1935
1934
*Nov. 9
1935
*May 13

MONTREAL ISLAND POWER COMPANY ..... APPELLANT;

AND

THE TOWN OF LAVAL DES RAPIDES ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Assessment and taxation—Municipal corporation—Water-power company—Flooded land—Whether assessable—Actual value—Arts. 503, 585 C.C.—Cities and Towns Act, R.S.Q. 1925, c. 102, s.s. 485, 488, 500, 504, 510, 511—Watercourses Act, R.S.Q. 1925, c. 46, ss. 16, 17, 18.

Land which had been flooded by a power company in order to raise the level of a river to a certain elevation for the purpose of establishing a power house is assessable and must be given some actual or real value.

Duff C.J., after commenting on the meaning of the words "actual value" when used for the purpose of defining the valuation of property for taxation purposes, was of the opinion, although not dissenting formally from the judgment of the majority of the Court, that the assessors of the respondent municipality had not performed the act of valuation in respect of the submerged land in conformity with sections 485 and 488 of the *Cities and Towns Act*, and, consequently, that there was no valid assessment in point of law; and, also, that this Court had no material before it by which it was able to perform itself the act of assessment.

Per Rinfret, Cannon, Crocket and Hughes J.J.—Such flooded land cannot be valued as having become industrialized as part of the water-power development of the company, when the water-power site and generating plant are situate outside the municipality within which the land is included; and the value of such flooded land cannot be the same as that of non-flooded land belonging to the company adjacent thereto. But, in order to avoid further litigation and costs, considering the elements contained in the record, the valuation placed on the flooded land by the judgment of the appellate court should be reduced by one-half.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of Stackhouse J., Circuit Court, which had held that certain flooded or submerged lands were not assessable for purposes of taxation as having no real value.

The material facts of the case and the questions at issue are stated in the judgments now reported.

H. E. Walker K.C. for the appellant.

Alphonse Décary K.C. for the respondent.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

DUFF C.J.—I do not find it necessary to dissent from the judgment upon which my colleagues have agreed. The amount involved is insignificant and although, I humbly think, we should follow the logical course by referring back the question of value with instructions as to the principles upon which that value is to be ascertained in accordance with the views I am about to express, still, I think, it is really a case of *de minimis* and that, whatever the result of such a reference, the pecuniary advantage to the appellants would be merely negligible. I wish to make it very clear, however, that I disagree with the principles upon which the majority of the court proceeds. We have to apply a statute of the legislature of Quebec. That statute lays upon the assessor a duty which is defined in sections 485 and 488 of *The Cities and Towns Act*. Those sections are in these words:

485. The assessors shall each year, at the time and in the manner ordered by the council, assess the taxable property of the municipality, according to its real value.

488. The actual value of the real estate in the municipality assessable for purposes of taxation shall comprise lands and buildings, workshops and machinery and their accessories thereon erected, and all the improvements made thereto.

Obviously, "real value" and "actual value" are regarded by the legislature as convertible expressions. The construction of these phrases does not, I think, present any difficulty. The meaning of "actual value," when used in a legal instrument, subject, of course, to any controlling context, is indicated by the following passage from the judgment of Lord MacLaren in *Lord Advocate* v. *Earl of Home* (1):

Now, the word "value" may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business communication or in conversation. But I think that "value" when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value—the price which the subject will bring when exposed to the test of competition.

When used for the purpose of defining the valuation of property for taxation purposes, the courts have, in this country, and, generally speaking, on this continent, accepted this view of the term "value."

(1) (1891) 28 Sc. L.R. 289, at 293.

1935

MONTREAL ISLAND POWER CO. v. THE TOWN OF LAVAL DES RAPIDES.

Duff C.J.

In *Grierson* v. *Edmonton* (1), Sir Charles Fitzpatrick, with, I think, the concurrence of all the members of the Court, used these words:

> Speaking generally the intrinsic value of a piece of property must necessarily be the price which it will command in the open market and the local Judge sitting in appeal with his knowledge and experience in ascertaining the price of real estate within his jurisdiction would, under normal conditions, be in a better position to judge of the value of such property than I can assume to be.

