Privy Council Appeal Nos. 147 *and* 148 *of* 1927.

The Inglewood Pulp and Paper Company, Limited - - - *Appellants*

v.

The New Brunswick Electric Power Commission - - - *Respondents*

The New Brunswick Electric Power Commission - - - *Appellants*

v.

The Inglewood Pulp and Paper Company, Limited - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE SUPREME COURT OF NEW BRUNSWICK.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. DELIVERED THE 20TH JULY, 1928.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT SUMNER.
LORD WARRINGTON OF CLYFFE.
LORD ATKIN.
CHIEF JUSTICE ANGLIN.

Delivered by LORD WARRINGTON OF CLYFFE.]

This is an appeal from an order of the Appeal Division of the Supreme Court of New Brunswick, dated the 22nd April, 1927, varying in certain particulars, but otherwise affirming an award of Le Blanc, J., sitting as an arbitrator under the New Brunswick Electric Power Act, 1920 (10 Geo. V, c. 53).

There is also before the Board a cross appeal (brought by leave) against so much of the order of the Court of Appeal as varied the award in the appellants' favour and against that part of the same order which directed the respondents to pay interest on the principal sum awarded.

The award was made on a claim by the appellants for compensation in respect of certain lands expropriated by the respondents for the purpose of their statutory undertaking.

The respondents are virtually a Department of the Province of New Brunswick and were incorporated by the Act above referred to for the purpose of constructing, maintaining and operating works, machinery and plant for generating electrical energy from (amongst other things) water power and for transmitting the same. They were given extensive powers of expropriation, and it is not disputed that such powers were validly exercised in the present case.

With regard to compensation, it was provided that a notice specifying generally the property taken, and signed as directed by the Act, should be filed in the office of the Registrar of Deeds for the county in which the property is situate, and such property should thereupon become and remain vested in the Commission, and after the filing of such notice, a notice should be served upon the owner of the property which should contain (*a*) a designation of the matter or thing so to be taken sufficient to identify the same, and (*b*) a declaration of willingness to pay some certain sum as compensation for such matter or thing so to be taken. This notice was to be accompanied by the certificate of a sworn surveyor or civil engineer disinterested in the matter to the effect (amongst other things) that he knows the land, matter or thing taken and the amount of damage likely to arise from the exercise of the powers, and that the sum offered is fair compensation for the land taken and for the damages aforesaid.

It was further provided that, in default of acceptance of the sum offered, within the time fixed by the Act, the Commission might, in such a case as the present, apply for the assessment of damages to a Judge of the Supreme Court, and upon the application being made the Judge should by order designate himself the sole arbitrator, and the Judge so designated should thereupon become and be the sole arbitrator for determining the compensation to be paid.

It was expressly enacted that if the sum awarded should not be greater than that offered, the costs of the arbitration should be borne by the owner.

An appeal was allowed upon any question of law or fact to the Appeal Division of the Supreme Court, and it was provided that upon the hearing of the appeal, the Supreme Court, if the question were one of fact, should decide the same upon the evidence taken before the arbitrator as in the case of original jurisdiction.

The Musquash River, which flows into the Bay of Fundy, about 17 miles S.W. of the city of St. John, consists of two branches, the east branch and the west branch, which unite about seven miles above the river's mouth. Each branch in its course passes through some lakes, of which the principal is the Alva Lake, on the east branch.

The lands of the appellants expropriated by the respondents are part of a large area of wild forest land purchased by the appellants in or about the year 1901. The area was used by the appellants for lumbering purposes, and had no agricultural value. In the appellants' time the saw mills were driven by steam power, but there were upon the property certain old water-power saw mills and several dams had in former times been constructed, partly for the purpose of water storage in connection with these mills, and partly as driving dams to float the logs to the mills. Some of these dams, or what remained of them, were in existence when the property was taken over by the respondents. All but two were much dilapidated.

In 1903, a disastrous fire occurred which destroyed nearly all the timber, and there have been several fires since. The result is that in 1920, when possession of the expropriated land was first taken by the respondents, and for many years previously, the land had ceased to be used for the only purpose for which it was fitted. It is estimated that the property would not again become of value for lumbering purposes for at least 50 years and probably more.

The entire area consists of about 35,000 acres; the portion expropriated consists of 8,364·94 acres, and is in the main made up of the beds of the river and its tributaries and comparatively narrow strips of land on their banks. The whole of Lake Alva and the land on its shores is included. These portions are severed from the rest of the area, which thus loses such facilities for water transport as it previously enjoyed. The owners are also deprived of the fishing in the rivers and lakes included in the expropriated portion.

Pursuant to the provisions of the above-mentioned Act, the respondents obtained the certificate of Mr. G. G. Murdoch, a sworn surveyor and civil engineer, disinterested in the matter. The amount stated by him to be in his opinion fair compensation for the land to be taken and for damages was $59,003·56, made up of the following items:—

8,364·94 acres at $2·50 per acre	$20,912·33
10 per cent. forcible taking	2,091·23
Standing timber estimated 200,000 sq. ft. at $5·00 a thousand	1,000·00
Severance, roads flooded and to be rebuilt in portions of property isolated ..	35,000·00
	$59,003·56

This sum was offered to the appellants and was not accepted. After some delay, owing to the death of the Judge first designated, by an order dated the 27th November, 1924, Le Blanc, J., designated himself sole arbitrator for determining the amount of compensation and damages to be paid.

