1946
Nov. 25, 26 & 27
1947
March 5

BETWEEN:

GILLIES BROS. LIMITED ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Petition of Right—Expropriation—Action to recover value of an alleged interest in lands the property of the Crown—Suppliant a mere licensee with no property in the land—No basis for estoppel—Action dismissed.

Suppliant, pursuant to a call for tenders by the Deputy Minister of the Department of Mines and Resources of the Government of Canada under the authority of Order in Council P.C. 3102, December 14,

1938, entered into an agreement with that department whereby suppliant was granted the right to enter on certain lands in the Petawawa Forest Reserve, Ontario, and cut timber thereon. Subsequently the respondent initiated expropriation proceedings to enter and cut timber on the said land.

Respondent did not proceed by way of information in this Court to ascertain the value, if any, of suppliant's rights and suppliant now brings this action by way of petition of right, the action being one for compensation following an alleged expropriation and not for damages. The fee in the lands in question is and always has been in the Crown in the right of the Dominion of Canada.

Held: That Order in Council P.C. No. 3102 did not authorize a grant or lease of the lands in question and that there was no grant or lease thereof to the suppliant; the suppliant was a mere licensee and no interest in the land passed to it.

2. That the sale to the suppliant was of logs and in addition the suppliant was permitted or licensed to go upon the property only for the express purpose of cutting designated trees and removing them in the ordinary way as provided by the conditions of sale.

3. That there is no basis for estoppel since any representation concerning suppliant's interest in the land was a mere misrepresentation of a matter of legal inference from facts known to both parties or of which both parties could be presumed to have equal knowledge.

4. That since no interest in the land passed to suppliant and the expropriation was of no effect as the Crown took from the suppliant no interest in the land, this action must be dismissed.

PETITION OF RIGHT by suppliant to recover from the Crown the value of an alleged interest in certain lands the property of the Crown.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

D. K. MacTavish, K.C. and *G. F. Henderson* for suppliant.

Lee A. Kelley, K.C. and *W. R. Jackett* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (March 5, 1947) delivered the following judgment:

This is a claim by Petition of Right for the value of the right to enter and cut timber on certain lands in the Petawawa Forest Reserve, County of Renfrew, Ontario.

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

The suppliant alleges that by virtue of an agreement made in July, 1942, with the Department of Mines and Resources, it had the right to so enter on and cut timber thereon on October 8, 1942, when the respondent caused an expropriation plan to be filed in the Registry Office of the County of Renfrew, thereby depriving the suppliant of its alleged rights. The respondent took no steps by way of exhibiting an information to this Court to ascertain the value, if any, of such rights and the suppliant has proceeded under sec. 37, Exchequer Court Act, R.S.C. 1927, Chap. 34, by petition of right.

The facts leading up to these proceedings are not in dispute.

Ex. 4 is a copy of P.C. 3102, approved on December 14, 1938, and is as follows:

> The Committee of the Privy Council have had before them a report, dated 23rd November, 1938, from the Minister of Mines and Resources, stating that the Dominion Forest Service of the Lands, Parks and Forests Branch, operates forest experiment stations for experimental and demonstration purposes, timber resources of said stations being managed under working plans for continuous production; and
>
> That proper management involves the *removal of mature timber,* dead or diseased trees, and excess growing stock for purposes of stand improvements such as thinnings, release cuttings, etc.
>
> The Minister, therefore, recommends that *authority be hereby granted for the disposal of forest products* from forest experiment stations by *permit or sale;* the rates for standing timber to be not less than those charged for provincial timber of the same kinds and classes by the province in which the forest experiment station is situated; the rates for material cut by the department in improvement operations to be on the above basis plus a charge against cutting or preparation costs as approved by the Minister of Mines and Resources.
>
> The Committee concur in the foregoing recommendations and submit the same for approval.

In 1942, the Deputy Minister of Mines and Resources called for tenders in respect of Timber Sale No. 26 for the right to cut jackpine on the lands described. The notice calling for tenders is part of Ex. 5. It estimated that there were 6,000,000 ft. B.M. (Scribner rule) of timber 8" D.B.H. and over. It stated that the upset dues were $4.00 per M. ft. B.M. and were payable on the scale of measurement as made by the Forest Officer. Tenders were based on the upset price, plus whatever bonus would be offered. It required each tender to be accompanied by a deposit of

$4,800. In the case of the successful tenderer the deposit would be retained as a guarantee that the contract would be fulfilled. The notice contained the following clauses:

> The successful tenderer will be required to enter into a contract for the carrying out of the operation in accordance with the terms and conditions embodied therein.
>
> Full particulars, including detailed conditions governing the sale, may be obtained from the Superintendent, Petawawa Forest Experiment Station, Chalk River, Ontario.

