R.S.Q. c. 46) read as follows:—

“ 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 adjacent lands so as to allow him to utilize such water-power in the manner and subject to the conditions mentioned in this division.”

30 **33.** This declaratory provision applied to Appellant's water-power at Cascades in the same manner as it applied to those of the Respondents lower down at Chelsea and Farmers. It is submitted that Appellant's established industries at Farm Point, although of lesser magnitude than the power development contemplated by Respondents, were a matter of similar public interest and were recognized as such by Section 18 of the same Act which protected them against expropriation for private undertakings.

34. Until the passing of the Special Act on the 19th February, 1932, the Respondents had, it is submitted, no statutory powers as regards

Record.

Appellant's water power, or his industries at Mileage 12 and Farm Point, and it will be noted that the Legislature, in passing the Special Act, did not subject Appellant to the expropriation provisions of the Water Course Act or the Railway Act. The Special Act directed that Respondents should not be disturbed, and should be allowed to raise the waters to any controlled elevation not exceeding 321.5, but that just and fair compensation for all Appellant's properties and rights taken or affected should be assessed in his favour as of the 21st May, 1926, in the pending case.

35. Appellant contends, therefore, that the present action, in view of the Special Act, is not an ordinary expropriation, but must be considered as *sui generis*. The Special Act gave the trial Judge particular instruction and direction and exceptional discretionary powers and although a right of appeal was provided, the trial Judge was, in effect, *persona designata*.

36. In any event it is submitted that the Court of King's Bench was 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 the trial Judge proceeded upon an erroneous view of the Special Act or whether or not there was any evidence on which his awards could properly be arrived at. It is moreover submitted that there is nothing in the Special Act to create any exception to the rules laid down by the Judicial Committee in such cases as *Lacoste et al. v. Cedars Rapids Manufacturing & Power Co.*, 1928 2 D.L.R. 1, *Ruddy v. Toronto Eastern Railway*, 86 L.J., P.C. 95 and *McHugh v. Union Bank*, 1913 A.C. 299.

CASCADES.

37. The Cascades consisted of four contiguous falls on the Gatineau River, one of the most important power rivers in the Province of Quebec entering the Ottawa River in the vicinity of the City of Ottawa. On the 21st May, 1926, Appellant owned or controlled the two upper and Canada Cement Company the two lower falls. The total head was about eighteen feet. Letourneau J. found about seven feet as the natural head of the falls belonging to Appellant. Included therein were his rights under a Deed of Promise of Sale from David Caves (executed before Bertrand N.P. on the 20th November, 1916 and registered) which Letourneau and Walsh JJ. expressly found to be valid and subsisting on the 21st May, 1926.

38. Appellant's rights above Cascades included certain riparian land and options, his Farm Point properties and the west portion of La Peche Rapids.

39. Prior to the 21st May, 1926, Canadian International Paper Company, the predecessor in title of the Respondents, owned only four riparian properties above Cascades. Respondents owned none.

Record.

40. As of the 21st May, 1926, Appellant's ownership of the two upper falls at Cascades amounted to much more than the statutory 200 horse power. The Water Course Act declared such a water power to be a matter of public interest, and subject to approval of plans, Appellant had the right to expropriate the adjacent lands for its development. As he was the owner of the only non-expropriable properties between Cascades and La Peche Rapids he was entitled to utilize not only his head at Cascades but to make use of a total head of about 14 feet by purchasing or expropriating the properties above him, and a sale of Cascades and his other riparian lands would convey similar rights to any purchaser.

Vol. 6, p. 45, l. 44.
Vol. 6, p. 135, l. 14.

R.S.Q., c. 46, s. 16.

Vol. 6, p. 220.
ll. 34-42.

41. Appellant was therefore in a position—

(A) To sell Cascades for inclusion in a larger scheme of development lower down the river ;

(B) To sell to, or combine with, the Canada Cement Company, as owners of the two lower falls at Cascades, for a joint development ;

(c) To make a separate development himself at Cascades.

42. Undoubtedly one important element of the value of Cascades lay in the special advantages it possessed for inclusion in any larger scheme down the River and it is submitted Appellant was entitled to have the compensation assessed in reference to those advantages which gave his properties and rights the greatest value.

Vol. 6, p. 41, l. 19.
Vol. 6, p. 60, l. 27.
Vol. 6, p. 134, l. 28.

43. It should also be pointed out that the inclusion of Cascades in a development lower down would further confer the benefit of pondage over the $4\frac{3}{4}$ mile stretch of river from Cascades to La Peche and that pondage is of great value to a hydro-electric plant, as a reserve for peak load periods.

Vol. 6, p. 41, l. 38.
Vol. 6, p. 143, l. 10.
Vol. 6, p. 145, l. 33.

44. The Appellant's evidence was particularly directed to show that on the 21st May, 1926, Cascades and the adjoining riparian lands owned or under option to the Appellant had substantial present and future advantages and rights for use in connection with hydro-electric undertakings lower down the river and that these advantages considerably enhanced the market value of the property.

45. It was shown that there was active competition for undeveloped power sites in the Province of Quebec both for individual development and for inclusion in larger undertakings ; that prices had " multiplied by five, six or seven " since 1906 ; that there was a growing demand for power ; that the Gatineau River was about to be developed, the Hull Electric Railway, a subsidiary of the Canadian Pacific Railway, having acquired at Pagan Falls 21 miles higher up a head of not less than one hundred feet.

Vol. 6, p. 134,
ll. 33-41.
Vol. 6, p. 51, l. 9.
Vol. 6, p. 135, l. 1.
Vol. 6, p. 156, l. 4.
Vol. 6, p. 207, l. 44.
Vol. 7, p. 166, l. 43.

Record.

Vol. 6, pp. 136,
158 and 159.

46. Mr. J. M. Robertson, a Vice-President of Southern Canada Power Company, who has been connected with hydraulic enterprises all his life and was the only independent power company executive officer to testify in this case, gave a valuation of about \$40.00 a horse power for the undeveloped water power at Cascades, and estimating its potentialities at about 15,000 h.p. placed the total value at about \$600,000.00.

Vol. 6, pp. 59-60.
Vol. 6, p. 59, l. 18.

