

In the Privy Council.

**ON APPEAL**  
 FROM THE COURT OF KING'S BENCH FOR THE  
 PROVINCE OF QUEBEC (APPEAL SIDE).

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BETWEEN—

FREEMAN T. CROSS - (Plaintiff) *Appellant*

— AND —

GATINEAU POWER COMPANY

(Defendants) *Respondents.*

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**RESPONDENT'S CASE.**

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RECORD.  
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1. This appeal is from a judgment of the Court of King's Bench for the Province of Quebec rendered on the 28th December, 1934, which allowed the appeal of the present Respondents (original Defendant) from a judgment rendered by Mr. Justice de Lorimier of the Superior Court on the 28th June, 1933.

Vol. 14  
 pp. 1-6.  
 Vol. 13,  
 pp. 152-167.

20 2. The matter in dispute has reference to the compensation ("indemnity") payable by the Respondents to the Appellant in respect of property of the Appellant (a lumber merchant in a substantial way of business) affected by the backing up of water impounded by a dam constructed by the Respondents as part of a large hydro-electric development on the Gatineau River, a stream running from north to south at approximately right angles to the Ottawa River and emptying into the latter in the vicinity of the City of Hull, Province of Quebec.

3. The trial judge awarded the present Appellant the sum of \$271,500.00 plus \$76,981.22, the latter sum being in respect of dis-

Vol. 13,  
 p. 160.

## RECORD.

Vol. 1,  
pp. 29-31.

Vol. 3,  
pp. 136-8.

Vol. 13,  
pp. 152-167.

Vol. 14,  
pp. 1-6.

Vol. 14,  
pp. 11. 62.

bursments, fees and costs alleged to have been incurred by the present Appellant in connection with his claims and with a special Act passed by the Quebec Legislature concerning the differences between the parties as mentioned in paragraph 14 below. The sum of \$271,500 was to bear interest from the 12th March, 1927, at 5% per annum, and the Respondents were further condemned to pay the costs of the action.

4. On appeal by the present Respondents from this judgment the Court of King's Bench reduced the total indemnity payable by the Respondents to the Appellant to the sum of \$157,493.87. the sum of \$271,500 awarded by the trial judge by way of indemnity as mentioned in paragraph 3 hereof being reduced to \$82,000 and the sum of \$76,981.22 for expenses being reduced to \$75,493.87. The judgment of the Court of King's Bench was unanimous save that two of the five judges were in favour of reducing the sum of \$76,981.22 to round about \$70,000 in lieu of \$75,493.87. 10

5. The law in force in the Province of Quebec relating to the exploitation of water power is mainly to be found in the Water Course Act (R.S.Q. 1925 Chapter 46), which provides (*inter alia*) as follows :—

"4. Every owner of land may improve any watercourse bordering upon, 20  
"running along or passing across his property, and may turn the same to  
"account by the construction of mills, manufactories, works and machinery  
"of all kinds, and for such purpose may erect and construct in and about such  
"watercourse, all the works necessary for its efficient working, such as flood-  
"gates, flumes, embankments, dams, dykes and the like."

Section 5 (1) "No . . . . dam . . . . or other similar work,  
"the construction or maintenance of which will cause public property or the  
"property of third persons or public or private rights to be affected either by  
"the backing up of the water or otherwise, shall be constructed or main-  
"tained in any of the water courses referred to in Section 4, unless the site on 30  
"which it is to be constructed has been approved by the Lieutenant-Governor  
"in Council, nor unless it is constructed and maintained in accordance with  
"plans and specifications likewise approved by the Lieutenant-Governor in  
"Council."

6. Section 7 of the said Act provides that any person intending to establish any such works must file in the local registry office complete plans and specifications giving details of the undertaking and showing all property which will be affected and must give public notice and thereafter petition the Lieutenant-Governor in Council through the Minister of Lands and Forests for approval by Order-in- 40  
Council of these plans and specifications. Section 12 of the Act

provides that the owner of any work constructed by virtue of the powers set out in Section 4 shall be liable for all damages resulting therefrom to any person. Section 16 of the Act declares every water power belonging to any person to be a matter of public interest and permits the owner to expropriate adjacent lands so as to allow him to utilize such water power in the manner provided by the Act. Before exercising the right of expropriation a promoter must submit to the Minister a plan and description of the particular parcel to be expropriated and secure approval which is evidenced by a further  
10 Order-in-Council.

7. The hydro-electric development above-mentioned was carried out at Chelsea Falls and Farmers Rapids, on the Gatineau River a few miles above its junction with the Ottawa River, by the Respondents, acting under powers given to the Respondents' associate the Canadian International Paper Company by two Orders-in-Council of the Quebec Government dated the 21st May, 1926. The works were completed on or about the 12th March, 1927, and the water power as now developed produces about 200,000 h.p. of electric energy.

Vol. 4,  
pp. 14.

20 8. The Appellant had property at two main points upstream from the Respondents' said dam, the first about eight miles above at a place known as Cascades, and the second two miles or so further up, at Farm Point. The contiguous riparian lands on both sides, up and down stream, had been acquired by the Respondents, which indeed held practically all the land on both sides of the river, save that of the Appellant, which would be affected by the development.

At Cascades, the Appellant owned a property having a riparian frontage on the west side of the river, faced in part, on the opposite bank of the river, by a triangular piece considerably smaller. The  
30 Appellant had not developed any industrial or other activity at Cascades.

Ex. Book IV,  
D. 71.

At his other property, Farm Point, there is a small tributary of the Gatineau River known as the Meach Creek. This stream originates in high land adjacent to the river on the west side and runs down the hill and then through some low lying land which has been referred to in the evidence as the "delta" and which is practically at the same level as the river. This low land at the base of the Creek was submerged annually for a considerable portion of the year under natural conditions before the Company's works were constructed,  
40 and on the margin of this low lying land and upward on the slope were a number of rough workmen's dwellings and a saw mill. The Appellant had impounded the water of the Creek at the top of the

Ex. Book IV,  
D. 162.

Ex. Book IV,  
D. 187.

Vol. 5,  
p. 146.

RECORD.

hill by a small dam and brought it down the hill through an iron pipe or penstock from which he operated a water wheel at his saw mill and lower down at the bottom of the hill he had a small concrete power house with a turbine attached to a generator by means of which, when there was sufficient water available, he generated electricity which he distributed by a more or less primitive distribution line which ran up from Farm Point along the main road hard by, which followed the river upward to a place called Wakefield and downward to a place called Kirk's Ferry, a few miles downstream.

9. The Respondents, acting on the view (which whilst its determination is not material to the present Appeal, is submitted to be the correct view), that it was entitled in law so to do, proceeded with its hydro-electric development without first either purchasing or expropriating such parts of the Appellant's property as might be affected by the raising of the level of the river resulting from the development, and the Appellant took no steps to prevent the Respondents from proceeding with the work. 10

10. Finding itself, however, unable to settle amicably with the Appellant for the said parts of his property, the Respondents, acting under the provisions of the above-mentioned Water Course Act, on the 17th December, 1926, secured an Order-in-Council authorising the expropriation of the property in question, and on the 14th February, 1927, served upon the Appellant a formal written offer of \$12,155 for the property involved, as a preliminary to expropriation under the Act. 20

The Respondents then applied to the Quebec Public Service Commission, (an administrative non-judicial body established under Provincial Statute and entrusted with controlling functions in relation to public utilities), for leave to proceed to the actual expropriation of the property in question, but by Order dated the 22nd April, 1927, (a few weeks after the actual completion of the development) the Commission decided, rightly or wrongly, that leave could not be granted to proceed with the expropriation. (The Respondent sought to challenge this decision on appeal in the Court of King's Bench and in the Supreme Court of Canada, but its appeals were quashed for want of jurisdiction: see Quebec Reports 46 K.B. 65. and (1929) S.C.R. 35). 30

11. The Respondents, (again rightly, it is submitted, although again it is not now material), took the view that even if expropriation could not be had it was still entitled to proceed with the development by virtue of the general law of Quebec, of the Water Course Act, and of the said Orders-in-Council, subject only to the payment to the Appellant of any damages that might result, which 40

Vol. 4.  
pp. 5-6.

