

Freeman T. Cross - - - - - *Appellant*

v.

Gatineau Power Company - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR THE PROVINCE OF
QUEBEC (APPEAL SIDE)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1936

Present at the Hearing :

LORD BLANESBURGH.

LORD MAUGHAM.

LORD ROCHE.

[*Delivered by* LORD ROCHE.]

This is an appeal from two judgments of the Court of King's Bench for the Province of Quebec dated 28th December, 1934, reducing the amount of compensation awarded to the appellant in an action which was heard by Mr. Justice de Lorimier in the Superior Court and in which he pronounced judgment on 28th June, 1933.

The compensation in question is compensation for the properties and rights of the appellant taken for, or affected by, the respondents' works in connection with power development on the Gatineau River. The appellant was awarded \$348,481.22 by the Superior Court but on appeal to the King's Bench Division that sum was reduced to \$157,493.89.

The relationship of the parties out of which the litigation arose was as follows :—

The appellant, a lumberman and property owner, was, at the material time, possessed of lands and buildings on the Gatineau River, which is a tributary of the Ottawa River. These lands which were situate above Chelsea Falls on the Gatineau River included part of the bed of the river itself at a series of rapids or falls called Cascades. The buildings included a saw mill used for the appellant's timber business and a power house and plant for the production and distribution of electricity, which were both of them situate at a place on the Gatineau River known as Farm Point and were both worked by water power from Meach.

Creek, a stream flowing into the Gatineau River. These properties were acquired and these businesses were started and developed by the appellant in the period between 1903 and 1926. In the latter year, predecessors in title of the respondents, the Canadian International Paper Company, formulated a scheme for the development of hydro-electric power on the Gatineau River, and on 21st May, 1926, the plans for such development were approved by Order in Council. Later in the year 1926, the respondents took over the scheme as assignees of the Paper Company and proceeded with the development. Between the end of 1926 and the date when the present action was begun, that is to say 2nd March, 1931, a contest was in progress between the parties conducted in or before the Quebec Public Service Commission with appeals to the King's Bench Division and the Supreme Court of Canada. It is unnecessary to consider further the course of this contest or the rights debated therein. It is sufficient to say that the respondents were attempting to expropriate for the purposes of their scheme a number of the appellant's properties, and that the appellant was resisting these attempts. Meanwhile, however, the respondents in 1927 erected the dam at Chelsea Falls, which was the feature in their scheme most materially affecting the appellant, and when the dam was complete, the river was thereby raised, and a good deal of the appellant's property, both at Cascades, Farm Point and elsewhere, was submerged and others of his properties were affected. On 2nd March, 1931, the appellant brought the present action praying for an order against the respondents for the lowering of the water to the natural level, unless they preferred to pay a named sum for compensation. Questions of title were raised in the action, as well as other questions of law and fact, and the hearing took place between September, 1931, and January, 1932, when judgment was reserved. But before it was given, the situation was radically changed by the passing of a special Act of the Legislature of Quebec (No. 128) which was assented to on 19th February, 1932. The terms of the Act are as follows:—

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.
Proviso.

"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.

Compensation.

"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.

Date of valuation.

"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 disbursement, fees and costs incurred in such pending action and in connection with the passing of the present Act.

Costs, etc.

"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.

Award by Court.

"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.

Matters to be determined by Court.

"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.

Effect of payment.

"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.

Effect of judgment.

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

Coming into force.

As has been already stated, the date of the Order in Council referred to in clause 3 of the Act was 21st May, 1926, and accordingly that became and is the date in reference to which the valuation had to be made.

After the pleadings in the action had been amended or supplemented as contemplated by the Act, the hearing of the action, thus changed in its nature, was resumed and continued throughout the months of October and November, 1932; judgment was reserved on 24th November, 1932, and delivered on 28th June, 1933.