In *Cummings* v. *Merchants' National Bank of Toledo* (2), Mr. Justice Miller, speaking for the majority of the Supreme Court of the United States, said:

> It is proper to say, in extenuation of the rule of primary valuation of different species of property developed in this record, that it is not limited to the State of Ohio, or to part of it. The constitutions and the statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed. The phrases "salable value," "actual value," "cash value," and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose. Burr. Tax., p. 227, sec. 99. But it is a matter of common observation that in the valuation of real estate this rule is habitually disregarded.

The court in that case virtually adopted a passage in Burroughs on Taxation at page 227. The writer of that well known textbook treated the rule as settled in the United States, and the Supreme Court of the United States adopted his view.

I mention also the judgment of the Court of Appeal in Ireland in *Curneen* and *Tottenham* (3), (Lord Ashbourne, Chancellor, FitzGibbon, Barry and Walker L.JJ.) and particularly the judgment of FitzGibbon L.J. at p. 362-3).

Of course, it may be that there is no competitive market at the date as of which the value is to be ascertained. In such circumstances, other indicia may be resorted to. There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value.

(1) (1917) 58 Can. S.C.R. 13; [1917] 2 W.W.R. 1139.

(2) (1880) 25 Law. Ed. 903, at 906.

(3) [1896] 2 Ir. Rep. 356.

Considerations of this character, as we will see, do not come into play on this appeal. I think it important to say that, in my view, the standard of assessment laid down by the Legislature of the province of Quebec is not a standard which, for the purpose of assessing property for taxation purposes under these sections (485 and 488), admits of the application of the principle by which compensation to the owner of land is determined when it is compulsorily taken from him under the authority of an expropriation act. In the case of expropriation, the rule is undisputed. The person whose property is taken is entitled to be compensated for the loss he has suffered by being deprived of his land compulsorily; the value of the land, for the purpose of ascertaining such compensation, is the value of the land to him. Cases often arise in which the land taken has no market value for various reasons, and no value which could be ascertained by a reference to any of the considerations just mentioned. Nevertheless, compensation must be paid; and one method of ascertaining that compensation has been applied in, for example, cases where a recreation park, that the owners are prohibited from alienating, or a part of a golf course, which the owners would not alienate, and in respect of which there would be no purchaser, except, possibly, for a price measured by the agricultural value of the land, and that method is described in the formula enunciated by Lord Moulton in *Pastoral Finance Ass'n, Ltd.* v. *The Minister* (1): the owner is entitled to that which a prudent man in his position would have been willing to give for the land sooner than fail to obtain it.

There is no room for the application of any such formula in the administration of an assessment act, because the amount ascertained under the formula depends upon the special position of the owner with regard to the land. If the owner were a golf club, it would be influenced in determining the amount it would be willing to pay by reference to the convenience of having the particular piece of land in view of its situation and adaptability as a part of the particular golf course. That is not a principle of valuation contemplated, in my opinion, by the assessment provisions of *The Cities and Towns Act*. These assess-

(1) [1914] A.C. 1083, at 1088.

1935

MONTREAL ISLAND POWER CO. v. THE TOWN OF LAVAL DES RAPIDES.

Duff C.J.

ment provisions, like other assessment provisions, contemplate an objective standard which can be applied with fairly reasonable uniformity to all classes of owners alike.

It seems to me clear that the assessors in this case proceeded upon some rule of thumb and they did not really attempt to ascertain the actual or real value of the particular lands they were assessing.

