CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

IN THE MATTER OF THE PETITION OF RIGHT OF

1918
April 15.

THOMAS DELAHUNT MALONE,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT;

AND

MACDONELL & O'BRIEN,

THIRD PARTIES.

Public lands—Provincial grants—Right of way—Railway—Timber—Expropriation—License—Assignment—Jurisdiction — Compensation.

Where a Province has made a free grant of a right of way on its lands to a railway of the Dominion Government, it cannot subsequently, in the absence of Dominion legislation authorizing it, grant or assign to a third person any rights to the timber on such right of way.

2. The Exchequer Court has jurisdiction to entertain a claim for the cutting and removing of timber by officers and servants of the Crown while engaged in the construction of a Crown railway.

3. A licensee to cut timber has a sufficient interest in the limits covered by the license to entitle him to claim compensation for the taking of the timber by the Crown. The measure of damages is the value of the timber as a whole as it stood at the time of the taking.

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PETITION OF RIGHT to recover for the value of timber taken by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, February 12, 19, 20, 1918.

L. S. St. Laurent, K.C., and *J. P. A. Gravel,* for suppliant.

E. Belleau, K.C., and *E. Baillargeon,* K.C., for respondent.

R. T. Heneker, K.C., for third parties.

AUDETTE, J. (April 15, 1918) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $40,080 as representing the value of timber alleged to have been cut on his 3 timber-limits, Numbers 1, 2 and 7, by the respondent's officers and servants while engaged in the construction of the National Transcontinental Railway.

However, at the conclusion of the evidence, counsel at bar for the suppliant abandoned and reduced the figures mentioned in paragraph 4 of the petition of right, and brought his claim down to $29,466.

The claim now stands as follows, viz.:

(a) For timber alleged to have been cut on the right-of-way, (in substitution of paragraph 4 of the petition):

On Limit No. 1. 109 acres at 7,000 ft. b.m.	763,000	
On Limit No. 2. 121 acres at 8,500 ft. b.m.	1,033,000	
On Limit No. 7. 121 acres at 10,000 ft. b.m.	1,275,000	
		3,071,000

(b) For timber alleged to have been cut *outside* the right of way, as alleged in par. 6 of the petition:

On Limit No. 1. 50 acres at 7,000 ft. b.m.	350,000	
On Limit No. 2. 73 acres at 8,500 ft. b.m.	620,000	
On Limit No. 7. 83 acres at 10,500 ft. b.m.	870,000	
	1,840,000	
		4,911,000

which, at $6 per 1,000, represents the total sum of $29,466.00

By an order-in-council of the Province of Quebec, bearing date November 26th, 1907, a free grant was made to the Commissioners of the Transcontinental, of the right of way upon the Crown lands of the province, in the manner provided in par. (3) of Arts. 5132, R.S.P.Q. 1886, everywhere where their railway passes, subject, however, to Art. 5164 thereof, in respect of the area which may be taken for the said right of way.

Subsequent to this free grant, namely, under the authority of an order-in-council of July 23rd, 1909 —as the whole will appear from exhibits 5 to 10 inclusively—tenders for right to cut on timber limits of the Province were asked and received, from among others, the suppliant for limits Nos. 1, 2 and 7, and accepted by order-in-council of October 20th, 1909. Some time after that date correspondence was exchanged between the officers of the Land and the Attorney-General Departments, as to whether or not the right to cut in question should cover the

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timber on the right of way of the Transcontinental, and from such correspondence it appears the Assistant Attorney-General was of opinion it did, and the Minister of Lands and Forests approved of that course. This correspondence is here mentioned only as a link in the history of the different phases of the case, as by itself it is not possible to conceive it could afford any ground for recovery. See *De Galindez v. The King*[1], affirmed on appeal to the Supreme Court of Canada.

The timber licenses in question were given, as follows:

For Limit No. 1—dated August 12th, 1910—for a period from October 20th, 1909, to April 30th, 1910.

For Limit No. 2—dated August 12th, 1910—for a period from October 20th, 1909, to April 30th, 1910.