Vol. 4,  
pp. 130-3.

Vol. 1. p. 9.

Vol. 4.  
pp. 224-233.

Vol. 1,  
pp. 1-4.

damages should be assessed by the said Commission : and it accordingly completed the development and raised the water of the river to its new normal operating level on the 12th March, 1927, (some weeks, actually, before the making of the Commissioner's Order above-mentioned).

RECORD.

Vol. 4,  
pp. 224-233.

12. The Appellant apparently agreed at that time with the view of the Respondents both as to the right to proceed with the development and as to the function of the Public Service Commission in the assessment of damage, for, after taking no steps in the matter  
10 until the 5th April, 1929, two years after the water had been backed up to its normal operating level, he proceeded, through his then Attorney the late Mr. Eugene Lafleur, K.C. to petition the Public Service Commission to fix the indemnity under Section 12 of the Water Course Act, for the damage to his property; it is noteworthy that at that time he made no claim for damage to any other property than that at Cascades. The Respondents joined with the Appellant in these proceedings, for they afforded the proper method for establishing the indemnity due to the Appellant. The matter was finally  
20 set down for hearing before the Public Service Commission in the month of January 1931; but three days before the hearing, the Appellant desisted from this arbitration and although the Respondents protested against such desistment, being itself interested in and desirous of having the indemnity fixed, the Appellant's desistment was allowed.

Vol. 1,  
p. 9, l. 4.Vol. 1,  
p. 10, l. 6.

13. Thereafter, on the 2nd March, 1931, four years after the development had been completed and the water raised to its new level, the Appellant instituted against the Respondents in the Superior Court the action out of which this Appeal arises. In its original form, the action was a petitory action, in which the  
30 Appellant demanded that the Respondents should be compelled to reduce the water to its original level, or alternatively to pay \$600,000 by way of damages.

Vol. 1,  
pp. 2-11.

14. Whilst this action was pending, the matter engaged the attention of the Quebec Legislature, and ultimately a special Act, 22 Geo. V., cap. 128, was passed to deal with the situation. This Act, which was expressed to secure that the Respondents on the one hand should not be disturbed in the operation of the development and that the Appellant on the other hand should be properly compensated for all damage sustained by him as a result of the  
40 Respondents' development, provided as follows:—

Vol. 1,  
pp. 29-31;  
Vol. 3,  
pp. 136-8.

By Section 1, that the Respondents should not be disturbed in its operation of the development "by maintaining the level

RECORD.

“of the Gatineau River . . . . at any controlled elevation “not exceeding 321.5 feet above sea level at Farm Point”, provided “fair compensation” should be assessed and paid to the Appellant;

By Section 2, that the Respondents should make “just and “fair compensation” to the Appellant “for all his properties and “rights taken for or affected by the development up to the said “elevation, and by the operation thereof”;

Vol. 4,  
pp. 1-4.

By Section 3, that the date with reference to which valuation (of the damage to the Appellant) should be made should be the date of the Order-in-Council approving the plans for the development, i.e, the 21st May, 1926;

By Section 4, that in fixing the compensation, the Superior Court should include such amount as it should deem just for the disbursements fees and costs incurred by the Appellant in the pending action and in connexion with the passing of the Special Act:

By Section 5, that the assessment and award of compensation to the Appellant should be made in the pending action; and

By Section 8, that the judgment to be rendered in the pending action should be deemed for all purposes of appeal or otherwise a judgment of the Superior Court.

Vol. 1,  
pp. 32-45.

**15.** The Special Act came into force in February 1932, five years after the water had been raised to its ultimate operating level. At that time, the evidence in the pending action, after a hearing occupying some 14 days, had been completed, and the case was under advisement. After the Special Act came into force, the case was in effect re-opened, and the Appellant by a Supplementary Declaration added to his original figure of damage (\$600,000) a further sum of \$458,000 for the alleged destruction of his lumber business and electricity enterprise at Farm Point, together with the sum of \$54,104 for the expenses falling to be paid under Section 4 of the Special Act, which latter item by an amended supplementary declaration he increased to the sum of \$81,632.19, bringing the total for all items to the enormous sum of \$1,140,458.21. The Respondent pleaded and offered \$48,400, with interest from the date the water was raised. Eventually judgment was rendered at first instance for the sum of \$348,481.22 which, with interest up to the time of the judgment rendered by the Court of King's Bench brought the total sum for which the Respondents were condemned in the Court of first instance, to close upon half a million dollars.

Vol. 1,  
p. 64.Vol. 1,  
p. 56.

16. The Court of first instance then proceeded to hear further evidence and argument in a Supplemental Hearing, the question being of course reduced by the Special Act to one of indemnity alone, the Respondents' right to operate its development being definitely secured, subject to payment of the indemnity. The Appellant's claims, in their final form, were ranged under four main heads, as follows:—

RECORD.

Item A—Damage to the property at Cascades :

10 Item B—Damage to the lumber industry at Meach Creek or Farm Point, including "Mileage 12" and Timber Limits and other minor accessories :

Item C—Damage to the Electrical System at Meach Creek or Farm Point :

Vol. 1,  
pp. 42-3.

Item D—Claim for extra judicial fees and disbursements.

17. It would be out of place to discuss in great detail the voluminous evidence applicable to these claims, but it is necessary to refer to various of the points in order to support the Respondents' contention that the findings of the trial judge were erroneous in law and that the indemnity assessed by him was greatly exaggerated  
20 in amount and clearly unjustified by the evidence, and that the unanimous finding of the judges of the Court of King's Bench re-forming his decision should not be disturbed. The four items can conveniently be discussed one by one.

#### ITEM A—CASCADES PROPERTY.

18. At the Cascades there are four rapids in the river, the total fall from the head of the first rapid to the bottom of the fourth rapid downstream being, according to the profile of the Quebec Streams Commission, a Government body engaged in the examination of streams in the Province, about fourteen feet. This is  
30 approximate, and varies with the flow of the stream. The Court of King's Bench has found that the Appellant owned the first two rapids upstream and the Respondents owned the lower two rapids, and for the purposes hereof this view is accepted by the Respondents. The head appurtenant to the Appellant's portion of the rapids has been variously estimated at from four to about seven feet. Mr. Justice Létourneau of the Court of King's Bench refers to it as being 7·6 feet. The principal witness of Appellant says it is 7·2 feet.

Ex. Book 1,  
p. 28.Vol. 14,  
p. 22, l. 10.  
Vol. 6,  
p. 69, l. 11.

## RECORD.

Vol. 7,  
p. 190.

Vol. 7,  
p. 96.

Vol. 7,  
p. 96.

**19.** At the head waters of the river, over a hundred miles above, in another part of the country, the Respondents under Government authority had constructed at a cost of about \$6,000,000 large storage reservoirs designed to impound the water in freshet times and thereby to even up and regularize the flow in the river. These works were not completed until after the 21st May, 1926, the date fixed by the Special Act, as that at which the valuation of the Appellant's property was to be made. Prior to these works, the average flow of the river under natural conditions was about 3,000 cubic feet a second, and its minimum flow about 1,900 cubic feet a second, but as a result of these works the dependable flow was raised to about 10,000 cubic feet a second.

**20.** The parties are in substantial agreement on the following points :—

Vol. 2,  
p. 2.

(a) That the whole of the property involved, including land not affected by the water, was purchased by the Appellant in the year 1916 for the sum of \$2,890.

Vol. 5,  
p. 76. l. 25;  
p. 80. l. 25;  
p. 83. l. 17;  
p. 88. l. 17;  
p. 92. l. 18;  
p. 96. l. 33.

(b) That the Appellant had each year up to and including the year 1926 declared to an auditor who made up his accounts yearly (as he personally kept no books) that the value of the alleged water power was \$5,000.

(c) That no development of the property had ever been attempted by the Appellant nor any plans approved as by law required for such a development;

(d) That within the boundaries of the Appellant's own property, and giving him every possible advantage on questions of fact with regard to the division of the river bed, the head or slope applicable to the property is less than eight feet and is contained in the first two rapids upstream;

(e) That the land controlling the water course above and below the Appellant's property was owned or controlled by the Respondents, including the lower two rapids, the lowest or fourth rapid having the greatest pitch of all four.

