July 11, 1950.

IN THE MATTER OF THE CLAIM OF THE DEEP BAY LOGGING COMPANY

(E. KAGETSU)

AN INQUIRY BEFORE THE JAPANESE PROPERTY CLAIMS COMMISSION BEFORE MR. JUSTICE H. T. BIRD, COMMISSIONER, NOV. 8, 1949.

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Vancouver, B. C.,

November 21st, 1949, 10:00 a.m.

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

ARGUMENT

MR. NORRIS: My lord, I would like to submit at the opening of this argument certain considerations of the law to your lordship, on the matter of the principles which, I submit respectfully, should govern your lordship's finding, after which I would ask your lordship's permission to withdraw, and my learned friend, Mr. Baldwin, will carry on.

THE COMMISSIONER: Very good.

MR. NORRIS:: My lord, I refer your lordship, first of all, to Order-in-Council P.C. 1810, as amended by Order-in-Council 3737.

THE COMMISSIONER: That is the terms of reference?

MR. NORRIS: Yes. And to paragraphs 1 and 2 (reading). I submit, my lord, that paragraph 2 is, of course, the paragraph which contains the provision which directs the basis on which your lordship should make a finding of the amount which, in your opinion, would fairly and reasonably compensate the claimant.

Now, if--and I am going to submit that that, if anything, extends the meaning--but if there should be any distinction between that and fair market value, or if it is suggested that there be any distinction between fair and reasonable

compensation and fair market value, if it be suggested such is the case, then I submit to your lordship that fair market value is such a broad term, that that which your lordship is to find is not on the fair market value, but if there be any difference, I am going to submit that the authorities freely show that your lordship is governed by the principles of fair market value, and find a fair and reasonable compensation.

THE COMMISSIONER: Just let me follow you. Do you contend that the final phraseology dealing with fair and reasonable compensation broadens the term "fair market value".

MR. NORRIS: Well, I submit that the broad term of "fair and reasonable compensation", that the term "fair market value" is synonamous with "fair and reasonable compensation", and that which your lordship is required to find is not fair market value, but fair and reasonable compensation, and that all the governing cases indicate that fair and reasonable compensation is to be found, and in deciding what that is, they use the term "fair market value".

My proposition is this: that fair market value is not a term of art; that the authorities to which I refer indicate that in those expropriations, the amount to be determined is fair and reasonable compensation, and in those cases, the learned judges refer to the term "fair market

value".

I don't know whether your lordship follows me. There is nothing in the Exchequer Act or the Expropriation Act which indicates what the meaning of "fair market value" is. If anything, "fair and reasonable compensation" is extensive of the term "fair market value"; but in any event, I submit that in determining what fair market value is, your lordship will go the whole way in finding every element of loss to the claimant.

THE COMMISSIONER: That is to say, in another way, that in determining what is fair market value, one has to take in all potential uses of the property at the date fixed.

MR. NORRIS: Yes, all potential uses, and every element; as was said in the Irving Oil case, "every element of value which they possess must be taken into consideration insofar as they increase the value."

Now, my lord, I submit that the principles which determine the amount of compensation payable in respect to this claim are set out in the judgment of the Supreme Court of Canada in Diggon-Hibben Ltd. vs. The King, not yet reported; and that judgments quotes with approval the judgment of the Supreme Court of Canada, the case of Irving Oil Company Limited vs. the King (1946) S.C.R. 551, and particularly the judgment of Mr. Justice Rand, in the Diggon-Hibben case (concurred in by

Mr. Justice Taschereau) and the dissenting judgment of Mr. Justice Locke (concurred in by the Chief Justice). Mr. Justice Locke's dissent, I may say, doesn't affect the statement of the principles.

THE COMMISSIONER: No. I have read the case.

MR. NORRIS: I have submitted to your lordship that fair market value is not a term of art; and throughout the judgments of the Supreme Court of Canada, in the two cases, it is clear that, although fair market value is not specifically referred to in the Statutes, it is the principle on which compensation was determined in those cases.

The principle is stated by Mr. Justice Rand, in the Diggon-Hibben case, on page 4 of the typewritten copy of the judgment:

"The statement means . . . . .that he is to continue in business."

--and I stress that--"in this we have no need . . . . .the use to which he has put it."

Mr. Justice Locke, at page 6 of his judgment, stated the proposition as follows:

"The principle to be followed . . . . . failed to obtain it."

--and he put that, perhaps, on a little stronger ground than stated by Mr. Justice Rand--"the question is . . . . .continue in business."

"This formula was applied by Duff, J. . . . . .should be calculated."

I submit that particular attention should be paid to Mr. Justice Rand's statement:

"that the owner at the moment . . . . . continue in business."

Then, my lord, I refer your lordship to the judgment of Lord Moulton in re Lucas and Chesterfield Gas and Water Board (1909) 1 K.B., 16 at 29. This judgment is quoted with approval in the Irving Oil case. At page 29, Lord Moulton said:

"The principles upon which . . . . .increased the value to him."

And Mr. Justice Estey, in the Irving Oil case, at page 568, says:

"This item . . . . .in so far as they increase the value to him."

Now, my lord, I submit, on the basis of those judgments that the amount of compensation is to be determined on the basis of the value of the timber limits and other property to Kagetsu, as a going concern, and all the elements which went to make the property a satisfactory going concern are to be considered.

I submit, my lord, with respect, that the fact that Kagetsu had been removed from the property is not an element for consideration. The Custodian stood in his shoes, and the Custodian is to be taken, I submit, my lord, as thinking and acting as Kagetsu would have thought and acted in dealing with the land. He was, in fact, Kagetsu's alter ego, and there was no obligation

on the Custodian to sell the property. He did sell it because of the war emergency, and no criticism is addressed to him on this count. I submit, however, that if the property was sold because of the war emergency, this should not adversely affect Kagetsu.

The whole situation, my lord, was abnormal, in relation to the buying and selling of land of the people of the Japanese race, and particularly timber property, and Kagetsu, the shrewd operator that he was, would undoubtedly have held onto his limits in view of the fact that the rising market was obvious, and there was a great demand for timber. This, my lord, should be considered, I submit, by your lordship, as the thinking of the Custodian standing in Kagetsu's shoes and the trustee for Kagetsu in respect to the property.

Now, my lord, for the convenience of your lordship, and for the convenience of dealing with these matters, the claim has been divided up under several heads, and certain agreed values were reached the other day for your lordship to consider, with regard to certain items of equipment.

THE COMMISSIONER: I have accepted counsel's recommendations on those.

MR. NORRIS: I submit, of course, these should be taken without prejudice to the general claim, that the value of the property, as a going

concern should be considered, but it was not suggested, for that reason they are treated--

THE COMMISSIONER: It is to be treated as a salvage operation?

MR. NORRIS: Yes. As Mr. Justice Rand put it, "It is assumed that he is to continue in business." --namely, the Custodian, for Kagetsu, and Kagetsu at the end of the abnormal period of war, would carry on the business; and as Lord Moulton put it, he should be paid:

> "the full price for his lands and any and every element of value which they possess in so far as they increase the value to him."

There should, I submit,-or your lordship will consider it by determining a fair and reasonable compensation for the compulsory taking, as well as interest on the amount awarded.

THE COMMISSIONER: You are now referring to the 10 per cent. feature, under th e Expropriation Act?

MR. NORRIS: Well, something analagous to it.

THE COMMISSIONER: Was that not applied in terms of actual legislation, under the Act?

MR. NORRIS: I don't think so, my lord. I think it is referred to as a fair and reasonable amount, in some of these cases, and I think, perhaps, it is in the Diggon-Hibben case. I may have misread the Act, but I don't know that there is a Statutory provision for the 10 per cent.

THE COMMISSIONER: I am not sure.

MR. NORRIS: I think it is a usual thing to allow that, and I think it is referred to, but I don't know whether it was by Mr. Justice Rand or--Mr. Justice Thorsen, I think, disallowed it below, in the Diggon-Hibben case, there is no statutory provision for it that I know of.

Mr. Justice Locke, at page 7, deals with it at the bottom of the page: "the amount allowed may be varied . . . . .distinguish it."