The suppliant, having received a copy of the notice, made its tender on or about July 18, 1942, its bid being $5.26 per M. ft. B.M. or a bonus of $1.26 over and above the upset price. The suppliant also signed the Conditions of Sale and forwarded its deposit of $4,800. On July 22, 1942, the suppliant was advised by letter from the Dominion Forester at Petawawa that its tender had been accepted. An interim receipt (Ex. 6) for the deposit of $4,800 was enclosed with an intimation that the official Treasury receipt would follow in due course. Two copies of the Conditions of Sale (part of Ex. 5) were enclosed with a request that they be completed and one returned to the Superintendent and the other retained. These Conditions of Sale were duly signed by the suppliant and on July 24, 1942, it wrote to the Dominion Forester as follows:

> We have your letter of July 22 advising us that we are successful tenders on the above mentioned timber sale and that our accepted cheque for $4,800 is being held as a guarantee of the fulfilment of the sale conditions.
>
> We also acknowledge receipt No. 12259 covering the deposit.
>
> As requested by you we are signing and forwarding copy of sale conditions to the Superintendent at Petawawa for his records.
>
> We understood from conversation with you that a formal contract will be forwarded to us in due course. Are we right in this or does the signing of conditions of sale constitute a contract?

On July 28, 1942, the Acting Dominion Forester replied as follows:

> I note from your letter of July 24, that a signed copy of the "Conditions of Sale" for T S. 26 has been sent to the superintendent at Chalk River. We have on file here the copy you submitted with your tender. *Nothing further by way of contract is required.*
>
> If you will advise Mr. Morison, the Superintendent, when you would like to commence operations he will issue you a permit as specified in the conditions. We do not want operations to start during the fire season, however.

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

On July 30, 1942, the suppliant replied as follows (Ex. 5*a*):

We thank you for your letter of July 28 and note from it that nothing further in the way of contract is required.

We do not expect to have our plans completed *re* this area for some weeks, but when we do we will get in touch with Mr. Morison, Superintendent at Chalk River.

In the meantime the Timber Controller had written the suppliant on July 25, 1942 (Ex. 7) as follows:

Regarding the Department of Mines and Resources timber sale, Petawawa No. 26 for 6,000,000 feet of jackpine on the Petawawa Forest Experiment Station, I have been tentatively notified that claim to this timber may be filed by another firm, in which case it may be necessary for me to decide under powers contained in P.C. 2716 who should get possession of this timber.

In case formal claim is made you, of course, will have equal opportunity to make claim.

This letter, therefore, is merely to notify you of the circumstances and ask you in the meantime to not take any action that would incur any expenditure towards the cutting of this timber, and should it be necessary for you to proceed before the matter is settled one way or the other, would you please notify me so that it could be cleared up at that time.

By letter of July 30, 1942 (Ex. 8) the Timber Controller again wrote the suppliant stating that the Pembroke Shook Mills Ltd. had submitted a brief in support of its contention that it should have the timber on Timber Sale No. 26, and requested the suppliant to do likewise. An assurance was given that if the suppliant did so no action would be taken until there was opportunity for further discussion. This was followed by a further letter of August 5, 1942, enclosing a copy of a letter from the Pembroke Shook Mills Ltd. and suggesting that after consideration a reply should be given by the suppliant. Again on August 19, 1942, the Timber Controller wrote the suppliant, intimating that he did not feel justified in reaching a decision from the correspondence and information on hand and would, therefore, ask for a report from an independent person to aid in reaching a conclusion. Part of this letter (Ex. 11) is as follows:

I think we should all admit that there is no question of equity involved and that the only justification there could be for attempting to interfere with the sale could be satisfactory proof that the Government of Canada would benefit by such interference. I am, therefore, approaching it in this way and no other.

On September 10, 1942, the suppliant wrote the Minister of Mines and Resources, who replied on September 15, 1942 (Ex. 9) as follows:

I have your letter of the 10th instant, about Timber Sale No. 26, Petawawa Forest Experiment Station. The departmental officers have reported on the sale which was awarded to you as the highest tenderer. I am writing to my colleague, the Minister of Munitions and Supply.

On October 15, 1942, the suppliant was informed by letter written by Col. F. F. Clarke, Land Expropriations, Department of Munitions and Supply (Ex. 12) as follows:

This is to inform you that His Majesty the King in the Right of the Dominion of Canada caused an Expropriation Plan to be filed on the 8th day of October, 1942, taking the right to enter and cut timber on certain lands in Petawawa Forest Reserve, Township of Wylie, County of Renfrew, Province of Ontario.

The portion affected by the expropriation forms part of Compartment "C" in the Montgomery Block and takes in all the bush lands between Base Line "C" and Base Line "B" between Montgomery Lake and the Westerly Boundary of the Forest Reserve, about 1,300 acres in all.

