1928
*May 3, 4.
*Oct. 2.

CANADIAN PROVINCIAL POWER COMPANY LIMITED (PLAINTIFF).. } APPELLANT;

AND

THE NOVA SCOTIA POWER COMMISSION (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Waters and watercourses—Power development—Nova Scotia Water Act—Nova Scotia Power Commission Act—Expropriation of land by Power Commission for water power development purposes—Amount of compensation—Finding of jury—Insufficient direction to jury—Factors to be taken into account—New trial.

Plaintiff was incorporated by c. 181 of 1914, N.S., with comprehensive powers for its purposes of developing water power and producing and selling electric power. It acquired, for $500, about 31½ acres of land at Marshall Falls, on East River, Sheet Harbour, Nova Scotia. In

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

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1919 (c. 5) the Nova Scotia legislature passed the *Nova Scotia Water Act* which, among other things, declared that every watercourse and the sole and exclusive right to use, divert and appropriate any and all water in any watercourse was vested forever in the Crown in the right of the Province. There was provision for the Governor in Council authorizing persons to use any watercourse and any water therein on such terms and conditions as the Governor in Council might deem proper. The legislature also passed the *Power Commission Act* (1919, c. 6; subsequently, with amendments, consolidated as c. 130, R.S.N.S., 1923) by which defendant was incorporated. Under its powers given by that Act, the defendant proceeded to develop East River, Sheet Harbour, for power purposes; it contracted to supply electrical power to the Pictou County Power Board (incorporated by c. 165 of 1920); constructed storage dams above Marshall Falls; and expropriated land, including plaintiff's said land. Plaintiff filed its claim for compensation, and (as authorized under the *Power Commission Act,* defendant not having instituted action within the time prescribed) sued in the Supreme Court of Nova Scotia for a declaration that it was entitled to $80,000 as compensation. At the trial a special jury found the compensation to be $32,000. On appeal by defendant, the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 524) set aside the finding and directed a new trial. Plaintiff appealed.

Held, that the direction for a new trial should be affirmed; there was no evidence that the land's agricultural value had increased, or that it had any special suitability except in relation to the development of power at Marshall Falls; and the jury had not been sufficiently directed so as clearly to apprehend the effect of the *Nova Scotia Water Act* and the *Power Commission Act,* and of what had been done pursuant thereto, and of the resultant situation which prevailed, as affecting the plaintiff's rights and prospects, at the time its land was expropriated.

It was pointed out that unless the owner of the land constituting the dam-site had a right or privilege to use or divert the watercourse or the water, the dam-site was of no utility or value for the manufacture of power, and that subs. 2 of s. 4 of the *Nova Scotia Water Act,* as enacted by c. 75 of 1920, whereby the Governor in Council is empowered to authorize any person to use any watercourse or any water therein for such purposes and on such terms and conditions as are deemed proper or advisable, is not expressed in a manner which points to the grant of a heritable or assignable right; that the use which may be authorized is not a use which goes with the land, and that it was upon the exercise of this power by the Governor in Council that the plaintiff's claim to a value for special adaptability must depend.

The *Nova Scotia Water Act* discussed and construed, in its bearing on the matters in question.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *en banc* (1) setting aside the verdict of the jury at the trial and ordering a new trial.

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The defendant, in the exercise of its powers under the *Power Commission Act* (Statutes of Nova Scotia, 1919, c. 6; subsequently, with amendments, consolidated as c. 130, R.S.N.S. 1923) acquired by expropriation, in June, 1925, 31.48 acres of land belonging to the plaintiff (a company incorporated by c. 181 of the Statutes of Nova Scotia, 1914, with comprehensive powers for its purposes of developing water-power and producing and selling electric power) at Marshall Falls, on East River, Sheet Harbour, Nova Scotia. The plaintiff filed a claim for compensation and sued in the Supreme Court of Nova Scotia (as authorized under the *Power Commission Act,* the defendant not having instituted action within the prescribed time) for a declaration that it was entitled to receive the sum of $80,000 as compensation. At the trial, before Carroll J. with a special jury, the jury found the compensation payable to the plaintiff to be $32,500. On appeal by the defendant, the Supreme Court of Nova Scotia *en banc* (1) ordered that the verdict of the jury be set aside and that there be a new trial. From that judgment the plaintiff appealed to this Court.

The material facts of the case, and the legislation, the construction and effect of which was involved in the consideration of the case, are sufficiently set out in the judgment now reported. The appeal was dismissed with costs.

F. R. Taylor K.C. and *R. M. Fielding* for the appellant.

C. J. Burchell K.C. and *G. McL. Daley* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The appellant company seeks, in this appeal, to have restored the finding of a special jury assessing the compensation for land taken by the respondent Commission on East River, Sheet Harbour, in Nova Scotia, the finding having been set aside and a new trial ordered by the Supreme Court of that province.