Moreover, it is very important to insist on two things: first, there is not a scrap of evidence before this Court by reference to which we can determine the value of this property to the appellant; its value, let us say, as part of the appellant's undertaking considered as an integer. We do not know that the undertaking as a whole, or this particular part of it, has any value whatever to the appellants. For all we know it may be *damnosa haereditas*. On that basis, we cannot judicially find that it has any value and any figure assumed to be the result of such a process could be nothing but a guess. Second, there is no evidence before us that there is not any market for this property, nor do we know that there may not be some method according to which, by reference to other circumstances, some actual value might not be arrived at.

I am disposed to think that market value, present or prospective, is really the only practical basis of the assessment of this property under the enactments by which we are governed; but, if some other method were admissible, we have been left entirely without information as to the necessary facts to enable us to apply it.

I have no doubt, I should add, that the assessors did not perform the act of valuation in respect of the submerged lands as required by the statute as essential to a valid assessment, and, consequently, that there was no valid assessment in point of law; nor do I doubt that this Court has no materials before it by which it can perform the act of assessment itself.

The judgment of Rinfret, Cannon, Crocket and Hughes JJ. was delivered by

CANNON J.—The appellant brought before the Circuit Court for the district of Montreal, under the provisions of s. 504 of the *Cities and Towns Act* (R.S.Q. 1925, c. 102) an appeal against the homologation by the municipality of the valuation roll for 1932

to the end that the valuation roll may be amended and the values placed on the property of the company fixed at their true value and comparatively equal to the values placed on other properties in the said municipality.

This seemed to limit the conflict to an alleged discrimination against the company. In its conclusions, however, the appellant demanded that the Circuit Court fix the valuation as indicated in a certain statement annexed to their notice of appeal. This statement showed the 1931 assessed value per square foot of each lot belonging to the appellant in Laval des Rapides and also the valuation complained of with the company's valuation. Opposite each of the flooded areas in that statement, the company's valuation appears to be: Nil.

The learned trial judge, Stackhouse, C.C.J., considered that in assessing appellant's flooded lands as being industrial lands at the same valuation as those lands which are not flooded, the respondent adopted a wrong principle of law; that these flooded or submerged lands have no real value and, therefore, their assessment for taxable purposes is illegal, null and should be set aside.

The town brought the matter before the Court of King's Bench and was successful on this issue, the formal judgment fixing at ten cents per foot the real value of the submerged land, the same as that of the adjoining riparian lots. Bernier and Hall, J.J., dissented and gave elaborate reasons accepting the finding of the trial judge.

The company brought the matter before us for the sole purpose, according to its factum, of determining

(1) Has the municipality the right to tax the land which has been flooded?

(2) If this land can be taxed, is it fair to tax it at the same value per foot as the adjacent unflooded land?

And it contends: First, that the flooded areas on the Boulevard des Prairies at 10 cents a foot: $51,788.90, and the flooded areas in the Marigo (which was periodically flooded before the establishment of the company's dam) at varied valuations per arpent and per foot: $12,509.65, total: $64,298.55, should be entirely struck from the valuation roll; second, that in any case, if these flooded areas are to be valued at all, they should not be valued at the same per foot valuation as is placed on their marketable dry land.

1935

MONTREAL ISLAND POWER CO. v. THE TOWN OF LAVAL DES RAPIDES.

Cannon J.

Section 485 of the *Cities and Towns Act*, R.S.Q. 1925, c. 102, provides that

> The assessors shall each year, at the time and in the manner ordered by the council, assess the taxable property of the municipality, *according to its real value.*

Section 488, under the caption "What real estate taxable?" says:

> The actual valuation of the real estate in the municipality assessable for the purposes of taxation shall comprise lands and buildings, work-shops and machinery and their accessories thereon erected, and all the improvements made thereto.

Section 500 enables the council, after the homologation of the roll, to cause the valuation of such property to be reduced to its real value if it is considerably diminished in value either by fire, the pulling down of buildings or any other cause.

The powers of the Circuit Court on the appeal are

(*a*) to confirm the decision appealed from, amend or annul the same;

(*b*) or render such decision as the council ought to have rendered;

(*c*) order it to exercise the functions respecting which recourse is had (sec. 510).