For Limit No. 7—dated October 18th, 1910—for a period from May 1st, 1910, to April 30th, 1911.

In each of these three licenses the territory is described, *"as a territory extending one mile on either side of the National Transcontinental Railway"*—from mile number so and so to mile number so and so of the said railway.

Nothing could be plainer.

However, under indenture bearing date of February 4th, 1914, between the Province of Quebec, represented by the Minister of Lands and Forests, and the suppliant, it appears—after reciting that the above timber limits had been so granted, that—

[1] 15 Que. K.B. 320; 39 Can. S.C.R. 682.

"Whereas it was the *intention* of the said the Gov-
"ernment of the Province of Quebec to give and
"grant unto the said party of the second part, by
"the aforesaid licenses, the right to cut and remove
"all the timber on the right of way of the said the
"National Transcontinental Railway—and this whe-
"ther such right of way had or had not been granted
"by the said the Government of the Province of
"Quebec.

"Wherefore, the said party of the first part, here-
"by declares that it was the intention of the said
"the Government of the Province of Quebec to give,
"grant and convey unto the said party of the second
"part, by the above mentioned licenses, the right to
"cut and remove timber on the said right of way
"of the said the National Transcontinental Rail-
way.

"Now, therefore, these presents, and I, the said
"Notary, witness—

"That the said party of the first part declares to
"have given, granted and conveyed, and by these
"presents doth give, grant and convey unto the said
"party of the second part, represented as aforesaid
"and hereof accepting, that is to say:

"All the right, title and claim of the party of the
"first part to the timber growing on the right of
"way of the said the National Transcontinental Rail-
"way, where such right of way passes through the
"said timber limits so granted to the said party of
"the second part under the aforecited licenses, or
"is bounded by the said Timber Limits so granted to
"the said party of the second part, and doth also
"assign, transfer and make over unto the said party
"of the second part, hereof accepting, all the rights,
"claims and demands of the said party of the first

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"part to compensation for the value of any timber "cut on the said right of way, and this whether such "timber was cut previous to or after the above men- "tioned licenses were granted by the said party of "the first part to the said party of the second part.

"The present conveyance and transfer has been "made by the said party of the first part upon the "conditions hereinafter mentioned, which are here- "by accepted by the said party of the second part, "who hereby binds and obliges himself to imple- "ment and fulfil the same, that is to say:

CONDITIONS.

"1. The present grant, conveyance and transfer "is made without any warranty on the part of the "said party of the first part, and at the sole risk "and charges of the said party of the second part.

"2. That if the said party of the second part shall "cut any timber on the right of way of the said the "National Transcontinental Railway, or shall re- "cover compensation for the value of timber which "has been cut on the said right of way, he shall, in "either such cases, pay to the Commissioner of "Lands and Forests of the Province of Quebec "stumpage on the amount of timber so cut or in re- "spect of which compensation shall have been grant- "ed to him, at the same rate of stumpage as he pays "with respect to the timber cut on the remaining "portion of the said timber limits."

This deed, it will be noticed, bears only upon that part of the claim in respect of the timber cut on the right of way of the National Transcontinental Railway, as distinguished from the other branch of the case in respect of the timber cut *outside* of the said right of way.

It will perhaps be more convenient to deal now with this deed of February 4th, 1914, before entering into the consideration of the licenses. It may be said as a prelude that it is difficult to conceive whether in a case of this kind, a court of justice should take into consideration the motives and intentions of contracting parties with the object of altering plain and unambiguous language of previous deeds affecting third parties. It is the duty of the court to approach all questions from a legal angle.

In the *Moisie* case[1] it was held that when a Crown patent was in plain and unambiguous terms, the patentee could not claim additional rights, under previous or subsequent negotiations and correspondence, as enlarging the terms of the grant or even by reason of such rights having been exercised by him continuously from the date of the grant without hindrance or interference.

Freed from any subtlety, is not this an *ex post facto* declaration of this intention embodied in that deed, a self-confessed afterthought without any complexity? Does it not mean that the province, in answer to the suppliant's demand for the timber on the right of way, is willing to say, so far as it is concerned, it has no objection that the suppliant lay claim to this timber. In fact it has no objection to go further and disclaim. The province says, we will assign to you, without covenant, at your own risk and peril, all rights we may have in such timber. Could such an assignment be enforced against the Crown, as represented by the Dominion Government?