**21.** The main claim for this item as set out in the Appellant's first declaration is as follows :—

Vol. 1,  
p. 7, para. 17.

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



His whole case is based on the following theory of value :—

RECORD.

(a) That he might have been able to construct a dam across the river on his property at Cascades and thereby impound the water for a good many miles upstream well above the top of the Cascades rapids, up to a point known as Paugan, and thus secure a head of between fourteen and fifteen feet, of which only about seven feet would have been on his own property;

Vol. 1,  
p. 8, para. 26.

10 (b) That applying to this head a stream flow of 10,000 c.f.s. made possible by the Respondents' said storage reservoirs he could have secured approximately 15,000 horse power of electrical energy;

Vol. 6,  
p. 77, l. 20.

(c) That this theoretical horse power in its raw and undeveloped state was worth \$40 a horse power, making the total amount claimed \$600,000.

20 22. The Appellant did not and does not contend that the property in itself had merit as a developable water power unless there were joined to it the advantages to be derived from the head of water and slope of the stream appurtenant to properties upstream which he did not own. The evidence of his principal witnesses bears out this as follows:—

Vol. 6,  
p. 72, ll. 10-20.

MacRostie, Vol. 6, p. 94, l. 46:

“Q. Can you give me any estimate of what horse-power would be developed with such a dam, sticking to his own lot, on the natural flow of the river?”

“A. I would say it would not be an economic proposition on the natural flow.”

Again at page 77, l. 22:

30 “Q. You have been very generous to your client, inasmuch as you gave him credit for a 10,000 foot flow which did not exist at the time, and you gave him credit for 6·80 feet of head which he did not own, to make up your 15,000 horse power?”

“A. I assume he has the right to use this.

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

“A. Yes.”

RECORD.

Witness J. M. Robertson, Vol. 6, p. 168, l. 22 :

“Q. And you would not suggest putting an independent power proposition on Cross’ property alone, unless you acquired the rights above?”

“A. Anybody in his senses would expect to use the rights above.”

And at p. 183, l. 39 :

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

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

“Q. What would you give him as owning?”

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

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

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

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

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

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

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

23. Mr. MacRostie attempted to make proof of the technical features of this hypothetical development. The details he gives are most meagre. His scheme includes the submersion of La Pêche Rapids several miles upstream, having a head of about six feet and owned by the Respondents and included in its plans for development. He estimates the total cost of construction at \$1,481,580 for a development of 11,904 horse power (not 15,000 horse power as claimed) and he reckons this to represent a cost of \$124.80 a horse power. The testimony of Mr. Beaubien, a witness brought forward in rebuttal notwithstanding the Respondents’ objections that the testimony was not competent rebuttal evidence, was along the same lines as that of Mr. MacRostie, although his theory called for the raising of the water to a higher elevation than that claimed for in

Vol. 6,  
pp. 77, 78, 82.

Vol. 6,  
p. 72, l. 20.

Vol. 6,  
p. 82.

Vol. 8,  
p. 8, l. 15.

Vol. 8,  
p. 15, l. 20.

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the Appellant's declaration and higher than the operating level of the Respondents' works, and incidentally to a level which would neutralize the excessive claim for damages to the Meach Creek properties as sued for by the Appellant.

24. Uncontradicted evidence was brought by the Respondents to show that the estimates did not include such items as the necessary re-location of the track of the Canadian Pacific Railway the cost of which as shown by the Railway's Engineer would be \$66,000, and various other large expenditures required for roads and other  
10 properties were also omitted.

25. Mr. Robertson for the Appellant testified as to various sales of property which controlled water power chiefly on other rivers in different parts of the country in an endeavour to establish a price of \$40 per horse power in the undeveloped state. Practically all those to which he referred were natural water power concentrations with very high heads susceptible of easy and economic development within themselves. Cross-examination of this witness clearly demonstrated the fallacies involved in his testimony. In it,  
20 notwithstanding the theories given in his examination in chief, he admits that there is no general market for raw power. The weight of testimony was indeed strongly to the effect that there is no such thing as a general market or market price per horse power for raw or undeveloped power, which in itself is, it is submitted, fatal to this part of the Appellant's case.

As a further instance of the unreliability of his testimony, the Respondents refer to Mr. Robertson's evidence as to the supposed value of the horse power of the undeveloped Pagan Falls thirty or forty miles above Cascades. This property has a concentrated head of about 100 feet and it is significant as will be noted hereafter  
30 that the Appellant himself contracted to purchase for the Hull Electric Company the main chute and all the head involved in the small rapids and property above it for many miles for inclusion therewith at the rate of \$3,333 per foot of head which he did. Mr. Robertson ignores this fact and the inferences which should be drawn from it, and estimates the price at about \$40 per horse power on the basis of a calculation of the horse power supposed to be involved in relation to the price paid some years later for the total capital stock of the Hull Electric Company, which Company had in  
40 addition to its other assets, about 5,000 power customers as well as a complete tramway system in Hull and connecting Hull with the City of Ottawa and in addition developed water powers and a very valuable charter.

RECORD.

Vol. 7,  
p. 264, l. 33.Vol. 7,  
p. 274.Vol. 6,  
p. 136, *et seq.*Vol. 6,  
p. 148, *et seq.*Vol. 6,  
p. 153, l. 18 to  
p. 154, l. 19.Vol. 7,  
pp. 198-9, 204,  
244 and 256;  
Vol. 6,  
p. 153.Vol. 6,  
p. 139, l. 20.Vol. 6,  
pp. 170-175.

**26.** To the Appellant's claim in respect of the Cascades property, the Respondents pleaded *inter alia* as follows:—

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

**27.** The Respondents submit that the value to be paid for was the value to the Appellant as it existed on the date of the 21st May, 1926, referred to in the special Act, and that it was the advantages actual or potential, which the property possessed at that date that fell to be determined. 10

**28.** Although it submitted that the principle of valuation adopted by the Appellant in his pleadings and in his proof was fallacious, the Respondents nevertheless proceeded to proof which it submits conclusively demonstrates that even if Appellant could have fulfilled the legal requirements and secured Government authority for a development, and even if he had been entitled to assume in his favour the advantages derivable from property other than his own and a stream flow of 10,000 c.f.s. subsequently made possible by the works paid for by the Respondents, he could not then have made a development which would be economically feasible or which could compete even with power generated by steam, for the evidence of his chief witness, Mr. MacRostie, in addition to being found inaccurate, (as mentioned in paragraph 24 hereof), by reason of the omission from his estimates of important items of expense involved in the proposed construction, is definitely contradicted by hydraulic engineers having long experience in their profession, who testified for the Respondents on the scientific features and cost of this problematical development itself; and these witnesses are unanimous in declaring that the property offered no possibility whatever for economic development. 20 30

**29.** Among these witnesses were Mr. Olivier Lefebvre, Chief Engineer of the Quebec Streams Commission, a Government body, one of whose duties it is to study the possibilities of rivers in the Province; Mr. W. S. Lee, Mr. Arthur Surveyer, Mr. S. Scovil, all hydraulic engineers; Mr. Paul Beique, an Engineer and land surveyor; and Mr. C. N. Simpson, Chief Engineer of the Respondents. 40

**30.** Mr Simpson prepared detailed estimates of several possible schemes of development on the basis of the actual head

applicable to the Appellant's property itself and also with the utilization of the head claimed for by the Appellant's witnesses. These were accompanied by plans to illustrate them. Under Scheme 3-D he has assumed in favour of the Respondents' properties a development to elevation of 318 feet above sea level including the La Pêche Rapids and using a full flow of 10,000 c.f.s. and he finds 9,219 horse power available at a cost of \$268 a horse power, which would mean 8,520 available for delivery in the vicinity at an annual cost of \$30.40 a horse power, provided it was sold immediately, and this  
10 could not compete even with electric power generated by steam.