Section 511 enacts that the decisions of the council may be set aside only when a *substantial injustice* has been committed and never by reason of any trifling variance or informality.

It should be noted immediately that the company never asked for the annulment of the roll, but only for its amendment, so that, on the face of the record, it must be found that these flooded areas, not forming part of the natural bed of the Rivière des Prairies, are not public property. They are still owned by the appellant, so that there only remains the second question: Had this flooded land in 1932 any real or actual value?

In the year 1928, the appellant, having obtained a lease of the bed of the Rivière des Prairies from the province of Quebec for the purpose of establishing a power house at St. Vincent-de-Paul village, which is situate a few miles below Laval des Rapides, also obtained authority under the provisions of the *Watercourses Act*, 1925, R.S.Q., c. 46, to submerge all lands necessary to raise the level of the river to a certain elevation. After a long drawn period of discussions, the legislature of the province of Quebec,

on the 7th of May, 1909, passed 9 Ed. VII, c. 68, with this preamble:

Whereas the development and utilization of the falls and water-powers of the province is a matter of public utility as they tend to the advancement of industries established and the creation of new ones by allowing of the utilization of their motive power;

Whereas certain conditions hinder the development and utilization of such falls and powers and it is important to cause the same to disappear, while at the same time safeguarding the private interests affected;

enacting as follows:

1. Every water-power formed by a lake, pond, water-course or river whether floatable or not, belonging to any person, is declared to be a matter of public interest, and the proprietor thereof may proceed to expropriate the adjacent lands so as to allow him to utilize such water-powers in the manner and subject to the conditions mentioned in this Act.

2. The following alone shall be subject to expropriation under this Act:

1. Immoveable property or any part thereof and riparian rights, necessary for the establishment of factories, manufactories and their dependencies and for the construction and maintenance of drains, canals, sluices, pipes and flumes.

2. Immoveable property or any part thereof, necessary for roads communicating with the most convenient highway as well as for the posts, wires, conduits and apparatus used for the transmission of power, light or heat, subject to the approval of the municipal council of the locality when such posts, wires, conduits and apparatus are placed on a highway.

3. Such expropriation under this Act shall not take place except for the benefit of a water-power of an average natural force of at least two hundred horse power, and large enough for industrial purposes, and shall in no case prejudice an industry already established or water-works supplying a municipality wholly or in part.

These sections are now sections 16, 17 and 18 of the Revised Statutes of Quebec (1925), c. 46.

This legislation completed the existing right embodied in article 503 of the Civil Code.

Are also relevant the following sections of the same *Watercourses Act:*

4. Every owner of land may improve any watercourse bordering upon, running along or passing across his property, and may turn the same to account by the construction of mills, manufactories, works and machinery of all kinds, and for such purpose may erect and construct in and about such water-course, all the works necessary for its efficient working, such as flood-gates, flumes, embankments, dams, dykes and the like.

5. 1. No flood-gate, flume, embankment, dam, dyke or other similar work, the construction or maintenance of which will cause public property or the property of third persons or public or private rights to be affected, either by the backing up of the waters or otherwise, shall be constructed or maintained in any of the water-courses referred to in section 4, unless the site on which it is to be constructed has been approved by the Lieutenant-Governor in Council, nor unless it is constructed and maintained in accordance with plans and specifications likewise approved by the Lieutenant-Governor in Council.

1935

MONTREAL ISLAND POWER CO. v. THE TOWN OF LAVAL DES RAPIDES.

Cannon J.

2. If any such work be constructed without such approval, or if, after having been constructed, it be not kept up in accordance with the plans and specifications which have been so approved, the demolition of such work and the restoration of such public or private land to its original condition as nearly as possible approaching thereto, may be ordered by any court of competent jurisdiction, upon an ordinary action instituted by the Crown or by any interested party, according as the land taken, occupied or affected is public or private property, without prejudice to any other recourse at law.