It was held in *Powell v. The King*,[2] "that the "Crown, as represented by the Government of Can-

[1] *Wyatt et al v. Attorney-General P. Q.* [1911] A.C. 489-496.
[2] 9 Can. Ex. 364 at 374.

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"ada, is not bound (by such transfer or assign-"ment.) The only legislature in Canada that would "have power in that respect to bind the Crown, as "represented by the Dominion Government, would ". . . . be the Parliament of Canada." As a general proposition the assignee of a claim against the Crown has no right to sue for it in his own name; and a debt due by the Federal Crown cannot be validly assigned, unless there is some Dominion legislation authorizing the same. There is no contract between the suppliant and the respondent herein. On the ground of public policy the Crown cannot be expected to seek out assignees of claims; its creditors and payees are those it sees fit to primarily and openly do business with, and it is upon this principle that garnishee process does not lie against the Crown. The Crown is not bound to recognize third-parties with whom it has not contracted.

The assignment contained in this 1914 deed is but the assignment of a so-called right to a claim against the Federal Crown, and nothing else.[1] It is made without covenant or warranty by the Province and at the sole risk and charge of the suppliant. It is contended by counsel at bar for the Crown that this is a transfer of litigious rights.

Sir Charles Fitzpatrick, in *Olmstead v. The King*[2] says: "The policy of the law has always been op-"posed to this trading of litigious rights, and such "transactions are to be discouraged in every pos-"sible way. . . . Whilst the assignment of a right "to litigation is forbidden as between subjects, the

[1] 7 Halsbury, 501. See also *The King v. Burrard Power Co., Ltd.*, 12 Can. Ex. 295; [1911] A.C. 87.

[2] 53 Can S.C.R. 450 at 453; 30 D.L.R. 345 at 347.

"rule must apply with greater force in the case of "the Crown, since the subject has *no right to sue "the Crown, but can only present a petition of right.* "There being no such thing as a right to a claim "to recover against the Crown, there can be no as- "signment of any such pretended right."

And when the "prerogatives of the Crown are in "question recourse must be had to the public law "of the Empire by which alone they can be deter- "mined."[1]

Under the laws of the Province of Quebec, as set out in Arts. 1582 and 1583, C.C.P.Q., a right is held to be litigious when it is uncertain and disputed, or disputable by the debtor, and between subject and subject may be sold, but may be discharged by the debtor by paying to the buyer the price and incidental expenses of the sale. And for a right to be litigious, it is necessary that the susceptible contestation of the same should bear upon the merits of the right itself.[2]

However, this deed of 1914 is in absolute derogation of the Order-in-Council of 1907 making a free grant of the right of way, and furthermore in derogation also of the licenses themselves, because in the result, they are clearly made subject to such right of way by their own clear and unambiguous language when it declares that this right to cut timber is in "a territory extending one mile on either "side of the National Transcontinental Railway". Why? The timber limit cannot be delimited before you find the right of way. And it is so much the case that it appears from the suppliant's evidence, that before describing the territory in those licenses, a

[1] *Attorney-General v. Black* (1828), Stuart R. 324.
[2] *Corpn. of St. Thècle v. Matte,* 27 Que. K.B. 185.

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plan of the right of way was obtained from the Transcontinental, which has been used as the very basis and starting-point in fixing the territory mentioned in those licenses. This very plan, or a copy thereof, has been filed of record as Exhibit No. 13, and is the plan upon which the tenders were called for.

Moreover, the timber on the right of way, as the natural growth of the soil, forms part of the soil itself—it is attached to and forms part of the land. It would seem difficult to conceive that there could be a severance worked out of the free grant and that the timber, *fructus naturales,* could be severed from the land so granted.

In February, 1914, at the date this deed was executed, the Provincial Government had no right of action against the Federal Crown in respect of the timber on the right of way, which went with the land under the free grant of 1907, and therefore had nothing in that respect to assign to the suppliant who is in no better position than his assignor.