47. Mr. MacRostie, an engineer with considerable experience on the Gatineau, also valued this undeveloped water power in the neighbourhood of \$40 a horse power "in the raw."

48. These witnesses supported their opinions by referring to a number 10 of actual sales of water powers which confirmed their valuations. These were, amongst others:—

Vol. 6, p. 138, l. 44
and p. 200.
Vol. 2, pp. 142 and
148.

(A) 22nd August, 1922 : Sale—Reford to Brilliant—Metis Falls—\$85,000.

Vol. 6, pp. 138, 201,
202.
Vol. 2, p. 136.

(B) 14th August, 1925 : Sale—Lefebvre to Shawinigan Water and Power Company—St. Ursule Falls—\$125,000.

Vol. 6, p. 135, l. 1.
Vol. 6, p. 139.
ll. 20-47.

(C) 1926 : Sale—Hull Electric Ry. (owned by the Canadian Pacific Railway) to the Respondents or Canadian International Paper Company—Paugan Falls and other properties—\$4,750,000.

Vol. 6, p. 84.
Vol. 6, pp. 140, 141,
142.
Vol. 2, pp. 95-103
and pp. 103-111.

(D) 10th July, 1926 : Respondents' acquisition from Canada 20 Cement Company of the two lower Falls at Cascades—a power contract at a preferential rate.

Vol. 6, p. 136.
Vol. 2, pp. 122 and
133.

(E) 27th April, 1928 : Sale—Dorwin Falls Improvement Company to the Respondents in fulfilment of the Vendor's obligations under an option agreement granted to Quebec Southern Power Corporation on the 10th December, 1926—Dorwin Falls—\$200,000.

Vol. 6, p. 146, l. 31.
Vol. 2, p. 89.

(F) 14th August, 1929 : Sale—Montreal Cotton Company to Beauharnois Light, Heat & Power Company—\$2,000,000 and a supply of free power.

Vol. 2, p. 79.
Vol. 6, pp. 52, 122
and 129.
Vol. 6, pp. 54-56.
Sp. Ex. Bk. IV, p. 47.

(G) 4th June, 1930 : Sale—Gatineau Company Limited to 30 James MacLaren Company Limited (one undivided third of a fall on the Lievre River, which flows into the Ottawa River some 14 miles from the mouth of the Gatineau)—\$200,000.

Vol. 4, p. 136.
Vol. 7, p. 317, l. 5,
and p. 319.
Vol. 7, p. 388.
Vol. 2, pp. 157-210.

Reference may also be made to the following transaction of the 26th August, 1926 : Sale—Canadian International Paper Company to the Respondents of Farmers and Chelsea power sites and certain additional properties and constructions.

49. Appellant also showed by the evidence of Mr. Beaubien, a hydraulic engineer, that a separate development for 20,000 h.p. at 70 per cent. load factor or 14,000 h.p. at 100 per cent. load factor was feasible at a unit cost not greater than Respondents' bonded indebtedness for its own developments.

Vol. 8, p. 18, l. 21, and p. 19.
Vol. 2, pp. 157-210.

50. Respondents led evidence mainly to deny that Cascades in itself was capable of an economic development. None of the experts called by the Respondents really attempted to put a value on the Cascades site for inclusion in a larger scheme of development on the Gatineau River. They attempted rather to assert that no two water powers can be compared and that prices paid elsewhere could not be of assistance here, and that this site was of little or no value.

Vol. 7, p. 146, l. 20 ; p. 233, l. 34 ; p. 238, l. 28 ; p. 242, l. 26 ; p. 245, l. 31 ; p. 247, l. 1 ; p. 222, l. 37 ; p. 221, ll. 8-40.

51. It is submitted that the following passage from the Reasons for Judgment of Walsh, J., in the Court of King's Bench is applicable to such testimony :—

“ The reasoning of some of these witnesses would lead one to conclude that a river, having a great number of small rapids forming in their sum a large head, might be acquired by the owner of the largest, who would only have to belittle the value of the others, in order to accomplish a confiscation, partial or total, of the whole.”

Vol. 14, p. 65, l. 21.

52. Evidence was also given that storage or conservation of water on the head waters of the Gatineau River was being undertaken by the Quebec Streams Commission and as early as July, 1926, one of the reservoirs with a capacity of 82,000,000,000 cu. ft. was under construction. This was designed to regulate the average minimum flow at 10,000 c.f.s. instead of 3,000 c.f.s. It was therefore proper to consider in valuing Appellant's properties and rights as of the 21st May, 1926, that a regulated flow of 10,000 c.f.s. would be available at the regular amortization and operation charges pro rated against all the users thereof.

Vol. 6, p. 135, l. 1 ; p. 135, l. 44.
Vol. 7, p. 192 l. 44 ;
Vol. 7, p. 188, l. 6 ;
Vol. 2, p. 163, l. 20 ;
Vol. 6, p. 207, l. 44.

Vol. 7, pp. 190-192.

53. The trial Judge awarded \$90,000 for Appellant's properties at Cascades and his riparian rights up to and at La Peche Rapids.

Vol. 13, p. 158, l. 44.

The following passage may be quoted :—

“ . . . 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.”

Vol. 13, p. 159, l. 9.

54. He said that the value of the power should be considered from the point of view of the owner and he quoted the following passage from the judgment of Lord Dunedin in the first case of the *Cedars Rapids Manufacturing & Power Company v. Lacoste*, 1914 A.C. p. 569 :—

Vol. 13, p. 159, ll. 30-36.

Record.

“For the present purpose it may be sufficient to state two brief propositions :—

(1) the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker.

(2) the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.”

55. The Court of King’s Bench reduced this award from \$90,000 to \$35,000. The Judges of that Court did not find fault with any principle upon which the trial Judge had proceeded in determining the value. Nor did they find that he had no evidence to support a finding of \$90,000. They merely substituted a new valuation, according to their view of “*la preuve faite.*”

Vol. 14, p. 3, l. 38.

56. In his Reasons for Judgment, Dorion J. says :—

Vol. 14, p. 9, l. 36.

“J’accepterais le chiffre de \$35,000 fixé par mes savants collègues. Il faut prendre comme point de départ pour fixer ce chiffre le montant accordé par la Cour Supérieure qui ne peut être changé que pour des raisons sérieuses, et non pas sur un simple doute.”