My learned friend points out that Mr. Justice Rand, at pages 3 and 4, deals with this feature, and he says: "Lor d Moulton's language . . .

. . to the owner"

and so on. I submit that, in addition to that, interest should be allowed from the time of taking, because of the fact that Kagetsu has not had the use of his money.

That, my lord, is my submission on the law. May I be excused, my lord?

THE COMMISSIONER: Yes, thank you.

MR. NORRIS: I have given my learned friend a copy of the judgment in the case. I may say I submit to your lordship that all that is necessary in the way of law for your lordship to consider is in those two cases. I say that with respect.

THE COMMISSIONER: The last word on the subject is the Diggon-Hibben case?

MR. NORRIS: Yes, my lord.

MR. BALDWIN: Just one remark, to the application of the law to the facts in this case, my lord. I was junior counsel on this Diggon-Hibben case, and I can tell your lordship that there was not discovered by counsel on either side any statutory provision for the 10 per cent.

THE COMMISSIONER: It just ran in my mind there was.

MR. BALDWIN: It has been some time, my lord, since your lordship heard a lot of the evidence in this case, and it has been very lengthy. Perhaps I should renew the facts briefly. My learned friend and I and your lordship have adopted a submission of settlement, so we have left now, with the exception of the personal claim re the house and the automobile, the timber limits and the value and use of the equipment which was reserved from the settlement.

The timber limits, my lord: first of all, we had Block 195, a large block of timber which had not been cut, in the Lake Cowichan area. Then, secondly, we had the Deep Bay operation, which was a logging claim on lands owned by the claimant, which he was in process of logging at the time he was evacuated. He had a railway operation, as your lordship will recall from the evidence. Those are the two things with which it remains to deal.

Our argument takes the form, first of all, by dealing with the quantity and quality of the timber on these limits, and then by referring to

the evidence which has been led on both sides, as to the value of this timber.

Lest I should forget it, I would like at this time to emphasize the fact that this timber was going on lands which were owned by the claimant. It was not a case, as in very many instances is the case, where an operator goes in under a license to cut, and once he has cut the timber, his interest is finished. Kagetsu, in the case of Deep Bay and the other, owned the land, and in the case of Deep Bay, as his own evidence shows, he paid taxes on this land. In co-operation with the Government, new crops were planted, and his whole attitude was that these were lands which were capable of producing a crop just as agricultural land is capable of producing potatoes, or other crops.

Going back, let us deal first with Block 195, and in dealing with Block 195, first of all let us consider the evidence as to the quality of timber on that block. First, my lord, if you will take Eustace Smith's Report, in 1940, March 23rd, Exhibit 53; at the outset, in dealing with this Exhibit, I would draw your lordship's attention to the fact that this is a check cruise, and the basis of this cruise was an examination made in 1923, as appears by reference to the second paragraph of this report. This report of 1940 is a report pursuant to an examination of only parts of the area, the eastern part. It

begins "The total cruise on this . . . . . portion." As I recall it, it was an examination of the eastern half of Block 195. If your lordship would wish to refer to Exhibit 15 and the plan at the back of it, your lordship will be able to see the general shape of this block, which is irregular, in the form of an inverted "U" more or less. There are two arms that come down on each side. This 1940 report refers to an examination made in 1940 of the eastern half of this block.

THE COMMISSIONER: Is this the Schultz cruise?

MR. BALDWIN: Yes. The 4 per cent. stumpage examination. I just draw your lordship's attention to it at this time, in order that your lordshipmay see the general nature of the outlines of this block of timber.

This report, Exhibit 53, as to the quality of the timber on these limits, about the sixth paragraph, is entitled "Quality of Timber on Eastern Portion". It says (reading).

Then the next line says: "The cedar is small . . . . ." And immediately under that "The hemlock, for the most part . . . . .long-bodied. And the next line,"The pine is long-bodied . . . . .sound quality."

The other matters in the Report, as to accessibility, etc. I don't propose to deal with, because they will come under the head of Stumpage Value.

Still on the point of quality of timber on this Block 195, we have the cruiser's report of Block 195, etc. by Mr. P. F. Sheehan. Your lordship will recall we were unable to get Mr. Sheehan, and his report went in. It was identified by Mr. Eustace Smith, who had read it over, and had his comments to make, contained, I believe, in Exhibit 45.

THE COMMISSIONER: What is the number of the Sheehan Report?

MR. BALDWIN: Exhibit 5, my lord. This cruiser subdivided Block 195 into areas, and on my copy of the exhibit, it is page 3, dealing with Area "A".

THE COMMISSIONER: There are two Sheehan Reports, Exhibits 5 and 6.

MR. BALDWIN: No. 5 is the Sheehan Report, and No. 6 is a summary of the cruise which, it didn't appear, was made by Sheehan. I think it was a summary made by Kagetsu.

THE COMMISSIONER: I see.

MR. BALDWIN: I think the summary is a mathematical summary of what Mr. Sheehan has already stated in his general report. I am referring to Exhibit 5, my lord.

THE COMMISSIONER: Yes. You say thatMr. Smith made some comments on the Sheehan Report in Exhibit 45?

MR. BALDWIN: I think that reference must be wrong. I think it will be Exhibit 36. When Mr. Smith reported on Block 195, he did tell the Custodian, or Ross & Sons that the Report had also been made

by Sheehan. It is Exhibit 3 to Exhibit 36, a letter dated April 5, 1943, from Mr. Smith to Ross & Sons, in which he says: (Reading).

Back again to Exhibit 5, my lord, page 2 of my copy, dealing with Area "A" of Block 195, about half-way down the page:

"The fir on this portion . . . . .15 per cent. No. 3. . . . . .at the top end."

That is the fir.

"The white pine which is . . . . . 1 and 2 grades."

Then hemlock and larch, over the page he says:

"is comparatively small . . . . . fine grade of lumber."

Then he goes on to the cedar. He says:

"The cedar, while small . . . . .7A."

7A, my lord, in Mr. Schultz's Report, is the inside of the yew.

"Where there are some exceptionally . . . . .later on in the report."

Then he goes on to what he calls Lot "B", and he says: "This subdivision . . . . .316".

Now, as to the quantity, first of all he lists the quantity, and he says:

"In addition to the above . . . . .45 footlengths."

Then he goes on:

"The fir . . . . .10 per cent. No. 3."

I just pause there for a moment. If your lordship will recall, the evidence adduced as to average

grades in the Vancouver District, that is an exceptionally high grade.

THE COMMISSIONER: Yes.

MR. BALDWIN: For example, for 1944, the average for the Vancouver District for fir was 3 per cent. No. 1, 52 per cent. No. 2, and 45 per cent. No.3.

Then he goes on to the hemlock and larch on the next page, and he says:

"The hemlock . . . . . and the balance rough."

Then, the third subdivision he makes of this block is Lot "C". He says:

"This subdivision takes in . . . . .7A".

After having listed the amounts which he finds, he says:

"The fir on this lot . . . . .Lot "B'"

Lot "B" was very high indeed on all species.

So there we have Mr. Eustace Smith's estimate of the quality of the timber, and Mr. Sheehan's, and those estimates were made in 1923. That is, Mr. Sheehan's report was made about that time; Mr. Smith's report, his examination was made in 1923, and he made a check cruise in 1940 of the eastern half.

Your lordship may recall Kagetsu's whole evidence on this. He thought it was very high-class timber; and Keith Shaw said he and Eustace Smith went in there to look for peelers. Peelers, as your lordship is, of course, aware, is a good-quality log.

THE COMMISSIONER: You have not the reference to Keith

Shaw's evidence.

MR. BALDWIN: I am sorry , my lord, I don't have the specific page.

THE COMMISSIONER: You say he did deal with quality?

MR. BALDWIN: Keith Shaw stated, as I recall it, that he did go in with Eustace Smith, to look for peelers. I think that was about 1940. I will go through Mr. Shaw's evidence, and if that is not the case, I will retract. Either Mr.Shaw or Mr. Smith said it.

THE COMMISSIONER: There is a great deal of this evidence, and I have made fairly full notes. Possibly I can find the reference in my notes on Mr. Shaw's evidence.