**31.** Mr. Lefebvre corroborates the correctness of these estimates and is in agreement that no economic or profitable development could have been constructed on the Appellant's property. Mr. Arthur Surveyer, a hydraulic engineer of international reputation, made independent estimates which were even higher than those of the Witness Simpson, and he definitely stated that the property had no value as a water power project.

Mr. W. S. Lee, another hydraulic engineer of wide experience, corroborated this evidence, having made independent estimates of  
20 the cost of development.

Mr. Scovil, previously with the Dominion Government Water Powers Branch, testified as to the accuracy of hydraulic measurements made by the Respondents' witnesses, and he corroborated their testimony as to the lack of possibilities of the property for power purposes.

Mr. Beique was retained by the Respondents to go on the property before the water was raised and make an independent report as to levels, elevations and other possibilities. His independent investigation convinced him that the property was not  
30 susceptible of development.

**32.** The evidence of the Respondents' witnesses as to the value of the site is as follows:—

Mr. Lefebvre discusses it on the basis of similar rapids on the same river, and in particular the des Os Rapid, having a head of seven feet and whose owners, the Oblate Fathers, had consulted him as to an offer they had received of \$200 per foot of head, which he recommended they accept. He considered the Appellant's rapid worth \$300 per foot of head.

Mr. Lee values it at \$1,500, being the price at which La Pêche  
40 Rapid, a few miles above Cascades, having about seven foot of head, had been purchased.

RECORD.

Vol. 4,  
pp. 265-282.  
Ex. Book III,  
D. 96, D. 99.Vol. 4,  
p. 282.Vol. 7,  
p. 145.Vol. 7,  
p. 200.Vol. 7,  
p. 243.Vol. 7,  
pp. 230-232.Vol. 7,  
p. 109.Vol. 7,  
pp. 333-4.Vol. 7,  
pp. 204-6.Vol. 7,  
p. 207, l. 23.Vol. 7,  
p. 235.

RECORD.

Vol. 7,  
pp. 341-348.

Mr. Beique's valuation is considerably higher than the Respondents' other witnesses. He made a careful analysis of the whole situation, separating the land value and river rights; and, giving the benefit of every advantage to the Appellant, he testifies to a value of \$11,000.

Vol. 13,  
pp. 158-9.

**33.** For this Cascades property item the judge awarded \$90,000, giving no reasons for such an allowance but indicating this to be ten times the amount of Respondents' offer and stating that the Respondents should have no reason to complain because it had arbitrarily usurped the Appellant's property without previously offering to pay the just indemnity for the same, and adding that the Respondents had paid more than this for less important properties. 10

**34.** It is submitted that there was no justification either in the evidence or at law for such a finding. The wording of the judgment almost suggests that the learned trial judge took the view that the Appellant had failed to prove the basis of valuation relied upon in his action, and that the matter could be resolved by computing the compensation at ten times the Respondents' offer, by way of penalty upon the Respondents for arbitrarily usurping the property without previously having made an offer therefor. 20

Vol. 4,  
pp. 130-3.

**35.** Apart from the fact that this would not be an admissible method of calculating "fair and just" compensation as provided by the Special Act, the statement that no offer had been made by the Company is definitely in error in view of the formal offer made under the provisions of the Water Course Act, as mentioned in paragraph 10 hereof, on February 14th, 1927, a month before the water was raised. The offer was for \$12,155, covering various groups of properties including an offer for \$1,290 for this Cascades item.

There is, moreover, nothing whatever in the proof to support the statement of the trial judge that the Respondents had paid greater sums for less important water powers than that of the Appellant. 30

**36.** The Court of King's Bench, from whose judgment the present appeal arises, fixed the indemnity on this item at \$35,000. The Judges of that Court were unanimous in their findings on this, as on the other, items of indemnity involved in this appeal. The notes of the various judges printed in the record of proceedings indicate that they carefully examined the evidence and were alive to the undesirability of disturbing a finding of a trial judge on matters of fact unless under exceptional circumstances. In this connection the following is cited from the notes of Mr. Justice Letourneau:— 40

Vol. 14,  
p. 20.

“Mais l'Intimé soulève un moyen qu'il importe d'examiner préliminairement, à savoir qu'il faudrait traiter comme le verdict d'un jury ou la

“decision d’un bureau d’arbitrage. le jugement qui nous est soumis et  
 “n’intervenir pour le mettre de côté que si nous trouvons qu’il y a été fait  
 “une fausse application de la loi, ou que ce jugement est clairement erroné  
 “eu égard a la preuve faite. Il cite au soutien de cette prétention l’opinion  
 “souvent emise par le Conseil Privé et que nous retrouvons dans *Lacoste vs.*  
 “*Cedars Rapid* (seconde decision: 47 B.R., p.271).

10 “Je ne puis toutefois admettre la rigueur de cette règle dans le cas qui  
 “nous est soumis, car en somme, ce n’est plus a un jury ou à un bureau  
 “d’arbitrage charge de choisir, sur une pure question de fait, entre les préten-  
 “tions respectives des parties, que nous avons affaire, mais bien a un jugement  
 “de la Cour Supérieure compétente à faire juridiquement les déductions qu’il  
 “convient dans un cas comme celui dont il s’agit ; et, à cause de cela, j’estime  
 “que cette cause doit être décidée comme toute autre nous venant de la Cour  
 “Supérieure, à savoir que, sur une question de fait, l’on doit en principe  
 “tenir compte du choix qu’aurait pu faire le juge de première instance entre  
 “deux groupes de témoins qui se contredisent ; que son appréciation des faits  
 “soit d’un grand poids, surtout si elle est motivée ; que si quant au montant  
 “accordé la preuve vague et indéfinie ne permet pas de dire qu’un autre chiffre  
 “serait juridiquement plus sûr, mieux vaut ne pas intervenir. Mais hors de  
 20 “là, il nous faut reconnaître que d’après notre système l’appel existe pour le  
 “fait comme pour le droit et qu’il n’y avait d’autre alternative, dans le cas  
 “qui nous a été soumis, que de reprendre l’étude très longue de la preuve faite,  
 “sauf a ne conclure autrement que ne l’a fait le savant juge de première  
 “instance—je le repète—que si nous sommes convaincus d’une erreur quant  
 “aux montants qu’il a fixés, et que l’autres montants sont plus sûrement  
 “conformes a la preuve offerte.”

30 37. In revising the judgment on this item they have accorded  
 to the Appellant for the water power at Cascades the sum of \$35,000,  
 giving him credit for the fullest head he could possibly claim on these  
 properties about 7.5 feet, at \$3,333 per foot thereof. (the rate paid for  
 head under similar circumstances by the Appellant himself in his  
 transactions with the Hull Electric Company, as mentioned in para-  
 graph 25 hereof). This, in round figures, amounts to the sum of  
 \$25,000 to which a further sum of \$6,000 for land has been added  
 and this again increased by a further \$4,000.

40 38. It will be noted that this is seven times the amount which  
 the Appellant himself declared over his own signature after the  
 material date in the year 1926 that the water power was worth, as  
 mentioned in paragraph 20 (b) hereof. The Respondents, therefore,  
 humbly submit that the judgment of the Court of King’s Bench on  
 this item should be maintained.

Vol. 14,  
 p. 3, l. 33.  
 Vol. 14,  
 pp. 24, 43,  
 66-7.

RECORD.

ITEM B—THE LUMBER PROPERTY AT MEACH CREEK—  
FARM POINT.Vol. 1,  
p. 38, para. 12.

**39.** In respect of this item, the Appellant alleges that he had a lumber mill at Farm Point run by water from Meach Creek, a branch mill at Alcove  $7\frac{1}{2}$  miles up the river and another branch mill at Mileage 12 several miles below Farm Point. He alleged that this industry was totally destroyed by the Respondents' operations, and claimed \$265,112.78, of which the sum of \$165,112.78 was for physical property and \$100,000 for goodwill. Against this he gives credit to the Respondents for \$53,000, purporting to represent a reduction in the value of his assets which would have come about had he himself raised the water to level 318 by the alleged development which he proposed to make at Cascades as discussed in Item A hereof. 10

Vol. 1,  
p. 42.Vol. 1,  
p. 30, l. 22.EX. Book 111,  
D. 107.Vol. 1,  
p. 8, para. 23.