The arbitration opened on the 7th January, 1925, and lasted, with adjournments, over several months, during which time the

arbitrator heard a large number of witnesses. He also, with the consent of both parties, viewed the property, and on the 30th October, 1926, he made his award in the form of an elaborate reasoned judgment. By this he awarded $42,500, made up as follows :—

8,000 acres at 2·50 an acre	$20,000
10 per cent. for forcible taking	2,000
Flooding of roads	3,000
Damage to remainder of property on account of severance	17,500
	42,500

The appellants appealed to the Appeal Division of the Supreme Court, which by their order dated the 22nd April, 1927, varied the award as follows : (1) By allowing a further sum of $900 with the addition of 10 per cent. for forcible taking for the 360 acres not allowed for by the arbitrator ; and (2) by allowing $6,000 for fishing rights, making the total amount awarded $49,490. The Court also allowed interest, refused by the arbitrator, on the said sum of $49,490 at the rate of 5 per cent. per annum from the 13th October, 1920. They gave the appellants the costs of the appeal, but ordered them to pay the costs of the arbitration.

The appellants appeal against this order, and contend (1) that the sum awarded as compensation for the land is insufficient, inasmuch as the arbitrator did not award any sum in respect of the special advantages alleged to be enjoyed by reason of the possibility of use being made of the water power connected therewith ; (2) that something ought to be allowed for the value of the property for the purposes of hunting and shooting ; and (3) that the arbitrator was not justified in reducing the amount fixed by Mr. Murdoch in respect of damage by severance, and the Appeal Division ought to have so held.

The respondents, by the cross appeal, seek to vary the order of the Appeal Division by omitting the sum allowed for fishing rights and by striking out the direction for payment of interest.

As to the first point raised by the appeal, the arbitrator and the Judges of the Appeal Division have, as appears clearly from their judgments, rightly apprehended the law on this subject, and their Lordships therefore cannot find that the arbitrator has proceeded on an erroneous view of the law. He has found as a fact that on the evidence before him no value ought to be placed on such advantages, if any, as the land possessed as a water power site. There was much conflicting evidence on the point and the arbitrator has, as he was clearly entitled to do, adopted the evidence given by witnesses for the respondents rather than that of the appellants' witnesses. Then having found that there were no special advantages on which a value could be placed, he has adopted the value placed on the land by

Mr. Murdoch. It cannot be suggested that there was no evidence on which his finding could properly be based. There being no error in law and sufficient evidence to support the finding, it is clear that the Court of Appeal were right in refusing to disturb it.

The arbitrator made a mistake as to the number of acres taken and that has been properly corrected by the Appeal Division.

As to the complaint that no value has been placed on the land in respect of possible profits to be derived from the hunting and shooting, their Lordships do not see their way to interfere with the award. They think that the Court of Appeal were right in their view that there was really no evidence on which such a claim could be founded. It would appear that there is abundance of land in the neighbourhood, shooting over which would be obtainable under an ordinary game licence, and it cannot be assumed that under such circumstances anything substantial would be paid for such a right over the appellants' land.

As to the amount allowed for severance, Mr. Murdoch, in the $35,000 which he estimated as the amount of damage from this source, in terms included the $3,000 allowed by the arbitrator for flooded roads. It appears fairly plain that he also included any sum which might be attributed to the loss of fishing by the rest of the property being cut off from the lake and the rivers included in the part expropriated. Both these items are now allowed. The only question, then, is whether the arbitrator and the Appeal Division were bound to accept the remaining $8,500 making up the $35,000. The question of the amount of damage is one pre-eminently for the arbitrator, and it is impossible to say that he was wrong in forming his own opinion and bound to accept Mr. Murdoch's figure.

Their Lordships are therefore of opinion that the appeal fails.

As to the cross appeal :—

The arbitrator gave nothing for damage to the fishing rights. The Appeal Division, while agreeing that no case could be made for awarding compensation for the loss of salmon fishing, thought there was evidence that the fishing for trout and land locked salmon was of value and assessed it at $6,000. Their Lordships are of opinion that there was abundant evidence that this fishing was of some substantial value, and they can see no reason for interfering with the order of the Appeal Division as to the amount.

The last question is that of the allowance of interest, and it is a serious one.

It is now well established that on a contract for sale and purchase of land it is the practice to require the purchaser to pay interest on his purchase money from the date when he took possession (per Lord Cave, L.C., in *Swift* v. *The Board of Trade* [1925], A.C. 520, at p. 532).

The law on the point has also been extended to cases under the Lands Clauses Consolidation Act, 1845.

Their Lordships can see no good reason for distinguishing the present case from such cases. It is true that the expropriation under the Act in question is not effected for private gain, but for the good of the public at large, but for all this, the owner is deprived of his property in this case as much as in the other, and the rule has long been accepted in the interpretation of statutes that they are not to be held to deprive individuals of property without compensation unless the intention to do so is made quite clear. The statute in the present case contains nothing which indicates such an intention. The right to receive interest takes the place of the right to retain possession and is within the rule.

The respondents in their case state that they expropriated the land on the 13th October, 1920, the date from which the Appeal Division directed the interest to be calculated, and that date may be taken as correct.

Their Lordships are of opinion that the appeal and cross appeal both fail and should be dismissed, but without costs in either case, and they will humbly advise His Majesty accordingly.

In the Privy Council.

THE INGLEWOOD PULP AND PAPER COMPANY, LIMITED,

v.

THE NEW BRUNSWICK ELECTRIC POWER COMMISSION.

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DELIVERED BY
LORD WARRINGTON OF CLYFFE.

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