Therefore, it must be found that under the circumstances of the case nothing passed under that deed of 1914, which could afford the suppliant a right of action on any ground to recover against the Crown, in respect of the timber cut on the right of way.

I shall now pass to the consideration of the rights acquired by the suppliant under the licenses themselves. Having disposed of the deed of 1914, which appears to be the result of an afterthought, an *ex post facto* declaration, for the reasons above mentioned, I must also find that from the very description of the territory upon which timber may be cut, as appears upon each license. it is impossible to hold

that the licensee thereunder ever acquired any right to the timber cut on the right of way. The right of way is in clear and unambiguous language excluded from the territory of the licenses.

TIMBER CUT OUTSIDE RIGHT OF WAY.

The extent of the lands which may be taken, under the free grant made by the Order-in-Council of November 27th, 1907, for the right of way of the Transcontinental, is controlled by sub-sec. 3 of sec. 5132, and sec. 5164 of the Revised Statutes of the Province of Quebec, 1888.

It appears from the evidence of Mr. Doucet, the district engineer, that in the course of the surveys to be made for locating the right of way, when at the origin surveyors go through the country to be crossed by the railway they have, in a way, to feel their way—go to the right or to the left, and in course of such process, trial lines are first made, which involve the cutting of trees on an area of 4 to 6 feet in width. Then, secondly, comes the *location line*—the selected line. And thirdly, there may also be a revised location line, followed by fourthly the final location.

Moreover, land is also taken for stations, double tracks, contractor's camps, engineers' camp, gravel pits, etc. We shall have to deal with each of these items or counts in respect of which claim is made by the suppliant.

The evidence in respect of these complex items is not as clear and satisfactory as it could be, and I regret to say I am under the obligation at times to arrive at a conclusion from very meagre evidence or from mere presumption, which, however, when

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arising from facts, are left to the discretion of the tribunal. Arts. 1238, 1242, C.C.P.Q.

The question upon which this branch of the case first presents itself is the date at which the rights of the suppliant originated under his licenses. His tender for the three limits was accepted by the Order-in-Council of October 20th, 1909, (Exhibit 8). Then the licenses for limits Nos. 1 and 2 are dated as of August 12th, 1910, but in the body of the licenses the right to cut is defined to be from October 20th, 1909, to April 30th, 1910—and counsel for the Crown contends that the licenses are good and valid only from their date, and that they cannot have any retroactive effect, and therefore are null and void. This contention is based upon sec. 1310, R.S.P.Q., 1886, and sec, 1598, R.S.P.Q., 1909, which reads as follows: "No license shall be so granted "for a longer period than twelve months from the "date thereof."

With this contention of the Crown I am unable to agree. This statutory enactment is only a limitation placed by the Legislature upon the executive whereby the latter is given a restricted and controlled power to issue licenses, but for a period of twelve months and no longer. That is obviously the object of this enactment, and no other.

It would appear to make no difference whether the license be ante-dated or post-dated—the life of the license is determined by the term mentioned therein.

While the dates for the license of timber limit No. 7 are different from those of Nos. 1 and 2, the same principle and reasoning will apply.

Therefore, before entering into the manifold and complex details of the items of the claims under

this branch of the case, I hereby find that the suppliant acquired his rights to cut from the dates mentioned in the licenses, and not from the time at which the licenses were dated.

Under the evidence of the district engineer, it appears that survey lines were started in 1904, and that he took charge in 1908, when he revised the lines, made trial lines, and revised location. There was nothing final until the line was actually constructed, and there were changes even after the line had been selected and contract given. This witness remembers three changes made, on limits Nos. 1 and 2; namely, at Lake Travers, at Lake Kamitsgamack, and at Lake Menjobagus, but no area is given. In respect of the last mentioned lake, he says there was a change for 5 to 6 miles; but he cannot say whether it had been cleared before. And he adds that these three changes were made between 1909 and 1911.