Nevertheless the learned Judge did not indicate in his notes any reasons for departing from the amount fixed in the Superior Court.

Vol. 14, p. 23,
ll. 11-15 ; p. 24,
ll. 3-7.Vol. 2, p. 170, l. 12 ;
Vol. 4, p. 287 ;
Vol. 4, p. 288, l. 37 ;
Vol. 7, p. 172, l. 17 ;
Vol. 6, p. 51, l. 9 ;
Vol. 6, p. 134, l. 33.

57. Letourneau J. considered there was evidence that there was a surplus of power in May, 1926 and has largely based his findings on this erroneous belief. It is submitted that there was no such evidence. He must have misconceived the evidence of Respondents’ witness Simpson. The latter’s reference to a surplus of power is neither relevant nor cogent : (1) because he speaks of the situation in November, 1931, which had no bearing on the valuation of Cascades as of the 21st May, 1926, hundreds of thousands of additional horse power having been developed in the meantime ; (2) because his evidence was contradicted by the fact that his own Company was installing a new generating unit of 34,000 h.p. capacity as late as March, 1931, at Pagan Falls ; and (3) because Simpson was attempting to show that Respondents derived no present benefit from their development between elevation 306 and 320. According to the evidence there was a shortage of and a demand for more power in May, 1926.

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Vol. 14, p. 24, l. 1 ;
Vol. 6, p. 140 ;
Vol. 2, p. 103.

58. For the same reason the learned Judge treated as of no account the consideration which the Canada Cement Company received for the transfer of the two lower rapids of the Cascades which the Respondents contracted to purchase provided they were able to acquire the other

properties above up to elevation 318. The consideration was 3,000 h.p. in perpetuity at a price of \$10.00 a horse power when the annual price for power in the Ottawa District was \$17.00 to \$18.00 according to Simpson, and \$20.00 according to Robertson. The witness Simpson said that his Company could afford to pay the Canada Cement Company on the basis of the "open market" and a "free sale" because the Company was making a definite and substantial profit by including the Canada Cement Company's property in Chelsea. But for his error as to a surplus of power, Letourneau, J. who says this sale "*eut pu nous guider*," would apparently have come to different conclusions.

Record.

Vol. 7, p. 153, l. 3.

Vol. 14, p. 24, l. 4.

59. In spite of the conflicting evidence upon the value of Cascades, both in itself and as a controlling site, the learned Judge finally decided to adopt as the factor best fixing a market price for Cascades, the 1917 Paugan Falls option agreement, to which Appellant was a party. This comes to something less than \$10.00 a horse power as pointed out by Walsh, J.

Vol. 5, p. 28.

Vol. 14, p. 67, l. 2.

60. It is submitted that the learned Judge erred in basing himself upon an agreement entered into nine years prior to 1926 and in disregarding the evidence of constantly increasing prices since 1906. No storage was in contemplation in 1917; there was no proof of active competition; and there was no evidence that the agreement provided for the purchase of non-expropriable sites. Appellant was there employed by the Hull Electric Railway merely as a land agent to buy riparian lands, for which he was to receive as compensation for services and disbursements, \$3,333 for each additional foot of head acquired over and above the minimum agreed head of one hundred feet.

Vol. 6, p. 135, l. 1;
Vol. 6, p. 207, l. 44.

61. Hall J. first of all differed from Letourneau and Walsh JJ. upon the extent of Appellant's rights in the upper fall of Cascades and considered that Appellant had lost any rights under the 1916 registered Promise of Sale from Caves, apparently because the latter was expropriated by the Respondents. In point of fact this was done after the 21st May, 1926.

Vol. 14, pp. 40 & 41.

Vol. 2, p. 86.

Vol. 14, p. 41, l. 5;

Vol. 4, p. 207;

Vol. 4, p. 22.

62. The following passage may be quoted from Hall J. :—

"The indemnity to which he is entitled must, therefore, be restricted to the actual rights he possessed in the Cascades alone. These were not susceptible of independent development."

Vol. 14, p. 42,
ll. 18-20.

63. He discusses the evidence made by the experts as to the value of undeveloped water power and as to the extent of available power (misconceiving as is submitted the effect of the evidence of Respondents' witness Simpson) and he concludes by saying that "a just and fair compensation should not exceed, say, \$28,000 for the Cascade Water Power, and \$7,000 for the flooded lands, making \$35,000 in all."

Vol. 14, p. 43, l. 45.

Record.

Vol. 14, p. 65, l. 21.

64. Walsh, J. speaking of evidence as to values given by Respondents' engineers criticized it as tending "to accomplish a confiscation, partial or total of the whole."

Vol. 14, p. 66, l. 37.

Vol. 7, p. 137, l. 35 :
p. 146, l. 35.

65. Nevertheless this learned Judge fell into the same error as his colleagues in supposing that Mr. Simpson "established a value of \$18.00 per horse power (137)."

The reference to this evidence shows that this witness was speaking of the general rental price of hydro electric power in Ottawa in 1925 and 1926 and obviously referred to the annual prices received under an ordinary power contract in the open market. The adoption of \$18.00 per horse-
power from Simpson's testimony as the capital value of undeveloped water
power is clearly erroneous. 10

Vol. 14, p. 66, and
p. 67.

66. This Judge also confines his valuation to that of horse power at the site in question, using an unregulated flow of 3,000 c.f.s., and he adopts 5 feet as the head and \$20.00 per horse power as the valuation for 1704 h.p. ($5 \times 3000 \times 62.5 \div 550$) making approximately \$35,000. He further states he would allow an additional sum of \$7,000 for the flooded lands, but he concludes by saying that the total award for Cascades would be \$35,000—not \$42,000 as would result from his own figures.

Vol. 14, p. 42,
ll. 18-20.

67. It is respectfully submitted that all the Judges erred in holding that "just and fair compensation" to which Appellant is entitled must be "restricted to the actual rights he possessed in the Cascades alone." 20

Vol. 14, p. 34, l. 42.

