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*May 31
*Jun. 1, 4, 5
Dec. 21

GAGETOWN LUMBER CO. LTD. (*Defendant*) ..... APPELLANT;

AND

HER MAJESTY THE QUEEN, on the information of the Deputy Attorney General of Canada (*Plaintiff*)..... RESPONDENT;

AND

THE ATTORNEY GENERAL FOR NEW BRUNSWICK (*Defendant*) ... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Compensation—Timber lands—Valuation of lands and unexpired licences on Crown lands—Licence as "interest" in land—The Expropriation Act, R.S.C. 1952, c. 106—Allowance for compulsory taking.

The Crown in right of Canada expropriated for military purposes a large tract of land in New Brunswick, including some 28,000 acres on which the appellant company had carried on lumbering operations. About half of this land was owned by the company and the other half consisted of Crown lands in respect of which the company held two different licences, one of which would expire in the ordinary course in 11 years, while the other had only 1 year to run. The Exchequer Court determined the value of the company's freehold lands at $330,000 (to which was added 10 per cent. for compulsory taking), the value of the licences at $42,000, and the value of the freehold in the Crown lands at $344,000. Adding other allowances, and deducting the value of the timber that the company had been permitted to cut after the expropriation, the Court fixed the total compensation at $394,177 for the company and $344,000 for the Province. Both the company and the Province sought increases in the amounts awarded.

*PRESENT: Rand, Locke, Fauteux, Abbott and Nolan JJ.

Held, the company's appeal should be allowed with costs and the Province's cross-appeal should be dismissed with costs.

Per curiam: The company's rights under its licences constituted an "interest" in land for which it was entitled to compensation under the *Expropriation Act,* but only to the extent of the unexpired terms; the mere possibility of renewal in the future was not in itself an interest in land.

Per curiam: The additional allowance of 10 per cent. for forcible taking, having been rightly given in respect of the freehold lands, should also have been given in respect of the licences.

Per Locke, Fauteux and Nolan JJ.: The witness M, whose valuation of the land was accepted in the Court below, considered the matter solely from the standpoint of what a prospective purchaser might be willing to pay for the lands, and did not at all consider the value to the company or whether an informed owner would have agreed to sell at any such figure. He simply expressed his opinion as to the amount the lands would realize if the owner was under compulsion to sell for what they would bring on the open market. In determining the value to the owner all advantages, present or future, that the land possessed in his hands were to be taken into consideration, and he was entitled to have the price assessed in reference to those advantages that would give the land the greatest value. These lands, in the circumstances, clearly had a value to the appellant company that they would not have had to someone who did not have like facilities for converting the logs into lumber, and a long-established business designed and effective for disposing of the lumber at a profit. Applying these principles, the award to the company in respect of the freehold properties should be increased by $55,000. There was nothing in the record that would support a higher valuation than had been made of the Crown lands as freehold in the hands of the Province. The award in respect of the licences should be increased by $35,000, and there should be a reduction of $10,426.50 in the credit to be given for timber cut after the expropriation.

Per Rand J.: The value of the property to the owner, as a measure of compensation, had two aspects: (1) the present value of all the land's possibilities to the owner, as opposed to the value to the taker, with which the owner was not concerned; and (2) the value to the owner as a prudent man in a situation affected by conditions or relations from which buyers generally on the market would be free, representing the sum total of detriment suffered by reason of the disruption, over and above what the market price would take into account. Market value, *i.e.,* the price on which a prudent and willing vendor and a similar purchaser would agree, might or might not be the sole determinant of compensation. Where the position of the owner *vis-à-vis* the land was not different from that of any purchaser, that value would be the measure; where the owner was in special relations to the land, as in the case of an established business, the measure was the value to him as a prudent man—what he would pay rather than be dispossessed, that value thereafter representing the capital cost of the business to which the profits would be related. But the value of these special relations must be established by the claimant. Considered on this basis, and on the evidence adduced, the final valuations of the lands arrived at by the Court below were liberal and should not be disturbed.

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Evidence of settlements for lands taken from other owners in the area in the same expropriation proceedings was rightly rejected by the Court below. Evidence of sales to the Crown might be admissible if the Court found that they were the result of genuinely free negotiations, influenced only by the desire of the parties to reach agreement on a figure deemed to be the fair value of the property, and not by extraneous considerations, but here the act of expropriation covered all the land required for the project and what remained was settlement of the claims for compensation, which involved elements different in degree, if not in nature, from those in sales to the Crown, and of such a character as to exclude the necessary freedom. *Amory et al. v. Commonwealth* (1947), 321 Mass. 240 at 255, quoted with approval.

On all the evidence, the company was entitled to an increase of $15,750 in the amount awarded for the licences, a reduction of $10,587 in the amount deducted in respect of the timber cut after the expropriation, and half the cost of marking boundary-lines shortly before, making a total increase of $30,039.

Per Abbott J.: The valuations for both the freehold lands and the Crown lands in the hands of the Province were liberal, and should not be disturbed. The economic value of the licences could not exceed their profit potential after taxes, during the terms that they still had to run. Applying the evidence as to the prices at which licences for timber lands in New Brunswick were bought and sold, and the other matters considered in the judgment appealed from, the valuation of the licences should not be disturbed. There should, however, be an allowance of $4,200 for compulsory taking in respect of the licences, $3,702 in respect of the survey costs, and a reduction of $10,567 in the credit for wood cut after the expropriation.

APPEAL from the judgment of Thorson P., of the Exchequer Court of Canada, fixing the compensation to be paid on lands expropriated by the Crown in right of Canada. Appeal allowed in part.

A. B. Gilbert, Q.C., and *D. M. Gillis,* for the appellant.

A. McF. Limerick, Q.C., C. J. A. Hughes, Q.C., and *K. E. Eaton,* for Her Majesty the Queen in right of Canada, respondent.

J. F. H. Teed, Q.C., for the Attorney General for New Brunswick, respondent and cross-appellant.

RAND J.:—This appeal arises out of an expropriation of approximately 28,000 acres of land in New Brunswick. Part was freehold, 13,413 acres, and part Crown lands under licences to cut, 14,424. The latter were embraced within two types of licence to the company by the Crown, one called a sawmill licence covering 9,027 acres and the other a timber licence for 5,397 acres. Of these in 1935 and 1950, 2,586 acres of the freehold and 1,818 acres of the

licensed, lands had been burnt over. The freehold had 151 acres of non-productive and 76 acres cleared; the licensed lands, 579 acres of non-productive and 2 cleared. The sawmill licence was sustained by legislation which was to expire in 1963 and the timber licence in 1953, and at the time of the expropriation, August 6, 1952, their terms were accordingly limited to 11 years and 1 year respectively. In each, where the conditions of the licences had been complied with, an annual renewal was stipulated. It was shown that, although they were so limited in time, the policy of the legislature by periodic authorizing enactments for the last 40 years had been to permit continued renewal.

The main claim made by both the company and the Province was on a basis of some simplicity of conception though of complexity in computation. The total quantities of wood, as at the moment of expropriation, from sapling to mature tree, classified by species and in categories of sawlogs, pulpwood, firewood and other uses, were estimated; from the market prices for products received in 1952 by the company and in other cases, estimated, operating costs of the company for the same year, operations extending over lands in another section of the Province, in corresponding units, were deducted; and the balances, the net returns, with minor adjustments, multiplied by the quantities produced the total value of the growth. To this was added that of the land related to its capacity to yield growth. The price, for example, of white pine in sawn lumber at shipping point (Saint John) was $94.16 per M (f.b.m.), and for spruce and fir, $75.15; the production costs, to that point, exclusive of stumpage fees payable to the Province, deducted from the selling-prices, left balances of $41.08 and $22.07 respectively. These amounts, embracing an unspecified element of profit, were said to represent the unit-value of the standing trees, although the actual figures used in the calculation of the claim were, for spruce and fir $20, and for white pine $25.