The main items and amounts going to make up the sum of \$348,481 adjudged by the Judge of the Superior Court to be due, were four in number, and were as follows:—

	\$
Cascades water power	90,000
Lumber business	115,000
Hydro-electric system	60,000
Disbursements, fees, etc., under clause 4 of the Act	76,981

There were a few other smaller items which were unimportant, and are not now in question. Interest was also awarded but no question arises as to that. The judgment of Mr. Justice de Lorimier further, and in compliance with clause 6 of the Act, contained an order detailing the properties and their extent to be vested in the respondents.

From this judgment the respondents appealed to the Court of King's Bench, and on 28th December, 1934 the judgments now appealed from were pronounced. The result in connection with the four main items above referred to was as follows:—

An adjustment was made in the amount for disbursements and fees, whereby it was reduced from \$76,981 to \$75,493. No question now arises as to this item.

The compensation was very substantially reduced thus:—

As to Cascades ...	from \$90,000 to \$35,000
As to the hydro- electric system ...	from \$60,000 to \$16,000
As to the lumber business ...	from \$115,000 to \$28,100

The judgment of the King's Bench also made alterations in the form of the order as to the vesting of properties in the respondents; but their Lordships are satisfied that there was no real difference of opinion between the two Courts as to the construction of the vesting clause in the Act or as to the powers of the Court thereunder, or as to the order intended to be made. The alterations made by the judgment of the King's Bench in relation to the property which was to be vested in the respondents were directed to form rather than to substance, and to the removal of uncertainties that might be thought to arise on the wording of the judgment below. The meaning and effect of the language of the Act in its bearing upon the heads of claim to be considered will be discussed later in this judgment when those heads of claim are under consideration, but certain general observations fall to be made. The Act was a very special Act to deal with

an exceptional situation. Works had been carried out at great cost and they submerged or affected properties of the appellant. It was sought in the action to obtain an order undoing what had been done. The Act took it out of the power of the Court to make such an order, and it was natural that in this situation the Court well conversant already with the facts should be entrusted with wide discretionary powers as to the compensation to be awarded and as to the lands to be vested in the respondents. Their Lordships think that in both matters, that is to say compensation and vesting, a wide discretion of that nature was granted by the terms of the Act, and as regards vesting, they think that the Act did not require the Court to vest in the respondents all lands or properties affected, if in its discretion, it thought another determination more proper. It is also to be observed that a right of appeal was contemplated and preserved by the Act.

The appeal against the judgment of the King's Bench is founded on the contention that there was no sufficient ground for interference by the appellate court with the assessment of amount by the trial judge, and that the trial judge proceeded upon proper legal principles and assessed an amount that was justified by the facts and not excessive in amount.

The arguments before this Board included some discussion of the principles applicable to a consideration upon appeal of determinations as to amount by a trial judge. There seems to their Lordships to be no uncertainty or difficulty as to those principles themselves, though their application to complex facts is far from easy. The principles were admirably stated in this case by Letourneau J. who, amongst the judges of the King's Bench, gave the most detailed reasons for the judgment. The learned judge used the following language:—

“ 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 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 à ne conclure autrement que ne l'a fait le savant juge de première instance—je le répète—, que si nous sommes convaincus d'une erreur quant aux montants qu'il a fixés, et que d'autres montants sont plus sûrement conformes à la preuve offerte.

This statement of the principles accords in all material respects with the principles frequently stated with authority, as for example, by this Board in *Ruddy v. Toronto Eastern Railway Company Limited*, 86 L.J. P.C. 95, and by the

Court of Appeal in England in *Flint v. Lovell* [1935] 1 K.B. 354 and by the Supreme Court of Canada in *Cossette v. Dun* 18 Canada S.C. 222. Their Lordships, however, observe that in the present case, as in many other cases, the differences of view between the trial and the appellate courts, though resulting in a difference of amount, really arose from differences of view on questions of fact and law preliminary to the question of amount, and such questions of fact and law can be examined and decided upon appeal with less difficulty than can such mere questions of amount as are dependent upon estimation or opinion.