In 1913 Roderick McColl, the appellant's leading witness, who had been for many years provincial engineer of Nova Scotia, in charge of all the public works, resigned his office to go into hydro electric development. He had been interested, as he says, in the fact that Nova Scotia was paying

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so high for its power, and was making so little progress. He looked around for the best market, and it seemed to him that Halifax and Pictou Counties were the natural markets, and those that were suffering most. He was familiar with the East River, Sheet Harbour, in the County of Halifax. He obtained the provincial Act, c. 181 of 1914, incorporating the appellant company, the objects and powers of which are very comprehensive; in the words of the witness, "Briefly speaking, the Act empowered the company to develop a water-power on Sheet Harbour and electric development on that river for supplying mainly Pictou County towns." Paragraphs (*c*) and (*d*) of the objects and powers are in these terms:

(*c*) to set, erect, operate and maintain in and through the counties of Pictou, Colchester, Antigonish and Guysboro, and in that portion of the County of Halifax east of the Musquodoboit River, the usual poles with wires thereon for the purpose of conveying said electrical or galvanic currents, or for the purpose of hanging or stringing thereon telegraph or telephone wires for any of the company's purposes, from the point or points where the same is generated to the point or points of sale, which shall be and become when erected the property of the Company;

(*d*) to enter into a contract with any electric light, power, tram or other company or municipality to supply the electric current and electricity they may require in their business, or for the purposes of lighting or power, and for the use of their poles and wires and apparatus for distribution and other purposes;

By s. 19, subs. 1, it is provided that

In order to secure, have, develop, maintain or increase the power to be derived from the waters of the East River, Sheet Harbour, or any river, stream or lake tributary to, flowing into or connected with the same, and all branches thereof, the Company shall have full right, power and authority to dam, pen back and hold said waters of said East River, Sheet Harbour, and of any such river, stream or lake and all branches thereof by dams or reservoirs, and to withdraw the waters from the channel of such East River, Sheet Harbour, and of any such river, stream or lake, and all branches thereof, and to convey the water so dammed, penned back, and held, by sluice way, canal, flume, conduit or other means, over, across, under or through any lands whatever, to any penstock, sluiceway, pipes or reservoirs, as may be most expedient or efficient for delivering the water for the purpose of operating the water wheels of the said Company; the use of the water of said river to be subject to any provisions or regulations that may be made by commissioners appointed under Chapter 95, Acts of 1895, for conveying lumber and timber on rivers, or any amendments thereto.

The other subsections of section 19 provide for the ascertainment and recovery of compensation for damages or injurious affection caused by the exercise of the powers so conferred.

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By section 20, the Company is empowered, when it considers it necessary to acquire lands upon which to construct its works, or for other purposes, and, when no agreement can be made for the purchase of the land, to present a petition to the Governor in Council praying for decision of the question as to whether the property or easement sought to be acquired is necessary for any of the company's purposes, and it is provided that the Governor in Council shall thereupon determine that question according to a procedure which is outlined, and, if he decide that the property or easement sought to be acquired is necessary for any of the purposes of the company, "and by Order in Council declare that the same may be expropriated under the provisions of this section," the value of the property shall be ascertained in the manner thereby provided. There is special provision, by s. 23, for the company's acquisition of rights of way for its transmission lines through uncultivated or wilderness lands, and, by s. 24, it is provided that

> The Company shall have the right:
>
> (*a*) to enter upon and occupy any Crown Lands for a right of way for its tranmission line, or for the construction of dams, or building canals or flumes or power plant or other works of the Company;
>
> (*b*) to cause any Crown Lands to be overflowed and to keep the same overflowed.
>
> The compensation to be paid the Crown for any act or thing done under the provisions of this section shall be settled by an arbitrator * * *.

There were three waterfalls on East River where power could be developed; first, going up stream, at Ruth Falls, near the mouth of the stream; secondly, at Malay Falls, a short distance above, and thirdly, at Marshall Falls, about half a mile above Malay. The appellant company acquired some land for power sites at each of these situations, but nothing was done in the way of construction or development.

In 1919 the Legislature of Nova Scotia enacted the *Nova Scotia Water Act*, c. 5, of 1919. Its provisions have an important bearing upon the case. By section 2, par. (*b*), "watercourse" is defined to include

> every watercourse and the bed thereof and every source of water supply, whether the same usually contains water or not, and every stream, river, lake, pond, creek, spring, ravine, and gulch; but shall not include small rivulets or brooks unsuitable for milling, mechanical or power purposes.

The principal enactment is section 3, which provides that

> Notwithstanding any law of Nova Scotia, whether statutory or otherwise, or any grant, deed or transfer heretofore made, whether by the

Crown or otherwise, or any possession, occupation, use, or obstruction of any watercourse, or any use of any water by any person for any time whatever, every watercourse and the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse, is declared to be vested forever in the Crown in the right of the province of Nova Scotia.