The total value was reduced to an acreage figure for the several categories. For sawlogs on the forested area of the Crown lands, $14.02; for growth of 5 inches and over available for sale in cords for pulpwood, firewood, spoolwood, etc., $53.18; for undersized trees, less than 5

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inches in diameter, dealt with on a maturity basis and the 1952 market price discounted at 4 per cent. compounded for the appropriate number of years for each species to obtain the present value, $12.02; the land's capacity for producing a crop of trees over a period of 64 years, $6.15: a total of $85.37. A similar calculation for the freehold lands yielded a total of $84.66 an acre. In each case $5 was allowed for reproducing burned and cleared land, and 5 per cent. deducted for inoperable growth. The grand total claimed before us was, for Crown lands, to the Province $451,551.54, to the company $555,011.92 (less an amount for cutting after the expropriation which is dealt with hereafter); and for the freehold, $877,911.50 (also less an amount for subsequent cutting).

This theoretical computation was argued to represent the value to an owner whose utilization of his property was by way of treating the annual growth of the trees as a crop in an indefinite continuity, as the most profitable mode of the exploitation on a large scale of woodlands; but as can be seen, it virtually ignores present market or exchange value and the element of profit which that involves.

It may be assumed that the general range of market values for freehold and for licensed lands in a Province where lumbering has played and now plays so large a part in the economy as in New Brunswick must long since have been established; and that in the case of licences the probability of indefinite renewal would, in some degree, have been a factor. But the expropriation, here, of the estate of the Province excludes that possibility, and the interest of the company as licensee must be taken as confined to the strict rights under the licences, including the limits of size for cutting, but not excluding the value, if any, placed by the market on the chance of being able to obtain leave under the regulations to cut undersized growth. The compensation for this interest must accordingly be referred to the periods in 1952 remaining unexpired of the licences.

It is, I think, beyond question that no sales and purchases of timber lands or licences have ever been carried out on the basis outlined. It was in fact rejected by Mr. Reid, an officer of the company; in speaking of the price at

which licences would be bought or sold, the President, examining the figure of $20 per M (f.b.m.) claimed for the standing spruce on the licensed lands, put this question:

> Is there any way of finding out how much would you pay to licence holders—will you pay them $12 and then pay the province $8 [the stumpage rate]? Is that how it would work out?

His answer was:

> I would not buy it on that basis; he would expect as much as he could from his lease . . . He might [expect to get $12] just according to how hard a bargain he could drive . . . He has the lease and wants to sell his licence to you, that is part of a dicker between the two parties.

The unexpressed element here which is concealed by the answer is the profit over the stumpage value which the purchaser would have in view, largely the determinant of the market price, the failure to face which is the serious defect in the argument presented.

Mr. Gilbert's exclusive concern with this basis results from an underlying misconception of the meaning of the form in which the principle of compensation is put, that the value of the property to the owner is the measure of compensation. Properly understood, that language is accurate but the meaning is not precisely what the appellant has in mind. It has two aspects, one that it is the present value of all the land's possibilities to the owner in contradistinction to the value to the taker, for with the latter the owner is not concerned; and the second, the value to the owner as a prudent man in a situation affected by conditions or relations from which buyers generally on the market would be free, as, for example, the special features involved in the ejection of an established business from possession of land. They represent the sum total of detriment suffered by reason of the disruption, over and above what the market price would take into account. The claim confuses the present exchange value of the land with the present value of the total return of its present growth; in substance it attributes to the land a value equal to the present value of what the owner would be able to realize from the existing growth over a growth cycle of say 64 years plus the residual or capacity value of the land. The mere recognition of some undetermined element of profit does not alter the basic structure of the claim. The

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defect of this formulation was long ago pointed out by the Exchequer Court in *The King v. Thompson* (1) and *The King v. Griffin* (2).

The conception so advanced conceals other vital items involved in exchange value: the multiple risks of the future, risks of fire—of which there is significant evidence here, the infestation of pests, fungi, etc., market variations, changes in operating-costs, seasonal conditions, the effect of competitive substitutes and other factors and uncertainties. In the broader sense, it disregards the price for re-establishing the owner in business, the price at which he could purchase comparable lands and continue his business.

Those variables and uncertainties, some in more or less vague appreciation, are the unexpressed factors operating on the minds of persons habituated to lumber dealings. Opinions, varying, of course, with the individual, are given weight roughly according to the experience and standing in the business of those who give them; and they may require modification in the application to the facts on which they are based of the principles governing compensation. From this point of view, we have little or no help from what was adduced on behalf of the company; what, instead, is given us is the ideal realization of an equally ideal body of values, reduced by 5 per cent. and an unestimated profit.

The confusion of the appellant's case may arise from the manner in which the rule in a number of cases has been examined and treated, and, distasteful as it is, a brief restatement appears to be called for. The task of the tribunal is primarily to determine compensation, not market or other values: these are items or elements that enter into or make up compensation. And it is compensation for the *taking of land*. By definition (3), "land" includes damages and these are not to be confined to the exercise of powers other than that of *taking* land. In developing the scope of compensation, such as, for example, the effects on remaining lands of the operation as distinguished from the construction of works placed upon the lands taken, and in injurious affection, we have followed the interpretation

(1) (1916), 18 Ex. C.R. 23. (2) (1916), 18 Ex. C.R. 51.

(3) The *Expropriation Act*, R.S.C. 1952, c. 106, s. 2(*d*).

given to the early English statutes granting, in more or less similar language, like powers. But, both by the express language of the statute and that interpretation, the compensation here is wrapped up in and is in respect of that act of appropriation, the taking.

Market value, that is, the price on which a prudent and willing vendor and a similar purchaser would agree, may be the sole determinant, exhausting compensation, but it may not be. Where the position of the owner *vis-à-vis* the land is not different from that of any purchaser, that value is the measure; where the owner is in special relations to the land, as in the case of an established business, the measure is the value to him as a prudent man, what he would pay, as the price of the land, rather than be dispossessed, that price thereafter, in effect, representing the capital cost of the business to which the profits would be related. But evidence of those relations issuing in special injury upon extrusion and their value in terms of money must be adduced. It is in this comprehensive view that in *Woods Manufacturing Company Limited v. The King* (1), by a unanimous judgment, the rule for compensation under the existing law was laid down definitively by this Court.

The President relied largely on the opinions of two experienced lumbermen, Mr. R. G. MacFarlane and Mr. Ashley Colter. The former is associated, in an executive position, with the largest pulp and paper organization in the Province, and the latter is engaged in large scale lumbering and contracting. Both show long and successful careers and their opinions, as the President held, are entitled to high respect.

Mr. MacFarlane, on the footing of an operation stripping the land in 3 years, and taking certain market prices of white pine, red pine, spruce, fir and hemlock in f.b.m. and cords, computed the net return from sawn lumber of 9 inches and over and from trees down to 5 inches available for pulpwood. From this he deducted 15 per cent. as representing inoperable growth. On that total net return he then considered a price which a prudent purchaser from a willing seller would risk in an operating venture. With

(1) [1951] S.C.R. 504, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87.

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interest of 10 per cent. on the price for the 3 years, and allowances for annual charges, taxes, warden service, etc., he sought a figure that would permit also an inducing profit. On this, his valuation of the freehold was $230,000 and the Crown lands, as freehold, $274,000. Mr. Colter used a somewhat different method. He estimated, in the light of his experience, the stumpage value of each class of product and using the same quantities but deducting 20 per cent. for inoperable growth he reached a price for the freehold of $251,978 and for the Crown lands, $284,276, including in each case $3 an acre for the land with its undersized growth.

The selling prices based on information received from what Mr. MacFarlane considered a reliable shipping source, were, in his judgment, warranted for a 3-year period from 1952. They were less than the highest prices obtained in that year by the company, peak prices in a period of abnormal demand, and it is objected that they were, as presented, hearsay. By Mr. MacFarlane's use of them, they carried the support of his own general opinion; it is obvious that the appellant's prices could not themselves be taken; lower figures must have been used and in the circumstances, including other evidence, and what was omitted from as well as adduced in that submitted on behalf of the claimants, I cannot say that the President was unwarranted in accepting generally Mr. MacFarlane's estimate and the unit figures on which it was based.