I am prepared to consider any claims which might be made by private interests against this expropriation. My office is located at Room 340, West Block, Parliament Buildings, Ottawa, Ont.

In the result, and doubtless due to the exigencies of war and that the Pembroke Shook Mills Ltd. was engaged in essential war work in manufacturing boxes for shells and was in great need of the lumber for such purpose, the right to enter and cut timber on the lands covered in Timber Sale No. 26 was awarded to the nominee of that company at the same price as bid by the suppliant, namely, $5.26 per M., B.M.

Immediately upon being advised that its bid had been accepted, the suppliant made plans to log the area in order to get cutting operations in progress before October 1, 1942, as required by the Conditions of Sale, and to implement its contract. Certain executives of the suppliant visited the area. A sum estimated at $200-$300 was so spent after receiving notice of acceptance of its offer and prior to expropriation proceedings. No actual logging operations were commenced by the suppliant. The deposit of $4,800 was returned to the suppliant.

Ex. 3 is a certified copy of the plan and description filed in the expropriation proceedings taken by the Secretary of the Department of Munitions and Supply, pursuant to the provisions of sec. 8 of the Expropriation Act. The usual

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

certificate was given and the land identified, followed by the words:

* * * over which the exclusive right to enter and cut timber is taken by His Majesty the King in the right of the Dominion of Canada under the provisions of subsection (2) of Section 9 of the Expropriation Act, Chapter 64 of the Revised Statutes of Canada, 1927

The description of the land is prefaced by:

Description of land over which His Majesty the King in the right of the Dominion of Canada has taken the exclusive right to enter and cut timber being part of the Montgomery Block * * *

It is admitted that the fee in the lands in question is in the Crown in the right of the Dominion.

It is to be noted particularly that this is not an action for damages, but one for compensation following an alleged expropriation. Counsel are in agreement on this point.

The respondent takes the position that, while for the purpose of this action it is not contesting the validity of the sale of timber made by the Department of Mines and Resources to the suppliant, there was no sale of an interest in land itself and that, therefore, there could be no valid proceedings under the Expropriation Act which relates solely to the taking of land or an interest in land. It is urged that the only manner in which an interest in this land could have been conveyed was under the Public Lands Grants Act (R.S.C. 1927, Chap. 114); that no grant or lease was made to the suppliant and that, while the respondent did institute proceedings under the Expropriation Act, that such proceedings were of no effect whatever, in that, as the respondent had never parted with any interest in land, the expropriation proceedings merely related to what the Crown had always had—the full interest in the land. The respondent states that the expropriation proceedings were erroneously taken, due to the "hurly-burly" of wartime conditions and that such proceedings were of no assistance to the suppliant. The respondent argues also that the Crown is not estopped by its conduct from alleging that these expropriation proceedings were invalid.

The authority under which the Department of Mines and Resources proceeded to advertise Timber Sale No. 26 was Order in Council P.C. 3102 (*supra*). So far as I am

aware, it had no authority to deal with the matter other than under the powers thereby conferred, and counsel for the suppliant does not urge that it had any other authority. By it, authority was granted for the disposal of forest products from Forest Experiment Stations by *permit or sale*. Then follow two provisions as to the rates to be charged. One rate is that to be charged for standing timber, which, of course, would be cut by the successful tenderer. I think that rate is the one intended to apply when the forest products were disposed of by *permit*—that is the right to enter and cut timber. The other rate is that provided for a *sale* of timber which has been cut by the Department. That rate, I think, is applicable to the disposal of the forest products by the second method—that is by *sale*. The Order in Council confers no authority on the Minister to enter into any lease of the lands.

Tenders were called "*for the right to cut jackpine* on the lands described" by the Conditions of Sale, and although the word "purchaser" is used throughout it is provided:

> The purchaser is granted the *right to cut timber* on the Petawawa Military Reserve, subject to the following conditions:
>
> (1) The lands covered by this sale and on which *cutting* will be permitted are as follows * * *
>
> (2) Before cutting is commenced a *permit* to cut until the 30th day of April, 1943, must be secured from the superintendent of the Petawawa Forest Experiment Station, Chalk River. This permit may be renewed for two years on condition of satisfactory fulfilment of the terms of the contract.

I think it is clear from the above that the Department proceeded to dispose of its forest products by permit, by which I think is meant the right to enter on the lands, to cut the designated timber and remove such timber after scaling, and with the duty of paying for the timber at the rate provided for in its tender and on the amount of timber ascertained after scaling.