By section 4, subsections 1 and 2 (the latter as enacted in substitution by c. 75 of 1920), it is enacted that

(1) Where any person within two years from the passing of this Act establishes to the satisfaction of the Minister that any watercourse or any water therein was at the time of the passing of this Act being lawfully used by him or that he was entitled to use the same, such person shall be entitled to be authorized by the Governor in Council to use such watercourse and water therein, subject to such terms and conditions as the Governor in Council deems just.

(2) Notwithstanding the provisions of the next preceding subsection, the Governor in Council may from time to time authorize any person to use any watercourse and any water therein for such purposes and on such terms and conditions as are deemed proper or advisable, including, in the discretion of the Governor in Council, the payment of compensation to any person whose rights may be injuriously affected, the amount of such compensation to be fixed and determined by the Governor in Council or fixed and determined by a Judge of the Supreme Court whom the Governor in Council may appoint, and, except as aforesaid, no action, process or proceeding whatsoever shall be commenced or issued in any court or before any tribunal by or against any person authorized by the Governor in Council to use such watercourse or any water therein conditionally or otherwise.

This Act, as consolidated and revised, now appears as c. 26 of the *Revised Statutes of Nova Scotia, 1923.*

The *Nova Scotia Water Act* was enacted on 17th May, 1919, and at the same time the legislature enacted c. 6 of 1919, "*An Act respecting the Development of Electrical Energy from Water-Power and other Sources,*" cited as the *Power Commission Act,* which, with its amendments, was subsequently consolidated as c. 130 of the Revised Statutes of 1923. By this Act the respondent Commission, consisting of three persons, appointed by the Governor in Council, "two of whom may be members, and one of whom shall be a member, of the Executive Council," was incorporated and constituted as an agency of the government, under the name of *The Nova Scotia Power Commission,* with authority to

generate, accumulate, transmit, distribute, supply and utilize electric energy and power in any part of the province of Nova Scotia, and do everything incidental thereto, or deemed by the Commission necessary or expedient therefor.

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The Commission is given comprehensive powers to acquire, expropriate and use property of various descriptions, including land, watercourses, water privileges, works, machinery and plant developed, operated, used or adapted for its purposes, and to enter upon, take and use, without the consent of the owner, any land upon which any water, watercourse or privilege is situate, or any watercourse which, in the opinion of the Commission, is capable of improvement or development for the purpose of providing water-power, and to construct such dams, sluices, canals, race-ways and other works, and to do all such acts, as may be deemed proper or expedient for such purposes, and to flood and overflow any land for the purpose of providing storage of water, or for any other purpose in connection with such works, and to acquire by purchase or otherwise, or, without the consent of the owner, to enter upon, take possession of and use any land or watercourse, and any dams, buildings or structures or improvements thereon, and any easements, rights or other privileges which, in the opinion of the Commission, are necessary, requisite or useful for the storage of water, back flowage, erection of any building or other structure, or for the doing of any work thereon, or for the full, partial or better development, extension, utilization, improvement or exercise of any water-right, water-privilege, water-power or other improvement, or work undertaken or proposed to be undertaken by the Commission, or by any municipality, corporation or individual, on such terms and conditions as the Commission may deem expedient; and to expropriate, or acquire by purchase or otherwise, real and personal property of every description deemed useful for the purpose of generating, accumulating, transmitting, distributing, supplying and utilizing electrical power or energy in a municipality, the council of which has entered into an agreement with the Commission for the supply of electrical power or energy. It is provided by s. 15, subs. 9, of the Act that

> Notwithstanding any of the provisions of the *Nova Scotia Water Act*, or of any authorization by the Governor in Council to any person to use any watercourse or the water therein, or to exercise any rights in respect thereof, the Governor in Council may and is hereby empowered to authorize the Commission to use exclusively or to such extent as the Governor in Council may specify, any watercourse and any water therein for the purposes of the Commission; and no damages or compensation shall be given or claimed in respect thereto except such amount, if any, as may be fixed and determined by the Governor in Council.

It is also provided by section 15, paragraph D, that

> In any action for compensation, whether commenced by the Commission or by any person interested, the Court shall not allow compensation for the taking or injuriously affecting by the Commission of any watercourse, but the compensation for same, if any, shall be fixed and determined by the Governor in Council.

It is enacted by s. 18 of the original Act, s. 19 as revised, that

> Expropriation powers conferred by this Chapter shall extend to land, works, rights, powers, privileges, and property, notwithstanding that the same are or may be deemed to be devoted to a public use, or that the owner thereof possesses the power of taking land compulsorily.

There is a provision that, if the Commission does not commence an action for compensation (*sic*) within three months after particulars of a claim are filed with it, any person so filing particulars may commence an action in the Supreme Court of the Province claiming compensation, in which action, however, no relief shall be claimed, except a declaration as to the amount of compensation payable, and as to the parties entitled thereto.