**40.** It is worthy of note in this connexion that the Special Act speaks of "any controlled elevation not exceeding 321.5 feet above "mean sea level at Farm Point"; this expression is of importance because the normal operating water levels at which the Respondents' works are designed to function and do function are not as high as 321.5, but range between 318 and 320 as demonstrated by Exhibit D-107, which is a chart showing the operating levels over a period of six months' normal operation in the year 1930; and these were the operating levels actually declared by the Appellant's first declaration as having existed up to the year 1931, four years after the water was raised. It is a reasonable inference that the legislature in fixing the elevation 321.5 had in mind not that the water would normally back up to that elevation, but that the Appellant should be fully protected against the operation of the works, and that it assumed that he would be amply protected in this regard, both from seepage and from any abnormal situation which might arise, if the level were fixed at 321.5. The Respondents do not urge this point as suggesting in any way that the Appellant should not be compensated up to this level of 321.5, (indeed, as mentioned in paragraph 43, below, it has offered compensation for possible injurious effect to three feet higher), but to demonstrate that in point of fact the fixing of this level of 321.5 in the Act in no way altered the actual situation which had existed over the five year period during which the Appellant operated the industry without claiming any damage from the Respondents, and to suggest that his claim for the destruction of the industry was prompted more by the mention of this technical level in the Act than by the physical situation with which he was confronted. 20 30 40

**41.** Two important points bear on this claim for total destruction of the industry, as follows:—



(a) It is based solely upon the fact that the water submerges ground alleged to be necessary to the Appellant for the piling of lumber. The mill itself is high above the water and admittedly is not affected, and of the forty buildings claimed for, only five are actually affected by the water directly or by seepage. That the piling ground is the whole cause of the trouble is definitely indicated by the Appellant's chief witness, Mr. MacRostie, as follows:—

10       “Q. There is one more question I would like to ask you with regard  
 “to this claim of Mr. Cross, in so far as the Farm Point lumber industry is  
 “concerned: does the claim arise from any other reason than loss of piling  
 “ground?”

Vol. 9,  
 p. 176, l. 26.

“A. At Farm Point?”

“Q. Yes.

“A. I would think the loss of piling ground was the main reason?”

“Q. The main and only reason?”

“A. As far as I know.”

And again at page 178, l. 43:

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

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

Evidence of the Appellant on Discovery (Vol. 9, p. 79, l. 22) as follows:—

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

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

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

“A. On that business?”

“Q. That is all.

“A. Yes.”

RECORD.

The railway spur, to which reference is made, runs from the railway line to the mill over part of what is claimed for piling ground.

(b) Attention can be confined, in considering possible damage, to property between the contour lines 318 and 321.5, for the Appellant admits in his pleadings that a water elevation of 318 on this property would not affect his lumber business and in his evidence he confirms this with particular reference to the piling ground as follows:—

Vol. 1,  
p. 40, l. 2.

Vol. 9,  
p. 37, l. 46.

“Q. In other words, at elevation 318 the water will not flood any of your  
“piling ground? 10

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

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

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

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

“A. I did not want to.

“Q. You never had occasion to use it?

“A. No. 20

“Q. Therefore, I take it, it was the raising of the water between levels  
“318 and 321.5 that is causing the alleged destruction of your piling ground?

“A. Yes.”

**42.** Careful surveys of all the affected property at this site were made for the Respondents by Mr. Farley, land surveyor, and independently checked by Mr. Cassils, another land surveyor. Plan Exhibit D-160 shows the various parcels affected designated as A, B, C, D, E<sup>1</sup> and E<sup>2</sup>.

Ex. Book III,  
D. 160.

**43.** Although the Special Act provides that the Appellant should be compensated up to elevation 321.5 above mean sea level, 30 the Respondents, in order to give to the Appellant the benefit of every doubt which might exist with regard to possible seepage or infiltration, have included in this plan D-160 the land and property up to an elevation three feet higher than that provided by the Act, namely up to elevation 324.5, and offered compensation to the Appellant for possible adverse effect on this extra three feet, although it is only authorised by the Special Act, as against the Appellant, to raise the water to the level of 321.5.

44. As the whole claim rests upon damage to the piling ground, parcel "A" is the most important part of the Plan D-160, for it includes the only portion of piling ground affected. This Exhibit shows, edged in yellow, land affected in this parcel up to the level 318, being 15.05 acres in area, the submersion of which Appellant declares, as mentioned in paragraph 4 (b) above, in no way affects his business. The left side portion of this parcel coloured in green indicates property affected at this point between the levels 318 and 324.5. For the yellow and green areas of Parcel "A" and for the parcels B, C, D, E<sup>1</sup> and E<sup>2</sup> the Respondents compensate the Appellant, and there is no substantial difference in principle between the parties on this point, because although affected by the water they are not of importance to the industry.

45. It is with respect to the right hand portion of Parcel "A", edged in red, that the main difficulty between the parties arises, for this area contains all of the affected portion of the piling ground between the level 318 (below which the industry is not affected) and the level 324.5, three feet higher than that provided by the Act. The total area is 1.9 acres and the portion which would be affected between the levels 318 and 321.5, the level mentioned in the Act, is approximately one acre.

46. The plan shows in dotted lines a road running across the property outside this affected area and spot levels indicate the elevations of the land in the vicinity of this road. The land slopes upward behind this road and all of the elevations are well above even the level 324.5.

47. In conjunction with the plan D-160, the Respondents urge the importance of the panoramic photograph filed as Exhibit D-187. This photograph was taken on September 21st, 1926, under natural conditions, after the material date and six months before the water was raised. It shows the creek in the foreground and the low lying land referred to in the evidence as the "delta" which surrounds it. The small white building immediately facing the creek is the Respondents' power house, and on the slope behind it are shown the saw mill and adjacent lumber piles.

48. The significance of this exhibit lies in the fact that it shows clearly that no lumber was piled below the road which runs directly across the property in front of the power house and which is shown in the dotted lines referred to above on Exhibit D-160. It appears, it is true, that certain quantities of wood other than lumber, being the outsides of the trunks, and firewood, known as slabs or cord wood, were deposited on the ground below the road, but in the

RECORD.

Ex. Book III,  
D. 160.Vol. 9,  
p. 38, l. 1.Vol. 11,  
p. 124, ll. 10-15.Ex. Book IV,  
D. 187.

RECORD.

submission of the Respondents this exhibit makes it conclusive that the raising of the water does not affect the ground used for the actual piling of lumber as the industry was actually carried on in 1926 at the material date for valuation, and it definitely contradicts the theory that the Appellant's business has been destroyed.

**49.** That theory is also contradicted, it is submitted, by the following facts:—

Vol. 12,  
p. 263.

(a) That after 1926 the business was carried on in greater volume than before and no claim was made by the Appellant that it had been destroyed until 1932, five years after the Respondent's works had been operating under their usual and normal levels;

Vol. 5,  
pp. 175-6.

Vol. 10,  
p. 132.

(b) That in 1927, the year after the raising of the water, the saw mill at Farm Point was destroyed by fire and was immediately reconstructed and continued to operate in greater volume than before;

Vol. 12,  
p. 269, l. 1.

(c) That the annual returns of the Appellant to the Government for wood operations for the five years preceding 1926 showed for the Farm Point mill a total of 168,850 feet board measure, while the total for the same period for his Pickanock and other mills, which were far away and are not concerned with this case, was approximately 6,556,000 feet board measure, whilst for the five years after 1926, during four years of which the water was up to its ultimate level, the like returns show that the mill operations at Farm Point resulted in an output of 5,504,000 feet board measure, while the other mills, which are not in question here, gave only 1,600,000 feet board measure.

Vol. 12,  
p. 269, l. 1.  
Ex. Book IV,  
D. 202.

Vol. 5,  
p. 91.

(d) That the total fixed assets of Farm Point are shown by Exhibit D-141, the Appellant's auditors statement for 1925 as less than those at Pickanock and other points, whereas the 1926 statement (Exhibit D-142) dated after the material date, shows a considerable increase in the assets at Farm Point and a reduction in the assets at other points.