Such being the principles applicable to this appeal, the real question is to what extent have they been correctly applied, and to what extent is the very drastic revision by the King's Bench of the decision of the trial judge justified on the law and facts of the case. To solve this question the attention of their Lordships has been called to a very considerable amount of the evidence and documents contained in the 14 volumes constituting the record in this appeal. Counsel on both sides have been both skilful and helpful in eliminating the unessential, but in the end the argument has been of necessity protracted. It is neither necessary nor proper that the evidence should now be reviewed or discussed at any length, and their Lordships propose to confine themselves to as compendious a statement as possible of such matters as lead them to prefer the one view or the other in respect of the three heads of claim now remaining in question. Counsel for both parties preferred a request to the Board that in the event of it appearing upon any head that some other measure of amount than that adopted by either Court was more proper to be adopted, their Lordships should not remit the matter for reconsideration and for re-assessment of compensation, but should themselves fix the compensation and so avoid further delay and expense. Having regard to the conclusions which their Lordships have reached on the several heads of claim and which will now be explained, it will appear that neither remission nor re-assessment is in their view proper or necessary.

The first head of claim to be considered is for the land and for the water power at the Cascades Falls.

The learned trial judge purported to found his judgment on the principles laid down by this Board in the case of *Cedars Rapids Manufacturing and Power Company v. Lacoste*, [1914] A.C. p. 569, at p. 576, citing the language of the judgment delivered by Lord Dunedin to the following effect:—

“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.”

The learned Judge was presented with a very large amount of evidence as to the value of these water rights and it need hardly be said that it was of a very conflicting character. It was put as low by some witnesses for the respondents as a few thousand dollars and as high by some witnesses for the appellant as six hundred thousand dollars. The finding of the judge as to their value would appear to be amply justified by evidence both oral and documentary unless certain criticisms directed by the Court of King's Bench to the judgment and to the evidence relied upon therein are sustainable.

The main criticisms may be considered under three heads:—

First it was said that if the potentiality of Cascades for the production of power was properly estimated and at a proper price the figure of \$35,000 would result instead of the figure of \$90,000. But though Letourneau J. in his very careful and detailed judgment assumed in estimating the power of the falls under the control of the appellant, a fact which the respondents now concede to be correct, namely 7.6 feet of fall, it is not clear what rate of flow the learned judge took for his calculation. It is now conceded by the respondents that 3,000 cubic feet per second should be taken. Further, the learned judge appears to have formed the mistaken impression that 18 to 20 dollars per horse power was the capital price to be used for the calculation, but it is conceded that this had not been given by the witnesses as a capital price but as an annual price for current sold in large quantities. This mistaken impression as to price appears in the notes of other judges and, as their Lordships think, must be corrected by the substitution of some figure such as \$30 to represent capital value. Hall J. while agreeing with a result of \$35,000 only does so by using factors different from those which are now conceded by the respondents to be correct. That is to say he bases himself on a fall of 4 feet and apparently on a flow of 1,900 feet per second. Similarly Walsh J. though he found that it was established beyond doubt that the flow of the river was 3,000 cubic feet per second, took the fall as being of 5 feet only, that is to say 50 per cent. less than the 7.6 feet fall now agreed upon. If the necessary corrections are made in the factors so used by these learned judges, the resulting total figures will nearly approach the figure arrived at by the trial judge.

Secondly, there was a transaction between the respondents and the Canada Cement Company as owner of a lower portion of the Cascades falls involving the transfer by the latter to the former of the water powers arising from such ownership. Inasmuch as these water powers were of the same nature and at the same place as those now to be valued, this transaction is of obvious importance as an illustration of market value, and it was considered and discussed as such by Letourneau J. who thought that but for one fact this transaction would have guided the Court. The