68. Furthermore, it is submitted that the question of quantum was essentially a matter for the trial Judge and that what Letourneau J. said regarding disbursements, fees and costs is applicable to the compensation awarded with respect to Cascades. He said :—

"Ce texte d'une loi spéciale, les circonstances qui ont donné lieu à cette loi, le mot 'équitable' qui se retrouve dans la disposition particulière à ces 'déboursés, honoraires et frais,' et enfin le pouvoir d'appréciation donné en pareille matière au juge de la Cour Supérieure (*La Cité de Montréal vs. Brossard* 42 B.R., p. 299), font qu'il serait à mons sens impossible de fixer un autre montant que celui auquel s'est arrêté le juge de première instance." 30

Vol. 13, p. 158, l. 46.

69. It will be further submitted that if it were proper to vary on appeal the trial Judge's award, that for Cascades should be substantially increased because the trial Judge in fact apparently disregarded some of the features of Appellant's rights and based his valuation entirely upon the potential hydraulic power Appellant could have developed (aurait développé) himself at this site ; he erred in not taking into consideration the market

value of the site resulting from the special advantages it possessed for inclusion in any larger scheme of development and which are so conclusively established by what has taken place in fact. Its inclusion has permitted an increase of at least 14,000 h.p. of primary power in such larger scheme and has made possible additional pondage which the larger scheme at Chelsea is equipped to use to the full during peak load periods.

Record.

Vol. 8, p. 18 and p. 19.
Vol. 2, pp. 157-210.
Vol. 6, p. 41, l. 38, to p. 45;
Vol. 6, p. 145, l. 33.

HYDRO-ELECTRIC PLANT AND DISTRIBUTION SYSTEM.

70. Appellant's submission is that he is entitled under the Special Act to be compensated for his hydro-electric plant and distribution system on the basis of a total loss because :—

(A) the site of his power house is below the elevation 321.5 to which elevation the title of his properties is to be vested in Respondents upon payment of the award ;

(B) even though he should retain his power house, the reduction in head and consequent generating capacity and the disturbance of layout are such as to render his plant incapable of satisfactorily or profitably supplying the power requirements of himself and his customers.

71. The trial Judge awarded the following compensation :—

Vol. 13, p. 160, l. 1.

20 “ 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.”

72. The formal judgment of the Court of King's Bench reducing this award to \$16,000 is as follows :—

Vol. 14, p. 4, l. 11.

30 “ CONSIDERANT que d'après l'ensemble de la preuve l'Intimé a subi quant à son industrie électrique (Hydro-Electric Plant and Distribution System) des dommages pour un montant total de \$16,000.00 par suite de l'inondation dont il s'agit : \$3,000.00 pour couvrir des réparations rendues nécessaires au Power House, \$5,000.00 pour la perte d'une ligne de transmission vers Kirk's Ferry et \$8,000.00 pour diminution de production.”

73. The judgment of the Court of King's Bench is predicated on the assumption that the actual site of the power house, except for one corner of the building, does not become vested in the Respondents.

74. In his Reasons for Judgment Mr. Justice Letourneau wrote :—

Vol. 14, p. 32, ll. 1-15.

“ Notons que bien qu'ici encore l'élévation de la Gatineau à 321.5 doit intervenir en ce sens qu'elle correspond exactement à

Record.

l'élévation du parquet du Power House et implique un empiètement de 3 pieds environ sur l'un des coins de cet édifice, rien n'établit que la situation ainsi créée soit incompatible avec les réparations ou améliorations qui ont été suggérées ; car si même il faut pour ces réparations et améliorations laisser de côté la partie du parquet susceptible d'être ainsi submergée, il en reste suffisamment pour une installation satisfaisante, sans qu'il soit pour cela nécessaire de recourir à la minime partie de l'immeuble qui, à raison de la loi spéciale, pourrait devenir propriété de l'Appelante.

A cause de cette particularité toutefois, j'accorderais à l'Intimé 10 une indemnité de \$8000 pour les réparations à faire au Power House ; ceci est moins que ce que suggèrent les experts de l'Intimé mais est le double de ce que suggèrent ceux de l'Appelante."

Vol. 14, p. 46, l. 31.

75. In his Reasons for Judgment Mr. Justice Hall said :—

“ But the Respondent contends that if the property be vested in the Company-Appellant, up to the contour 321.5, the actual site of the power house will be lost, and he will no longer be able to operate his plant.

There is, unfortunately, a conflict of evidence as to the exact location of contour 321.5, but it is admitted by one of the Appellant's 20 witnesses that that elevation cuts through the corner of the power house, and the Farley Plan (D-160) shows that it is at least flush with the front of the building.”

76. The learned Judge recognizes the difficulty in coming to a conclusion that 321.5 may include the site of the power house and places an interpretation upon the Special Act different from that given by the Court with respect to the necessity of vesting in the Respondents all properties and rights to elevation 321.5.

Vol. 14, p. 47, l. 10.

77. He adds, therein differing from the formal judgment of his Court :—

“ In my view, these provisions do not mean that the whole of the properties below the provisional elevation 321.5 must necessarily be vested in the Company. It is within the discretion of the Court to fix the actual limits of the property which is so to be vested . . .”

Vol. 14, p. 47, l. 22.

“ The elevation 321.5 is the maximum which must not be exceeded, but the Court may make reasonable provision for the operation even to that level, without vesting the Company with all the property affected.”

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Record.
Vol. 14, p. 47, l. 31.

“ It seems to me, therefore, to be well within the competence of the Court to take the view that the power house is merely ‘*affected*’ and not actually ‘*taken*’; and that a just and fair compensation would be such sum as might be required to carry out the simple and easily executed alterations proposed by the Company’s engineers, at a cost of \$3,000.00.”

78. Dorion J. says :—

Vol. 14, p. 10, l. 11.

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“ Quant aux usines électriques, la hauteur du ruisseau qui produit l’électricité est diminuée de quelques pieds par la crue des eaux, mais le chiffre de \$16,000 fixé pour les dommages me semble représenter la pleine valeur de cette diminution et des travaux et reconstructions qui seront nécessaires pour remettre l’usine (power house) et les lignes de transmission en état de fonctionner.”

Thus he too bases himself upon a reconstruction of the power house upon its present site irrespective of whether or not it actually becomes vested in the Respondents.

79. Walsh, J., wrote :—

“ The power-house may be improved, and placed beyond action of the Gatineau. This may be done for \$3,000.00.”