MR. BALDWIN: Your lordship will recall the evidence of--I may be a little presumptuous in saying your lordship will recall this, because there was a great deal of it, but Charles G. Prettis, who gave evidence before your lordship at page 643, when speaking of the timber in the Cowichan District, said,at about line 17--this is in cross-examination by my learned friend, Mr. McPherson--Mr. McPherson said:

"In arriving at stumpage value . . . . ."

He was putting a very gloomy picture to the witness, and the witness says:

"The additional haul . . . . .a low standard."

Mr. Byers was before your lordship for some time, and at page 265 he is referring to the average of grades shown by Exhibit 23. Exhibit 23 was a

summary of the S. & R. accounts for the timber which had been taken off Block 403 which lay to the north of Block 195. Mr. Stultz was logging under the same 1-C-6 crescent. And at page 265, as to the grades of the logsxcoming from this area, Mr. Byers said:

"As I mentioned before . . . . ."

Here we have 11.25 No. 1, and only 25.48 No. 3.

Mr. Schultz, in his evidence given last year, before your lordship, at page 510, at the bottom of the page, your lordship will see the general question was:

"The timber on the east coast of Vancouver Island . . . . .first-class timber on it."

Then, at 521, Schultz again, in chief. I didn't realize I had this evidence twice from the witness. The other day he said the same thing again, but he was referring to a block of timber near Nanoose, which was sold by Charles McGonigal to Allison, about line 12:

"Do you know the block . . . . . superior, yes."

At 524, he again is referring to Exhibit 23, which is the scale of the logs from that combined area, and he says that 62.89 is a high percentage of No. 2, and as to No. 1, the percentage being 11.53, he says that is a fair average for that type of stand. He has already given evidence that that type of stand is superior to others in the Province.

That finishes the evidence I propose to draw attention to with regard to the quality of the timber on Block 195. It was, we submit, very high, far above average. Even in 1944, it was far above the average being cut, and that is the date, 1943 or 1944, we are concerned with, because you will recall again, my lord, that the Sheehan Report and the Smith Report on these limits--Mr. Sheehan's original report on which his 1940 letter was based, was made in 1923. In 1923, the evidence is that the class of utilization was different than it was in later years, and even in 1923, both Smith and Sheehan thought the quality on Block 195 was exceptional.

I am going on to another phase of the argument. Would your lordship wish to adjourn?

THE COMMISSIONER: Just as you prefer. I will take a break now, if you like.

MR. BALDWIN: Yes. I think we are about half-way through.

THE COMMISSIONER: We will recess for five minutes.

(PROCEEDINGS RESUMED AFTER SHORT RECESS)

THE COMMISSIONER: What is your next branch?

MR. BALDWIN: I was going to deal with quality and quantity, taking these limits, first of all Block 195, and then Deep Bay. I have dealt with the evidence as to the quality, and I now propose to go on to the question of quantity.

First of all, my lord, I would refer your lordship to Exhibit 53 again, and that is Eustace Smith's General Report on Block 195, eastern portion

Cowichan Lake District. It is dated May 23rd, 1940. The quantity shown in this report is 31 million feet. In this report, Mr. Smith added to his 1923 finding approximately 1 million feet. In 1923, he found a total of 29,921,000 feet. Throughout the evidence, not only of Eustace Smith, but of the others, it has been quite clear, I think, that the practice, certainly in the earlier years, that is, back in 1923 to, say, 1935, was that cruisers disregarded timber that was not considered by them to be merchantable. They didn't get very specific instructions as to the kind of cruise. It was largely a matter of discretion with the cruiser involved; and I wish again to stress that this Exhibit 53 is merely a check of a cruise made in 1923.

In 1923, there is no argument on this point: that the utilization was certainly not what it had reached in 1943 or 1944, and therefore, our submission is, with regard to this Exhibit 53, which is based on a cruise made in 1923, that the primary factors of it were the 1923 market and the 1923 utilization.

THE COMMISSIONER: Am I right in my recollection that Mr. Smith saidhe based his cruise on an 18-inch DBH utilization, and did not take into account timber lower than that in diameter?

MR. BALDWIN: You are referring to Block 195?

THE COMMISSIONER: Well, in all timber, to the date of

the sale of both these areas. Is that not what utilization comes down to? There is no question that subsequent to 1943, and I think Mr. Smith said, not until 1945, did loggers generally adopt a practice of utilizing timber of smaller diameter than 18 inches DBH?

MR. BALDWIN: I believe that is the evidence, my lord, yes. On the other hand, we have other evidence that they cut lower than 18 inches DBH earlier than that. Mr. Byers' evidence was it had been the practice of some operators from 1935 on.

THE COMMISSIONER: Might it not be desirable to deal, first of all, with quantity, and then let me have the references to utilization from the various witnesses, because I can see that is a matter of very considerable importance.

MR. BALDWIN: I know a lot of time was taken up with the evidence of utilization, but I don't think utilization is very important, because, in the case of the cruise of Deep Bay as to quantity recoverable, bearing in mind the market as of the date of operation, in the case of 195, the total cruise was 55 million.

THE COMMISSIONER: That is the Schultz cruise?

MR. BALDWIN: Yes. Now, on that, and it runs pretty generally--about 10 per cent. was from 12 to 18 DBH. In other words, conceding, for the purpose of argument that 18 inches DBH and over was all that was merchantable at that time, you have

50 million feet.

THE COMMISSIONER: According to Mr. Schultz.

MR. BALDWIN: Yes, by that Exhibit 15.

THE COMMISSIONER: Yes. Schultz's 55 million included--

MR. BALDWIN: Includes 5 million.

THE COMMISSIONER: Five million below 18 inches, is that it?

MR. BALDWIN: Or 12 inches to 18 inches, yes.

THE COMMISSIONER: All right, go on.

MR. BALDWIN: And in the case of Deep Bay, the 15 million figure in Mr. Schultz's Report, Exhibit 61, is also 18 inches DBH and up. It is disregarding the stuff below 18 inches.

THE COMMISSIONER: Very good.

MR. BALDWIN: Now, I suggest to your lordship that that is just what we had mentioned is the primary reason for the difference between the figures arrived at by Mr.Schultz and by Mr. Smith. This report, Exhibit 15, of Block 195, this stump examination, is a careful examination. The stumps were all measured, and it was made last year, 1948. It was not made with instructions to cruise the merchantable timber. The instructions given for this stump examination were that Mr. Schultz was to measure all merchantable timber 12inches DBH and up. As I have said to your lordship, that percentage between 12 to 18 inches is quite small; it's roughly 10 per cent.

I would again refer your lordship to Exhibit 53, in which Mr. Smith states that his original

cruise in 1923 checked by the above in 1940 was definitely conservative. It was a low cruise, and the witness was quite frank about it. He said it was a low cruise.

THE COMMISSIONER: He said it was conservative.

MR. BALDWIN: On the quality, itself, he said it was definitely conservative, yes. He did say--and I think I can get your lordship the reference to the witness' evidence--he did say it was a low cruise. He may have said it was a bit low. I am not sure of his exact words. But in any event, that is what he said, himself, about his own cruise. It is in the report that it was definitely conservative.

Now, going on to Mr. Sheehan's cruise, Mr. Sheehan's cruise was, roughly speaking, 49,720,000.

THE COMMISSIONER: What is the exhibit number--5?

MR. BALDWIN: Yes, my lord. That was again made about 1923.

THE COMMISSIONER: Sheehan shows 49 million?

MR. BALDWIN: Yes, roughly 50 million. And the lowest--and that is back 20 years ago, before Kagetsu left--his lowest utilization was 14 inches and up. Bearing in mind the very high quality of that limit, and bearing in mind also the lapse of time between 1923 and 1942 and 1943, that 14 inches--everything Mr. Sheehan cruised at 14 inches and over, I submit, my lord, was quite definitely marketable in 1943, when this block was sold.

I did refer your lordship to a statement by

Mr. Smith, with regard to this cruise of Mr. Sheehan's, contained in Exhibit 36, and which is Exhibit 3 to that exhibit. It is a letter from Mr. Sheehan "To Whom if May Concern", dated April 5, 1943. The only reason I draw this to your lordship's attention is I am sure my learned friend will, if I don't, and I suggest it is not a very convincing letter. He says:

"With respect to the smaller timber . . . . to make money."