In this case the appellant claimed for compensation $80,000, but the Commission did not itself institute any action, and the appellant, as authorized by the statute, commenced its action in the Supreme Court of the province, and obtained a special jury for the trial of the cause.

Upon obtaining the legislation of 1919, the Government proceeded to organize the Commission, and announced its intention to develop the East River for power purposes. The *Act to Incorporate the Pictou County Power Board,* c. 165 of 1920, was enacted as a public Act of Nova Scotia on 22nd May, 1920. It recites that the incorporated towns of Pictou, Trenton, New Glasgow, Stellarton and Westville, and the Municipality of the County of Pictou, respectively, had made, or were about to make, application to the Nova Scotia Power Commission for a supply of electrical energy under the provisions of Chapter 6 of the Acts of 1919, the *Power Commission Act,* and that it was considered advisable, for the purpose of reducing overhead expenses and delays, and to facilitate the purchase, distribution and sale of electrical energy, that a Board should be appointed representing these municipalities. It provides that a Board of not more than eight, nor less than five, persons shall be appointed; that the Board shall be a body corporate; that, for the purposes of the purchase, distribution and sale of

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electrical energy and of the *Power Commission Act*, the Board shall be deemed to be a municipality, and that the provisions of the last mentioned Act relating to a municipality shall *mutatis mutandis* apply in the case of the Board. The Board is empowered to appoint a Chief Engineer, Accountant, Secretary and such other officers, servants and workmen as may be deemed requisite; to regulate their salaries and expenses, which shall be chargeable to and payable from the revenues coming to the Board from the sale of electrical power and energy, and that the Board shall be subject to the provisions of the *Public Utilities Act*, c. 1 of 1913, and the amendments thereto.

Upon the survey and exploration of the river, the Power Commission found that it was capable of a considerable development of power, which could be made available for the supply of the Pictou Municipalities by the construction and use of storage dams. Mr. Johnston, the Chief Engineer of the Power Commission, said in his evidence:

Q. You constructed storage dams above Marshall Falls prior to the expropriation of the lands in question?—A. Yes.

Q. You might explain why you put up storage dams.—A. Before the storage dams were put in, the flow of the river in summer time, in dry months, got down until there was practically nothing. It was equivalent to 25 cubic feet of water per second, that is 250 gallons per second flowing in the river at that time.

Q. How much did you need?—A. The maximum flow of the river reached 7,500 feet, that is 150 times that quantity, which is of course no use for power purposes; you must have a steady supply of water all the year, so you have to level up by the creation of these storage bases, so as to draw from the storage bases during the drought period in summer time to create the necessary quantity of water to produce power. It was calculated we would be able to have a uniform flow of 305 feet.

Q. At Marshall Falls in the summer time it was practically dry?—A. Normally, it would be practically dry. In the words of the inhabitants, one was able to walk across the river dry shod in summer time.

Q. It was therefore necessary to have a system of these storage dams? —A. Yes. Some of these storage dams were twenty miles away from the head of Marshall Falls.

Q. Prior to the time of this expropriation of lands in question how much had the storage dams cost?—A. Approximately, $250,000. That includes the lands flooded and lands round the dams themselves.

Q. How much did you pay for those lands?—A. $18,000 is shown in 1925.

Q. Subsequently, since that date?—A. Last summer two additional dams were put in, Union and Marshall Falls dams, which are to be used for storage dams initially. These two cost approximately $200,000.

Q. Your total expense up to date is $550,000 for storage dams. You keep men employed to look after the storage dams?—A. We keep one man constantly looking after the dams and one man part of the year. I

should have said, if there had been only Malay Falls on the river, it would be necessary for Malay Falls alone the same way it would have been necessary for the development of Marshall Falls.

Q. It is sufficient for all your present needs?—A. Yes.

It is, as I understood the testimony, admitted that the appellant's project for development and manufacture of power at Marshall Falls depended upon the use of the water held by the Commission's storage dams. Mr. McColl says:

Q. You were figuring on making use of the storage base. You would, necessarily, have to—the storage base is further up the river?—A. Yes. They put us to a disadvantage by taking our lower lands and they give us that additional advantage by supplying storage. The action had two effects; one was to improve our storage and the other was to take away the lower development, which also increased a little the cost of this development; so we were about even.

Q. You expect to get that for nothing?—A. Tit for tat; if they injure us in one way, I suppose they make it up in another. I never got much for nothing from them.