The values for stumpage used by the company were arbitrary. For example, that for spruce and fir sawn lumber was $20 per M (f.b.m.); the officers of the company, with no actual experience in New Brunswick, had "thought" that amount to be the going rate, but they could furnish no evidence in support of it. Drawn out of the void, it was observed to be $2\frac{1}{2}$ times the Government stumpage of $8: that factor was then applied to white pine which carried a Government stumpage of $9, making $22.50, but because of a greater return from pine it was increased to $25. Similarly the other figures were reached. But between the $8 and the $20 for spruce, as is seen by Mr. Reid's "dickering" view of purchases, an element of profit is hidden. The final estimates of the freehold forested land at $84.66 an acre and the licensed land at $85.37 an acre, as well as

those of $92.69 and $98.29 urged at the trial, fully justify their description by the President as unrealistic. They are to be contrasted with the estimates of $17.15 and $19 by Mr. MacFarlane and $20 and $20.54 respectively by Mr. Colter.

To Mr. MacFarlane's totals, the President made certain increased allowances. For the freehold lands they were, for pulpwood $31,939, residual value $40,239, and reductions in operating expense $27,829: for the licensed lands, pulpwood, $37,728, residual value $43,272, and expense reduction $31,003. The additions to the net operating returns would have affected the purchase-prices at which Mr. MacFarlane arrived but they would not wholly have been added to them. The final valuations so reached were, in my opinion, liberal and should not be disturbed.

The valuation of the interest of the company as licensee of the Crown lands remains. Mr. MacFarlane proceeded on the same general basis as for the freehold using as the individual net unit returns from each class of product those of the latter less the Government stumpage. Considerable evidence was given of prices paid for licences, the highest figure being $2,000 a square mile. Using that as the standard appplicable, the President awarded $42,000 on the basis of 21 square miles, or at the rate of $2.91 an acre for the actual acreage of 14,424. The balance of the total valuation enured to the Province. This resulted in an award to the latter of $344,000 or $23.85 an acre.

It would have been of some benefit to have had a theoretical estimate of the market value of the Provincial Government's interest on the footing of a continuing operation by licensees. The amount allowed to the Province considered in the light of its stumpage revenue from this area appears to be in sharp contrast to what those returns could justify and what the market would be prepared to pay. For the years 1934-1952 inclusive the total cut under the sawmill licence was 1018M: and from 1942-1952 under the timber licence 52M. At the prescribed stumpage rates this represents a negligible return.

In a table prepared by the forestry experts it is shown that the time required to bring the undersized trees, that is, trees 5 inches D.B.H. (diameter at breast height), to an increase of 4 inches D.B.H., ranged from 26 to 46 years.

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By 1963 on the sawmill-licensed land there would be 3722M spruce and fir sawlogs: 1212M red pine sawlogs: 1097M white pine sawlogs and 742M hemlock sawlogs. On the timber-licensed lands the quantities available for cutting in 1953 were: spruce and fir sawlogs 364M, red pine 45M, white pine 140M, and hemlock 28M. These quantities are of sizes within the regulations for cutting. The stumpage on spruce, fir and red pine in 1952 was $8 per M: on white pine $9 per M: and on hemlock $7 per M. At those rates the return would be less than $60,000. The difference between the acreage allowance to the Crown of $23.85 and to the company, $2.91, lies in the value attributed to the growth between 5 inches and the 12 inches for spruce and 16 inches for white pine at the stump to which the regulations limit cutting by the licensee, the value for the undersized growth and the land, and that stumpage.

Although the interests of ownership and licence in a settled relation are complementary in indefinite time, that of a specific licensee is of right limited strictly to the terms of his licence and the regulations: he enjoys it for only the fixed period of time and the prescribed modes and sizes for cutting. The Government may allow additional cutting but is not bound to; new legislation authorizing renewal licences to past licensees may or may not be passed; on neither consideration can a direct claim be rested. The market value of the licence, to be reached by ordinary bargaining, may, to some extent, take both into account; but only in that form can they be contemplated as factors.

For the price of $2,000 a square mile we know nothing of the growth which it purchased. Mr. MacFarlane reached a value of $2,800 a square mile, but this involved the cutting of smaller sizes than allowed by the regulations. Having in mind the total value reached and the other considerations mentioned, general prices over the years can properly be related to each situation. For these reasons I should think $2,500 a square mile would be more proportionate to the total value than the sum allowed. To this I would add 10 per cent. for the forcible taking. The President conceded that allowance on the freehold and I am unable to see how it can be withheld from the value of the licences. Mr. Colter did not essay an estimate on

the latter and I cannot think the abstention to have been wholly divorced from the difficulty of making it; but that circumstance is a reason for such an allowance.

The amount for 21 square miles at $2,500 plus 10 per cent. is $57,750, an increase over the amount allowed of $15,750. As the Dominion has not appealed, the award to the Province stands notwithstanding it was based on a total compensation as for a freehold minus the value attributed to the licences. As that total has been found to have been adequate, there is no ground for a supplementary percentage allowance to the Province.

Evidence of settlements for lands taken in the Gagetown area under the same expropriation proceedings was offered and rejected. Mr. Gilbert contended that the rejection was wrong and prejudicial to the proof of his claim. The respondents support the ruling; and as the question is involved with that of sales to the Crown or other expropriating authority for the purposes of a public or semi-public work before expropriation, an examination of both seems desirable.

Sales of land to the Crown prior to expropriation have, in a number of cases, been admitted in the Exchequer Court: *The King v. Condon* (1); *The King v. Hayes* (2); *The King v. Murphy* (3); *The King v. La Compagnie des Carrières de Beauport Limitée* (4); *The King v. King* (5); *The King v. Bowles* (6). Of these both *The King v. King* and *The King v. Bowles* were affirmed in this Court on December 11, 1916, but it should be said that in them no objection to the evidence seems to have been taken. The matter has been considered in innumerable instances by Courts in the United States, and as shown in Orgel on Valuation under Eminent Domain, 2nd ed. 1953, pp. 581 *et seq.*, much diversity of opinion is exhibited. The objection to admission is that the power on the one side to take and the necessity on the other ultimately to yield introduce factors that destroy freedom of action between the parties. But the ideal conception of a free vendor and a free purchaser is in many transactions infringed by

(1) (1909), 12 Ex. C.R. 275.
(2) (1909), 12 Ex. C.R. 395.
(3) (1909), 12 Ex. C.R. 401.
(4) (1915), 17 Ex. C.R. 414.
(5) (1916), 17 Ex. C.R. 471, 41 D.L.R. 374.
(6) (1916), 17 Ex. C.R. 482, 41 D.L.R. 254.

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factors personal or peculiar to the parties or their purposes and irrelevant to pure economic or market value. This is elaborated in a decision of the New Jersey Court of Appeals in *Curley et al v. Mayor and Aldermen of Jersey City* (1). The rule of admissibility is well stated in *Amory et al. v. Commonwealth* (2):

> If it is made to appear that the water rights taken from the petitioners are substantially similar to those taken from the other riparian owners, save only in the extent of the rights taken, and that the taking from them was not too far distant in space and time from the taking in question, then it is to be reasonably expected that the judge in the exercise of a sound discretion will find that the value of those rights will furnish a fair standard of the value of the petitioners' rights, provided it is shown by those having knowledge of the details involved, including the basis upon which the payments were in fact computed, that the transactions between the Commonwealth and these other riparian owners amounted in reality to a purchase and sale of water rights and nothing more, irrespective of the form in which these transactions were clothed and, finally, provided it is shown that these sales were voluntarily and freely made between these riparian owners and the Commonwealth.

As Holmes C.J. of the same Court, in the case of *O'Malley v. Commonwealth* (3), said:

> We cannot say merely because of the name of the purchaser that the sale was not a fair transaction in the market rather than a compulsory settlement.