22. No expropriation proceedings may be had unless the Lieutenant-Governor in Council, upon application of one of the parties, notice whereof must be given to the other, has first approved of the area to be expropriated.

The application for approval must be made by petition to the Minister of Lands and Forests, accompanied by plans of the land to be expropriated and by reasons in support of the application.

Acting under these provisions, the company either expropriated or purchased the lands in question in lieu of paying the damages anticipated from the necessary floodings which would practically have destroyed their whole value for their then owners. It would appear that the total price paid was $709,397.79.

It is also in evidence that the company, before submerging these lands, laid on same rubble stone masonry to prevent erosion by water.

The assessors, considering that these lands were used for industrial purposes, fixed a higher value on them than that on neighbouring lands which were mostly used for residential purposes.

The Court of King's Bench said that, under the circumstances and in view of the fact that these lands were only an adjunct of the water-power of the appellant which is situate in the neighbouring municipality, the land owned by the company and used for the purpose of raising the water level of the river should be treated as equal in value to its dry land adjacent.

It seems to me that when attempting to increase the real or actual value of these flooded lands for the reason that they had become industrialized as part of the water-power development of the appellant, the assessors and the municipality lost sight of the important fact that the water-power site and generating plant, the industry is situate miles below, outside the limits of Laval des Rapides. The power site which has been developed by the company, the source of electrical energy, which would be called in French "la houille blanche" does not exist in Laval des

Rapides and, therefore, is clearly not assessable by the respondent. The lands are needed in Laval des Rapides, not to generate power, but to avoid paying damages to the riparian owners whose properties were affected by the building of the dam.

In 1918, in France, they passed legislation similar to the one adopted by the Quebec legislature in 1909 and for the same purposes. In order to facilitate the exploitation of water-powers, the state intervened and gave or exercised expropriation powers to abate the nuisance of the "barreurs de chutes," the owners whose excessive demands often proved a complete barrier to the creation and exploitation of hydraulic forces. Messrs. Planiol & Ripert, *Droit Civil*, vol. 3, p. 488, say:

> Un bien nouveau a été créé par la loi: *l'énergie hydraulique*. Non pas que celle-ci n'existât auparavant, mais elle était confondue avec l'eau qui lui sert de véhicule; elle n'était que l'une des formes d'utilisation de l'eau. Elle acquiert désormais une individualité juridique; elle se sépare de l'eau de la même manière que, dans la législation minière, la propriété du tréfonds est séparée de la propriété de la surface. Et ce bien nouveau va obéir à des règles propres, déterminées eu égard à sa nature et à son rôle économique.

Whether this new species of property, the hydraulic power, is to be considered as moveable or immoveable, is not a question which we have to decide in the present case. Even if it be an immoveable, it would not exist, as stated above, within the limits of the respondent municipality.

But nowhere have I been able to find in the *Cities and Towns Act* power to value and assess hydraulic powers such as the one developed and owned by the appellant on Rivière des Prairies. Whether or not these flooded lands which we are now considering form part of the bottom or the sides of the reservoir authorized by the province under certain conditions, I do not think that they had, as such, in 1932, a real market value; even if the company had wished to dispose of them, nobody would have been willing to purchase them separately in their present state. But the company goes too far when it claims that these lands holding the water of the Rivière des Prairies are of no real or actual value to it.

On the other hand, I am not ready to say with the Court of King's Bench that the value of this submerged property is the same as that of the dry land belonging to the com-

1935

MONTREAL ISLAND POWER CO. v. THE TOWN OF LAVAL DES RAPIDES.