For the suppliant it is urged that the parties hereto were in the relevant position of lessor and lessee, but I cannot find that such is the case. The authorities indicate that to constitute a lease (rather than a licence) there must be an intention to give exclusive possession of the land. This problem was before me in the case of

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

D. R. Fraser & Company Limited v. *The Minister of National Revenue,* (1) and many of the authorities are therein cited. It is apparent to me that in the instant case there was never any intention on the part of the Crown to give exclusive possession to the suppliant. Only designated and particular sizes of one kind of timber were to be sold, the Crown retaining all others. There is nothing in the Order in Council, Notice of Tender, or Conditions of Sale which would in any respect restrict the right of the Crown to the use, control and possession of the property, save to such very limited extent as might be necessary to enable the suppliant to go upon the property, fell and remove such designated timber.

Reference may be made to: 6 *C.E.D.,* 583; *30 E. & E. Digest* 511; Vol. *25 Canadian Abridgement,* 259; 29th ed. *Woodfall on Landlord and Tenant,* P. 6; *Wells* v. *Kingston-upon-Hull* (2); *N. B. Land Company* v. *Kirk* (3).

Moreover, the only authority I can find as to leasing of the lands here in question is that contained in the Public Lands Grants Act (R.S.C. 1927, Chap. 114). Sec. 4 gives authority to the Governor in Council to authorize the sale or lease of any public lands not required for public purposes and for the sale or lease of which there is no other provision in the law.

So far as I am aware there is no other provision in the law relevant to the lands in question. They do not come within the lands mentioned in the Dominion Lands Act (R.S.C. 1927, Chap. 113). Sec. 49 of that Act authorizes the Governor in Council to make regulations for the disposal by public competition of the right to cut timber, and the following sections provide for the issue of licences and for wide powers of possession and vesting of ownership in the licensee. Such provisions, however, have no application to the lands here in question.

Sec. 5 of the Public Lands Grants Act authorizes the Minister having control and management of the lands, to execute leases authorized by the Governor in Council or pursuant to any regulations of the Governor in Council. I was not referred to any such regulations.

(1) (1946) Ex. C.R. 211.
(2) (1875) 44 L.J.C.P., 257.
(3) (1849) 6 N.B.R., 443 (C.A.).

Nor have I been referred to any authority which would indicate that the Crown (other than by statutory authority) can convey lands by any means other than by a grant under the Great Seal—i.e., by Letters Patent (*Mersereau* v. *Swim* (1). No such grant was here made and the only statutory authority to which I have been referred is that contained in sections 4 and 5 of the Public Lands Grants Act. Even if the Order in Council P.C. 3102 had authorized a lease of the lands in question, the Minister of Mines and Resources did not execute a lease pursuant to section 5 of the Act. I do not consider that his letter of September 15, 1942, to the suppliant was sufficient compliance with the provisions of section 5 to constitute the execution of a lease, or that it was ever intended to do so.

Nor did the passing of P.C. 3102 constitute a contract between the suppliant and the Crown. Reference may be made to *Bulmer* v. *The Queen* (2) where, at p. 491, Strong C.J. said:

> The orders in council authorizing the Minister of the Interior to grant licences to cut timber on the timber berths in question did not, on any principle which has been established by authority, or which I can discover, constitute contracts between the Crown and the proposed licensee. These orders in council, as similar administrative orders in the case of sales of crown lands in the provinces of Ontario and Quebec have always been held to be, were revocable by the crown until acted upon by the granting of licences under them. They embodied no agreement of which specific performance could be enforced. They were mere authorities by the Governor in Council to the minister upon which the latter was not bound to act but might act in his discretion. This is apparent from the statutory enactment applicable to these orders in council and the licences to be issued under them.

I have reached the conclusion, therefore, that Order in Council P.C. 3102 did not authorize a grant or lease of lands and that there was no grant or lease thereof to the suppliant.

Counsel argues that the suppliant had an interest in the land in the nature of a profit a prendre—a form of servitude—and that as the definition of "land" in the Expropriation Act (R.S.C. 1927, Chap. 143) includes servitudes, such interest was, therefore, subject to proceedings under the Expropriation Act. A profit a prendre is a right to enter the land of another person and take some profit of the soil or a portion of the soil itself for the use of the

(1) (1914) 42 N.B.R., 497. (2) (1894) 23 S.C.R., 488 at 491

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

owner of the right. Profits a prendre, though sometimes called licences, must be carefully distinguished from mere licences which are not tenements and do not pass any interest or alter or transfer property in anything, but only make an act lawful which otherwise would have been unlawful. (11 Halsbury 340).

In *Marshall* v. *Green* (1), Brett J. said:

> Then there comes the class of cases where the purchaser is to take the thing away himself. In such a case where the things are fructus industriales, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not fructus industriales, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in the land, and the case is within the section.