The primary question is of freedom in the negotiation as a fact, and it is for the tribunal, in the light of the circumstances, to say whether the price was influenced by extraneous elements, or whether the parties were concerned only to reach agreement on a figure deemed to be the fair value of the property. This rule is in effect what appears to have been followed in the cases in this and the Exchequer Court cited.

But, as Mr. Teed pointed out, that is not the question here. The act of expropriation in this case covered all the land required for the project and what remained was settlement of the claims for compensation. This has been deemed generally to involve elements different if not wholly in nature at least in degree from those in sales to the Crown, and of such a character as likely to exclude the requisite freedom: *O'Malley v. Commonwealth, supra.* It was on this view that the President acted in this case, and in my opinion his ruling should not be disturbed.

(1) (1912), 83 N.J.L. 760. (2) (1947), 321 Mass. 240 at 255.
(3) (1902), 182 Mass. 196 at 198.

Some minor items remain. A sum of $25,000 was awarded for disturbance. No evidence was given sufficient to enable an estimate to be made with any degree of accuracy and the amount allowed cannot be said to be inadequate.

Following the expropriation, the company was permitted through the season 1952-1953 to carry on lumber operations on both tracts. In deducting the value of the stumpage to be charged for this, the President took the figures on which the claim had been presented but which he rejected. Mr. MacFarlane did not deal directly with stumpage value; Mr. Colter did, taking, for example, spruce logs for sawn lumber at $10 per M (f.b.m.), and white pine at $15. He allowed also $3 an acre for the land and residual growth for which there was no corresponding item on the MacFarlane calculation. The Colter total for the freehold was $251,978, including $37,728 for residue; the MacFarlane valuation, $230,000. For the Crown lands, the former found $284,276 with $41,520 for the land, and the latter $274,000. Mr. Colter deducted 20 per cent. for inoperable growth against Mr. MacFarlane's 15 per cent. Applying the latter to the Colter figures after deducting the allowances for land, the estimates are: freehold, Colter $227,641 against $230,000; Crown lands, $257,929 against $274,000. Assuming a similar element of profit, the stumpage rates thus appear to be, roughly, the same, and those used by Mr. Colter, with one-half of the additional amounts allowed by the President, *i.e.*, $1 a cord in addition to the return on spruce and fir pulpwood, and $1 per M (f.b.m.) for sawn lumber and 50c. a cord for pulpwood, from revised operating costs, can be used for the purpose here.

There was cut on the freehold 180,518 f.b.m. of spruce, 23,000 of fir, 10,000 of red pine, 47,379 of white pine and 24,000 of hemlock; on the Crown lands, the corresponding production was 1,501,918, 39,981, 621,909, 585,106 and 11,892. The pulpwood removed from the freehold was, spruce and fir 193 cords, red pine 66 and white pine 6. These quantities at the rates mentioned yield stumpage for the freehold, $4,531.65 and the Crown lands, $32,204.35, a total of $36,736 against $47,323 found by the President.

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A small item related to the cost of marking boundary-lines which had been done shortly before the expropriation, $7,404. This was disallowed on the ground that it had been taken into account in the estimates. I see nothing in the case to show that; and since its value to the lands is unquestioned some allowance should be made. Although not all the lands of the company so bounded were taken, new boundaries have been created. We do not know the cost represented by what was taken but at least 50 per cent. of the outlay should be allowed.

A final item concerned the value of a siding and appurtenant property owned by the company and used in connection with a sawmill at which the logs were sawn. The item was considered in detail by the President and the amounts awarded appear to be reasonable.

The question, whether the company has an "interest" in the land, within the meaning of the *Expropriation Act*, R.S.C. 1952, c. 106, was raised. On this I have no doubt: the licensee is in substantial possession; he may bring trespass or replevin in respect of standing trees or cut logs; he is vitally affected by any loss or damage to the growth in respect of not only the future operations but past payments to the Province both at the time of purchasing the licence and annually thereafter as bonus, mileage, fire fees, minimum stumpage, etc. A *profit à prendre* is admittedly an interest within the statute and the distinction in substance between the two, if any, is extremely fine. In this I am in agreement with the President.

The appeal of the company will therefore be allowed with costs and the judgment modified by adding to the amount awarded the company the sum of $30,039; in other respects it is affirmed. The cross-appeal of the Province will be dismissed with costs.

The judgment of Locke, Fauteux and Nolan JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Exchequer Court settling the compensation to be paid to the appellant as the owner of certain timber lands and as the licensee of other such lands held under licences from the Province of New Brunswick issued under the provisions of *The Crown Lands Act*, R.S.N.B. 1927, c. 30, title to

which was taken under the provisions of the *Expropriation Act*, R.S.C. 1952, c. 106, on August 7, 1952. The lands so taken were part of a much larger area taken by the Crown in right of Canada for military purposes. By the judgment from which the appeal is taken, the compensation payable to Her Majesty in right of the Province of New Brunswick, in respect of the lands subject to the licences granted to the appellant, was determined and the Province has cross-appealed against the amount of that award.

Different considerations apply in arriving at the value to the owner of the lands of the appellant, 13,413 acres in extent, of which it was the owner in fee simple, and the lands of the Province subject to the licences, 14,267 acres in extent, and to the interest of the appellant in those lands under the licences referred to.

The freehold lands of the appellant had been acquired by it and its predecessors in title over a period of some 50 years prior to the expropriation. They had been purchased mainly by a partnership carrying on business under the name of Reid Brothers, of which firm Richard R. Reid, who gave evidence at the trial, was a member. The appellant company was incorporated in the year 1948 to take over the lumber business theretofore carried on by this firm, and the freehold lands and the existing licences were thereafter transferred to it. Reid Brothers had built a lumber mill on the Saint John River at Gagetown in 1917 and, adjoining the mill, had established a lumber yard supplied with railway facilities by a spur line connecting with the Canadian National Railways Valley Line. The business was mainly the manufacture and export of lumber to the United States and Great Britain and was a successful and profitable undertaking.

The timber limits in question, including both the freehold and licensed lands, lay generally to the west of Gagetown. The nearest of these was distant about $1\frac{1}{2}$ miles from the mill and none was more than 15 miles away. According to Reid and to the witness Allingham, a brother-in-law of his who had been a member of the firm of Reid Brothers for many years and is the vice-president of the appellant, these limits had been obtained as a source of log supply for the mill at Gagetown. The mill itself, as distinct from the lumber yard and its facilities, had not

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been acquired by the appellant company but remained the property of the partnership and manufactured lumber for the appellant on a custom basis. As the evidence showed, comparatively little cutting was done upon either the freehold or the licensed lands up to the time of the expropriation. These witnesses said, and there is no contradiction of their evidence or doubt expressed as to their veracity, that the appellant's intention in respect of these limits was to utilize them as a yearly and permanent source of supply of logs. Neither Reid Brothers nor the appellant had ever engaged in the production of pulpwood and there was no intention on the part of the appellant to cut any of the trees which were not sufficiently large to be logged for use as lumber for that purpose, but rather to allow them to mature.

The learned President arrived at his conclusion as to the quantum of the compensation in reliance mainly upon the evidence of the witness R. G. MacFarlane, an experienced lumberman employed by Fraser Companies, Limited, in New Brunswick in an executive capacity. MacFarlane was, I think, well qualified to express an opinion as to the value of these properties to a company such as the appellant having a well-established export lumber business at Gagetown, closely adjacent to these limits, with the information as to the timber standing on the properties afforded by the cruises which had been made. He, however, refrained from doing so.

Though this witness had said at the outset of his evidence that his instructions from the Department of National Defence had been to compile data as to what, in his opinion, a prudent and informed buyer would pay to an informed and willing seller, he apparently interpreted this as requiring him to express an opinion only as to what a prospective purchaser might be agreeable to pay for the lands. In a written report prepared several months prior to the trial and which was put in evidence, MacFarlane submitted an opinion to the Department which, he said, reflected "the value that in my opinion a prospective purchaser might place on the freehold lands and the Crown lands treated as freehold lands as of August 7, 1952". That his opinion was based entirely upon what he thought his

"prudent purchaser" would pay was made clear by his evidence. When asked by the learned trial judge if his figure of $230,000 for the freehold lands was his estimate of their value as of the date of expropriation, he answered:

> I would not say that. I would say I estimate that is the price that a prudent purchaser might pay.