And the whole trend of that letter is that of a man who has recanted at the suggestion of someone else. If your lordship will look at Exhibit 5, the original report Mr. Sheehan made on this block, and compare that with his letter, I think you will see it will be quite apparent that this letter is not an expression of opinion on which any degree of reliance should be placed..

THE COMMISSIONER: The point, I take it, from Mr. Sheehan's letter, is the cruise was based on the assumption that the operators who cut the timber was going to mill it near by.

MR. BALDWIN: That is what he says in his letter. If you look at Exhibit 5, you will see it wasn't a very great element in his estimate contained in Exhibit 5. It does happen to be an estimate in certain items. For example, he says, in Exhibit 5, my lord, something I draw your lordship's attention to: "There is an exceptional heavy stand . . . . . in this estimate."

THE COMMISSIONER: On page 2, he says: "If a mill were operated . . . . . 20 per cent.", and so on.

MR. BALDWIN: That is exactly what I wanted to indicate. He is basing his report on some other assumption. Then he says: "If a mill were operated . . . . .this report."

THE COMMISSIONER: He is talking there about quality?

MR. BALDWIN: Yes, my lord.

THE COMMISSIONER: I take it he means you get better grades if operating a mill close by the timber.

MR. BALDWIN: Yes, over above what he reported in this Exhibit 5.

THE COMMISSIONER: He reiterates that all through, you notice. At the bottom of page 3, he says: "If operated . . . . .would be increased"-- and so on.

MR. BALDWIN:" Would be increased". In other words, Exhibit 5 is his report, based on the utilization without bringing the mill in. These things would increase it above this report.

THE COMMISSIONER: Yes.

MR. BALDWIN: Now, Exhibit 15, the Schultz 4 per cent. stump examination of this area, was made last year. As the report, itself, shows, and as Mr. Schultz, in evidence, said, it is a 4 per cent. examination of the whole area, and every stump was measured. It wasn't an ocular cruise. Every stump was actually measured. He says also, on page 513 of the transcript, that the allowance he made for breakage and culls was, in his

opinion, a large one. That was shown in "G". He was going through the report with your lordship: "Also a factor . . . . .area." Then he says: "I tried to indicate . . . . .than there was, in fact, there."

This examination, Exhibit 15, furthermore, showed that the stand was uniform in nature. The density was quite uniform, over the whole block, and that being the case, although the examination was 4 per cent. only on the area, it has proved itself to be -- where your stand is uniform, obviously your examination doesn't have to be as intensive. They discovered, by applying the samples they took from one area to the other, and having them jibe, that the stand was uniform. Although in some cases a 4 per cent. examination might not be as accurate as could be, in this case, by reason of the uniformity of density, the 4 per cent. examination was amply intense.

We have already mentioned the fact that, of the 55 million, roughly speaking 5 million was 12 to 18 inches. In other words, 50 million was 18 inches DBH and over. The reference in the transcript to that is page 594, when Mr. Schultz was giving evidence.

If your lordship pleases, we will now go on to Deep Bay.

THE COMMISSIONER: Before leaving that, was there not some evidence from Keith Shaw as to what was actually cut from 195?

MR. BALDWIN: I don't recall there was any evidence from Mr. Shaw on that matter, my lord. There was Exhibit 23, and that was a record of the scale under timber mark 1-C-6 Crescent, which was the scale of the southern portion of 403, together with Block 195, as cut by the Stultz outfit. Our difficulty there was, of course, we had the one timber mark covering more than the area we had in question.

THE COMMISSIONER: The note I have of Keith Shaw's evidence on that point is this:

"We have taken 58 million from both 403 and 195, to date. We hope to take a total of 70 million, depending on market."

MR. BALDWIN: I believe that is correct, my lord.

THE COMMISSIONER: Was there anything in the evidence to indicate how the stand on 403 compared with that on 195, as to quantity?

MR. BALDWIN: Yes, my lord, there was a plan which was made. It was the plan of the cruise made by Eustace Smith in 1923.

MR. BRAIDWOOD: Mr. Smith cruised it at 21 million feet, my lord--403.

THE COMMISSIONER: Where does that appear?

MR. BRAIDWOOD: Page 906 of the transcript, in Mr. Shaw's evidence.

THE COMMISSIONER: It shows that Smith cruised 403 at--?

MR. BRAIDWOOD: 21,800,000 feet.

THE COMMISSIONER: Have you any other reference to that same matter, Mr. Baldwin?

MR. BALDWIN: Yes, my lord.

THE COMMISSIONER: I have that reference that Shaw had dealt with it, although it was doubtful whether one could get much help from it.

MR. BALDWIN: Exhibit 57, my lord, is the plan which Mr. Eustace Smith made in 1923. Your lordship will see this plan. It is described as a sketch map of timber lands adjacent to Block 7-A. In other words, this doesn't include 195 alone. It includes, to the west of it, parts of 403.

THE COMMISSIONER: There is nothing to indicate it does.

MR. BALDWIN: If your lordship will look at Exhibit 15, you will see that is the plan at the back of Mr. Schultz's examinationof 195.

THE COMMISSIONER: Yes.

MR. BALDWIN: On Eustace Smith's plan, dated September 28th, 1923, if your lordship looks east from Block 2, until the first north and south line, you will come to the north-westerly extremity of Block 195.

THE COMMISSIONER: Yes.

MR. BALDWIN: In other words, Block 2 is outside 195.

THE COMMISSIONER: Yes. The portion you refer to is that shown "Good cedar" to the east?

MR. BALDWIN: That is correct, my lord; and to the west of it, your lordship will see it says: "Balsam and hemlock, scattered cedar."

THE COMMISSIONER: Yes.

MR. BALDWIN: Then again there is a part marked on

the Eustace Smith plan, Block 1, the north end of it.

THE COMMISSIONER: Yes.

MR. BALDWIN: Where it says "Balsam, hemlock and scattered fir and cedar." That is to the north of 195 again?

THE COMMISSIONER: Yes, I see it.

MR. BALDWIN: And then again, looking south-east from that last point I have referred your lordship to "Balsam and hemlock, scattered fir", the words "scattered fir" being partially in Block 195.

THE COMMISSIONER: Which do you say 403 is--Blocks 1, 2 and 3?

MR. BALDWIN: Blocks 1 and 2.

THE COMMISSIONER: To the west of 195.

MR. BALDWIN: Yes.

THE COMMISSIONER: Does that show the whole of it?

MR. BALDWIN: Oh no, my lord, but it shows a considerable part of the area of 403, which joined 195. Your lordship wished to ascertain if there was any evidence in as to the relative values.

THE COMMISSIONER: No, I was thinking of quantity more than anything else.

MR. BRAIDWOOD: I don't wish to interrupt my learned friend, but it might be helpful to refer you to page 913 of Mr. Shaw's evidence, and reading on for about 2½ pages, wherein Mr.Shaw discusses 403 and 195. Line 24, page 913, it starts.

THE COMMISSIONER: Perhaps you would like to read that over before you go on to discuss it further.

MR. BALDWIN: Yes, my lord. I don't think this affects very much the point I was making. It is that this map that Eustace Smith made in 1923 indicates that this timber on Block 195 is growing more densely, and is better timber than is on the areas shown on this same plan outside it, and that, generally speaking, the quality and the density improve as you work south. For example, up in the neighbourhood of the border of 195 with 403, you have, "Fairly well timbered,"--about the middle of the map. Then you work down to the west side, and get "Fairly well timbered", and down to the south you get "Well timbered;old growth fir," "Some good fir", and so on, the point being that, if anything, that the timber, we suggest, on 195, was better than that to the north of it.

If you would find it more convenient for me to deal with my learned friend's references to the pages of the transcript, I will do so now.

THE COMMISSIONER: No, you go ahead and present your argument as you wish.

MR. BALDWIN: As I recall it, that was based on an estimate of what we would get out of the two areas--70 million.

I am going now to Deep Bay, my lord, if there is nothing further on 195.

THE COMMISSIONER: Very good.

MR. BALDWIN: In the case of Deep Bay, my lord, we have some considerable assistance, because we

had the scale of the amount of timber cut, showing the grades, etc. from the area under timber mark 2K-9-Crescent, Exhibit 22.