Vol. 14, p. 69, l. 29

20 This too contemplates a reconstruction upon the same site.

80. In summary, there is no finding by Dorion, Hall and Walsh, JJ., as to whether the site of the power house is above or below elevation 321.5.

81. Mr. Justice Hall’s view that 321.5 can be treated as a *provisional* elevation is contrary to the judgment of the Court as is shown by the following passage from the formal judgment :—

“ . . . que jusqu’à cette ligne de hauteur, la perte de l’Intimé doit en conséquence être tenue pour absolue ; ”

Vol. 14, p. 3, l. 18.

82. This is further shown in the Reasons for Judgment of Letourneau, J.—

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“ Il convient de retenir que c’est à la date de l’Ordre en Conseil approuvant et autorisant le projet de l’Appelante (21 mai 1926) qu’il faut se placer pour une estimation des dommages ; comme aussi que la *dévolution* à l’Appelante que suppose la loi spéciale quant à partie des biens de l’Intimé, doit être absolue jusqu’à la ligne de hauteur indiquée (321.5) et qu’ainsi cette prescription empêche qu’en appréciant les dommages l’on puisse, pour les atténuer, s’arrêter à des travaux de remplacement (remedial works), du moins jusqu’à cette ligne de hauteur 321.5. (The Quebec

Vol. 14, p. 19, l. 9.

Record.

Improvement Co. vs. The Quebec Bridge & Ry. Co., 1908 A.C., p. 217.) Il à fallu pour que les compagnies de chemin de fer puissent recourir à ce mode de diminuer l'indemnité, qu'on y pourvût par un texte spécial (S.R.C. 1927, Chap. 170, art. 222)."

Vol. 14, p. 32,
ll. 1-15.

83. It is submitted that Mr. Justice Letourneau has fallen into the very error which he himself and the Court in its formal judgment said they must not commit, because if elevation 321.5 corresponds exactly with the elevation of the floor of the power house the natural ground underneath the floor must be at a lower elevation and, therefore, will become vested in the Respondents upon payment. Moreover, if the flooring is and was in May 1926 at elevation 321.5 everything to and included in that level is to be vested in Respondents under the Special Act, as held by the trial Judge. 10

Vol. 13, p. 163, l. 10.

Vol. 11, p. 82, l. 3 ;
Vol. 5, p. 136 ;
Vol. 5, p. 156.

84. The structural alterations to the power house suggested by the Respondents' engineers were merely remedial works to the existing building on a site to be vested in Respondents.

Vol. 13, pp. 149, 150,
151.

85. Counsel for the Respondents declared at the conclusion of the case in the Superior Court that they abandoned in favour of the Appellant any right of ownership upon any such property as might be made the subject of any remedial works below elevation 321.5 and declared their willingness to limit their rights thereon to a right of real servitude permitting the Company to maintain the level of the Gatineau River upon the said properties at any controlled elevation not exceeding 321.5, or alternatively should the land be vested in them to create a real and perpetual servitude upon it in favour of Appellant. 20

86. It is submitted that under the decisions in *Quebec Improvement Co. v. Quebec Bridge and Railway Co.*, 1908 A.C. 217, and *Herron v. Rathmines and Rathgar Improvement Commissioners*, 1892 A.C. 498 at p. 523, this suggestion was properly disregarded by the Superior Court and the Court of King's Bench. 30

Sp. Ex. Bk. I, P-93 ;
Sp. Ex. Bk. II, D-10 ;
Sp. Ex. Bk. III,
D-72 ;
Sp. Ex. Bk. III,
D-160 ;
Vol. 4, p. 226, l. 25 ;
Vol. 9, p. 123, l. 39 ;
Vol. 9, p. 185, l. 8 ;
Vol. 11, p. 4, ll. 42-
46 ;
Vol. 11, p. 80, l. 43.

87. It is further submitted that there was ample evidence for holding that contour line 321.5 takes and includes the site of the power house and in point of fact it also includes the bed of Meach Creek for some 80 feet above it.

Vol. 14, p. 5, l. 44
and p. 6.

88. In any event in view of the conflict between Respondents' three plans signed by its engineer Farley, namely D-10, D-72 and D-160, it is submitted that the Court of King's Bench was not warranted in accepting D-160, a plan dated the 7th April, 1932, as correctly establishing the 321.5 contour line as of the 21st May, 1926, and using it for its vesting

order with respect to the Farm Point properties, disregarding Respondents' former plan D-10 registered in the Land Titles Office on the 24th March, 1926.

Record.

89. There was evidence that the raising of the waters to elevation 321.5 meant a loss of head of about $10\frac{1}{2}$ feet in the Meach Creek plant. The consequent reduction in generating capacity was calculated at about 25% by Beaubien and at about 10% by Respondents' witnesses and as the load required full operating capacity this had the effect of rendering the plant incapable of satisfactory service. Moreover $4\frac{1}{2}$ miles of the distribution system were absolutely destroyed. A business formerly profitable became unprofitable when outside power had to be purchased. The Respondents' witness Beique had estimated a partial loss of 10% at \$8,800.

Vol. 9, p. 185, l. 32.

Vol. 10, p. 248, l. 18 ;
Vol. 10, p. 251, l. 4.Vol. 9, p. 81, ll. 7-14.
Vol. 9, p. 116, l. 43 ;
Vol. 9, pp. 82-84 ;
Vol. 10, p. 213, l. 11 ;
Vol. 12, p. 233, l. 35.

90. On the whole it is submitted that the evidence adduced fully justified the finding of the trial Judge that:—

Vol. 10, p. 212.

(A) There was a total loss of the hydro-electric plant and distribution system as a going concern ; and

(B) that \$60,000 was just and fair compensation therefor.

LUMBER BUSINESS.

91. Appellant's claim on this head was for the loss of the lumber business he had been carrying on at Farm Point since 1903 and at Mileage 12 and for the buildings and lands held in connection therewith. The trial Judge awarded \$115,000 as compensation.

Vol. 1, p. 40, l. 13.

Vol. 13, p. 160.