Vol. 5,  
p. 95.

Ex. Book III,  
p. 93.

Ex. Book IV,  
D. 160.

Ex. Book II,  
p. 35, D. 10.

**50.** The Appellant's witness MacRostie produced the plan P. 93 purporting to show a somewhat greater area of piling ground affected and an attempt was made to support this plan by statements that the Respondent's plan D-160 had been taken from the surface of fill which had been on the property. The matter is not of great importance and the weight of testimony is definitely in favour of the accuracy of the Respondents' plan, especially as it corresponds with plan P-35 (a duplicate of plan D-10) produced and

vouched for by MacRostie himself, notwithstanding that his plan P-93 produced later is at variance with it.

RECORD.

51. It was the basis of the Respondents' case, in so far as damage to piling ground is concerned, that the Appellant would be adequately compensated for the small area thereof affected, by the payment of a sum sufficient to re-establish the piling ground and railway siding and other minor accessories, and this view is accepted by Appellant's chief witness MacRostie; nevertheless the Appellant, pursuing his theory that the Respondents should pay for all his assets at Farm Point affected or unaffected by the water, attempted to establish that the ground if re-established would not bear the strain.

Vol. 1,  
p. 52, para. 37.  
Vol. 9,  
p. 179, l. 3.

52. This theory was directly contradicted by the witness Gill, Professor of Geology of McGill University, and by Mr. R. E. Chadwick, Chief Engineer and President of the Foundation Company of Canada, which specializes in foundations of all kinds, and these witnesses are corroborated by Mr. W. S. Lee, an engineer, and by Mr. James A. Kennedy, a contractor, who has had a long experience in such work. The fact that the railway embankment, which is on similar land adjacent to the piling ground, supports weights greatly in excess of what the piling ground might have to bear, also assists in contradicting the Appellant's theory.

Vol. 12,  
p. 27.  
Vol. 11,  
pp. 267-291.  
Vol. 11,  
pp. 294-301.  
Vol. 12,  
pp. 1-7.

53. The cost of raising and re-establishing the piling ground and the siding in order to place the site in even better condition than it was before, was testified to by the following witnesses for the Respondent:—

Mr. Ralph, who deals minutely with the matter and produces Exhibit D-168, and states definitely that the cost would be \$10,000;

Vol. 11,  
pp. 203-264.  
Vol. 5, p. 145.

Mr. Marshall Small testified that the proper compensation for the piling ground would be represented by the cost of filling in and raising the siding, plus \$500 to \$1,000 for disturbance.

Vol. 12,  
p. 122.

Mr. Boyle estimated the indemnity at between \$9,000 and \$10,000.

Vol. 12,  
pp. 155-162.

Mr. Beique testified to a total of \$10,310.

Vol. 12,  
p. 231.

Mr. Chadwick stated that \$10,000 would restore the piling ground and make it better than it was before.

Vol. 11,  
p. 280, l. 3.

54. Apart from the piling ground, the property of all kinds physically affected at elevation 324.5, of which the portion between 321.5 and 324.5, if affected at all, is only affected by seepage, is shown on Exhibit D-160 as follows:—

40

RECORD.

Land, total 30·5 acres, of which (1) 17·73 acres are below the 318 level and their submersion is stated by the Appellant to have no effect on the lumber business, although the Respondent of course offers to pay for them; (2) 10·33 acres, between level 318 and 324·5, none of which is piling ground and a large part is subject only to a possible adverse effect from seepage; (3) 1·9 acres of piling ground already discussed.

Total buildings—five affected up to 324·5, some only theoretically by dampness or seepage. These five are groups 5, 6, 9, 10 and 30 on the plan Exhibit D-160. (The small power house is also affected and will be discussed separately under remarks on the electric business).

55. The Respondents' evidence on the value of the above land and buildings, none of which are essential to the industry, is as follows:—

Mr. Bedard, Chief Assessor of the City of Hull, embodies the result of an independent valuation in Exhibit D-181. He testifies to total land damage up to 324·5 of \$4,267, and the value of buildings as \$5,046.77 making a total for land and buildings, other than piling ground, of \$9,314·67.

Mr. James Gillespie, Contractor, of Ottawa, summarized his evidence as to value of buildings in Exhibit D-182. He gives replacement value in 1926 as \$7,600 to \$7,700 and estimates 30% depreciation. He testifies that he would construct all the buildings new for \$6,928.03.

Mr. Paul Beique produced a duplicate of plan D-160 as Exhibit D-189 setting out in different colours the various portions of the individual parcels with clear reasons for his various valuations. His total land valuation, apart from piling ground, is \$6,884.90 and for buildings affected \$4,944.99. His total valuation is \$10,779.89.

With respect to the " Mileage 12" property, Mr. Beique produced a sketch plan D-194 and in his evidence testified to a valuation of \$3,572 for the property including land and buildings, which includes \$500 allowance for the site and a further 10% allowance for disturbance.

56. The Respondents submit that the total indemnity payable to the Appellant for damage to lumber property at Farm Point (including Mileage 12) to an elevation three feet higher than the Act provides, has been definitely shown by the proof to be not in excess of \$25,000.

Vol. 12,  
pp. 167 *et seq.*

Vol. 5,  
p. 150.

Vol. 5,  
p. 152.

Vol. 12,  
p. 190, l. 18.

Vol. 12,  
p. 190, l. 3.

Ex. Book III,  
D. 189.

Vol. 12,  
pp. 210, *et seq.*

Ex. Book  
D. 194.

Vol. 12,  
p. 235, l. 44.

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40

**57.** On the theory that the adverse effect to the small area of piling ground destroyed the lumber industry, the Appellant has attempted to charge Respondent with all the physical assets of the industry in this vicinity whether affected or not by the water, and among these unaffected properties are the following:—(Exhibit P.66).

Vol. 3,  
p. 6, et seq.

- (a) The saw mill and machinery burned down and replaced in the year 1928 after the water was raised;
- (b) Between thirty and thirty-five buildings;
- 10 (c) The dam at the top of the hill behind the mill;
- (d) About thirty acres of land at varying levels above 324.5;
- (e) A plot of land on a hill some distance away referred to as "twenty acres on the hill";
- (f) Two parcels of land forming part of Lot No. 24(c) not even owned by the Appellant.

**58.** The trial Judge without any reference to the evidence gave judgment for in effect the whole value of the lumber industry, including all these unaffected properties, and fixed the indemnity at 20 \$115,000, in the following words:—

"Quant à la valeur de l'industrie de bois du demandeur (y compris "Mileage 12") elle a été fixée dans l'allegation 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.).

Vol. 13,  
p. 160.

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

**59.** The arguments of counsel heard at Bar before the trial judge were taken down in shorthand and transcribed and although they are not reprinted as part of this record, extracts from pages 50 and 51 of Mr. St. Laurent's argument, referred to by the trial judge, are reproduced in the Record in the factum filed by the present Respondents in the Court of King's Bench as follows:—

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

Vol. 15,  
p. 67 l. 24  
et seq.

"Le Juge: C'est sous l'item 'lumber business.'

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

RECORD.

“Le Juge : C’est sur ce point-là.

“Me St. Laurent, C.R. : C’est sur ce point-là. Nous avons allégué que “c’était \$165,112.78. Goodwill for the three mills, \$100,000. Goodwill est “une expression un peu malheureuse. Ce que nous voulions dire, c’est “‘système comme système en opération—’ one going value. Nous ne justifierons pas pleinement le \$165.112.78 mais nous le justifierons jusqu’à “concurrence d’environ \$115,000. Nous donnerons les détails du calcul. J’ai “ici ces détails, mais nous les mettrons dans le mémoire avec référence aux “pièces, etc., A part cela, il y a certainement une dépréciation dans nos propriétés forestières, et cette dépréciation se chiffre dans les \$77,800.

10

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

“Me St. Laurent, C.R. : Je l’ai mis dans le montant de \$115,000. C’est “une partie de ‘lumber business.’