The timber in this case is not fructus industriales but fructus naturales. Perusal of the Order in Council, the Notice of Tender and the Conditions of Sale seems to indicate that there was no intention that the timber was to remain on the land for the benefit of the suppliant or to derive benefit from so remaining. The whole object of the Order in Council was the removal of designated timber; by the Conditions of Sale penalties were provided for non-removal, cutting was to commence by October 1, 1942, and all such designated trees were to be removed by April 30, 1945. Reference may be made to the cases mentioned in *D. R. Fraser Company Limited* v. *The Minister of National Revenue* (*supra*).

In my opinion the suppliant was a mere licensee with no interest in the land itself. P.C. 3102 was the governing provision and it deals with the disposal of "forest products" by permit or sale. "Forest products" were defined by Mr. Noakes, Forestry Officer, as "any material *taken* from a forest that has a use value", and that definition was accepted by counsel for the suppliant. Payment was provided for on the basis of the ascertained board measure (that is scaling) after the timber was cut, and only when the scaling was completed and the timber stamped or marked by the Forestry Officer was the suppliant free to deal with the timber in any way. No assignment of its

(1)(1875) L.R. 1 C.P.D. 35 at 42

interest could be made by the suppliant without the approval of an official of the Crown. In my view, the sale to the suppliant was of logs, and in addition the suppliant was permitted or licensed to go upon the property only for the express purpose of cutting designated trees and removing them in the ordinary way as provided by the Conditions of Sale. If the contract is merely for the use of the property in a certain way and on certain terms, while it remains in possession and control of the owner, it is a licence. (*Halsbury,* Vol. 18, p. 337).

There are many cases where, under the particular conditions therein referred to, it was found that in the granting of timber licences or leases there has been given an interest in the land also. Reference may be made to the case of *Laidlaw* v. *Vaughan-Rhys* (1). That case had to do with timber licences on lands in British Columbia, but the report does not give any information as to the details of the terms and conditions of the licences. The Court there found that the interest granted by the instruments transferred from the vendor to the purchaser were interests in land. Idington J., however, at p. 463, indicated the difference that existed between the type of instrument there before the Court and others, and stated:

> In some cases the bargain may be relevant to the price of timber when cut, and hence have no relation to the land. I think confusion apt to arise and has in some cases arisen out of a non-observance of this distinction.

The distinction there pointed out by Idington J. seems to me an important one and to be the proper test to apply in this case. I have already found that the whole intent of the arrangements entered into between the parties was for a sale of cut timber with a purely ancillary right to enter on the land for the purpose of felling and removing such timber. It is clear also the sale here was relevant to the price of the timber when cut and it was not a sale of a block of standing timber, the price being referable to the volume as ascertained after scaling, felling and cutting. I find, therefore, that no interest in land passed to the suppliant.

(1) (1911) 44 S.C.R., 458.

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

It would follow, therefore, that, as the suppliant at no time had an interest in the land, the expropriation proceedings taken by the Department of Munitions and Supply were of no effect so far as the land was concerned, the Crown, by such proceedings, taking nothing more than it had always had.

It is urged for the suppliant that the respondent, having initiated expropriation proceedings, has thereby represented to the suppliant that the latter had in fact a sufficient interest in the land to make it the subject of expropriation and that the Crown is now estopped from denying that the suppliant had such an interest. Counsel for the Crown argues that there is no estoppel as against the Crown and, alternatively, that there is here no basis for raising the question of estoppel.

Decisions as to estoppel against the Crown are somewhat conflicting. In the Supreme Court of Canada in the *Bank of Montreal* v. *The King* (1), three of the judges held that estoppel could not be invoked against the Crown. Reference also may be made to *The King* v. *Capital Breweries Company Ltd.* (2); Everest & Strode, *"Law of Estoppel"* 3rd ed. 8; Robertson on *Civil Proceedings By and Against the Crown,* p. 576; *Rex* v. *Victoria Lumber Company* (3).

In the case of *Rex* v. *Royal Bank* (4) Cameron J. said at p. 304:

> It appears from the authorities that the King is not bound by estoppels, though he can take advantage of them. This rule has been frequently applied in Canada and I am not aware that it has ever been rescinded or relaxed.

On the other hand there are cases which would seem to indicate that, while the doctrine of estoppel by deed does not apply as against the Crown, yet estoppel in pais does so operate. Reference may be made to the *Attorney General to the Prince of Wales* v. *Collom* (5); *Attorney General for Trinidad and Tobago* v. *Bourne* (6); *Plimmer* v. *Mayor of Wellington* (7); *Rex.* v. *Gooderham & Worts* (8).

(1) (1907) 38 S.C.R. 258.
(2) (1932) Ex. C.R. 171 at 182.
(3) (1895) 5 B.C.R., 288 (C.A.).
(4) (1920) 50 D.L.R. 293 (C.A.).
(5) (1916) 2 K.B. 193 at 204.
(6) (1895) A.C. 83.
(7) (1884) 9 A.C., 699.
(8) (1928) 3 D.L.R. 109.