92. The Court of King's Bench reduced this award to \$28,100 made up as follows : \$12,500 as compensation for lands and buildings at Farm Point lost as being below elevation 321.5 or affected up to three feet above that elevation ; \$12,000 for remedial works to relocate the piling ground and railway siding at Farm Point ; and \$3,600 for lands and buildings at Mileage 12.

Vol. 14, p. 3, l. 45.

93. The amount of \$3,600 for Mileage 12 was that offered by Respondents. Appellant's evidence was \$13,913. \$12,500 was the amount offered for lands and buildings at Farm Point, whereas Appellant's evidence was \$16,730 for the lands and \$52,500 for the buildings, both those below 321.5 to be vested in Respondents and those above affected by holding the water to that elevation.

Respondent
Company's Factum
in C.K.B. p. 110,
l. 20 ;

Vol. 1, p. 56, l. 44 ;

Vol. 3, p. 143 ;

Vol. 3, p. 114 ;

Vol. 10, p. 240, l. 18 ;

Vol. 3, p. 6 ;

Vol. 9, p. 289 ;

Vol. 9, p. 297.

94. Appellant's submission is twofold:—

(A) The Court of King's Bench erred in reversing the trial Judge's award for a total loss of the lumber business ;

Record.

(B) It erred in accepting on the conflicting evidence of values of physical property taken or affected, the estimates made by Respondents' witnesses and in rejecting those of Appellant's witnesses.

95. The submission as to total loss of the lumber business is based upon the loss of the piling ground and C.P.R. siding which served it by a vesting in the Respondents to the 321.5 elevation. As to this Letourneau J. who wrote the leading opinion, says :—

Vol. 14, p. 27,
ll. 10-27.

“ La difficulté vient de ce que la cour à bois de l'Intimé était utilisée depuis la ligne 318, et qu'en obtenant un droit absolu d'inonder jusqu'à 321.5, l'Appelante en supprime une partie, puis, le cas échéant, endommagement par infiltration jusqu'à 324.5, et ne laisse ainsi intacte de cette cour à bois qu'avait l'Intimé à la date du 21 mai 1926, qu'une étendue variant selon les témoignages entre une demie et les trois quarts d'un arpent. 10

Ceci est trop peu, d'après ce que nous verrons plus loin. Et il y a plus encore, c'est qu'en obtenant une dévolution du terrain jusqu'à 321.5 l'Appelante prend ainsi une partie de la voie d'évitement qui s'y trouve et dont bénéficiait l'Intimé.

Que cette voie d'évitement ait été placée au meilleur endroit, eu égard aux circonstances, qu'une cour d'empilages soit indispensable, 20 cela résulte nettement de la preuve.”

Vol. 14, p. 28, ll. 1-3 ;
Vol. 9, p. 178, l. 29.

96. According to this Judge at least two acres of piling ground are necessary, although there was evidence that Appellant used a larger area.

Vol. 14, p. 28,
ll. 5-13.

97. He adds :—

“ Il a perdu en partie celle qu'il avait avant le 21 mai 1926 et il convient qu'il soit remis dans la situation où il était, ou justement indemnisé.”

“ Deux théories s'offrent à nous : ou élever la cour actuelle en même temps que la voie d'évitement qui y passe de façon à ce que l'une et l'autre soient au-dessus de toute atteinte, soit à un niveau d'élévation de 324.5, ou déplacer légèrement l'assiette de cette cour ainsi que la voie qui la dessert.” 30

Vol. 14, p. 28, l. 38.

98. The learned Judge then says that under the Special Act the Court cannot consider remedial works below elevation 321.5.

Vol. 14, p. 29, l. 17.

He says it should be possible, if not easy, to find two acres of land having a height of at least 321.5 and adds :—

Vol. 14, p. 29, l. 25

“ (l'on verra avec intérêt les notes de mon collègue le juge Hall sur le point).”

99. Mr. Justice Letourneau then says :—

Vol. 14, p. 29, l. 30.

10 “ Il fallait de l’avis de tous, à défaut de pouvoir exhausser l’ancien site, passer plus à l’est ; mais il y a là un rocher de 100’ × 60’ environ que fait voir le plan P-94 de l’ingénieur MacRostie, le témoin principal de l’Intimé, et comme c’est d’après les données de celui-ci que l’ingénieur Stenhouse du C.P.R. a fait ses calculs, il en résulterait qu’une excavation de 10 pieds à cet endroit entraînerait à elle seule une dépense de \$10,000. Toutefois, un autre tracé répondant aux exigences éviterait ce rocher, c’est celui que l’un des ingénieurs de l’appelante (Ralph) a indiqué à l’encre sur le plan D-204.”

100. It is submitted that the learned Judge is quite mistaken in assuming there was any evidence that there was only one rock 60’ × 100’ to be removed from the area he indicated.

Sp. Ex. Bk. I, P-94 ;
Vol. 13, p. 25, l. 19 ;
Sp. Ex. Bk. III,
D-160.

101. The learned Judge then deals with the cost of relocating the piling ground and says :—

Vol. 14, p. 29,
ll. 43-47.

“ L’ingénieur Ralph croit qu’un tel déplacement ferait encourir une dépense de \$5,000. à \$6,000. au plus.”

He then says :—

Vol. 14, p. 30,
ll. 6-10.

20 “ Je reste convaincu, en face de la preuve faite, qu’en ajoutant une autre somme de \$6,000. à ce qu’à prévu l’ingénieur comme susdit, il deviendra facile de niveler d’une façon convenable le site nouveau d’une cour à bois que pourrait desservir une voie d’évitement établie d’après les lignes à l’encre qui ont été superposées au plan D-204.”

102. Hall, J. is of the opinion that the old piling ground may be raised within the red-edged area (D-160) and the siding also raised at the same place.

Vol. 14, p. 54, l. 13.

30 **103.** He has this to say with regard to the alternative siding which has been accepted by Letourneau, J. :—

Vol. 14, p. 53, l. 20.

“ Mr. Ralph, on behalf of the Company-Appellant, submitted an alternative plan for a siding adjoining the main line of the C.P. Railway farther west, and following approximately the natural contour line of elevation 325.”

104. He adds, after commenting upon the cost of a new siding estimated by Mr. Stenhouse, a C.P.R. engineer :—

“ Mr. Ralph does not regard either alternative siding as a sensible solution of the problem, not even his own. He is right.”