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

**60.** Apparently, therefore, the judgment of the trial judge is based upon the statement of Appellant’s Counsel to the effect that for the alleged total destruction of the lumber industry at Farm Point the Appellant had proved that he was entitled to receive an indemnity of about (d’environ) \$115,000.

20

**61.** It is significant that this estimate of counsel upon which the judgment was based, apart entirely from being unjustified by the evidence, fell far short of being supported by the details which counsel stated would be given, for in a written factum later submitted to the trial judge by the Appellant appeared the following as quoted in the factum of the present Respondent in the Court of King’s Bench :—

“Value of lumber business as a going concern.

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

30

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

“\$54,725.00—depreciation of timber limits.

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

**62.** As the item of timber limits was made the subject of a separate award the promised “details” of the Appellant in his said 40



factum before the trial judge are thus apparently directed to justifying only the sum of \$57,514 instead of "about" \$115,000, mentioned orally by counsel and forming the basis of the judgment.

63. The Respondent submits that the Court of King's Bench properly found that there was no justification whatever for this award of \$115,000, based as it was upon a casual statement of counsel at Bar and predicated on total destruction of the industry; and that having reviewed the evidence, that Court was justified in fixing as the fair and just compensation for adverse effect to the lumber properties the sum of \$28,100.

Vol. 14,  
p. 4, l. 42.

64. The trial judge further allowed \$5,400 in respect of depreciation for timber limits. These limits are all unaffected by the water and the large sum claimed for them rested on the theory of destruction of the lumber business at Farm Point. The Court of King's Bench reduced this to \$1,800. allowing this sum not on the basis of depreciation of value as claimed, but because of inconvenience resulting to the Appellant in reaching some timber on the east side of the river in view of possibly changed ice conditions in the river resulting from the Respondent's works.

Vol. 14,  
p. 4, l. 33.

20 ITEM C--DAMAGE TO ELECTRIC PLANT AND DISTRIBUTION LINES.

65. The claim made under this head by the Appellant is for \$50,000 representing physical assets, and \$100,000 for goodwill. No evidence has been led on the item of goodwill and it has, to all intents and purposes, been abandoned.

Vol. 1,  
p. 42, l. 6.

66. The physical assets claimed for are:--

	Power House and draft tube	...	...	...	4,110.29	
	Penstock and saddles	...	...	...	3,650.00	
	Power House equipment	...	...	...	5,650.00	
30	31 miles of transmission lines with poles and transformers	...	...	...	36,589.71	

Vol. 3,  
p. 65.

67. In point of fact the only parts of this system affected by the water are about five miles of distribution line constructed on the highway from Farm Point down to Kirk's Ferry and the small power house itself which has already been pointed out as the white building adjacent to Meach Creek. At this power house the Appellant had a small turbine fed by water running down the hill behind through an iron penstock, which penstock also fed a water wheel operating the saw mill half way up the hill and what was left of the water came on down through the penstock to the power house turbine.

Ex. Book IV,  
D. 187.

## RECORD.

Vol. 11,  
p. 2, l. 38.

Vol. 11,  
p. 4, l. 38.

Vol. 6,  
p. 105, l. 20.  
Vol. 6,  
p. 105, l. 45 to  
p. 106, l. 10.  
Vol. 11,  
p. 75, l. 38.

Vol. 11,  
p. 72, l. 10.  
Vol. 11,  
p. 73, l. 27.  
Vol. 11,  
p. 73, l. 43.  
Vol. 11,  
p. 74, l. 1.

Vol. 11,  
p. 74, l. 13.

Vol. 11,  
p. 75, l. 6.

Vol. 6,  
p. 105, l. 27.

Vol. 4,  
pp. 7-11.

**68.** The following facts appear from the evidence :—

(a) The total head from the top of the hill to the tail water at the Creek was 74 feet and a water elevation of 321·5 as mentioned in the Act would reduce this head by  $7\frac{1}{2}$  feet, resulting in a 10% loss in the capacity of the power house at any given time according to the water available from the Creek above. This is admitted by Appellant's witness MacRostie. The effect is that the 40 horse power available at the ordinary minimum flow of 6 c.f.s. is reduced by 4·1 horse power at a tail water elevation of 321·5 in the Creek below. 10

(b) The ordinary minimum flow of the Creek is six cubic feet a second and this flow under a head of seventy-four feet would give 40 horse power, but the flow at times goes as low as 2 c.f.s.; this happened e.g. for three months in 1931. This would result in only thirteen horse power;

(c) To run at full capacity, the saw mill required 30 c.f.s., and the electric plant required a further 25 c.f.s. a total of 55 c.f.s. which is only available about one-third of the time.

(d) There were periods during the year when more than 40 horse power could be generated according to the amount of 20 water available, but only for about 30% of the year could the plant be operated at its full capacity of about 150 horse power;

(e) Under natural conditions, before the Respondents works were constructed, the water ordinarily came up to the power house floor every spring.

**69.** The Appellant made no claim for damage to his electric business until 1932, five years after the water was raised to its ultimate level, and then he demanded payment for the whole system, although he was serving practically all his original customers save those in the vicinity of Kirk's Ferry, about thirty in 30 number, who had moved away because their properties had been purchased by Respondents for their purposes.

**70.** In the years 1929 and 1930 inspections were made of this small plant of the Appellant by the Quebec Public Service Commission Engineers as a result of complaints from his customers and several orders were issued to Appellant by the Commission.

The first order (Exhibit D-5), made in September 1929, stated that the flow of the creek was not sufficient to run the water wheel and generator (for this admittedly the Respondents could in no way be responsible). It stated that the plant did not receive the atten- 40 tion it should and could not furnish proper service. It mentioned

that there was an effect on the operation by the backing up of the water in the tail race. This refers to the 10% reduction in head caused by the backing up of the water as a result of Respondents' works.

RECORD.

The next order (Exhibit D-145), made at the same time again refers to the inadequacy of the plant and the poor condition and maintenance of the distribution lines and to the necessity of the Appellant's purchasing adequate power.

Vol. 5,  
pp. 102-4.

10 The final order (Exhibit D-146), made in February, 1930, again referred to the disrepair and inadequacy of the system and stated that the power plant, which had not been used while power was being purchased, had again come into operation and was supplying all the energy to the system; a little repairing had been done to the distribution system which was in general in very bad condition.

Vol. 5,  
pp. 105-7.

71. The Appellant, in evidence in support of his claim in 1932, attempted to show that his difficulties as above outlined resulted from the flooding, but there is evidence that long before the water was raised the lack of water in the Creek made the supply of electricity inadequate and uncertain.

20 On this point the evidence of the Respondents' witness Ralph is as follows:—

Vol. 7,  
p. 269. l. 31.

“Q. I take it you have been in that locality a good deal in the last “number of years?

“A. Yes, I have been on the Gatineau ever since I have worked for “the Gatineau Power Company. I have been on the Gatineau certainly three “times a week during the last two years, and I lived there the first two years. “I lived at Cascades the first fourteen months.

“Q. Have you had occasion to judge of the lighting capabilities of that “plant from your residence there?

30 “Witness: In what respect?

“Counsel: As a resident. The type of service it has been giving?

“A. When I first went on to the railway, and highway work I boarded “at Kirk's Ferry, a point four miles below Cascades. We worked all day “of course, on our survey work, and every night plotted up our notes. The “lights went out every night at ten o'clock for three months, as long as I was “there, and for a period of at least two weeks, it may have been longer, we “had no lights at all. I bought lamps for my men.

“Q. In what year was that?

“A. That was in January, February and March of 1926.

RECORD

“Q. That was, of course, long before there was any rise in the water?

“A. Oh, yes. We were doing our preliminary work. That was one  
“year before any water came up.”

And again (p.270 l.31.):

“Q. Can you account for that in any way?

“A. Lack of water to run his power house, I presume he would save  
“what water he could all day, and by ten o'clock it was all gone.”

Vol. 11,  
pp. 109-114.

Evidence on this point was also given by Dr. Geggie a physician 10  
in the district.

Further, the Appellant, when by reason of the lack of water and inadequacy of his plant, he was ordered by the Public Service Commission to secure a supply of power elsewhere properly to serve his customers, purchased 80 horse power as his requirement, which indicates that the system must normally have lacked about eighty horse power, and consequently the loss of 10% of his original dependable output of 40 horse power was not the reason for the inadequacy of the plant.