Cannon J.

pany adjacent thereto. Value of property in the neighbourhood is an element to be considered; but in order to adopt the same value for two neighbouring properties they must be *similar*. No one can contend that, during the year 1932, similar conditions were found in the flooded portions and the dry land. Some of the latter at least could have been offered for sale for building purposes by the company with the advantage of being on the new artificial shore of the river. But none of the flooded land could be used for any purpose, except perhaps to add to the enjoyment of the riparian owners by the acquisition from the company of a water lot opposite the shore. The water, either impounded or not, is not the property of the company. It is one of the things which, under art. 585 of the Civil Code have no owner and the use of which is common to all. The enjoyment of it is regulated by laws of public policy; and, in the province of Quebec, by the above quoted sections of the revised statutes supplementing art. 503 of the code, which reads as follows:

503. He whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes, for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs; saving the provisions contained in chapter 51 of the Consolidated Statutes for Lower Canada, or other special enactments.

He whose land is crossed by such stream may use it within the whole space of its course through the property, but subject to the obligation of allowing it to take its usual course when it leaves his land.

Planiol & Ripert, in the same volume, define exactly what I have in mind as follows:

492. *Condition juridique des eaux courantes.* A la différence du lit sur lequel elles coulent, les eaux courantes font partie des choses communes qui n'appartiennent à personne, mais qui diffèrent des choses sans maître, en ce que nul n'en peut devenir propriétaire exclusif, parce que leur usage est commun à tous. Il résulte de là que les eaux courantes sont, en principe, à la disposition du public. Mais la loi a reconnu au profit des seuls riverains certains droits d'usage particuliers, appelés droits de riveraineté.

493. *Droits de la collectivité sur les eaux courantes.* Les eaux courantes étant des *res communes*, le public possède sur ces eaux un droit d'usage général. Il faut en déduire que chacun peut s'en servir en vue des usages domestiques, c'est-à-dire puiser de l'eau, se baigner, laver du linge, faire abreuver les animaux domestiques et aussi circuler en bateau, puisque cet usage n'est prohibé par aucun texte particulier.

Mais ce droit d'usage général rencontre dans son exercice une triple limitation. Tout d'abord, il ne peut être exercé que si l'accès à la rivière est possible. Or, s'analysant juridiquement en une simple *faculté légale*, il ne donne pas à son titulaire le pouvoir de contraindre les riverains à lui livrer passage. Il n'est donc pratiquement réalisable que sur les points

où le cours d'eau est contigu à un terrain laissé à la disposition du public. Ensuite, il ne doit pas porter atteinte aux droits reconnus par la loi au profit des riverains, car, s'il peut y avoir conflit d'intérêts entre le public et ces derniers, il ne peut y avoir entre eux conflit de droits, puisque le public ne jouit que d'une simple faculté. Enfin, il est soumis aux règlements de police qui peuvent en régler l'exercice.

The fact that water is within reach and easy of access of the dry lands owned by the company might add to the value of this part of its property but does not add to the market or actual value of the land supporting the increased volume of water resulting from the erection of the company's dam a few miles below. It appears by the document annexed to the complaint that these flooded lots were assessed in 1931 at prices ranging from $\cdot 00\frac{1}{3}$ of a cent per square foot to, in a few instances, $\cdot 12\frac{1}{4}$ and $\cdot 17\frac{1}{2}$. Despite the fact that that company did not in 1931 protest the valuation cannot bind them as to the real or actual value of this property in 1932, may it not be said with fairness that at least they did not feel that they were suffering the *substantial* injustice that would, according to sec. 511 of the *Cities and Towns Act*, have authorized the court to amend the valuation? Therefore, I do not agree with the motive given by the Court of King's Bench to assimilate and treat as being of equal value the flooded and the non-flooded property.

On the other hand, this flooded land owned by the appellant within Laval des Rapides is assessable and must be given some actual or real value. The appellant says in its memorandum that the case was conducted before the Circuit Court on the assumption that if the flooded area could not be taxed on the basis of the use the company was making of it, it would have no market value.

Leach states, confirming the document filed with the notice of appeal, that the company's valuation on the flooded area in each case is: Nil; and that he considers it to have no value.