THE COMMISSIONER: Was that during the Deep Bay operation?

MR. BALDWIN: No, it's from 1945 to 1948. No, this is the cut made by the Tsable River Logging Company, after they bought the cutting license from MacMillan. MacMillan purchased the land and the timber, and the Tsable River Logging Company operated these limits on a stumpage contract.

Dealing first with the quality of the timber on these limits, we submit we have here a very valuable guide, and also that the information from this has been substantiated and corroborated by--that this corroborates the report made later by Mr. Schultz, Exhibit 61.

As to the quality of them, reference to Exhibit 22 shows that, on the end of July, which was the last date we have, the total percentage computed to--that is at the bottom of the first page--the fir was scaling 9.4 per cent., No. 1; 63.63, No. 2; and 26.9 per cent., No. 3, and that the fir was 49.71 per cent. of the whole stand. Then the cedar shows about 24.39 per cent. of the whole stand, divided as between 1, 2 and 3 in the ratio of 5.7; 49.54; and 44.7.

THE COMMISSIONER: Apparently poor grade. It ran much more heavily to 2 and 3 grades.

MR. BALDWIN: It wasn't as good as the fir, no, but of the species you had there, fir and cedar, which are the more valuable species, approximately 75 per cent. of the stand, your average was a good deal higher than the average log grade for the Vancouver district for 1944.

THE COMMISSIONER: In whose evidence was this document discussed?

MR. BALDWIN: Exhibit 22?

THE COMMISSIONER: Yes.

MR. BALDWIN: Mr. Byers', my lord. I was going to call your lordship's attention to page 527 of the transcript. Mr. Byers reviews the figures we have just been going over, my lord, and he says, on page 527: "The remainder of the species .....of a superior quality."

Then Mr. Allison, at page 366, when referring to booms of logs--Allison, you may recall, was there to operate a mill.

THE COMMISSIONER: Yes.

MR. BAIDWIN: And he was talking about booms of logs which had come from the Deep Bay area, and at page 366: "What have you to say with regard to .....were both good."

I haven't seen the transcript of the evidence which you r lordship has heard in the last few days, but your lordship will recall that Mr. Schultz, in his evidence, said he knew the timber that was sold by McGonigal to Allison, and that he was of the opinion that -- he has cruised both

limits--the Deep Bay timber was superior to the McGonigal timber at Nanoose.

So much for the quality of the Deep Bay timber, my lord, except insofar as it is contained in this Exhibit 61, which is Mr. Schultz's Forest Inventory of that area. This is a very detailed and painstaking report, from which your lordship can get further evidence of the quality of the timber. For example, for the quality, I would refer your lordship to page 6, where he is describing Block 617, under "Condition of Timber". He says, "The old growth . . . . . were made from gross volumes."

And again, page 9, for Block 504: "Condition of Timber" he says: "Old growth fir . . . . . .peeler logs."

Again, at page 11, for Block 263, where he says, as to the condition of the timber, "This timber is similar in quality to the timber in Block 504." In other words, good.

At page 13, as to Block 566, for condition of timber, he says: "The comparatively minor . . . . . .approximately as follows."

And at page 15, Block 274, - that is not very important, because he says there isn't very much left there: "The very minor quantity . . . . . .second growth."

That covers it, as far as Mr. Schultz's report, Exhibit 61, is concerned.

Now, as to the quantity of the timber on

Deep Bay, I refer your lordship to Exhibit 45, which is the report by P. S. Ross & Sons, on the liquidation, and to a letter contained in that exhibit, which is dated August 16, 1943, from Eustace Smith, apparently to the Liquidators, P. S. Ross & Sons. It is a letter to which I drew the attention of the witness when he was on the stand on Friday. It is schedule 2, my lord.

THE COMMISSIONER: Yes.

MR. BALDWIN: Your lordship will appreciate that some time has passed since these examinations were made by him. He said he examined it from 1942, and it is quite natural that the witness should forget a good deal of what he had found at that time. No field notes were ever put in to indicate that the witness had any other means, other than this letter, of correcting his memory, and I suggest the only written record we have are these letters written when the witness' recollection was fresh.

This first letter, for example, written the 16th August, 1943, I draw your lordship's attention to that first paragraph, where it says:

"I made a general examination . . . . . accessible."

I think that paragraph describes the kind of examination that was made very accurately. It was a general examination. It didn't purport to be a systematic cruise. It was a check. A check

on what?

THE COMMISSIONER: A check on his private cruise.

MR. BALDWIN: No, my lord. I will indicate that to your lordship in a minute. He says the check he made should give a fair idea. Now, the check he made was of the E. & N. cruise. As your lordship will recall, Mr.Smith was a very honest witness. He didn't just remember what happened. He gave in evidence at first that he had been through there, and had arrived at his own figures independently, but he didn't remember the fact, because his own figures for Block 617, for example, were identical with the E. & N. cruise, 7,298,000 feet. Mr. Smith's check was a check of the E. & N. cruise. Your lordship may remember that while under cross-examination by Mr. Norris, there was an adjournment over the luncheon period, during which Mr. Smith was going to check to see if there was any possibility he could have arrived at the same figures as Mr. Pryor, who cruised for the E. & N., and when we came back after lunch, he did state that it was a check of the E. & N. cruise. It is not quite apparent in this report--

THE COMMISSIONER: Have you got the reference to the transcript?

MR. BALDWIN: I have, my lord, but I don't think it is necessary, because, in this report, I take you down to paragraph 5, when he was referring to Lot 617, he said: "The upper portion . . . . .

. . .is all there." And that cruise is Pryor's cruise; it is the E. & N. cruise. I can quite easily find that reference in the transcript.

THE COMMISSIONER: If you will make a note now, I do not want to interrupt you in the course of your argument. If you will let me have it later, that will be perfectly satisfactory.

MR. BALDWIN: My point on this general examination of Mr. Smith's is this, that it is, first of all, just what it purports to be. It was not a systematic cruise; it was a check, and should give a fair idea of the amounts accessible. Those are Mr. Smith's own words.

Then the other point I would stress is this: it is really ancillary to that, but in that paragraph I just read before about Lot 617, he says: "My check would indicate that the cruise of 7,298 million feet is all there." In other words, it was an examination on which Mr.Smith was concerned to ascertain the minimum. He wanted to see if that timber was there. He says it was all there.

THE COMMISSIONER: Is it not open to the construction that he was examining it, having in mind that whoever went in there would be conducting a salvage operation, and he wanted to find out how much was left? When he says it was all there, relative to 617, is he not saying, in another way, that 617 has not been logged?

MR. BALDWIN: Well no. As your lordship says he says

that 617 hasn't been cut out, in this report, and he says 617 is practically intact. If it hasn't been cut, then he is not referring to any cutting done on it. He is referring to the original cruise.

THE COMMISSIONER: That is what I was point out: he is saying, in effect, by the use of that phrase, "It is all there." -- that he is relating it back to "practically intact". It has not been cut, burnt, and so forth.

MR. BALDWIN: Yes.

THE COMMISSIONER: I do not know what significance is to be attached . Perhaps you consider it has some.

MR. BALDWIN: I think it is significant in this respect, my lord, that this was not a cruise to establish the maximum. It was merely to establish, as he says, a fair idea of the amount accessible, and to be satisfied that a minimum quantity was there. There were these amounts there. He didn't know how much more there was. He doesn't purport to say.

Now, going to Exhibit 61, which is Mr. Schultz's report, after an exhaustive examination of these areas, both Mr. Smith and Mr. Schultz, in evidence, were very careful not to cast any aspersions on the other's ability, and I think it is considered that both have been qualified as able men, in their field. I do not attack Mr. Smith's ability. I wouldn't for the world do that. I would,

however, point out the difference in the kind of cruise made by Mr. Smith and Mr. Schultz. Both are extremely able men, fully qualified in their own field, although their fields are slightly different, but their approach to the problem was fundamentally different, as appears, I suggest, from that letter I just read to your lordship, which was Mr. Smith's first report of his general examination which he says was a check of the E. & N. cruise, which should give an idea of the amount of timber accessible. It didn't purport to be an exhaustive analysis. By Mr. Smith's own evidence, the E. & N. cruises were notoriously low. The evidence of many other witnesses is to the same effect.