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

While the trend of judicial authority in Canada seems to be that the doctrine of estoppel cannot be raised as against the Crown, yet I am of the opinion that I do not need to determine that point. Under the circumstances existing here, I do not think that the suppliant is entitled to invoke estoppel. If there was here any representation as to the interest which the suppliant had in the land, then it would seem that it was nothing more than a mere misrepresentation of a matter of legal inference from facts which were known to both parties or of which both parties could be presumed to have equal knowledge.

In Halsbury's Laws of England, 1st Ed. Vol. 13, p. 379, it is stated:

> A mere misrepresentation of a matter of legal inference from facts which are known to both parties cannot, it is submitted, be a ground of estoppel.

Moreover it seems to me that the Minister of Mines and Resources had no authority whatever in the case of these lands to convey any interest in lands.

At paragraph 537 of Vol. 13 of Halsbury's Laws of England, it is stated:

> A party cannot by representation any more than by other means, raise against himself an estoppel so as to create a state of things which he is under a legal disability from creating. Thus, a corporate body cannot be estopped from denying that they have entered into a contract which it was *ultra vires* for them to make. No corporate body can be bound by estoppel to do something beyond its powers or to refrain from doing what it is its duty to do; and the same principle applies to individuals. No person can by his conduct or otherwise waive or renounce a right to perform a public duty, or estop himself from insisting that it is right to do so.

See also Phipson on Evidence, 8th ed. 667, where it is stated that:

> Estoppels of all kinds, however, are subject to one general rule; they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.
> *Hunt* v. *Wimbledon* (1); *Canterbury* v. *Cooper* (2).

My finding, therefore, is that in this case the doctrine of estoppel cannot be raised so as to prevent the Crown from proving the true nature of the transaction between the parties.

My conclusion, therefore, is that nothing that took place between the parties transferred any interest in the land to

(1) (1878) L.R. 4 C.P.D. 48. (2) (1909) 100 L.T. 597.

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

the suppliant and that the expropriation proceedings, so far as the land was concerned, were of no effect whatever. It may be that the suppliant has rights in an action otherwise framed, but as to that I shall, of course, make no comment. The action will, therefore, be dismissed with costs.

Some consideration should, however, be given to the question of quantum in the event of the above conclusion being found erroneous. By its petition the suppliant claimed $60,000 for loss sustained by reason of the expropriation of its rights, interest to date of $3,750 and interest on the total sum of $63,750 from the date of the Petition of Right. The claim for interest on interest, cannot, of course, be upheld. At the trial the suppliant amended its claim to one of $80,000 for loss sustained by the expropriation and interest thereon at 5 per cent from the date of the alleged expropriation.

The evidence establishes that this timber area gave the suppliant what is known to the industry as a good "logging chance", due not only to the nature of the stand of timber, its location, land features and accessibility, but due also to its proximity to other timber areas operated by the suppliant. The logs would have been brought down by water to the mill of the suppliant at Braeside, and the floatability of jackpine is such that the sinkage loss would have been small. There is no question also that had the suppliant been allowed to take out the logs and convert them into timber, the entire product could have been disposed of at the ceiling price during the years 1943-44. It was its intention to take out one-half of the cut in the winter of 1942-43 and the balance in 1943-44. Its mill was equipped to handle the additional amount without difficulty. If sold as logs, the cut could also have been disposed of without great difficulty.

The suppliant says that the value to it of that which it alleges was expropriated by the respondent is equivalent to the profit which it would have made had no expropriation taken place. It estimates its loss of profit in three alternative ways: (1) The profit it would have made had it been allowed to cut and convert all the jackpine into lumber and sell it at ceiling price. Ex. 14A is its amended

estimate of its loss of profits in the sum of $72,424. (The suppliant also gave evidence that to this amount should be added $3,000-$4,000, the estimated sale of by-products such as fuel wood and lath.) This estimated loss of profits is determined by calculating the cost of stumpage, cutting, brush burning, driving, towing, sawing and placing on cars at Braeside. Of these amounts stumpage is, of course, actually ascertained; brush burning and driving to the Ottawa River are estimated and the remaining items are based on the actual average cost per M. B.M. for 1943-44 of other logs actually handled by the suppliant. These costs aggregate $36.02 per M. B.M. and deducting that amount from the average sale price f.o.b. Braeside of $43.04 per M. B.M., there is an estimated net profit of $7.02 per M. B.M. To this item is added 49 cents, said to be the estimated saving in overhead had an additional 4,000,000 feet been sawn in each of the two years—a total net profit of $7.51 per M. B.M., or for 8,000,000 feet a profit of $60,080. Allowing for overrun of 5 per cent less sawing costs thereon, there would be an additional $12,344, making a total of $72,424.