Fillion, one of the town's witnesses, testifies as follows:

D. Pensez-vous, prenons quelques-unes des propriétés de la Montreal Island Power Company par exemple la subdivision de lot cadastral 296, pensez-vous qu'on puisse emprunter de l'argent sur cette propriété-là? * * * Sur le terrain privé, là? * * * L'un ou l'autre. R. Bien sûr qu'on peut emprunter de l'argent mais beaucoup moins.

D. Mais personne ne les achète? R. Je crois bien, vous les avez inondées presque toutes.

1935

MONTREAL ISLAND POWER CO. v. THE TOWN DES RAPIDES. OF LAVAL

Cannon J.

D. Si on veut vendre ces propriétés-là est-ce qu'elles n'ont pas de valeur du tout? R. Non, je comprends les terrains qui ne sont pas bâtissables * * *

D. Maintenant, ils n'ont pas de valeur du tout? R. Je comprends que vous les avez noyées d'un bout à l'autre.

And Trottier, the chief assessor of the town, says:

D. En mettant une évaluation sur une terre, ordinairement il y a des bases sur lesquelles vous pouvez fixer la valeur, par exemple, il y a des ventes et il y a l'utilité de ces terrains; mais si vous voulez évaluer un bord de l'eau situé à plusieurs milles au-dessus d'un développement, hydraulique, qui a été un peu inondé par ce développement qu'est-ce qu'il y a pour indiquer une valeur, comment pouvez-vous fixer un prix de vingt cents (0.20), c'est ce que je voudrais savoir? R. Le prix de vingt cents (0.20) c'est la manière de l'employer, ce terrain-là. Le propriétaire le veut pour manufacturer de l'électricité, il passe de l'eau pour manufacturer de l'électricité, il fait un pouvoir, *il couvre des terrains d'eau qui n'auront aucune valeur à l'avenir, qui sont finis pour toujours*. Tout cela, c'est pour des fins industrielles, c'est du commerce, c'est de la manufacture, c'est pour faire de l'électricité pour envoyer en dehors, ici et là. Ce n'est pas du commerce comme un autre. C'est la raison pour laquelle nous avons mis cela à vingt cents (0.20). Nous considérons que c'est une industrie. Que ce soit la Montreal Island Power ou une autre, il n'y a pas de différence, il n'y a pas de parti pris.

This epitomizes the basic principle adopted by the assessors, which goes too far, in my opinion. They considered as assessable the electrical power, the product of the harnessing of the river. Hawley, one of the appellant's witnesses, stated that it would be disposed to allow any purchaser of one of its riparian lots, if he wished it,

to fill in to the original property line, that is the amount of property the company had under water.

Treating, therefore, this property separate and apart from the water which flows over it, just as a bottle containing wine may be considered as distinct from its content, we cannot ignore that the appellant used the submerged land to impound water to turn the wheels of its generating units. The simplest and most convenient method would be to value the whole development as an entire thing; but this cannot be done as only a part of the property is situate in the respondent's territory. We are, therefore, compelled to separate the whole into its component parts and to value such parts separately. While that method is more difficult, it involves no injustice or unfairness to the taxpayer, because, after all, the value of the whole would be the sum of the values of its component parts considered as parts of the whole. The appellant, as far as I understand the case, does not object to the valuation of its submerged lands as separate items,

but contends their valuation is excessive and includes elements which were not incidental or a part of the land as land. In 1932, these submerged lots had no intrinsic value as land in the ordinary acceptation of the word, if considered as separate and independent parcels. They were not adapted or adaptable to many of the uses to which land is ordinarily put. They could not be utilized or grazed, nor could they be used for residential or any other industrial purposes; they could, as above mentioned, be utilized for the service and enjoyment of the owner of adjoining riparian lots when these were of sufficient depth to be sold for residential purposes. But when all these parcels were consolidated by the company into a single unit which could be utilized as an aid in the profitable production of power, they each acquired in the hands of the appellants a definite actual value by reason of that relationship as part of that unit. "The company had made the realization of a potentiality a certainty for itself." Anglin J. *Irwin* v. *Campbell* (1).