In answer to a question put to him in cross-examination as to whether he had taken into consideration at all the value to the owner, he acknowledged that he had not and said:

> I am not in a position to assess what value the Gagetown Lumber Company might put on these lands over [*sic*] a long-termed project.

In the reasons for judgment delivered by the learned President, he approved this method of valuation, saying that he considered it to be basically sound. With respect, I disagree. Without using the term, MacFarlane, repudiating any idea that he had either considered its value to the owner or whether an informed owner in the position of the appellant would have agreed to sell at any such figure, simply expressed his opinion as to what was the market value of the property, meaning by that expression the amount it would realize if the owner was under compulsion to sell for what it would bring on the open market. He expressed no opinion as to the amount which would be agreed upon if the owner, willing but not obliged to sell, bargained with a purchaser, desirous but not required to purchase. This, in some of the decided cases, is referred to as a method of determining the market value and if it be assumed, as I think it should be, that in these circumstances the owner would not part with his property for less than its worth to him, the amount agreed upon might well be taken as the true value. Nothing of that kind was attempted by this witness, as his evidence made abundantly clear.

The witness Colter, also an experienced lumberman, called as a witness by the Crown, who valued the freehold limits at $251,978 was not asked and did not assume to express any opinion as to the value of these properties to the owner. According to him, his instructions were limited to being told by a representative of the Department that "he would like to have from me an idea of what I thought the property was worth".

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It is unnecessary to repeat what was said in the judgment of this Court delivered by the Chief Justice of Canada in *Woods Manufacturing Company Limited v. The King* (1), where the principles to be applied in these matters, stated many times theretofore in this Court, were restated. In determining the value to the owner, all advantages which the land possesses, present or future, in his hands are to be taken into consideration, and he is entitled to have the price assessed in reference to those advantages which will give the land the greatest value. These timber limits, well served by roads situate so closely to the mill at Gagetown, had obviously a value to the appellant which they would not have to someone who did not have like facilities for converting the logs into lumber, and a long-established business designed and effective for disposing of the lumber at a profit. Other than the evidence of these two witnesses and some evidence as to the sales of other properties in the vicinity, no evidence was adduced by the Crown directed to the real question to be decided. On the other hand, the opinion as to value given by Roberts and other supporting witnesses called by the appellant, based on the assumption that over the years all the trees growing upon the properties would mature and might be cut into lumber and sold at profits similar to those which might have been realized from the sale of lumber at the time of the expropriation, cannot be accepted. Too many assumptions of fact as to matters which are, of necessity, uncertain were made, such as the future prices which may be realized for lumber and the cost of producing it, to make the resulting figure of value in arriving at a conclusion. The risk of damage or destruction of the timber by any of the perils to which it is subject appears also to have been ignored.

I have read and reread this extensive record in order to decide whether there is sufficient evidence to enable us to determine the compensation which should have been awarded, rather than to send this matter back for a new trial. In the *Woods* case, where the Court concluded that the evidence was sufficient for this purpose, that course was followed and I have come to the conclusion that it may properly be done in the present case.

(1) [1951] S.C.R. 504, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87.

A most thorough cruise of both the freehold and licensed properties was made by the witness E. W. Roberts at the instance of the appellant and a detailed report was put in evidence. Unlike the ordinary timber cruise intended to ascertain only the merchantable timber upon the limit, Roberts made what was in effect an inventory of the trees growing upon the properties 5 inches in diameter and over. With a minor change due to the fact that, in error, he had not cruised a small area of the properties, the parties agreed on the accuracy of his figures. It was by the use of the information thus disclosed, and not by an independent examination, that the witness MacFarlane formed his opinion as to the value of the properties. He did this by assuming that his proposed purchaser, paying the amount of his estimate of the value of the property, would want to recover his money and realize his profit within 3 years. On this footing, he estimated the amount that would be realized from the logging of the trees suitable for manufacture into lumber and the subsequent sale of the lumber and from cutting the other trees too small to be used for lumber which were of sufficient size for sale as pulpwood. In forming his conclusion as to what such a purchaser would be prepared to pay, he made a calculation as to the costs of these operations, of necessity estimating the average prices which would be realized over the 3-year period for the lumber and pulpwood produced. According to him, if such a purchaser paid $230,000 for the freehold properties, he could expect to realize a profit of something more than $37,000 in the operation.

An examination of MacFarlane's figures in relation to the freehold property shows that he estimated a net profit from the sale of pulpwood of something more than $246,000 and from the sale of lumber approximately $110,000. The learned President considered that MacFarlane's estimate of the profit which would be realized on spruce pulpwood was too low and that the expenses which would be incurred in the operations on the property were in some respects too high. MacFarlane had valued the land itself after being completely logged and all the pulpwood cut at $2 an acre, and this, the learned President considered, should be increased to $3 an acre. He, however, accepted Mac-

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Farlane's figure as to the prospective realization from the lumber produced. In the result, he added $100,000 to his estimate of the value of the freehold lands at the date of the expropriation.

In my opinion, MacFarlane's figure as to the amount which, it might be expected, would be realized from the sale of lumber was too low. The witness was not himself engaged in the lumber business and did not, of his own knowledge, know the average prices realized from the sale of lumber exported to the United Kingdom and the United States, in either the year 1951 or 1952. As to this, he was permitted to say that he had requested a lumber sales manager of Fraser Companies Limited to ask one of the oldest brokers in New Brunswick shipping to the United Kingdom market, and used the information thus obtained in estimating the realization from the lumber. He did not say what year the price related to or say what prices were realized on lumber exported to the United States or give any further information on the subject. The broker was one Colin MacKay of Saint John but he was not called as a witness. Relying upon this information, he estimated the price which would be realized by a purchaser for spruce, fir and red pine lumber at $62.50 per M f.o.b. St. John: for white pine $66 per M, for hemlock $57.50 per M. He estimated the overall cost of producing and delivering the lumber f.o.b. Saint John at $47.25 per M. Using these figures, he arrived at a prospective profit on 5,247,294 feet of spruce, fir and red pine lumber of $80,021.23: on 1,394,291 feet of white pine of $26,142.96 and on 362,752 feet of hemlock of $3,718.21.

As opposed to these figures the appellant called a chartered accountant, Clifford Warner, employed by the firm of MacDonald, Currie and Company, who had compiled from the books of the company a record of the actual sales and production costs of the company for the year 1952. This showed the average price being received for pine lumber at the time of the expropriation at $94.16 per M and for fir and spruce $75.15 per M. This was f.o.b. the mill. The actual cost of production per M was $53.08, which showed a profit for pine lumber of $41.08 per M and for fir and spruce of $22.07. Allingham, who was also the assistant secretary of the company, with the assistance of the

auditors, prepared a statement from the books of the company showing the average price realized per M of lumber of all grades, including spruce, pine and culls, for the year 1951 of $75.86: for 1952 $75.99 and for 1953 $76.96.

No question of credibility is involved and the complete accuracy of these figures was not questioned by anyone and, in a computation which is to be used in an endeavour to ascertain the value of the realization to the owner, this, in my opinion, should be accepted in preference to the price used by MacFarlane, obtained in the manner above indicated and relating only to sales for export to the United Kingdom. A very large part of the lumber produced was exported to the United States. It must, of course, be borne in mind that MacFarlane's estimate was as to the lumber prices which would be realized in the 3-year period commencing in August 1952. In making such calculation, however, the actual figures for the 3-year period given by the appellant are to be preferred to those given by MacFarlane. As representing prices realized in the years 1951, 1952 and 1953 by a lumber company operating at Gagetown, they were proved to be inaccurate.

It is to be noted that the actual costs of the appellant in 1952 for lumber produced at Gagetown exceeded MacFarlane's estimate of the total cost of the lumber f.o.b. Saint John by $5.83 per M. While the prices realized over the 3-year period for all species was $76.24, accepting as accurate the costs of the appellant in 1952 as disclosed by its books, rather than MacFarlane's computation, this would show an average profit per thousand feet of all grades of $23.16.