(2) Alternatively the suppliant estimates the profit it would have made had it cut and sold as logs in the river without converting into lumber. Again this is entirely a mathematical calculation. It is arrived at by deducting from the average sale price f.o.b. cars Braeside ($43.04) the estimated cost of sawing, towing and driving (all of which would have been unnecessary had the suppliant sold as logs) ($13.48), leaving $29.56 per M. B.M. as the suppliant's estimate of what it would have got for the sale of logs in the river. Deducting from that amount the cost of putting them on the river, stumpage, logging and brush burning, $20.26, it was estimated that there would have been a profit on the sale of logs of $9.30 per M. B.M. or on 8,000,000 feet a total of $70,400.

Mr. Gillies, President of the suppliant company, says that he thinks that he would have been prepared to pay $29.56 per M. B.M. on the river, as he would have made a profit in the sawing (presumably from the over-run of 4,000,000 feet, and the by-products). But it is also clear that purchasing cut logs on the river was not normal for

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

the suppliant company. There is no evidence that I can recall of any actual sale in that area of logs lying in the river. I doubt very much whether a careful operator, knowing the costs incidental to stumpage and logging, would have paid a price which would have given his vendor a profit of $70,400 and would leave the purchaser to complete the floating of the logs to and down the Ottawa River, with all its attendant risks, when at best he could have hoped to make a profit on an estimated over-run of about $12,000, plus a possible additional amount of $3,000-$4,000 for by-products. (3) As a further alternative, the suppliant estimates the loss of profit had the logs been sold on the skidways by eliminating the cost of moving the logs from the skidways to the river.

It has to be kept in mind that if anything was taken by the expropriation procedure it was "the right to enter and cut timber". What was the value of that right?

These values advanced by the suppliant and based entirely on the loss of profits computed in various ways, do not constitute a proper approach to the problem. In expropriation proceedings the owner is entitled to receive compensation for the value of the land to him. The suitability of the land for the special purposes of the owner and the prospective profits which it could be shown would probably attend the use of the land in the owner's business would doubtless furnish material for estimating what was the real value to him. But the owner is not entitled to recover compensation for the savings or profits which he expected to receive from the use of the land. The owner is entitled only to have those savings and profits taken into consideration in so far as they might fairly be said to increase the value of the land. He is entitled to be paid the full price for his lands and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

The principles on which compensation is based where land is taken under compulsory powers have been established in many cases. In *Cedar Rapids Manufacturing and Power Company* v. *Lacoste and others* (1), Lord Dunedin said, at page 576:

(1) (1914) A.C. 569.

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of In re Lucas and Chesterfield Gas and Water Board where Vaughan Williams and Fletcher Moulton L.J.J. deal with the whole subject exhaustively and accurately.

For the present purpose it may be sufficient to state two brief propositions: (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton L.J. in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

In *Postoral Finance Association Limited* v. *The Minister* (1), Lord Moulton stated at p. 1088:

That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profit which it could be shown would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they 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. Now it is evident that no man would pay for the land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

Reference may also be made to *Malone* v. *The King* (2). In that case where the nature of the contract was quite

(1) (1914) A.C. 1083. (2) (1918) 18 Ex. C.R. 1.

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

different from that in the instant case, Audette J. held that there was a sufficient interest in the limits to entitle the suppliant to claim compensation for the taking of timber by the Crown. He held that the measure of damage was the *value of the timber as a whole as it stood at the time of the taking.* At page 17 he said:

> 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 1,000 ft. B.M. of that timber, after it would have passed through the mill * * *
>
> 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.*, 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 ofthe 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.

In the case of the *King* v. *Crosby* (1) the head note is:

> An owner of property expropriated is not entitled to claim as an element of its market value at the time of the expropriation a sum representing estimated profits from a business which he asserts might have been done on the property, but which in fact had never been undertaken.

In the *King* v. *Kendall* (2) (Affirmed in the Supreme Court of Canada 8 D.L.R. 900) the head note is:

> In assessing compensation for the expropriation of lands for the purposes of a public work, damages must be measured by the market value of the lands as a whole at the time of expropriation.
>
> 2. While certain material in the soil of the lands expropriated may largely increase the potential value of such lands, the Court will not go into abstract calculations with respect to the quantity of such material *in situ,* but will treat the lands as possessing a value that is entire and indivisible.

(1) (1919) 18 Ex C.R. 372. (2) (1912) 14 Ex. C.R. 71.

In the case of *Jalbert* v. *King* (1), Davis J. referred to the *Lake Erie and Northern Railway Company* v. *Schooley* (2) where it is said that the proper compensation is the amount which a prudent man in the position of the owner would be willing to pay.

The true contractual relationship of the parties, namely, that of purchaser and vendor, should be kept in mind and is not to be obstructed by endeavouring to construe it as another contractual relationship altogether—that of indemnifier and indemnified.