Vol. 14, p. 54, l. 1.

Record.

Vol. 14, p. 54, l. 13. **105.** After saying that he has “no hesitation in accepting Mr. Ralph’s estimate of the cost of filling in the section and relaying the siding” (on the old site) he adds :—

Vol. 14, p. 54, l. 19. “This is the only sensible scheme.”

Vol. 14, p. 54, l. 25. “But, assuming that the Court has no jurisdiction to direct a reconstitution of the flooded piling ground by filling-in; I am still of the opinion that the piling ground can be relocated at a cost not exceeding \$12,000.”

The learned Judge does not say how he arrives at this figure.

Vol. 14, p. 48, l. 12. **106.** Hall, J., says that :— 10
 “the award is made, of course, on the assumption that the raising of the water in March 1927, made it impossible for the Respondent (Appellant) to continue his operations, and that, therefore, his lumber business, at Farm Point and Mileage 12 with all the properties connected therewith, was rendered valueless.”

He adds :—

“The answer to that assumption is very simple; it has no basis in fact.”

Vol. 7, p. 169, l. 29 ;
 Vol. 7, p. 282, l. 11. **107.** But it cannot be inferred that the trial Judge based himself on any assumption that the raising of the water in 1927 rendered Appellant’s 20
 business valueless. The trial Judge was directed by the Special Act to fix compensation for properties taken or affected by the new elevation introduced as a result of the Special Act, namely, elevation 321.5—a level at which the waters had never previously been held. Appellant’s submission is that this new elevation takes in almost the whole of the old piling ground, as appears clearly by the contour line shown in yellow and initialled “N.B.M.” on P-129. The lower levels at which the waters had previously been held had not taken this area from him.

Vol. 13, p. 25 and
 p. 26.
 Sp. Ex. Bk. I.

108. Walsh, J., says :—

Vol. 14, p. 68, l. 8. “I am fully convinced, after reviewing the evidence, that this 30
 piling site may be reclaimed. The weight of evidence leads to the conclusion that a gravel fill may be made, and piles driven into the ground (if necessary).”

Vol. 14, p. 68, l. 31. **109.** He concludes by saying :—

“I would allow, as established, \$12,000.00 as damages, for the piling ground. The evidence, in my opinion, overwhelmingly established that conditions can be improved by the expenditure of this sum.”

It is obvious that he was referring to filling in and piling upon the site of the old piling ground.

Record.

110. Dorion, J., says :—

“ et il est certain que le Demandeur pourra continuer d'exercer son industrie lorsqu'il aura, par des travaux appropriés, rétabli les lieux dans un état tel qu'ils puissent être utilisés par l'exploitation de cette industrie.” Vol. 14, p. 9, l. 44.

He merely accepts the total amount of \$28,100 fixed by his colleagues which he assumes— Vol. 14, p. 10, l. 1.

10 “ tient compte des changements et rétablissements qu'il faudra opérer pour remettre les choses en état, en même temps que de la diminution de valeur que subira l'établissement par la perte du terrain inondé et par la difficulté plus grande d'exploitation.”

111. If this is a finding by Dorion J. that there should be compensation for—

“ la diminution de valeur que subira l'établissement par la perte du terrain inondé et par la difficulté plus grande d'exploitation ”

then the learned Judge erred in his assumption that such compensation was provided for in the \$28,100.

20 **112.** It is submitted that the finding of the Court of King's Bench that \$12,000 would enable Appellant to provide a suitable piling ground and railway siding to carry on his business, is based upon evidence which failed to satisfy the trial Judge and upon a scheme which at the trial was discarded as unfeasible. Vol. 14, p. 3, l. 45.
Vol. 14, p. 29 to
p. 30, l. 10.

30 **113.** The evidence of the witness Beaubien, an engineer, was to the effect that it would cost \$60,000 to relocate the piling ground and the siding and give the piling ground a flat surface such as Appellant had before the flooding, and this without including the price of property which would have to be bought from a third person against whom Appellant would have no powers of expropriation. Even then Appellant would only have $1\frac{1}{3}$ acres of piling ground. Vol. 13, p. 49, l. 4 to
p. 51, l. 16.
Vol. 12, p. 130, l. 20.

114. The evidence of Stenhouse, C. P. R. Engineer, who is in charge of erecting sidings for this Railway showed that a new siding would cost \$16,000. The sketch plan put in by Stenhouse with his estimate shows the uneven surface of the ground. Vol. 13, p. 40, l. 10
Sp. Ex. Bk. I,
P. 131; Vol. 3,
p. 166.

Record.

Vol. 13, p. 25, l. 22.

115. The positive evidence of MacRostie established that this area has large outcroppings of rock.

Vol. 12, p. 249, l. 19
and l. 31.

116. The Respondents' engineer Beique says 40 per cent. of this area would be unsuitable on account of rocks and that taking out the rocks "might constitute a heavy preparation or costly preparation."

Vol. 13, p. 117, l. 39
and pp. 121-122.

117. Ralph, one of Respondents' engineers, said the spur would cost \$2,325.00. He had not made any estimates for a level piling ground but merely for a sloping one; the grade of which would vary from 3 per cent. to 4 per cent. and in some places it might go to 6 per cent. He finally stated that both Mr. Stenhouse's spur line and his own spur line were

Vol. 13, p. 122, l. 25.

Vol. 13, p. 124, l. 12;
p. 50, l. 17; p. 51,
ll. 1-16.

"absurd." In re-examination he said that the former piling ground was the ideal site. In effect, Counsel for the Respondents abandoned any serious contention that any other piling ground could be economically used, as appears from the re-examination of Ralph, by their cross-examination of Beaubien and from the fact that they did not suggest it in their plea, nor in their factums in the Superior Court and the Court of King's Bench. 10

118. In summary there are clear contradictions as to the cost of relocating the piling ground and siding, and no one contended that Appellant could be put back in the same position as before for anything like \$12,000. 20

119. It is submitted that the Court of King's Bench erred in limiting the compensation to an estimate of the cost of a relocation of the piling ground elsewhere; certainly where there was any doubt on the point an Appellate Court was not entitled to base its judgment upon the doubt and decide that there was only a partial loss.