I therefore say that the assessors would have ignored the actual tangible fact if they had considered that each piece of property had no value, except from its quality as land. The power producing unit including these lots might unquestionably be sold as a whole and the real value of these lands lies in the fact that they are part of a natural basin through which the river flows and within a few miles falls, and that, by the erection of a dam across the only outlet from that basin, the waters of that river may be and have been impounded so as to generate power. I cannot say that its realized utility for that purpose gives no additional value to the land. As stated by the Court of Appeal of Maryland in the case of *Susquehanna Power Company* v. *State Tax Commission* (2), affirmed by the Supreme Court of the United States (3):

> No one of the parcels into which the lands were formerly divided had any such utility considered apart from the other parcels which together form the value, for unless all were used none could be used. But when they were all gathered into a single unit and the potential utility latent in them became available and apparent and for that reason when so held the entire tract of land was properly assessed as a unit.

(1) (1915) 51 Can. S.C.R. 358, at 372.
(2) (1930) 159 Maryland Rep. 334, at 355.
(3) (1931) 283 U.S. Rep. 291.

1935

MONTREAL ISLAND POWER CO. v. THE TOWN OF LAVAL DES RAPIDES.

Cannon J.

But the record shews that the respondent municipality and the appellant, as well as the courts below, have undertaken to value each parcel of land separately; they could not do otherwise, the real water power having been developed elsewhere. In considering the value of each parcel, can we ignore the fact that the company owns not only the parcel in question but all the other lots in the respondent municipality which were especially adaptable to contribute to the attainment of the object of its incorporation and the exercise of the licence from the provincial government to create new wealth in the national interest under the form of electrical power? I believe that in order to reach the real actual value, some consideration must be given to that special adaptability which has been utilized by the appellant.

On the other hand, the acquisition price paid once for all to avoid the payment of damages to the riparian owners is not the actual value to the company after the property has been flooded. It represents the value to the vendor plus the value of the special adaptability and immediate prospects and, besides, the damages resulting from the expropriation.

What should be done under such circumstances?

I think that we have the power to refer the case back to the judge who heard the appeal from the assessors, in order that he might, if necessary, hear fresh evidence, to value, on what we believe proper principles, the flooded lands. But, in order to avoid further litigation and costs with the elements in hand, including the 1931 valuation, the valuation now accepted by both parties for 1932 of the lots not covered by water owned by the company immediately adjoining the flooded lots, and for the motives hereinabove exposed, I would rather settle the matter and reduce the valuation placed on these lots by the Court of King's Bench by one half, that is to say, I would substitute 5 cents to 10 cents a foot for the flooded lots along the Rivière des Prairies enumerated in the judgment a *quo*.

In his factum, the appellant's counsel said:

> In the Marigo, we have accepted the town's valuation except that we put no value on what is under the water.

These Marigo lots consisted of a swamp before the water was raised. It had its mouth opening into the river a mile or two below Laval des Rapides. This swamp ex-

tended from its mouth back into the country, partly parallel but diverging from the river. The top of the Marigo extends into the territory of the respondent. When the river was raised, the Marigo was filled and, in anticipation, the company had purchased land both on the river frontage and on the Marigo. The unflooded land in the latter area was placed at a lower valuation and the flooded land valued at the same figure. Before us the appellant complained especially of the valuation of the water lots bordering the river. It does not seem to have stressed the same objection to the valuation placed by the municipality on the Marigo lots found in the judgment appealed from, and did not demur when M. Décary stated that there was no appeal as far as this inlet is concerned or he said that the amount involved is insignificant. Therefore we should not interfere with the valuation of these Marigo lots and the appeal should be allowed in part and the valuation reduced to 5 cents for the water lots on the Rivière des Prairies. As both parties before this Court were partly successful, there will be no costs on this appeal.

Judgment varied, no costs.

Solicitors for the appellant: *Chauvin, Walker, Stewart & Martineau.*

Solicitors for the respondent: *Décary & Décary.*