For all that was done outside the right of way prior to October, 1909, it is clear the suppliant cannot recover, and a good deal was done prior to that date—as much, however, as can be ascertained in a general way from the evidence; but for all that was cut on his limits outside the right of way since October, 1909, and during the period the territory was held under his licenses he is entitled to compensation, with, however, some small exceptions.

1st. CAMPS. Dealing first with the question of camps, I find that the suppliant has no recourse against the Crown for the area taken by the contractors for their camps. It will be sufficient to say upon this item, that as between the Crown and the suppliant there is no privity upon this branch of the case. These camps were for the contractors' use.

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2nd. ENGINEERS' CAMPS. For the area taken for the Transcontinental Railway—engineers' camps outside the right of way—the suppliant is entitled to recover. A very small area indeed appears to have been taken for that purpose. On this branch we have the evidence of witness Malone, who says there were two camps on No. 1, covering 4 to 5 acres, and on No. 2, 6 to 10 acres were, in a general way, taken for that purpose. But witness Black, the engineer in charge of 6 miles of No. 1, and of the whole of No. 2, says there was no engineers' camp on his part of No. 1, and that there was one camp on No. 2 occupying about 2 acres. It is somewhat difficult to arrive at any satisfactory conclusion upon such evidence. I will allow 6 acres for the engineers' camp.

3rd. BALLAST PITS. These were taken outside the right of way after October, 1909, and I will allow for the ballast pit on No. 1, 6 acres, and for the two ballast pits on No. 2, 17 acres, making in all 23 acres.

4th. TRIAL LINES AND CHANGES IN RIGHT OF WAY ABANDONED. Witness Wilfrid Adams, bush superintendent for the suppliant, says he went on limits Nos. 1 to 10 or 12 in 1909, and left in 1911. It appears he may have made a mistake as to the latter date, which should be 1912, when he was replaced by his brother Arnold. He testifies he does not recollect any trial lines on Nos. 1 and 2, and that no trial lines were run on Nos. 1, 2 and 7 while he was there.

Arnold Adams, who was in the suppliant's employ as bush superintendent from August 17th, 1912, to January, 1917, says no changes were made after he went on the limits. He contends he saw in the woods what he presumed to be changes in the right of way, and also trial lines running almost any way;

but he did not see anyone making these cuttings. Being asked to make an estimate of these cuttings, he reckons them on No. 1 at 50 to 75 acres; on No. 2 he says it ought to be 110 to 120 acres, and on No. 7 about the same as No. 2. During the examination of this witness he became ill and had to retire for a short period. From his demeanour in court he did not impress me as imparting anything of which he was in any manner very sure or convinced. He said that estimate was his idea, he had not measured. In the result it must be taken to be nothing else but a mere guess.

Engineer Black, who was in charge from November, 1909, until July, 1912, when the track was practically completed, with construction trains running through, testified that the right of way was begun in February, 1910, on No. 1, and in March, 1910, on No. 2. On No. 1, that part under his control, there was a change in the right of way involving seven acres. He adds that trial lines were run before December, 1909, of which he could make no estimate; but that there were three trial lines made after December, 1909, not covered by the right of way, involving about two acres.

On No. 2, the same witness would allow 18 acres for station grounds, and approximately 10 acres for abandonment of right of way, and for trial line, 2 acres. While he cannot give the area of trial lines made before he took charge, he says there were at least two. There is no evidence to establish whether the latter would have been made before October 20th, 1909.

Witness Malone says he saw trial lines on No. 2 before he purchased, and his estimate, or guess, as to what was cut after 1909 agrees with that of his

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employee, Arnold Adams, or Arnold Adams agrees with his employer's guess, and it is placed as follows: On No. 1, he puts it down at 50 acres. On No. 2, at 73; and on No. 7, at 83 acres.