Q. You have to have that storage?—A. Yes.

On 7th September, 1922, the Pictou County Board entered into a contract with the Commission for the purchase of electrical energy for a period of 30 years for the use of the Municipality of the County of Pictou and the incorporated towns of Pictou, Trenton, New Glasgow, Stellarton and Westville, and the inhabitants thereof, for lighting, heating and power purposes. It is recited by the contract that the development at Malay Falls on East River, Sheet Harbour, is the most economical and best suited for the present needs of the county; that it is estimated that it will deliver eight million kilowatt hours annually in Pictou County, which may be supplemented by a second development, and that Malay Falls will utilize eight possible storage basins out of a total of 13 (large and small) available. The Commission contracts to proceed promptly with this initial development, and to complete the same within 18 months from the date of the approval of the contract by the Governor in Council, and to reserve, deliver and supply to the Board electrical power and energy specified in the contract as follows:

1. Electrical power and energy up to a total of five million six hundred thousand (5,600,000) kilowatt hours per year, at a rate not exceeding twenty-four hundred (2,400) kilowatts and not exceeding three thousand (3,000) kilowatts amperes and at the option of the Board on eighteen months previous notice being given, eight million (8,000,000) kilowatts hours per year at a rate not exceeding thirty-six hundred (3,600) kilowatts and not exceeding forty-five hundred (4,500) kilowatt amperes, and

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2. Such further quantities of electrical power and energy as the Commission may from time to time consider may be available for delivery and supply to the Board, and rateably to the then existing or future requirements of other users.

And the Board contracts to purchase from the Commission all the electrical power and energy which the Commission contracts to deliver and supply, and to pay the Commission the cost, which is to be adjusted, appropriated and fixed annually by the Commission in the manner stipulated by the contract.

The appellant company or its promoters had been endeavouring from the beginning, unsuccessfully, to obtain capital. Its act of incorporation was conditioned to cease and determine if actual work were not "commenced and continued within two years from the date of its passing." Several statutory enlargements of this period had been obtained, the latest by c. 164 of 1919, whereby it was provided in effect that the Act was still in force, but should cease and determine if actual work were not commenced and continued within seven years from the date of its passing. That period would expire on 10th June, 1921. The situation with regard to capital and work done by the company at the expiry of that date is shown by Mr. McColl, who says,

Q. Apart from surveys, the only actual construction work was done in June, 1921?—A. Yes.

Q. That consisted in sending one man down to cut some brush down?—A. Clear the land; cut some trees for camp and get ready.

Q. The total bill you paid him was $48, something like that?—A. I think altogether it cost a couple of hundred dollars.

Q. He started work; do you remember when?—A. He started about the 8th June.

Q. The seven years would expire about the 10th June, 1921?—A. Yes.

Q. This was about two days before the time expired you sent the man down?—A. Yes, to technically comply with anything that might be raised. We were advised it did not affect our charter. To technically comply with it, we did that. We knew railways sometimes do that.

Q. You also stated in your evidence before (you were asked to bring all the books of the company) that this company never had any real money in its treasury?—A. No.

Q. That is right?—A. No; I would say no real money; they may have had a little.

Upon this statement of the facts a serious question is suggested as to compliance with the statutory condition for commencement and continuance of actual work; but that question was not very fully discussed before us, and was not considered in the courts below; moreover, the facts

were not fully investigated. The defendant will therefore be at liberty to raise this objection upon the new trial, and the evidence is quoted, and becomes material now, only as affecting the value of the interest which the appellant claims to possess, assuming the action to be maintainable.

The land which had been acquired by the Company at Marshall Falls in 1914 consisted of 31·48 acres, described as

All that part or portion of a certain lot of land containing one hundred acres and granted on the 11th day of August, 1899, and recorded in grant Book No. 7, page 167, being Grant No. 19377 and being all that portion of the said lot of land lying west of the centre line or thread of East River, Sheet Harbour. Reserving to the party of the first part the right to enter and cut hardwood for fuel and remove the same.

On 10th June, 1925, the Commission, pursuant to its powers of expropriation, filed its plan and description of land at East River, which included the lands so described. The land acquired by the Company at Malay Falls had already been expropriated by the Commission by a plan filed on 6th December, 1922, and proceedings were pending for ascertainment and recovery of compensation for that parcel. The appeal book in that case, which is in evidence here, shews that the case was tried by Carroll J., without a jury; that the plaintiff's claim amounted to $96,500 for compensation or damages, and that the learned judge awarded $5,500 for compensation and costs. We were informed at the hearing that that litigation was terminated, and it is necessary to mention it only for the purpose of excluding its subject matter as a factor in ascertaining the compensation or damages now sought to be recovered with relation to the upper site.

By the present action, which was commenced 26th January, 1927, the Company seeks a declaration of the value of the land. The jury rendered its finding of $32,500 on 27th May, 1927, and the Commission gave notice of motion for an order that the verdict given, and the judgment or order directed on the trial, should be set aside, and that the Supreme Court *en banc* should declare the amount of compensation payable to the plaintiff, or alternatively, that a new trial should be had upon grounds which are stated, including weight of evidence, excess of compensation, misdirection and non-direction in certain particulars. The Court, consisting of five judges, unanimously allowed the

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motion, set aside the finding, and granted a new trial with costs; the judgment proceeding mainly upon errors found in the charge