THE COMMISSIONER: Have you any reference to the page of the transcript where that feature is dealt with?

MR. BALDWIN: I think I can get it, my lord.

THE COMMISSIONER: Make a note of it now, and let me have it later, if you like.

MR. BALDWIN: Your lordship was asking as to whether or not this check of Eustace Smith's was of the E. & N. figures. I can now give your lordship the reference to the transcript. It is pages 862 and 863. In direct examination, Mr. Smith, at page 829 said that the E. & N. had no system until 8 years ago; did no extensive cruising. The question was: "Could you give his lordship . . . . .such as they are doing to-day?" Then at the foot of page 89, still under

direct examination by Mr. McPherson, Mr. McPherson asked: "And would that be about the time . . . . logging map for them?"

In other words, the E. & N. maps were very small-scale, and inaccurate.

There is another point, my lord, in comparison of the general examination of Mr. Smith with this Forest Inventory, and that is this, that the figure which is ultimately arrived at, 56 million odd feet here, is made up in part of the cut which had been made up to last fall. We didn't adduce anything further. But the cut to last fall was 16,720,000 feet, and that, in itself, exceeded the amount Eustace Smith estimated the amount to be. He said roughly 14 million feet of standing timber. So that the margin of error has been reduced, in the case of Exhibit 61 by reason of the fact there has already been a cut.

THE COMMISSIONER: That is, 16 million cut up to what date?

MR. BALDWIN: It is Exhibit 22, my lord. I think it is November, 1948.

THE COMMISSIONER: Of course, in all those years, they were utilizing much smaller timber than had been utilized generally, previous to 1943, is not that the case?

MR. BALDWIN: The evidence as to the utilization -- some of that evidence is conflicting -- is that certainly back in 1923 utilization was much poorer. Mr. Byers' evidence, as I recall it,

was to the effect that since about 1930, some operators -- not a general practice -- people knew a little more about utilization, and Mr. Smith gave evidence--I can't be sure of the exact date--when he says it was first cut to 12 inches DBH.

THE COMMISSIONER: It is in the Sloan report?

MR. BALDWIN: Yes, I think so. But in any event, we say, "Very well, we will concede that 12 to 18 inches DBH was not merchantable, and we are not including it in our estimate. This 56 million is net recoverable merchantable, 18 inches and over."

THE COMMISSIONER: I appreciate that.

MR. BALDWIN: As your lordship has heard, this volume, calculated roughly at 56 million feet is after deductions for breakage and culls. He didn't take an average figure and apply it to the area, as your lordship will see, by reference to the back of the report. The figure for breakage and culls was arrived at inddpendently in the case of each area. The average would work out to 30 per cent. for hemlock, cedar and balsam and fir 20 per cent., so that the amount of 56½ million which is contained in this report is the amount of timber which can be extracted economically from this area. It has already taken into account butt rocks and conk and breakage. It is a net figure, not a gross.

Again a point which may be of assistance to

your lordship in assessing the kind of reports these were, one was a general examination, and the other was a very painstaking and accurate one. Mr. Smith, in his evidence, said he went in on these limits with one man, and he completed his cruise of this area, which is a considerable area, in five days. He didn't have the assistance of aerial photography to guide him as to where to go, and he did in five days with one man what it took Mr. Schultz eighteen days to do, with four other men.

Once again, my lord, I do not want to suggest for a moment that any aspersions are being cast. I merely want to point out the difference in the nature of the examination of the timber. There is a big area there, and Mr. Smith's evidence is he covered it with one other man in five or six days, I think he said, and he didn't have planemetric survey.

As to evidence, -- there is considerable of it, I think--but as to the evidence with regard to the B. & N. cruise being low, I see a note here which says, Allison's evidence, at page 318, about the middle of the page, line 17. The question was; "As a logger, had you ever been . . . . they owned," and so on.

I will be going on now, my lord, to the other phase which I outlined earlier, and that is the stumpage matter, having dealt with the quality and quantity for both these limits. I will be

some time on that. If your lordship wishes, I think it would be convenient to adjourn now.

THE COMMISSIONER: Well, it is 20 minutes to 1 now. Do you suggest we adjourn now, and resume at 2 o'clock?

MR. BALDWIN: That is satisfactory, my lord. I thought it would be a logical place to break.

THE COMMISSIONER: Then we will adjourn now, and resume at 2 o'clock.

MR. BRAIDWOOD: I was wondering, my lord, in view of your lordship's commitments tomorrow --

THE COMMISSIONER: I do not want to break it. We may have to sit late tonight.

MR. BRAIDWOOD: I was wondering if we might start earlier this afternoon?

THE COMMISSIONER: Very well, 1:45, then.

MR. BALDWIN: I don't think I will be very much longer, my lord.

THE COMMISSIONER: Very well. If necessary, I will sit late tonight. I do not want to drive you, but in this instance, there is not much choice.

(PROCEEDINGS ADJOURNED AT 12:45 to 1:45 P.M.)

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

Deputy Official Stenographer

(1:45 P.M. PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

MR. BALDWIN: My Lord, this morning I had completed dealing with the matter of quality and quantity of the timber on these limits, that is, 195, and on the Deep Bay Limits, and now I propose to go on to the next point of my argument, which is concerned with the stumpage value, or the value of the stumpage on these limits.

THE COMMISSIONER: Dealing with 195 first?

MR. BALDWIN: Dealing with 195 first. But before that, again, my lord, there is a preliminary point which must be settled, or which has to be argued before your lordship, and that is as to the date of the sale.

During the Hearing, Mr. McPherson, and my friend, more recently, have indicated that they would contend that the dates operating in two agreements for sale were not in fact the dates of the sales, and our position has been, in the absence of proof positive to the contrary, the dates of these agreements must be taken as the dates of the sale.

Now, as to Block 195, that agreement for sale was dated the 28th of June, 1943, and I am not aware of any evidence that the Crown has led to rebut that date.

THE COMMISSIONER: What is the agreement, by exhibit number? It was put in, I fancy.

MR. BALDWIN: Yes, it is in evidence, my lord. I think it is in as Exhibit 45. 195 is contained in Exhibit 45.

Exhibit 45, as your lordship will recall, is made up of three reports from P. S. Ross & Sons. I think my friend can concede that the agreement is in, and that is the date of the agreement.

THE COMMISSIONER: Well, 195 was sold to MacMillan, was it not?

MR. BALDWIN: Yes, my lord. They were both sold to Mr. MacMillan. Oh, I beg your pardon, my lord. Exhibit 45 dealt with Deep Bay.

THE COMMISSIONER: Exhibit 51 deals with the sale to MacMillan?

MR. BALDWIN: Yes, but that is Deep Bay, I believe, my lord.

THE COURT: You are right.

MR. BRAIDWOOD: I think it will help my learned friend, my lord--there is considerable difference in the argument, as I appreciate it, over the dates of Block 195 being sold, and the Deep Bay being sold. My friend has given the date of June, 1943, for 195, and that appears to agree with my records, but there is a considerable difference of opinion, apparently, between my friend and myself, on the Deep Bay sale.

THE COMMISSIONER: Just what does that mean? Do you concede that the agreement for sale for 195 is June of 1943?

MR. BRAIDWOOD: Yes, my lord.

THE COMMISSIONER: So the only question that arises is in regard to Deep Bay.

MR. BRAIDWOOD: Yes, my lord. In that case, we contend it was in August or September of 1943, and my learned friend contends early in 1944.

THE COMMISSIONER: Yes. The date of the document, Exhibit 51, is the 13th of March, 1944. Well, that clears that up for you, Mr. Baldwin. There is no question about the date of 195, apparently.

MR. BALDWIN: That is my understanding of my friend's statement. Now then, as to Deep Bay, as your lordship has observed, the date of the document is the 13th of March, 1944.

THE COMMISSIONER: Yes, but could you tell me which document or exhibit it is that relates to 195?

MR. BRAIDWOOD: That is Exhibit 36, my lord. I think your lordship had it out this morning. It is one of the P. S. Ross Reports.

THE COMMISSIONER: Exhibit 36?