Sp. Ex. Bk. III,

D-160;

Sp. Ex. Bk. I,

P-129;

Vol. 13, p. 25, l. 46

to p. 26, l. 11;

Vol. 13, p. 27, l. 39;

Vol. 13, p. 20, l. 16;

Vol. 13, pp. 53-55;

Vol. 12, p. 209, l. 21.

Vol. 12, p. 52, l. 41.

Sp. Ex. Bk. III,

D-193.

120. Moreover, the Court of King's Bench erred in accepting the Farley line on Plan D-160 as delimiting the properties which are to be vested in Respondents at Farm Point. This line was established over sawdust fill placed to minimize the effect of the flooding which took place some ten months after the 21st May, 1926. The proper contour line is that shown in yellow on Plan P-129 taken from the natural elevations of the soil. This error obviously affected the views of the learned Judges in Appeal as to the feasibility of adequate remedial works and as to the piling area left to the Appellant. 30

121. The amounts awarded by the Court of Appeal, \$12,500 and \$3,600 respectively, for the lands and buildings at Farm Point and Mileage 12,

involve the acceptance of the valuations made by Respondents' witnesses against those made on behalf of Appellant which were as follows :—

Record.

	Machinery and mill	\$12,000.00	Respondent
	Buildings	52,500.00	Company's Factum
	Dam at Meach Creek	21,702.00	in C.K.B., p. 110,
	Part Penstock and saddles (that is, the part applicable		i. 20 ;
	to the lumber business as distinguished from		Vol. I, p. 56, l. 44 ;
	the part applicable to the electric system) ..	2,450.00	Vol. 3, p. 143 ;
	The railway siding	3,001.25	Vol. 3, p. 114 ;
10	The roads in the lumber yard	2,000.00	Vol. 10, p. 240, l. 18 ;
	4 wells	300.00	Vol. 3, p. 6 ;
	Cribwork and rollway	2,000.00	Vol. 9, p. 289 ;
	Storage dams and improvements in Meach Creek	6,314.00	Vol. 9, p. 297.
	Land as itemized in Exhibit P-99	16,730.00	
	Mileage 12	13,913.00	
		<hr/>	
		\$132,910.25	
		<hr/> <hr/>	

122. The trial Judge had heard the conflicting testimony and in awarding a lump sum of \$115,000.00 to cover both these items and the loss of the lumber business he obviously disregarded the valuations suggested by Respondents' witnesses. It is submitted that in so doing for the purpose of establishing the "just and fair compensation" for what was taken or affected he was exercising "le pouvoir d'appréciation donné en pareille matière au juge de la Cour Supérieure," and that in the absence of indications that he erred in law or that there was no evidence to justify his award it should not have been varied. Vol. 14, p. 34, l. 43.

DEPRECIATION OF TIMBER LIMITS.

123. The next item of compensation is for depreciation to the values of Appellant's timber limits in proximity to his mills due to the loss of his lumber business. The trial Judge awarded \$5,400 under this heading after considering the conflicting evidence. In their formal judgment the Court of King's Bench said that as the Appellant could still carry on his business at Farm Point, the limits on the west side of the Gatineau should not suffer depreciation in value. They did find, however, that since the raising of the waters there was difficulty in hauling the logs in the winter time from the east side of the Gatineau River across the ice, due to the frequent changes in the operation levels maintained by the Respondents. For this reason they awarded one-third of \$5,400, namely, \$1,800. Vol. 13, p. 160, l. 17. Vol. 14, p. 4, l. 28. Vol. 14, p. 35 ; p. 36. Vol. 10, pp. 82 and 83.

Record.

124. As the Court reduced the award for this item on the assumption that the lumber industry only suffered a partial loss, it is submitted that the compensation of \$5,400 given by the trial Judge should stand.

DISBURSEMENTS, FEES AND COSTS.

125. Appellant pointed out to the Court of King's Bench that there was an error as to an item of \$424.85, and it was properly deducted by the Court.

Vol. 14, p. 60, l. 37.

126. With regard to the other amounts awarded for disbursements, fees and costs it is submitted that the account of Messrs. Hazelgrove and Adamson should not have been reduced by the Court of Appeal from \$1,250.00 to \$187.50. If their charge was a proper one as against Appellant the principle applied by the Court to the other items warranted its inclusion.

Vol. 9, p. 288, l. 9.
Vol. 3, p. 96.

127. Except as to the admitted error of \$424.25 in the calculation of the costs, the Appellant submits that the Judgment of the Court of King's Bench, in so far as it varied the Judgment of the trial Judge, should be reversed for the following amongst other

REASONS.

- (1) BECAUSE there is no error in law on the face of the awards.
- (2) BECAUSE the awards make it clear that the trial Judge applied the right principles in arriving at the values of the properties and rights taken or affected.
- (3) BECAUSE the evidence before the trial Judge justified the amounts awarded.
- (4) BECAUSE an Appellate Court ought not to set aside awards which are founded on right principles unless there is no evidence to support them.
- (5) BECAUSE, as found by all the Judges, Appellant's Cascades properties and rights had special values beyond the bare agricultural values.
- (6) BECAUSE Appellant's lumber business and his hydro-electric undertaking became total losses and on that basis the only sums found to be just and fair compensation as required by the Special Act, are those awarded by the learned trial Judge.

30

- (7) BECAUSE the Special Act gave the trial Judge particular instruction and direction and exceptional discretionary powers in assessing the amounts to be awarded as just and fair compensation for the exercise by Respondents of the extraordinary rights conferred upon them by the Special Act.
- (8) BECAUSE the judgment of the trial Judge should be affirmed.

AND ALTERNATIVELY AS TO CASCADES.

10

- (9) BECAUSE if the awards could be varied that for Cascades properties and rights should be substantially increased.

LOUIS S. ST. LAURENT.

W. B. SCOTT.

In the Privy Council.

No. 41 of 1935.

*On Appeal from the Court of King's Bench
of the Province of Quebec (in Appeal).*

BETWEEN

FREEMAN T. CROSS

(Plaintiff) *Appellant*

AND

GATINEAU POWER COMPANY

(Defendants) *Respondents.*

CASE FOR THE APPELLANT.

BLAKE & REDDEN,

17 Victoria Street, S.W.1.