Now it seems clear enough upon the facts which have been narrated that the jury, in considering its finding, should have realized that, before the lands in question here were taken or expropriated, the appreciable probability of a market for any power which could be developed or made available at Marshall Falls, otherwise than by the Government, had been materially reduced, if not entirely dissipated, by the legislation which was enacted during or subsequently to the Session of 1919, and the contract which had gone into effect with the Pictou County Board. The Government had adopted the policy of supplying power to the municipalities at cost, and had provided for the extension of this privilege to industrial enterprises. The project recited by the contract contemplated a junction, opposite the Nova Scotia Steel and Coal Company's plant, of the respondent's transmission line from Stellarton to the town of Pictou, "so that a circuit may be run to that plant if and when desired." Mr. McColl stated at the trial, in his answer to the question as to what the Nova Scotia Steel and Coal Company was then paying for its power, that "they are getting power for one cent from the Nova Scotia Power but they cannot get it forever. Under their contract, whenever the Nova Scotia Power Commission wants to give to anyone else they can take it from them. They are getting it below what other people are paying."

It was a question for the jury, under proper direction, whether there was any special value in the market which, in the circumstances as they existed when the Commission took or expropriated the lands, could have been substantiated or figured for the Company. The cost of the 31.48 acres, when they were acquired for the Company in 1914, was $500, and there is no evidence that their agricultural value is any greater, or that the land has any special suitability, except in relation to the development of power at Marshall Falls, where it is naturally adapted to the foundation of one end of a dam, which would serve for storage, and to enable the water to be used for the production of power.

Then, of course, in considering the special value, if any, which the riparian land possessed as a dam-site for water-

power, the jury should know the nature and extent of the existing riparian rights, and it is, in this connection, impossible to overlook the modifications which were introduced in 1919 and 1920 by the *Nova Scotia Water Act*. By section 3 " every watercourse and the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse is declared to be vested forever in the Crown in the right of the province of Nova Scotia." It is true that, under subs. 1 of par. 4, any person making the requisite proof might have been authorized by the Governor in Council, subject to terms and conditions, but I think the jury should have been told that the Company was not entitled under that subsection, because it did not, within two years from the passing of that Act, make any proof to the satisfaction of the Minister. The Act was passed on 17th May, 1919, and, on the same day in 1921, the Minister received a letter written by Mr. McColl, as manager of the appellant company, stating that the company, since the acquisition of its charter, had purchased property on East River, and " made surveys and other work in connection with this development, and in accordance with their charter," and he continued:

> The company therefore begs to submit their application to you in accordance with Chapter 5 of the Acts of 1919. This application is however made without prejudice to any right which the company have under their Charter and its amendments or under any charter.

There is, however, nothing further upon the subject, and therefore nothing to entitle the Company to the use of the water under subs. 1 of s. 4. It was certainly contemplated by that clause that a mere notice without prejudice would not suffice, and that the Governor in Council should have a reasonable opportunity, within two years, to ascertain the essential facts and to consider the requirements of the case, and the terms and conditions, if any, which ought to be imposed. Mellish J., who gave the judgment of the Court on the appeal, interjected a doubt upon this point; but, looking at the words of the statute and the facts, I do not see room for any doubt.

Nevertheless there is a power in the Governor in Council, conferred by subs. 2 of s. 4, as enacted by c. 75 of 1920, whereby he may, from time to time, subject to the provisions of s. 15, subs. 9, of the *Power Commission Act*, authorize any person to use any watercourse, and any water

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therein, for such purposes, and on such terms and conditions, including compensation, as are deemed proper or advisable in the discretion of the Governor in Council.

Unless the owner of the land constituting the dam-site have a right or privilege to use or divert the watercourse or the water, the dam-site is of no utility or value to him for the manufacture of power, but the Governor in Council may authorize the use, as provided by subs. 2 of s. 4 of the *Nova Scotia Water Act,* if it be conceivable in the circumstances that he would do so, and it is, I think, upon the exercise of the power to authorize that the plaintiff's claim to a value for special adaptability must depend. It will be perceived that the clause is not expressed in a manner which points to the grant of a heritable or assignable right, and that the use which may be authorized is not a use which goes with the land. "The Governor in Council may from time to time authorize any person." Therefore the question seems to be if, and to what extent, the existence of this power in the Governor in Council adds an appreciable value to the land—and that, as I see it, must be considered as the strict and sole foundation of the claim to recover for special adaptability. See *Cedar Rapids Manufacturing & Power Co.* v. *Lacoste* (1); *Corrie* v. *McDermott* (2); *Pastoral Finance Association Ltd.* v. *The Minister* (3). Lord Moulton makes a very apt remark when he says on the last mentioned page:

> Probably the most practical form in which the matter can be put is that they (the owners) were entitled to that which a prudent man, in their position, would have been willing to give for the land sooner than fail to obtain it.