MR. BALDWIN: Here we are, my lord. It is contained in Exhibit 37, which is the final report of sale of Block 195, as January 25th--as at the 25th of August, 1943. This is a report from P. S. Ross and Sons, to the Custodian. Perhaps this will be of assistance to your lordship.

THE COMMISSIONER: I have it, thank you.

MR. BALDWIN: That exhibit begins with a letter to theCustodian, and the second item in it is a copy of the agreement between the Secretary of State and H. R. MacMillan Export Company Limited.

THE COMMISSIONER: Then we are concerned only with

Exhibit 51, relating to the sale of the Deep Bay timber.

MR. BALDWIN: Yes, my lord.

THE COURT: Yes. Proceed, Mr. Baldwin.

MR. BALDWIN: Well now, as to this agreement, we say, so far from the Government having led evidence to show that the date of the document isn't the date of the sale, there is positive evidence that the date of the document is the date which must be taken as being the date of the sale.

Mr. Field, in his examination-in-chief, at pages 750 and 751, stated that "Tenders were opened . . . . ." At the foot of 750, my lord, and over the page: "They were allowed to remain in abeyance," etc., and then we go to page 926 of the transcript, to Mr. Shaw's examination.

THE COMMISSIONER: 926, did you say?

MR. BALDWIN: Yes, my lord. Mr. Shaw was under examination, or cross-examination by Mr. McPherson, and he confirms, in reply to a question of Mr. McPherson, that in a period prior to March 13th, 1944, "It was a question that the Government would either accept or refuse the offer." In other words, the offer or tender of the H. R. MacMillan Company hadn't been accepted, prior to March 13th, 1944.

THE COMMISSIONER: Now, let us follow this evidence a little closer. We, perhaps, can save a good deal of time if we can deal with this question now, so

you do not have to deal alternatively with two dates.

MR. BALDWIN: Yes, my lord. I think that is a good idea.

THE COURT: In the middle of the page, I notice Mr. McPherson says: "Now, Mr. Shaw, with respect to the Deep Bay property . . . . .A. That is right."

MR. BALDWIN: That is correct, my lord.

THE COMMISSIONER:"Q: Would I be correct . . . . . for how many days?"

I do not know that that helps very much. That appears to give us the factual position. Now, what is your contention with regard to the effective date?

MR. BALDWIN: Well, our contention is this, my lord: first of all, we have the date of the document. We have no evidence to rebut that date, and, further than that, we have evidence which supports our contention that the date of the document is shown clearly by what Shaw has said at page 926. Mr. McPherson's question was: "Would I be correct . . . . .as the price."

It was a question that the Government would either accept or refuse the offer, and Shaw says that is right; in other words, that the offer hadn't been accepted until March, 1944.

THE COMMISSIONER: Yes, but are we not concerned with this factor, as to what were the logging conditions at the date the contract was made? In other words, I gather from the evidence that I

have heard that in the period between the beginning of 1943 and the end of 1944, there was a definite change in the method of logging, in terms of the measurement of timber, perhaps high, that was taken out. Is that not the situation?

MR. BALDWIN: There is evidence, though I can't recall it exactly, but the evidence is conflicting, my lord, as I said this morning, but what we are concerned to find out, I think, is the date when the Custodian was bound to go through with the deal.

THE COMMISSIONER: Having what relation?

MR. BALDWIN: Well, the terms of reference, my lord.

THE COURT: It is current price. I am not concerned with the terms of reference, at the moment. What is the matter that concerns me? Why is it you are anxious to have the date of the contract put at as late a date as possible? Is it because of a rising market, or a change in logging conditions, or what?

MR. BALDWIN: A rising market. Generally speaking, the trend was upward, and by the terms of reference, your lordship is to inquire into the claim as at the date of the sale, when the fair market value was so and so.

THE COMMISSIONER: Now that we have those factors settled, what is your proposition?

MR. BALDWIN: We really haven't any proposition, my lord. We say the date of the document is there,

and no evidence has been led to rebut it, and this is a contract dealing with land, and even verbal evidence to the contrary would not be sufficient, by the Statute of Frauds. What evidence there is in this case here supports the date of the contract.

THE COMMISSIONER: All right. I will hear from Mr. Braidwood, just on that phase of it. Perhaps we can save some time.

MR. BRAIDWOOD: Yes, my lord. I think that is all I have on that point.

THE COMMISSIONER: Yes, Mr. Braidwood.

MR. BRAIDWOOD: May I just have one moment?

THE COMMISSIONER: Yes. Just confine yourself to this problem.

MR. BRAIDWOOD: Yes, I wasn't prepared, right at this moment, to deal with it.

MR. BALDWIN: There is just one other point that I might mention, my lord, and that is this, in the call for tenders, it was stated that no tender, or not the highest price, or any tender is necessarily going to be accepted. So, it is quite clear, by the terms of the old deal, until the tender had been accepted by the Custodian, he was bound to go through with it by memorandum in writing, and specify to a statement that there was no contract.

On that last point, my lord, I refer your lordship to Exhibit 36 and Exhibit 1. They are these notices which call for tender. Oh, I beg

your pardon, my lord--that deals with 195--
I am sorry.

THE COMMISSIONER: Both those references have no application here?

MR. BALDWIN: I don't know, my lord. I think it was true in the case of Deep Bay, my lord. It is a standard term that neither the highest, or necessarily any tender will be accepted.

It is hard to keep putting this stuff in piecemeal. Exhibit 45 I can refer your lordship to, because I have found that in the schedule. Here is the notice on the Call for Tenders re Deep Bay and Clause (e)--Clause (d) of that is exactly the same as it was in the case of Block 195--"Neither the highest nor any tenders will necessarily be accepted."

THE COMMISSIONER: Clause (e)?

MR. BRAIDWOOD: Clause (d), my lord.

THE COMMISSIONER: Just let me run through this Exhibit 51, and see if there is anything in here.

MR. BRAIDWOOD: Yes, my lord.

THE COMMISSIONER: Mr. Baldwin, have you observed Clause (d) at the bottom of page 5? I will read it to you, Paragraph 6 (d): "Account shall be taken . . . . .shall be indemnified", etc.

Now, does that indicate the date of transfer as being fixed by agreement between the parties, as of the 31st of December, 1943?

MR. BALDWIN: I don't think so. That is Exhibit 51, from which your lordship is reading?

THE COMMISSIONER: Yes. Have you a copy?

MR. BALDWIN: No, my lord.

THE COMMISSIONER: You can read it yourself.

MR. BALDWIN: I have heard what your lordship has read, but I don't think it makes the slightest difference. That is an adjustment, if the contract is completed.

We say the date of the contract is the 13th March, 1944, and after that date, there is nothing whereby the MacMillan Company could have forced the Custodian to sell to them. They have no memorandum in writing, and no evidence of anything to the contrary. That is an adjustment date, which is common enough. It might have been in the future.

THE COMMISSIONER: All right. Yes, Mr. Braidwood?

MR. BRAIDWOOD: My lord, my submission on behalf of the Crown is related to the history of this matter as conducted by Mr. Field, and given in his evidence, as well as in the P.S. Ross Report, which is Exhibit 45.

It has been clearly shown in this evidence, my lord, that Mr. Smith had been retained to make a cruise of the property, and that P. S. Ross & Sons were attempting to sell that property on behalf of the Custodian. Advertisements were published on the 31st of July, 1943, and the advertisement which is in evidence here, my lord, clearly shows tenders were called for the 31st of August, and we see the list of replies

to this at page 3 of P. S. Ross & Sons' Report, Exhibit 45. This is the report of liquidation of the 15th of March, 1945, my lord.

THE COMMISSIONER: Yes.

MR. BRAIDWOOD: Now, there was a formal call for bids, my lord, by the 31st day of August, 1943.

THE COMMISSIONER: Now, you are reading from what?

MR. BRAIDWOOD: I am referring to Mr. Field's evidence, and to Exhibit 45.

THE COMMISSIONER: Now, there is a lot of evidence in this case. If you are going to refer to evidence or documents, will you please give the reference, so I can note them?

MR. BRAIDWOOD: I refer to Exhibit 45, from pages 1 to 3, and at the foot of page 2: "In accordance with your instructions . . . . .July, 1943."