Substituting this figure for those used by MacFarlane, this would show a net profit from sales of lumber of $162,212.64 as opposed to MacFarlane's figure of $109,881. MacFarlane deducted 15 per cent. from his estimate of a profit on lumber as well as upon pulpwood, on the theory that at least 15 per cent. of the timber would be inoperable, due to the low stand per acre. I am not satisfied on the evidence that this is justified but, if this be accepted and this percentage deducted from the profit on lumber as estimated by him and the profit that would be realized accepting the average figure realized by the appellant, the difference is $44,474.

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MacFarlane's estimate of $230,000 as what a prospective purchaser would pay for the freehold property was the amount which, he considered, a purchaser would be prepared to pay, on the assumption that the resulting profit from the production of lumber would be the lesser amount estimated by him. The increase of $100,000 made by the learned trial judge was simply added to the amount of MacFarlane's estimate and no attempt was made to determine what the prospective purchaser might be expected to pay on the footing that the profits to be realized would be $100,000 in excess of MacFarlane's estimate. With respect, if the basis adopted by MacFarlane was to be accepted as correct, this manner of dealing with the matter was inaccurate. I mention this as the fact that while, in my opinion, the amount to be realized from the 3-year operation contemplated by MacFarlane in making his estimate should be increased by $44,474, it does not follow that the prospective purchaser would pay this added amount for the property. Clearly, however, both additions would have substantially increased MacFarlane's estimate of the price to be obtained in this way.

While no one suggests (least of all MacFarlane) that the appellant, with its long-established lumber business, would have stripped its land in this manner, depriving itself of the annual log supply which, the evidence shows, the land would have afforded, MacFarlane's estimate is of some value in determining the value of the property to the owner. The estimate, with the additions made by the learned trial judge and, with the addition that should be made in regard to the realization from lumber, can, I think, properly be accepted as showing what the owner could have realized had he stripped the property in this manner. It may be said that it had at least a value of the amount that a prudent person in the position of the appellant would have paid rather than be dispossessed and deprived of the property.

The appellant, proceeding, in my opinion, on a proper basis, undertook to show the value of the properties to it by having a most accurate cruise made and by evidence as to the prospective annual cut of logs suitable for the manufacture of lumber which might be expected from the property. Roberts, whose competency on this aspect of the matter no one would question, estimated that the

owners could expect to cut annually, commencing in 1952, approximately 2,000,000 feet b.m. of logs from the freehold and licensed lands combined. Reid had estimated the annual cut would be between 1½ and 2½ million feet and Allingham agreed with this figure. Their evidence on this point stands wholly uncontradicted. They did not, however, estimate the amount to be expected from the freehold property as distinguished from the licensed lands. As to this, the most favourable view that can be put upon the matter from the standpoint of the appellant is that one-half of an anticipated annual cut of 2,000,000 feet might be expected from the freehold lands. Other than the figures which I have quoted as to the profits realized from the operations in 1951, 1952 and 1953, the appellant gave no evidence from which any accurate estimate might be made of the worth to it of such a source of supply. The cut at the Gagetown mill apparently averaged 5,000,000 feet and, on the assumption above stated, the freehold lands would have supplied 20 per cent. of these requirements for an indefinite period of time. As the evidence indicates, the source of supply of logs from farmers in the vicinity of Gagetown was progressively dwindling, which increased the value of this property to the company.

If it were to be assumed that the appellant might have obtained annually a million feet from these freehold properties and that a net profit equal to the average in the years 1951-1953 would be realized from the sale of the lumber, this would produce a net income of roughly $23,000 a year. There is a method of estimating compensation to an owner in possession by multiplying the highest annual value which he might expect to obtain from the land by the number of years' purchase which the special circumstances require. As stated by Cripps on Compensation, 8th ed. 1938, p. 187, the number of years' purchase depends upon the interest which the property should yield to a purchaser and should be taken from the recognized tables. Thus, if a property should yield to a purchaser 4 per cent., the number of years' purchase would be 25. If this principle were applied in the present matter and the return to be expected from these lands fixed at 4 per cent. and the annual return to be $23,000, the value of such a prospective income as of the date of the expropriation would

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greatly exceed the compensation that has been awarded. I am, however, of the opinion that this method is not to be adopted in connection with the earnings of an enterprise such as this, subject to so many fluctuations that it is impossible to determine with accuracy what return may be depended upon.

As stated in *Pastoral Finance Association, Limited v. The Minister* (1), the problem is to determine what amount a prudent man in the position of the owner would have been willing to pay for this property sooner than fail to obtain it. This principle, as pointed out in the judgment of this Court in *Woods Manufacturing Company Limited v. The King* (2), has been adopted and consistently followed in this Court. Applying it in the present matter, the question is as to what amount a prudent person in the position of the appellant company, with its long-established lumber export business, its facilities at Gagetown for the manufacture and shipping of lumber situated so close to the property, with access to it by good roads, being in possession of the property but without title to it, would be willing to pay sooner than fail to obtain it.

That the property was of peculiar value to the appellant is too clear for argument. In the absence, however, of sufficient evidence to determine its value to the appellant as a permanent source of logs for its mill, if a rehearing is to be avoided the matter can only be dealt with by utilizing the available evidence as to what would be realized from marketing the timber and pulpwood on the property. Taking MacFarlane's estimate of the profit which could be realized over a period of 3 years from the sale of lumber and pulpwood, which was $302,951.03, and adding to this $100,000, being the increase made in the judgment at the trial, and the further sum of $44,474 as the increased profit which could be realized from the lumber, this shows an aggregate profit of $447,425. As the evidence shows, there was an ample supply of labour available and, with the facilities at the disposal of the appellant company, all of the timber suitable for the manufacture of lumber could have been cut and manufactured within a year from the date of expropriation. Upon an operation carried out in

(1) [1914] A.C. 1083 at 1088.
(2) [1951] S.C.R. 504 at 507, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87.

this manner, the appellant could, as shown by the evidence as to the price realized by it on lumber for the years 1952 and 1953, have realized a profit in the amount above stated, while incurring only one year's taxes on the property and only one year's interest on the investment entering into the computation of net profits. In my opinion, a purchaser in the position of the appellant would be prepared to pay not less than $380,000, a figure which, it will be noted, would show a net profit on the realization from the lumber and pulpwood in excess of $65,000.

I would, accordingly, increase the amount of the award in respect of the freehold properties to $380,000.

The judgment appealed from determined the amount of compensation to be paid to the Province of New Brunswick for the lands subject to the licences at the sum of $344,000 and to the appellant as compensation for the loss of its interest in the lands under the licences at the sum of $42,000.

The licences held by the appellant were of two kinds. Under a sawmill licence which had been in force for many years and which was renewed for a further year on August 1, 1952, the appellant was licensed to cut all grades of timber, lumber and wood as permitted by the regulations relating to Crown lands in an area of 58½ square miles. Of this area, approximately 13 square miles were expropriated. This licence, on its face, was stated to be subject to renewal annually by yearly renewals to August 1, 1963. By the regulations made under the provisions of *The Crown Lands Act,* the licensee was required to operate a sawmill and to cut on the limits in each year such quantity of timber as might be fixed by the Minister and, in any event, not less than 10,000 feet b.m. from each square mile covered by the licence. Except with permission which might be granted upon application, no trees were to be cut of less than a specified diameter. The regulations effective as of August 1, 1952, fixed the stumpage payable in respect of spruce, fir, cedar and red pine logs at $8 per thousand, for hemlock at $7 and white pine at $9 per thousand. The timber licence issued to the appellant on August 1, 1953, covered an area of 35½ square miles, of which approximately 8 were expropriated. This licence was for a year certain, there being no contractual right of renewal as was

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the case with the sawmill licence. As in the case of the other licence, the rights granted were to be exercised subject to the regulations made under *The Crown Lands Act*.