The legislative declaration, embodied in section 3 of the *Nova Scotia Water Act,* that the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse is vested forever in the Crown in the right of the province, may be regarded as strong legislation; but the legislature had authority to give effect to it. I am not unmindful of the observation of Lord Blackburn in *Metropolitan Asylum District* v. *Hill* (4), that "the burthen lies on those who seek to establish that the legis-

(1) [1914] A.C. 569, at p. 576.
(2) [1914] A.C., 1056, at pp. 1064 and 1065.
(3) [1914] A.C., 1083, at p. 1088.
(4) (1881) 6 App. Cas. 193, at p. 208.

lature intended to take away the private rights of individuals, to show that by express words or by necessary implication, such an intention appears;" but I see no way of escape from the conclusion that this condition is satisfied by the words of the statute, and at the hearing no suggestion was made to the contrary. While no person is authorized to use the watercourse or the water therein, the exclusive use of the Crown remains unimpaired, and there is, in any case, nothing in the nature of a right of use which may be sold, but the right of use might nevertheless be considered to have a value to the owner of the land if he could obtain that right, and it therefore becomes a question whether a person willing to compete for the land would consider the possibility of obtaining such a right of use as a circumstance which in fact would enhance the price that he would give for the land.

Then, furthermore, it must be obvious that, since the river, according to its natural flow, is inadequate for the supply of the water required for a continuous generation of power, and that resort must be had to storage; and, since it is admitted that it would be necessary, for the profitable use of any dam which might be constructed upon the land in question, that use must be made from time to time of the water stored, the jury should know whether or not the company had the right to avail itself of this source of supply as impounded by the Commission; and, if so, whether or not the exercise of the right was subject to terms or conditions, including compensation, and, unfortunately, there is in the charge no reference whatever to this subject.

The learned trial judge was careful to explain to the jury that the measure of compensation was the value to the company of the property taken, not the value to the Commission. He told the jury that:

> Something has been said regarding water powers and water rights on this river and rights the Company have under their charter. You have nothing at all to do with awarding the Company damages for any water rights they have or may have had on this river. They are asking compensation for land, not water, and, if they did, they could not get it. There is another method of receiving compensation for water taken from them. The legislature saw fit to put in the Crown all title to water and water that runs through water courses. Furthermore, regarding this matter of water power at Marshall Falls, I want to say that, purely as water, you ought to award no damages. You are to award damages only and

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solely for the value of land taken over from the Company by the Power Commission of Nova Scotia.

He told the jury also that the land was confined to the 31·48 acres at Marshall Falls, excluding the lands taken at Malay Falls, and at Ruth Falls. He explained that the plaintiff was not claiming any damage or injury to its corporate rights; that it was claiming merely compensation for the land. In these circumstances, seeing that the value found by the jury was 65 times that of the purchase price, one is apt to look for the reason in the value of the access to the stream which the land affords, and to consider the possibility of some failure on the part of the jury to apprehend the effect of the legislation to which the learned judge referred in the following passages:

> It has been suggested to you that the action of the Nova Scotia Legislature regarding water rights of the province may have something to do with decreasing the value of the land to private companies or private owners on account of not having the absolute right of using the water. That is entirely a question for you. The Government of Nova Scotia representing the Crown owns every gallon of water that flows in the rivers of Nova Scotia. They have sole control over them at the present time. They did not at the time the company was incorporated but they have it to-day. Every lumberman who goes out to a river and uses that river for the purpose of rolling his logs down, must have some sort of a permit for rolling these logs down. Do you think the Government would refuse to give a permit to a person under these conditions. I think the matter was fairly well presented to you. When the Government takes these powers and gives the people the right to apply for the use of these waters, it is to be presumed the Government, or the person the Government appoints to hear application for permits and that sort of thing, will act in a reasonable manner. Under the provisions of the Water Course Act, where any person, within two years of the passing of the Act, establishes to the satisfaction of the Minister that any watercourse or water therein was at the time of the passing of the Act being lawfully used by him, such person shall be authorized to use such watercourse and water therein subject to terms and conditions of the Act of 1919. In my opinion, when this Act was passed the plaintiff had the use of the waters and lands at Marshall Falls. By the Act of 1919 the plaintiff company now and all other persons who want to use the waters of Nova Scotia must apply to the Government of Nova Scotia for a permit to use the water. The Government might place onerous terms on applicants that would make it impossible for applicants to comply with them. You know as much about governments as I do and it is for you to say if the Government would act in an unreasonable manner and withhold from this company or any other person the use of water in the streams of Nova Scotia without strong, legitimate and proper cause. I think it has been proven that this company never got that right. It is an element in this case and I think you should take it into consideration. Perhaps it is an element for you to take into consideration in awarding damages. You use your judgment as to whether or not the fact that the Government of

Nova Scotia has absolute control over the waters at Marshall Falls shall determine or lessen the value of the property. In all the circumstances of the case, I am assuming the Government of Nova Scotia would act in a reasonable, proper manner in dealing with any application of this kind if made. It is absolute speculation what terms they might impose on the applicant. If they say: Yes, you pay me fifty or a hundred thousand dollars for that water, I would have to have a mighty paying proposition. Do you think a Government would do that? It strikes me the Government would act reasonably in the matter.