**72.** As Appellant kept no books, he could give no accurate estimate of his earnings from the electric business. The unconvincing character of his own evidence in this regard is seen from 20  
the following:—

Vol. 9,  
p. 33, l. 38.

“Q. Did you make any money in 1925?

“A. I do not know. When you speak of the electric system, I do not  
“know.

“Q. Did you make any money in 1924?

“A. I do not know.”

Vol. 5,  
p. 35.

Vol. 9,  
p. 14.

Vol. 9,  
p. 26 *et seq.*

Conflicting evidence resulted from the production by the Appellant of Exhibit D-122 A, purporting to be a list of his customers before the flooding, three hundred and eight in number. It was found that about forty of these were not paying him anything for service 30  
and approximately twenty further names were duplicated on the excuse that they had more than one meter.

Vol. 9,  
p. 314.

Vol. 9,  
p. 190.

**73.** In so far as it may bear upon the claim for the whole system, the matter is in the Respondents' submission resolved by the Appellant's own evidence that he still had 238 customers two years after the flooding, and by the admitted fact that all parts of the distribution system were at the time of the trial still operating as before the flooding, save only the Kirk's Ferry section already mentioned.

**74.** The line to Kirk's Ferry was constructed on the public highway, for the submersion of which the Respondents had authority from the Government Department of Roads, and before the submersion of the road the Respondents, with the acquiescence of the Bell Telephone Company, removed all the lines of that Company from the road and re-located them elsewhere at the Respondents' expense, and by letter (Exhibit D-121 A) asked the Appellant for instructions as to the disposal of his lines, but the Appellant did not even reply to the letter.

Vol. 4,  
p. 222.

Vol. 5,  
p. 34.

10 **75.** As to the indemnity for this Kirk's Ferry line there is very little difference between the parties.

The Respondents' witness Parker values it at from \$4,100 to \$4,300.

Vol. 11,  
p. 25.

Mr. Beique at \$4,576.

Vol. 12,  
p. 234.

The Appellant's witness MacRostie at \$6,000.

Vol. 9,  
p. 189, l. 43.

As this Kirk's Ferry line was about five miles long the value would be about \$5,900 even on the mileage basis referred to in the Appellant's Exhibit P. 65.

Vol. 3,  
p. 5.

20 **76.** As to the damage occasioned by loss of 10% of power output, the Respondents' witness Mr. Simpson testified that Appellant would be properly compensated by the payment of a capital sum of \$3,200 which would yield sufficient to pay the yearly cost of four horse power even at the high figure of \$48 a horse power per year.

Vol. 11,  
pp. 83-4.

Mr. Beique testified to \$8,800 on the basis of an outside maximum of 12 horse power. In the light of the fact that the loss of the dependable minimum flow of the Creek was only about 4.1 horse power, such an indemnity would leave Appellant better off than he was before.

Vol. 12,  
p. 233, l. 35.

30 **77.** Mr. Simpson testified to \$1,450 as being the proper indemnity for re-adjustment to the power house in order to meet the changed conditions, and produced Exhibit D-153 in support of his estimate. He is corroborated by Messrs. Lefebvre and Boisvert, both Government engineers. Mr. Scovil testified that no additional loss other than the 10% loss of capacity would result from power house re-adjustments and this is confirmed by the Appellant's witness Mr. MacRostie.

Vol. 11,  
p. 82.

Vol. 5,  
p. 136.

Vol. 11,  
p. 105.

Vol. 11,  
p. 5.

Vol. 9,  
p. 187.

The Appellant's witness Mr. Robertson stated that the matter is not important.

Vol. 10,  
p. 212.

RECORD.

Vol. 13,  
p. 159, l. 43,  
et seq.

**78.** The judgment of the trial judge on the electric business item is as follows:—

“Les montants des autres items mentionnés à l’allegation 27 de la “déclaration amendée, ont été résumés a la page 113 du factum du demandeur “comme suit :

“Value of the hydro-electric plant and distribution system \$80,000 less “\$9,237.10 (voir la dite page 113 du factum) ;

“Etant donne la preuve contradictoire, la Cour est disposée à accorder au “demandeur la somme de \$60,000 comme était une juste et equitable com- 10  
“pensation pour la perte subie a tout le système hydro-electric ;”

Again, as in the lumber item the trial judge seems rather to have passed over the evidence and relied on the statements of the Appellant’s Counsel :

**79.** As the distribution system was at the time of the trial being carried on by the Appellant in all its parts and with all its customers, save those parts and customers appurtenant to the Kirk’s Ferry section, it is obvious why the Appellant did not attempt to prove anything under the item of \$100,000 goodwill, claimed in his action, but has relied upon a claim for all the physical assets to the amount of \$50,000 set up in his action and it is signi- 20  
ficant that the judgment rendered in his favour by the trial judge was for a sum of \$60,000, which is *ultra petita* to the extent of \$10,000.

Indeed the Appellant has not justified the \$50,000 claim made in his declaration, for his witness Mr. MacRostie states that his total fair value for Exhibit P-65, which includes all the physical assets, is \$33,127.60, and he later by Exhibit P-122 reduces this to \$25,427.60 by deduction of salvage.

The Auditor’s statement for 1926, Exhibit D-142, compiled on information supplied by the Appellant himself, states the value of the electric plant and power house to be \$18,750 after allowance for 30  
depreciation.

**80.** On this item of the Appellant’s claim, the Court of King’s Bench, basing itself upon the evidence, has allowed the Appellant an indemnity of \$16,000 and the Respondents submit that this is a generous compensation for any adverse effect caused by the Respon-  
dents’ works.

**81.** The summarized figures making up the total indemnity of \$82,000 granted by the Court of King’s Bench to the Appellant for all items of indemnity are as follows:—

Vol. 9,  
p. 198.  
Vol. 3,  
p. 5.

Vol. 10,  
p. 240.  
Vol. 3,  
p. 143.

Vol. 5,  
p. 95. l. 25.

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

Cascades property	...	...	...	...	35,000.00	RECORD.
Lumber property	...	...	...	...	28,100.00	Vol. 14,
Electric system	...	...	...	...	16,000.00	p. 57.
Depreciation of Crown Lease	...	...	...	...	1,800.00	
Value of gravel pit	...	...	...	...	100.00	
Gravel loss	...	...	...	...	1,000.00	
					Total	\$82,000.00

10 The two gravel items last mentioned are not in question here.

82. The majority of the judges of the Court of King's Bench maintained the judgment of the trial judge on the item of fees and disbursements only reducing it by approximately \$1,500 representing errors in calculation. The amount of this item remains in the Court of King's Bench judgment at \$75,493.87, although two of the judges of that Court were of the opinion that it should be reduced by approximately \$6,000.

Vol. 14,  
pp. 11, 62.

20 Although the Respondents submit that this sum is in no way warranted by the circumstances, no cross-appeal has been made against it in view of the concurrent findings of both Courts below.

83. The Respondents humbly submit that the unanimous judgment of the Court of King's Bench should be maintained for the following amongst other

**REASONS.**

- 1 Because the indemnity granted by the trial judge was in error in law and in fact and in no way justified by the evidence.
2. Because it was the duty of the Court of King's Bench to revise and re-form the judgment of the trial judge in the light of the special Act and on the basis of the evidence led ;
3. Because the judgment of the Court of King's Bench is amply justified by the evidence;
4. Because the indemnity given by the Court of King's Bench is fair and just and constitutes generous compensation to the Appellant.

30

D. N. PRITT.

T. R. KER.

**In the Privy Council.**

**ON APPEAL**

FROM THE COURT OF KING'S BENCH FOR  
THE PROVINCE OF QUEBEC (Appeal side)

BETWEEN :—

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

— AND —

GATINEAU POWER COMPANY  
(Defendants) *Respondents.*

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CASE FOR THE RESPONDENTS.

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LAWRENCE JONES & Co.,  
Lloyd's Building,  
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*Solicitors for the Respondents.*