MacFarlane expressed the opinion that the value as freehold to a prospective purchaser of these lands "had the Province offered these lands for sale free of all encumbrances on August 7, 1952" was $274,000. By s. 78 of *The Crown Lands Act* such sales must be made at public auction and the lands or the interest sold to the highest bidder. His method of arriving at that figure was similar to that employed in arriving at his conclusion as to the freehold lands of the appellant. Asked to make a separate valuation of the licensee's interest to a prospective purchaser, he estimated there would be a profit of $113,092.95 from sales of pulpwood and lumber and that a prospective purchaser might pay $64,000 for the licensee's interest. This figure did not contemplate a sale at auction. The learned trial judge, apparently considering this to be excessive, allowed $42,000, being approximately $2,000 per square mile.

By the judgment at the trial, a sum of $112,000 was added to MacFarlane's figure for the Crown lands as freehold, the addition being in relation to the same matters for which the addition of $100,000 was made for the freehold lands. From this, the amount of $42,000 fixed as the value of the licensee's interest was deducted, resulting in the allowance to the Crown in right of the Province of the amount of $344,000. The Crown in right of the Dominion has not appealed from this finding. By the cross-appeal, the Province asks that the amount should be increased substantially and that the amount allowed to the appellant be reduced.

To deal first with the cross-appeal, it is clear from the evidence, and indeed it is the argument advanced by counsel for the Province, that its policy has been for a very long time and still is to license the timber lands owned by the Crown and to regulate the cutting of timber on them in a manner calculated to derive a perpetual annual income. Stumpage rates which were $1 per thousand feet b.m. in 1932 had increased to $8 in 1952 for spruce, fir and red pine logs. The stumpage on white pine logs was in the same period increased from $2 to $9 and on hemlock from $1 to

$7. Thus, the Province could look forward to receiving substantial annual payments from the lands in question in the years to come. It is true that the amounts received as stumpage during the 10 years preceding the expropriation had been negligible but this, it is apparent, would not have continued. It is, I think, proper to assume that, of the 2,000,000 feet estimated by Roberts, Reid and Allingham as the probable annual cut on the freehold and licensed lands combined, half of this should be assigned to the licensed lands. Assuming an average stumpage rate of $8, this would produce an annual income to the Province of $8,000 and, if further substantial increases in these rates which are fixed by the Province should be thought justifiable in the future, that amount might be largely exceeded.

MacFarlane was apparently not instructed and did not attempt to express an opinion as to the value of these lands to the Province of New Brunswick. While profuse details were given by him as to the manner in which he arrived at his conclusion as to the amount which a prospective purchaser who intended to strip the freehold lands during a 3-year period could realize, none such were given in regard to the licensed lands. The witness, however, apparently proceeded in the same manner as he had in connection with the freehold land by estimating the realization from stripping the land of both timber and pulpwood and, from that, estimating what his prospective purchaser would offer for the property. The learned trial judge added $112,000 to MacFarlane's figure in respect of the same matters as to which he had made the addition of $100,000 in the case of the freehold property.

The same principle is to be applied in deciding upon the value of this property as freehold in the hands of the Province, as in the case of the freehold lands of the appellant. No one would seriously suggest, I think, that those having the responsibility of administering the timber lands of the Province would think that the most favourable use to which these lands could be put was to cut all the merchantable timber and pulpwood, an operation which, according to the witness MacFarlane, would mean that nothing could be derived from the property for approximately 30 years. Unlike the appellant, the Province was not engaged in the manufacture of lumber and, accordingly, did not have the

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facilities of the appellant to profitably operate the property, either as a source of log supply or in the conversion of the merchantable timber into lumber within a comparatively short period of time.

I am unable to find in this record any evidence to support a higher valuation than that placed by the learned President on these lands as freehold in the hands of the Province. It is to be remembered that I refer to their value as freehold unaffected by the rights of the licensee which, I agree, must be considered separately. As to the licences, I agree with the learned President that they gave the appellant an interest in the land for which it is entitled to compensation. In the case of the sawmill licence, the appellant was entitled, upon compliance with the regulations, to renewals for a period of substantially 11 years from the date of the expropriation. The timber licence, current at the time of the expropriation, expired on August 1, 1953, and renewing it was merely a matter of grace on the part of the Province. I also agree that the prospect that the Province would have continued to renew the licence from year to year is not in itself an interest in land for which compensation can be awarded.

MacFarlane followed the same method in coming to his conclusion as to the value of the licences to a prospective purchaser as he had adopted in regard to the freehold lands. Estimating that cutting all the logs suitable for lumber and for pulpwood over a 3-year period, a profit of $113,092.95 could be realized, he was of the opinion that such a purchaser would offer $64,000 for the licences. He made no attempt to estimate their value in the hands of the appellant and expressed no opinion as to whether or not the appellant, in bargaining with a prospective purchaser and being under no obligation to sell, would have agreed to any such amount.

In arriving at his conclusion as to the profit that would be realized, MacFarlane included an amount of $74,543.30 for the sale of 37,728 cords of spruce and fir pulpwood. In valuing the interest of the licensee, this must be omitted since the licences did not permit cutting any of the trees for this purpose and it is not to be assumed that the Province would grant a special permit to cut growing timber of a size suitable only for pulpwood when the stumpage rate

was only a fraction of that payable for sawlogs. Upon 6,023,258 feet of spruce, fir and red pine lumber, he estimated a profit of $7.25 per thousand, making $43,668.20. This profit was the estimate he had made in regard to the freehold property, less $8 stumpage payable on the licensed lands. Upon 1,426,362 feet of white pine lumber, he estimated a profit of $9.75 per thousand and on 286,744 feet of hemlock lumber $3.25 per thousand, in both cases deducting the appropriate stumpage from his previous estimate. From these two last-mentioned species, he estimated a profit of $14,848.95. As in the case of the lumber from the freehold lands, he deducted 15 per cent. from all of these figures in respect of timber growing upon lands which, he considered, would prove inoperable.

In making this computation, as I have said, MacFarlane used the price of lumber delivered at Saint John which he had used in his other calculation, relating only to export sales to the United Kingdom, and which was shown to be inaccurate, being roughly from $10 to $19 per thousand, according to the species, less than the average for all grades of lumber, including culls, realized by the appellant at Gagetown over the 3-year period 1951 to 1953. The error substantially decreased the anticipated realization from lumber. His computation contained a further error in that the figures used in estimating the profit on the lumber included logs from the land subject to the timber licence which, according to the evidence of the witness Brown, an official in the employ of the Department of Lands in the Province, were smaller than the size permitted to be cut by the regulations. According to him, the quantities of sawlogs larger than the diameter limits specified by the Timber regulations on these lands, as shown in the Roberts cruise, were 364 M spruce and fir, 45 M red pine, 140 M white pine and 28 M hemlock, a total of 577,000 feet. The figures of quantities used by MacFarlane in estimating the realization included 1,089 M of spruce, fir and red pine logs, 329 M of white pine and 286 M of hemlock logs, these figures omitting fractions of thousands. It cannot be assumed, in my opinion, that the Province would have permitted the cutting of these undersized logs during the year the timber licence was to run and I think it is only timber of the size which might have been cut under its terms which should be

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included in the calculation. As to that part of the remainder of these quantities attributable to the sawmill licence, part at least was less than the permitted size but, as to this, since the licence had 11 years to run and since these figures are advanced on behalf of the Crown, it is proper to assume, in my opinion, that the quantities shown would be of a size which it was permissible to cut within a 3-year period.

With these alterations and estimating the profit which, it might be anticipated, would result by applying the costs and the average realization of the appellant over the above-mentioned 3-year period, MacFarlane's proposed operation would show a profit, after making the same 15 per cent. deduction, of $89,632.78. This figure does not exhaust the profit which the appellant might reasonably have expected to realize from the sawmill limits. Unlike the freehold land, these figures represent only realization upon the merchantable timber of sufficient size to be cut under the Timber Regulations and do not include pulpwood. As shown by Brown's computation, within a further period of 10 years at least 3,000,000 feet additional would mature sufficiently to permit the logging of the timber. I am, however, unable to find evidence in this regard sufficient to enable me to estimate the value that should be assigned to this timber in the hands of the appellant.