I have read this part of the charge many times, and I am afraid that it may have produced some confusion in the minds of the jury. It admits of different readings, and is difficult to interpret, but it is, I have no doubt, not inapt to create the impression that the jury may, in ascertaining the compensation, find the value of the property as a power-site to the company undiminished, notwithstanding the provisions of the *Nova Scotia Water Act.*

The learned judge went on to say:

Regarding all this matter about Pictou and Springhill possibilities, I don't know exactly where it gets into this case except of course in regard to Marshall Falls having special adaptability for developing power. It would not make any difference how great the adaptability might be unless you had a market. I am not asking you to disregard one item of evidence that was given. Make use of it as best you may. I don't know that you should lay a great deal of stress on what the plaintiffs could make out of this. You heard a gentleman here, a very estimable man as far as I know; he was a good witness; he said if anyone came to him with the proposition that at the cost of $100,000 to develop the falls he could make an income of fifty thousand a year, he would be satisfied it was a good business proposition—any of you would come to the same conclusion. The trouble here is we don't know what would have occurred if the plaintiff company undertook to develop it. The land was taken in 1925 and you have to direct your attention to the condltions in 1925. They are entitled to absolutely what those lands were worth in 1925. You may have to give some consideration to Pictou County; you may have to give consideration to a new competitor in the field furnishing power at cost—that is if you take it into consideration at all. If you are satisfied this site had a special adaptability for generating power—I don't think there is an evidence of adaptability for anything else in 1925, it is an element you must consider. You must take all surrounding circumstances into consideration in arriving at a conclusion—first, as to adaptability; secondly, how much that adaptability enhances the value of the property.

At the conclusion of the charge, counsel for the Commission submitted several suggestions. He asked that:

1. the jury be instructed concerning the value on the basis of the value to the plaintiff. The jury should be instructed that the plaintiff at the time of this expropriation did not have the right to use the water in the river or the storage basins of the Commission at that time.

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2. the jury be directed that they cannot take into account in assessing the value of property the possibility of the plaintiff obtaining this authorization from the Governor in Council.

3. the jury be directed that the proper compensation would be what a prudent man in the position of the owner would be willing to pay for the property.

4. the jury be instructed that the plaintiffs only owned one side of the river.

5. with reference to special adaptability that the jury be instructed that this is merely one kind of special value which is likely in the market to attract the class of purchasers who would come into competition.

Counsel for the company replied that the Court had covered very fully and accurately all the facts of the case. The Court refused to entertain any of the respondent's suggestions, except the fourth, and as to that, the jury was recalled, and the learned judge addressed them as follows:

> It was drawn to my attention that perhaps I did not bring to the attention of the jury that fact that in 1925, at the time this land was expropriated, the plaintiffs owned property only on one side of East River. This was proven in the case. I am not suggesting you make any conclusions from this except what your intelligence will suggest to yourselves. I want to point out that, if they did not own the land, they had a right to acquire it by expropriation or otherwise for crown lot. They had expropriation powers as wide, or almost as wide, as had the defendant Commission, and they could have acquired them if they so desired.

This statement, however, fails to recognize the control by the Governor in Council, and the dominant rights of the Power Commission, provided for by the legislation to which I have referred, and seems, if I do not misapprehend its meaning, to invite the jury to consider that the powers of expropriation possessed by the company might apply to lands within the scope of the respondent's undertaking, or that these powers might be brought into competition with those possessed and subject to be exercised by the Commission under the special legislation of 1919, a result which I am sure the legislature could not have intended.

A considerable part of the learned judge's charge was devoted to evidence which the company introduced with regard to the cost incurred by the Commission for land and power development at St. Margaret's Bay, about 18 miles beyond the city of Halifax, to which the power is transmitted for the service of that city, which is situated 70 miles down the coast from Sheet Harbour. The jury was told that St. Margaret's Bay should be considered as perhaps in the vicinity of East River, Sheet Harbour, and having the same source, and that the amount paid by the

Commission for the land and works in course of development and construction at St. Margaret's Bay was material for consideration in relation to the value of the land in question at Marshall Falls. The Supreme Court *en banc* was of the opinion that this portion of the charge was calculated to mislead the jury, and I am disposed to agree, but I would not have held that a new trial was justified for that upon this motion, because that direction was not made a ground of exception at the conclusion of the charge, even although, when the jury was recalled, the foreman specially asked to be told the amount paid for the property and work done at St. Margaret's Bay.

In my opinion, the Government, at the time of the expropriation, had control of the watercourse, and the use of the water, whether as diverted or in its natural flow, and this was a dispensation of the law which should have been made clear to the jury.

In the result the appeal fails, and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Bernard W. Russell.*

Solicitor for the respondent: *C. J. Burchell.*