date of the transaction was July 10th, 1926, and very close, therefore, to the date material to this action. It consisted in the transfer to the respondents of certain properties of the Cement Company, including the bed of the river, for use in connection with the hydro-electric development of the respondents by means of the Chelsea Dam. The consideration for the transfer was expressed to be the delivery to the Canada Cement Company of 3,000 electrical horse power per annum for a minimum term of 15 years at a price of 10 dollars per horse power. The evidence was that as compared with this price of 10 dollars the prevailing prices were 40 dollars or more to a small consumer such as the appellant—18 to 20 dollars to large consumers and a price of 15 dollars to the Ontario-Hydro-Electric Commission. The respondents' principal witness put the average charge to large consumers at 14 dollars per horse power. A prospectus of the respondent company bearing date of July 21st, 1926, said that over 90 per cent. of the power to be developed by the schemes then in contemplation, including the Chelsea scheme, was contracted to be sold to specified large customers one of whom was the Canada Cement Company, and that the balance was expected to be readily absorbed in the adjacent power markets. There was evidence that at certain times there was a surplus load of electricity, and that when this happened at irregular intervals, it was disposed of very cheaply for steam drying of pulp wood to consumers who could use such irregular supply when it was available at a price as low as 7 or 8 dollars per horse power. But this fact would not seem to justify any inference such as appears to have been drawn by Letourneau J. Moreover even if, contrary to their Lordships' view, the evidence justified such a conclusion, the test of what the Canada Cement Company got for their interest in Cascades is to be measured not by the cost of the power to the respondents, but by the difference between what was the market or ordinary price for power and what the Canada Cement Company were to pay by reason of their agreement. That difference is indubitably not less than \$4 per horse power and allowing for a discount on that figure because the consideration was taken in kind instead of in cash and adjusting the figures to meet the difference in the amount of water power provided by the appellant as compared with that provided by the Canada Cement Company, the resulting figure certainly supports the award of the trial judge.

Thirdly, a transaction of the appellant himself on the Gatineau River much higher up the river and much earlier in date was thought to justify the reduction of the trial judge's figure. In 1917 the appellant acquired as agent for the Hull Electric Company water powers at the Paugan Falls on the Gatineau River, and it was said that the prices worked out at \$3,333 per foot of fall. But apart from a question of difference of locality and other circumstances,

the lapse of time between 1917 and 1926 is of no small importance. There was evidence of a marked increase of electrical development proceeding continuously as time went on, and there was a special fact as to the Paugan Falls which was of considerable importance. In 1926 the respondents acquired the business of the Hull Electric Company and with it the Paugan Water Power at a very large price of over \$4,000,000. No specific part of the purchase price was shown to be allocated to the Paugan Water Power, but the appellant adduced some evidence to show that the value of the other assets of the vendor Company accounted for so small a part of the purchase price as to justify the allocation of a very large sum to the Paugan Water Power. This evidence was inexact, and quite insufficient to warrant acceptance of the very high figures for Paugan contended for by the appellant's witnesses, but it was of such a nature as to call for answer by evidence on the point on the part of the respondents. No such answer was made, and in these circumstances, an estimation of the value of the Cascades fall in 1926 by the values of the Paugan fall in 1917 is both unsafe and unsatisfactory.

For these reasons as to this head of claim the criticisms upon the judgment of the Superior Court seem to their Lordships not to be well founded, and they are of opinion that there were not and are not any sufficient reasons shown for impeaching its assessment of the compensation for matters under this head at the sum of \$90,000.

As to the appellant's lumber business: the very wide divergence of view between the Superior Court and the Court of King's Bench in the estimation of the appellant's loss upon this head arises not solely or principally from different estimations of values and amounts but rather from a broad difference upon an essential and vital question of fact. This question of fact in its turn depends, to some extent, on the true construction and effect of the statute under which this assessment of compensation is made. The matter stands thus: the trial judge in assessing the compensation at the large sum of \$115,000 avowedly did so on the basis of the claim as finally presented by the claimant's Counsel, and Mr. St. Laurent frankly admitted that such claim was formulated and was supportable only upon one view of the facts, namely, that the claimant's timber business at and near Farm Point was totally destroyed by the respondents' works. The judges of the Court of King's Bench examined this fundamental question with great care and decided it against the appellant thus reversing the finding of the trial judge. The question was one of economic fact not dependent to any material extent on the demeanour or credibility of witnesses and assisted by an exhaustive review of the facts by Counsel, their Lordships have arrived at the conclusion that the Court of King's Bench was right in holding that the loss in respect of the timber business was partial and not