It is very difficult under this evidence to arrive, with satisfaction, to an area that would be in any manner reliable. From these large areas mentioned by witnesses Malone and Arnold Adams, must be deducted what was done before October, 1909, and the contractors' camp. Does that estimate cover the ballast pit? Was there not fuel cut by contractors upon these limits which was afterwards sold as fuel, as disclosed by the evidence, that would be included in the larger estimate? I am unable to say. Witness Black speaks with certainty upon what he knows, but leaves out points that are not covered. His estimate would come up to about 39 acres, and if we allow say 5 acres for the two trial lines he says were made on No. 2 before he took charge, although there is nothing to show whether they were made before October 20th, 1909—and that would give us a total of 44 acres altogether, and that would also be allowing the full 18 acres for station purposes.

I may say also I am not overlooking the error made by witness Plamondon in respect of the yellow colouring on plan Exhibit No. 13, as explained by witness Scott.

Taking into consideration that the estimate of Engineer Black does give us some reliable data so far as it goes, but does not actually cover everything in respect of this claim, and that for the reasons above mentioned, much indeed must be deducted from the guesses or estimates of witness Malone and Arnold Adams, I see no other manner to reconcile the evidence than to add a fair acreage

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to the engineer's estimate, as hereinafter mentioned. I am unable to reconcile these two estimates in a better manner.

On the question of jurisdiction, it will be sufficient to say that the court has jurisdiction to entertain the claim as well under sub-secs. (a) and (b) of sec. 20 of the *Exchequer Court Act,* as under the *Expropriation Act,* and the *National Transcontinental Railway Act,* 4-5 Geo. V., ch. 43, and 5 George V., ch. 18; also *Piggott v. The King,*[1] *Johnston v. The King,*[2] *The King v. Jones.*[3] The government engineers had the power to enter upon the lands in question and cut trees as part of the works necessary for the construction of the railway. See sub-secs. (a) and (c) of sec. 3 of the *Expropriation Act,* and sec. 2, ch. 36, R.S.C., 1906, the *Government Railway Act.*

The suppliant, while not having a fee in the land upon which the timber was so cut, had an estate and interest in it, and he is entitled to compensation. He has a possessory right in the limits and a right of ownership in the timber cut thereon.

To arrive at the amount claimed, the suppliant taking the alleged area upon which the timber was cut, makes an estimate of the quantity, in board measure, which was growing upon that area and claims $6 per 1000 ft. B.M., of that timber, after it would have passed through the mill. In that amount of $6, counsel in the course of his argument says that $3.55 would go to the Provincial Government for stumpage and the suppliant would receive $2.45. That reasoning is borrowed from the deed of February, 1914, under which the suppliant undertook, if he recovered, to so pay the stumpage; but that only

[1] 53 Can. S.C.R. 627; 32 D.L.R. 461.
[2] 44 Can. S.C.R. 448.
[3] 44 Can. S.C.R. 495.

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applied to the timber cut on the right of way which is entirely disallowed, and such reasoning cannot be applied for what is cut outside of the right of way.

However, this mode of assessing the compensation cannot be accepted. I have already said, in the case of *The King v. The New Brunswick Railway Co.*,[1] wherein a claim was made in respect of the passage of the Transcontinental through their limits, that the value of the estate or interest of the suppliant in such timber lands must be arrived at by looking at the property as it stood at the time of the taking by the Crown. What is sought here is to compensate the suppliant for the timber so cut, as a whole, at the time of the taking, and to arrive at the value one is not to take each tree so felled, calculate the board measure feet that could be made out of it and the profits derived therefrom when placed on the market for sale. A somewhat crude but true illustration may be used. If through negligence, while driving an automobile, a steer were killed, the measure of damages would be the value of the steer as it stood at the time of the accident and not after it had passed through the hands of the butcher who had cut it up and retailed it by the pound.

Similar views were also expressed in the case of *The King v. Kendall*,[2] confirmed on appeal to the Supreme Court of Canada. See also *Manning v. Lowell*;[3] and *Moulton v. Newburyport Water Co.*[4]

The rights of the suppliant, under the first license was for October to May, and in subsequent licenses for 12 months only. He could not within the life of

[1] 14 Can. Ex. 491 at 496.
[2] 14 Can. Ex. 71 at 81; 8 D.L.R. 900.
[3] 173 Mass. 103.
[4] 137 Mass. 163, 167.

one license, or even two, cut the whole timber upon the limits. It is not in evidence whether he did cut immediately adjoining any part in respect of which claim is made. There would further be *areas* to be taken into consideration, such as having the whole limit destroyed by fire.