As pointed out by the learned President, very little other evidence was given which is of any assistance in valuing these licences. In 1942 Reid Brothers had purchased licences from another company for 11 square miles for $10,000 and approximately 2½ square miles from another person for $3,054. As at that time stumpage rates and, I must assume, the value of manufactured lumber were so very much less than they were in 1952, this evidence is of no value. As shown by Brown, there had been other sales for considerably less than the $2,000 per square mile allowed in the judgment appealed from but, as there was no information as to the nature of the timber upon these licences, the evidence is of no assistance.

In these circumstances, I consider that the compensation should be determined on the available evidence and, in my opinion, a purchaser in the position of the appellant would have been prepared to pay not less than $70,000 for these licences, at which price the operation would realize a net

profit in excess of $19,000 in addition to such amounts as might thereafter be realized during the life of the licence as the timber matured, which undoubtedly added very substantially to this value.

By arrangement with the Crown the appellant company, following the expropriation, entered upon the freehold and licensed lands and cut substantial quantities of logs and a smaller quantity of pulpwood. Details of the quantities cut were given in the exhibit Z5 which was introduced into evidence by the witness Allingham. In addition to stating the quantities cut, the appellant estimated the stumpage to be paid to the Crown, in the absence of any agreement on the point, at the figures which it claimed in computing its claim to compensation from the Crown. The estimate of value made by Roberts in which these figures were used was rejected by the learned trial judge as exorbitant but, in computing the amount of credit that the Crown was entitled to for the logs and pulpwood so cut, the appellant was charged at these rates. In my opinion, since the evidence of MacFarlane and Colter as to the value of the timber and pulpwood, with the additions made by the learned trial judge to which I have referred, was accepted, a stumpage rate based on these figures should be accepted rather than the rate found to be so excessive. In computing the amount payable, I would apply a stumpage rate of $10 per thousand for spruce, fir and red pine, $15 for white pine and $7 for hemlock. With an addition of $1 per thousand for fir, red pine and hemlock, these are Colter's figures as shown in ex. 15 prepared by him. As to the pulpwood, I would add $1 per cord to Colter's figure. Upon this basis the amount of credit to be applied on the appellant's claim is the sum of $36,896.50 in lieu of the credit of $47,323 allowed in the judgment appealed from.

As to the claim of the appellant for the cost of the survey made prior to the expropriation which consisted of running and painting lines around the defendant's freehold and licensed lands, I agree with the learned President that this was simply one of the factors to be taken into consideration in valuing the lands and should not be allowed. I find nothing in the evidence to indicate that their value was increased by this work.

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I can see no ground for interference in the amount of the award made for the loss on mill-yard equipment or for disturbance.

The learned President, while allowing 10 per cent. for compulsory taking in respect of the compensation fixed for the freehold lands, refused such allowance in respect of the interest of the appellant under the licences. I am unable to perceive any logical reason why it should be allowed as to the one and refused as to the other. In accordance with the decisions of this Court the allowance should, in my opinion, be made. I may add that I am far from being satisfied that the increased compensation I would allow in respect of these licences is the full measure of their value to the owner but, on the evidence in this record, I do not consider any larger sum should be awarded.

The amount awarded to the appellant at the trial in respect of the licences was deducted from the amount found to be the value of the lands as freehold in the hands of the Province. There has been no appeal from the award made to the Province and, accordingly, that matter being *res judicata* as between the Dominion and the Province, we are without jurisdiction to reduce the amount. Had the Dominion appealed, I would have directed that the amount of $77,000 rather than $42,000 be deducted from the value attributed to the land itself. Since, however, the litigation is between Her Majesty in right of Canada and Her Majesty in right of the Province of New Brunswick, I would assume that the matter would be adjusted between the two Governments by arrangement.

In the result, I would allow this appeal with costs and increase the amount of the award in respect of the freehold lands by $50,000 and a further sum of $5,000 for the 10 per cent. allowance for compulsory taking, in respect of the licences by the sum of $28,000 and a further sum of $7,000 for compulsory taking, and by the reduction of credit to be given on the material cut after the expropriation by $10,426.50, these amounts totalling $100,426.50. I would allow interest upon the award, amended to this extent, from the dates fixed in the judgment of the Exchequer Court.

I would dismiss the cross-appeal of the Province with costs.

ABBOTT J.:—I have had the advantage of considering the reasons of my brother Rand and I share his view that the final valuations reached by the learned President, for both the freehold lands and the Crown lands, were liberal and should not be disturbed. With respect, however, I differ from him as to the amount by which the valuation of appellant's interest as a licensee of Crown lands should be increased.

The economic value to the owner, of timber and sawmill licences such as those held by appellant, cannot exceed the profit potential of such licences after taxes, during the term which the licences still have to run. Difficult though it may be to determine accurately such an amount in advance, it seems clear that the maximum benefit which the holder of such a licence can derive from his licence, is the profit he is able to keep, as a result of cutting and selling the permitted grades of timber during the term of the licence.

I have used the phrase "profit potential after taxes" because in capitalizing the profit possibilities during the remainder of the term of the licence, which must be done for the purpose of fixing compensation, a Court cannot, in my opinion, ignore the fact that such profits are subject to tax and that the only benefit the owner gets from the exploitation of his licensed timber limits is his profit after tax.

It is in evidence that these timber licences are put up for sale at public auction by the Province and are also bought and sold by private holders. It would seem obvious that the price at which these licences are traded in, must reflect, to a large extent, the value of this profit potential after tax. That being so, evidence as to such prices is clearly of assistance in determining the value of these licences to the owner, in order to fix compensation for compulsory taking.

Evidence was given as to the price at which licences for timber lands in New Brunswick were bought and sold, and this evidence established that such prices varied a great deal. Mr. Colter, who stated he held some 500 square miles of timber lands under licence, testified that the

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highest price he had ever paid was $2,000 per square mile. No evidence was given of any higher price ever having been paid although there was evidence of substantially lower prices. Mr. MacFarlane estimated the amount which a prospective purchaser would pay to appellant for its licensed lands at $64,000 or some $2,800 per square mile, but as has been pointed out by the learned President and by my brothers Rand and Locke, in arriving at this estimate he included the value of timber which appellant was not permitted to cut under the terms of its licence. This portion of Mr. MacFarlane's evidence was given during cross-examination by appellant, the witness stated he had not expected to be called upon to make such an estimate, and that the statement filed as an exhibit to support it, had been prepared by him only the night before. Moreover, I can find no indication in his testimony that, in making his estimate, Mr. MacFarlane took into account any tax payable on profits derived from the exploitation of the licences.

The learned President reviewed in detail all the evidence adduced as to the value of appellant's interest as licensee, and after doing so stated that he could find no justification in this evidence for valuing such interest at a figure higher than the highest amount established as having been paid for similar interests. He therefore fixed the compensation at $42,000. I am unable to say that he was wrong in so doing, and I do not think his finding should be disturbed.

The 10 per cent. allowance for a forcible taking was granted on the freehold and I agree with my brothers Rand and Locke that it should be allowed on the value of the licences. On the other matters raised on the appeal and the cross-appeal, I am in agreement with the conclusions of my brother Rand.

I would allow the appeal with costs; modify the judgment by adding to the amount of the award, (1) $4,200 allowance for compulsory taking in respect of the licensed lands; (2) $3,702, being 50 per cent. of the survey costs, and (3) $10,567 as a reduction in the credit for wood cut after expropriation: a total of $18,469, with interest from

the dates fixed in the judgment of the Exchequer Court. The cross-appeal of the Province should be dismissed with costs.

Appeal allowed with costs; cross-appeal dismissed with costs.

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Solicitor for the plaintiff, respondent: A. McF. Limerick, Fredericton.

Solicitor for the respondent, The Attorney General for New Brunswick: C. F. Inches, Saint John.