In the case of the *King* v. *Northumberland Ferries Ltd.* (3), Rand J. said:

> That the value is to be the value to the owner is, I think, incontestable, but what is that value? With special adaptability realized in the ownership from which it is expropriated, that value is the amount which a prudent man in the position of the owner would be willing to give for the property sooner than fail to obtain it. (*Pastoral Finance Assoc. Ltd.* v. *The Minister* (*supra*)). Without realized special adaptability, it is market value—theoretical, if need be—which is the present value of all possible utility reached in a competitive field.

Later in the same judgment he said at p. 505:

> Estimates of market value should be made by those who, through experience or acquaintance with similar or analogous transactions, are capable of judgments cognate with those of prudent purchasers and susceptible of analysis and exposition; but this, though at times difficult, is scarcely satisfied by a melange of notions crowned with a guess. And, as laid down in *Pastoral Finance Assoc. Ltd.* v. *The Minister*, the special value to the owner is not a capitalized value of estimated savings or increased profits; it is an addition to the ordinary market price which a prudent purchaser contemplating all of the risks and circumstances in which his investment and prospective use are to be placed, would, if necessary, be willing to pay.

In the *King* v. *McLaughlan* (4), Audette J., in dealing with a somewhat similar matter, said, at p. 425:

> Coming to the valuation of the woodlots, it must be stated that much of the evidence in this respect, in fact, all of the defendant's evidence, as will more particularly appear by Exhibits "B", "C", "D" and "E", has been adduced upon a wrong basis, upon a wrong principle. As was said in the Woodlock case, it is useless to juggle with figures, and to measure every stick of wood upon a lot, estimate the number of cords of wood upon the same, and upon that basis estimate the profits that can be realized out of that lot to fix its value according to such profits. In other words, it would mean that a lumber merchant buying timber limits would have to pay his vendor of limits, as the value thereof, the value of the land together with all the foreseen profits he could realize out of the timber upon the limits. In the result, leaving to the purchaser all the labour

(1) (1937) S.C.R. 51 at 70.
(2) (1916) 53 S.C.R., 416.
(3) (1945) S.C.R., 458 at 504.
(4) (1915) 15 Ex. C.R., 417.

1947

GILLIES BROS. LIMITED v. THE KING

Cameron J.

and giving to the vendor all the prospective profits to be taken out of the limits. Stating the proposition is solving it; because it is against common sense, and no man with a slight gift of business acumen would or could become a purchaser under such circumstances.

In the present case tenders for "the right to enter and cut timber" on the lands were publicly advertised in local post offices, and copies sent to lumber dealers in the district. Only two bids were received, that of the suppliant for $5.26 M. B.M. and that of the nominee of the Pembroke Shook Mills Limited at $4.00—the upset price. It seems to me that a public sale made in this manner in July, 1942, clearly establishes the market value of the rights here said to have been expropriated. There can be no doubt that the suppliant when making its tender took into consideration the advantage which would accrue to it from a tender so made, including any special advantages by reason of its proximity to its other operations in the area. Within one or two days of being notified of the acceptance of its tender it was advised that there was a possibility that the timber might be diverted elsewhere; and there is no evidence that between the date when its tender was made and the date on which the alleged expropriation proceedings took place, there was any increase in the market value of the limits either to the public generally or to the suppliant in particular.

The President of the suppliant company stated in evidence that in making the tender of $5.26 per M. B.M. "I figured what we could log it for." Evidence was given by Mr. Plaunt, a witness for the suppliant, that in his opinion the tender of $5.26 per M. B.M. was about right; a representative of the Pembroke Shook Mills Limited, whose nominee also tendered, said that in his opinion $5.26 per M. B.M. was excessive.

If, therefore, the value of "the right to enter and cut timber" was established at $5.26 per M. B.M. (and I can recall no evidence to indicate that it was any greater amount) and had the expropriation proceedings been valid, it would follow that the suppliant had sustained no loss. There is nothing to indicate that anyone immediately before the expropriation proceedings would have paid the

suppliant any greater amount for this right than $5.26 per M. B.M., all of which would have been payable to the Crown as dues.

I think it advisable to make no findings as to any loss of profits sustained by the suppliant and to make no comment as to the evidence adduced to establish such loss of profits. In view of my conclusion that, as an expropriation proceeding, the claim of the suppliant cannot be sustained, such findings are unnecessary. And, should any other proceedings be instituted by the suppliant, such proceedings should not be hampered by any conclusions of mine as to what damages or loss of profits the suppliant may have sustained.

I find, therefore, that the suppliant is not entitled to any of the relief claimed in the Petition of Right and its claim therefore will be dismissed with costs.

Judgment accordingly.