The suppliant was paying the sum of $5 a mile as a yearly ground rent. Under sec. 1312 R.S.P.Q. 1888, the licenses vest in the holder thereof all the rights of property in all trees, timber and lumber cut within the limits within the *term thereof*, whether such trees, timber or lumber are cut by authority of the holder of such license, or by any other person, with or without his consent. And under sec. 1313 the licensee has the right to seize such timber qualified as cut in trespass. But the trees, in the present case, were not cut in trespass, they were cut under statutory authority conferred upon the officers of the Crown for the purposes of the Transcontinental Railway.

I am unable to differentiate the present case from the general run of cases. The timber was cut under proper authority,[1] and the compensation to be paid the suppliant should leave him, after the expropriation, neither richer or poorer than he was before. The Crown is not to be penalized, but it should pay a fair and just compensation.

The suppliant's title consists in a right guaranteed for a short period, renewable only at will for a period of 12 months only. There is no evidence upon the record of the value of that land per acre or of the trees so cut.

As I have already said, while I cannot accept, under the evidence as presented, the estimate of

[1] *Attorney-General v. C. P. Ry.*, [1906] A.C. 204.

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206 acres made by witnesses Malone and Adams, I also find the estimate of the engineer Black is incomplete.

Under the latter's estimate we find the following allowances were made:

For engineers' camp	6 acres
For ballast pits	23 "
For trial lines and changes in the right of way, including the full area for station purposes, etc., and allowing 5 acres for the two trial lines he found when he arrived, but which he does not know whether they were made before or after October, 1909, making altogether	44 "
And to these 44 acres let us add, to make that allowance most generous, 50 per cent. more, making these 44 acres 66 acres, we will arrive at a total of.....	95 "

The suppliant is entitled to the fair value of the trees so cut at that date, before the railway was in operation. Most of these trees were cut, moved to the side and left there, and were not taken away.

There is not a tittle of evidence to help in arriving at a valuation upon a proper basis. Was this cutting on the trial line, on the abandoned area of the right of way, done on a poor or good part of the limits? Take the gravel pit, for instance. Gravel pits are usually, perhaps not always, under poor land where the growth is poor. In assessing the compensation regard must be had to the remoteness of the limit, the quality, quantity and species of the timber.

Two courses are now open to the court. The first would be to re-open the case and order that further evidence be adduced.

The second course left would be for the tribunal to assume the office of a jury and do what a jury would do in a case of this kind, and using common sense and taking all the surrounding circumstances into consideration, fix a lump sum which in its judgment would be considered fair and just under the circumstances.

Following the first course would involve procrastination and want of finality in adjudicating upon cases. I have already adopted the second course in the case of *Boulay v. The King* (May 10th, 1912), and it was confirmed on appeal to the Supreme Court of Canada (November 11th. 1912).

Taking all the circumstances of the case into consideration, and adopting the second course, I will allow for all the trees so cut the sum of $1,000—this amount I find will be a fair, just and liberal compensation as between the parties.

To this amount interest should be added. I have no definite date from which such interest should run, and the question was not mentioned at trial, although claimed by the pleadings, and is allowable under sec. 31 of the *Exchequer Court Act*. The first date of the licenses is October 20th, 1909. The cutting took place subsequent to such date, on different occasions, and I will adopt as a medium or average date August 12th, 1910.

Dealing now with the third-party proceedings, I find that as no part of the compensation allowed the suppliant is recoverable by the Crown from the third party, that issue shall stand dismissed with costs against the respondent.

As between the suppliant and the respondent there will be judgment in favour of the suppliant

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for the sum of $1,000, with interest thereon from August 12th. 1912, to the date hereof, and the costs will follow the event.

Judgment for suppliant.

Solicitors for suppliant: *Galipeault, St. Laurent & Co.*

Solicitors for respondent: *Belleau, Baillargeon & Belleau.*

Solicitors for third parties: *Heneker, Chauvin & Co.*