total. In arriving at their conclusion the appellate judges agreed with the trial judge in vesting the appellant's property in the respondents up to the 321·5 contour line though holding—in their Lordships' opinion rightly—that under the statute they were not bound to do so but in their discretion could have vested less. It follows from this conclusion that they certainly were not bound to vest anything beyond that line as for example to vest property above that line but within the area of possible seepage that is to say up to the 324·5 contour line. That a greater extent of land was not included in the vesting order was not really complained of on behalf of the appellant, and in any case, their Lordships are of the opinion that both Courts acted within the discretion allowed to them by the statute in fixing the line at the 321·5 contour. It was, however, not in dispute that compensation had to be paid for any affection of property above that line and the question debated was as to the extent of injury done by submersion or other affection of property used in the timber business. It was common ground that the saw mill itself was above both the 321·5 and 324·5 contour lines and that substantially the elements in the appellant's business—and those important ones—which were interfered with were the lumber piling ground and the railway siding. It was said that the submersion of parts of these elements rendered the carrying on of the business to a profit impossible. Against this contention was the fact that after the water had been raised to 318 and 319 feet, the appellant did a very large lumber business if not a larger business than he had done before at and in connection with this mill at Farm Point. A further rise to 321·5 feet would submerge or affect a considerably larger area, but nevertheless much ground was left and on a review of the facts the appellate judges held that a sufficient piling ground could be provided at an expense which they assessed and allowed as compensation. Their Lordships agree with this conclusion. It was said that it was wrong because it took into account or was dependent upon a view taken by the judges as to what were called remedial works on ground vested in the respondents. It does not appear that the conclusion was dependent upon such a view. On the contrary the assessment purported to be such as to cover provision of a piling ground apart from such remedial works. What was said by the judges was that remedial works would be the least expensive and were open to the appellant under an offer from the respondents. The offer is contained in the record (Vol. XIII, p. 149) and was in substance to grant to the appellant land or a servitude over land vested in the respondents for the restoration of the piling ground and railway siding. It was contended for the appellant that to take such an offer into account was not permissible in law. Their Lordships do not agree with this contention. It is no doubt well settled that if undertakers are granted permission to acquire property on paying compensation for it they cannot offer remedial works instead.

But no such question seems to arise here. The appellant complains that property not submerged or physically affected by the undertaking and not to be taken by the respondents is rendered useless because some others of his properties were taken. It is an admissible answer that other lands or facilities can be acquired at an expense the undertakers will provide as compensation and it seems to their Lordships that no principle of law or good sense is violated if amongst the suitable lands consideration is given to lands taken and paid for by the undertakers and over which they are willing to grant such rights as will prevent the anticipated injury from accruing to the property owner. In these circumstances, the judges of the Court of King's Bench seem to their Lordships to have proceeded upon principles which are correct in law to a conclusion which was correct in fact.

As to the amount of compensation assessed by the Court of King's Bench, the matter stands thus: the trial judge having proceeded to his assessment upon a finding of fact which has now been held to have been rightly disturbed by the appellate court, and not having considered or assessed compensation on the alternative basis of a partial loss it fell to the Court of King's Bench to make such an assessment for the first time. While not denying the force of the arguments of Counsel for the appellant directed to showing that the assessment was too low it is clear that these same arguments were addressed to and considered by the Court of King's Bench and their Lordships do not feel themselves either entitled or disposed to make a new or different assessment. The figure of \$28,100 allowed by the Court of King's Bench in respect of this head of claim must therefore stand.

One further point may be mentioned. The notes of the judges of the Court of King's Bench refer to the respondents' offer of land or of servitudes above referred to as if it would form part of the judgment but no doubt by inadvertence it does not seem to find a place in the formal judgment itself. Their Lordships think that the appellant is entitled to have the judgment amended in this respect so as to record that the rights so offered are available to the appellant if he desires to make use of them. The precise terms of the amendment of the judgment can doubtless be agreed between Counsel for the parties and if necessary, there should be liberty to apply to the Court of King's Bench on the matter.

As to the hydro-electric system: Here also the difference between the two Courts below arose from a difference in their conclusions of fact similar to that just discussed in connection with the lumber business. The judge of the Superior Court held that there was a total loss or destruction of the business. The judges of the King's Bench held to the contrary and that the loss was partial only. Hence the difference in the two assessments of amount. But here the similarity between this head of claim and the head relating to the lumber business ends. The facts were very different

here. The power house was actually on the 321.5 contour line and a small part of it was included in the property vested in the respondents while the whole of it was within the 3 foot seepage area. In other words, the power house was liable to be awash. The outflow of water power was so affected by the raising of the water outside that the power was diminished by at least 10 per cent. Part of the distribution system and some of the consumers' properties were submerged or affected and a substantial part of the business was wiped out. The result was that to carry on the business at all the appellant eventually took a supply of power from the respondents at an annual cost of about \$45 per horse power but its distribution to a diminished body of consumers left no margin of profit. There is ample evidence to warrant the conclusion of the trial judge with which their Lordships agree that in these circumstances the life of the business as a profitable concern was terminated by the respondents' scheme. In this view of the facts it is unnecessary to discuss further the vesting order in its operation upon the power house. Theoretically a line of vesting passing through a building does not seem very appropriate, but practically so far as the shell of the power house can be of value to anyone it is likely to be of more use to the appellant than to the respondents and no real complaint is made by the appellant in this regard. Nor is it necessary to discuss the question whether the reasoning of the Court of King's Bench does not in respect of the power house impinge upon the principle that remedial measures on lands to be taken are not a proper substitute for compensation. In this case their Lordships do not agree with the view that any such measures would be effectual to save the business. As to the question of amount, the Court of King's Bench did not as a Court purport to assess damages on the alternative basis of a total loss, though one judge, Hall J. mentioned a figure of \$25,000 as sufficient even if this basis were the correct one. But there was clearly a difference of view between the two Courts as to what was the extent and value of the appellant's business before the respondents came on the scene. In this matter, which, in the absence of any system of book-keeping in the appellant's business, depended very largely on the credibility of the appellant himself and the large body of witnesses called from amongst his customers, the trial judge was in a much more favourable position than any appellate court for arriving at a true conclusion. It is clear from what he said and did that the trial judge accepted the evidence of the appellant and his witnesses. In these circumstances their Lordships with regard to this assessment by the trial judge take the same view as they expressed with regard to the assessment by the King's Bench of the injury to the lumber business, and they are of the opinion that the reduction of the figure arrived at by the judge of the Superior Court was not justified and that his judgment upon this point should be restored.

The result of the above conclusions on the question of amount may be summarised as follows :—

As to Cascades : The order of the Court of King's Bench is to be varied by restoring the figure of \$90,000 fixed by the Superior Court.

As to the lumber business : The order of the King's Bench fixing the figure of \$28,100 is to stand.

As to the hydro-electric system : The order of the Court of King's Bench is to be varied by restoring the figure of \$60,000 fixed by the Superior Court.

It is also open to the appellant if he so desires to have the judgment amended so as to embody the respondents' offer above referred to.

There remains the question of costs. Their Lordships think that the proper order is as follows:—

The appellant in accordance with the order of both courts below will have his costs of the proceedings in the Superior Court.

As to the proceedings before the Court of King's Bench : treating the order of that Court as being that which, it has been held by this Board, it should have been, the respondents had to proceed in that Court to secure an alteration of the judgment below and that alteration has been sustained here; but nevertheless the respondents have in the result failed as to such large and important matters in issue in the Court of King's Bench that, in their Lordships' view, each party should bear their own costs there.

As to the costs here: To avoid the difficult and almost impossible task of taxation of costs of the separate issues, their Lordships think that the proper order is that the respondents pay to the appellant two-thirds of his costs of the appeal to this Board.

Their Lordships accordingly hold that the appeal should be allowed and the judgment of the Court of King's Bench varied to the extent and in the manner above indicated and on the terms as to costs above set out, and they will humbly advise His Majesty accordingly.

In the Privy Council.

FREEMAN T. CROSS

v.

GATINEAU POWER COMPANY

DELIVERED BY LORD ROCHE

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