THE COMMISSIONER: I do not see that at the foot of page 2.

MR. BRAIDWOOD: It is about 5 lines up. There are about three reports, I understand.

THE COMMISSIONER: Yes; the 31st of August, 1945.

MR. BRAIDWOOD: That is the document I refer to.

THE COMMISSIONER: At page 2, yours must be different from mine.

MR. BRAIDWOOD: There is a paragraph startxing: "Kagetsu had agreed . . . . .31st July, 1943." That was the passage I was reading from, my lord.

THE COMMISSIONER: That is not here. All I have is "Kagetsu had agreed . . . . .the 31st July, 1943." Oh yes--go on. What is it you refer to?

MR. BRAIDWOOD: I want to refer to that advertisement, which is in as Exhibit 46, my lord. I am sorry, my lord, that may be found at Schedule 4 of the report your lordship has. There is a copy set out there.

THE COMMISSIONER: Yes. "Tenders will be received on August 31st"?

MR. BRAIDWOOD: Yes, my lord. Now, as the result of those tenders, in Mr.Field's evidence, my lord, at page 750, we see this picture arising at line 28: "These bids were opened . . . . .I have a copy of the wire where Mr. --" My lord, the wires the witness referred to were filed as Exhibit 19, my lord, and they are in, my lord , as Exhibit 19. Now, the Crown's submission is, my lord--oh, I am sorry, my lord--I should, of course refer to the evidence again in the back of Exhibit 45, which is the reference by Mr. Field to Eustace Smith and his comments.

THE COMMISSIONER: What are you referring to now?

MR. BRAIDWOOD: Mr. Field, at page 751, refers to having taken up the matter of the acceptability of the bids with Mr. Smith, and I am suggesting, on behalf of the Crown, that Mr. Smith then indicated to Mr. Field that a certain bid should be accepted, and it turned out to be the bid of H. R. MacMillan & Company.

THE COMMISSIONER: Now, where is that?

MR. BRAIDWOOD: At page 3, my lord, of Exhibit 45, at the foot of the page, the last paragraph. You will

see a paragraph of the P. S. Ross Report: "While the tender of H. R. MacMillan Company Limited included . . . . .from the property" which, in parenthesis, my lord, was, in fact, done. "This was agreed to . . . . .necessary legal details."

Now, it is submitted on behalf of the Crown, my lord, that following on from the middle of page 4, and on into page 5, Mr. Field, through the Report of P. S. Ross & Sons, is giving details of what actually transpired. There were a number of difficulties which arose, over the course of the winter, and those difficulties had to be ironed out before the final agreement could be entered into, but I submit, on behalf of the Crown, my lord, that the deal was consummated at the time at which the Custodian was advised to accept the offer of H. R. MacMillan Company on the 9th of September.

THE COMMISSIONER: How do you say it was consummated, Mr. Braidwood, unless some committment was made by the Custodian, to the MacMillan Company?

MR. BRAIDWOOD: Well, my lord, I submit that the MacMillan Company had made the offer which the Custodian had seen fit to accept, but he spent some time ironing out the difficulties which were necessary to convey the title which had to be conveyed in the final analysis.

THE COMMISSIONER: Am I not faced with this difficulty: that MacMillan's offer was one in writing, and was

outstanding.

MR. BRAIDWOOD: That is right, my lord.

THE COMMISSIONER: And until the Custodian committed himself to this acceptance of that offer, he could not be said to be bound, nor has MacMillan anything more than an offer, which is presently in here.

MR. BRAIDWOOD: But there is this, my lord, that at that time the Custodian was taking active steps to put the matter in such a position that MacMillan could take over and those steps were only in line with the MacMillan offer.

THE COMMISSIONER: But you cannot say that either the Custodian or MacMillan were bound at any time, until the document was signed, can you?

Let us try and analyse it. Supposing January of 1944 MacMillan had said, "True, we know that you have had some difficulty, but we are tired of waiting and we will withdraw our offer". Was there anything the Custodian could have done to hold him to it.

MR. BRAIDWOOD: Well, my lord, I should point out one issue which has a bearing, I think, and that is that MacMillan had made a deposit with his original tender, and this was retained by the Custodian throughout.

THE COMMISSIONER: He would be entitled to retain it until the offer was withdrawn.

MR. BRAIDWOOD: There is, of course, my lord, unfortunately no evidence directly to the point, to be quite fair

to your lordship as to a normal acceptance of the offer by the Custodian.

THE COMMISSIONER: It appears stranger to me that there was not, unless the parties were acting on an extraordinarily friendly basis and one that might justify taking a chance on the situation. There should have been a letter written.

MR. BRAIDWOOD: There was a great deal of good faith in the matter. The parties were apparently working together towards a common end. I think the evidence clearly points to that.

THE COMMISSIONER: There is nothing you can point to as indicating that the Custodian was bound, until the document of March 1944, is that the situation?

MR. BRAIDWOOD: No, I wouldn't quite go that far, my lord, but I would say this, as your lordship knows, I wasn't present on the original conduct of the case here, but as far as my knowledge of the evidence is concerned there is no document which exists prior to the date of the agreement which will be helpful to your lordship, but at the very least I say that the document which your lordship has before you as an exhibit is supposed to relate back to the course of conduct of the sale.

THE COMMISSIONER: I pointedout one phrase to Mr. Baldwin. What do you make of it?

MR. BRAIDWOOD: Naturally, my lord, I take the view on that that it related back to December. It does appear indeed strange, my lord, but there was no evidence submitted by the Crown of a formal letter of acceptance and I am unable to get around that

point.

THE COMMISSIONER: Can you explain to me what the last part of this clause 6-D means which begins "The vendor shall be charged . . . . . and the vendor". In other words the Custodian appears to be assuming liability for rentals through to 1946.

MR. BRAIDWOOD: Yes, apparently, by virtue of a prior existing lease, which bound the Deep Bay Company, my lord.

THE COMMISSIONER: Oh, yes. The Deep Bay Company is the vendor, is it not?

MR. BRAIDWOOD: Yes, my lord. What does appear strange, my lord, is the fact that the Custodian and his representatives throughout were operating in a manner which could only be consistent with their having accepted the MacMillan offer as of the date of September 9th.

THE COMMISSIONER: I do not think I can go along with you on that, because, on the material before me there would have been nothing to prevent either the MacMillan Company or the Custodian, certainly the MacMillan Company from withdrawing their offer made in response to the advertisement for tenders. The Custodian may well have been held liable to any tenderer on the basis of the advertisement.

MR. BRAIDWOOD: My submission is based on what appears at page 4 of Exhibit 45, my lord, and that was a H.R.MacMillan Export Company Limited, having expressed their willingness to proceed with the timber deal and the Custodian and his representative

then going ahead and acting on the $40,000.00 offer, subject to a reasonable delay in which to remove the rails and other equipment from the property, and the Custodian in fact doing it.

The Custodian and his representatives would hardly have been taking such a substantial step as removing the rails and other equipment from the property if it hadn't been for the offer that the Custodian had accepted from the MacMillan Company, and I might say there is no evidence that any other offer was considered at any time after the date on which the tenders were opened .

THE COMMISSIONER: It seems to have been a very loose contraction, that even though there were minor details to be cleared up they steel was to be left in until the final document was executed.

MR. BRAIDWOOD: I know of no such document, my lord. I might speak to Mr. Shears about it again, if your lordship will give me a moment.

THE COMMISSIONER: Yes, certainly.

MR. BRAIDWOOD: After counsultation with Mr. Shears and Mr. Rae , my lord, they know of no such document that will be of help to your lordship.

I can only say what I have said before, that it certainly appears from the evidence, I submit, that the Custodian was working on an offer which he had received and which he had accepted, despite the fact there is no formal evidence of that appears here, but I think your lordship is entitled to draw that inference from the Custodian's later

action, my lord.

THE COMMISSIONER: I certainly could not draw any inference as to the acceptance having been made at a date prior to the 31st of December, 1943, in view of the fact that the adjustments were not to be made until that date.

MR. BRAIDWOOD: No, my lord, but by all means the Custodian who got in offers from the public -- those offers were related to the date of the 31st of August.

THE COMMISSIONER: I do not think that helps me very much.

MR. BRAIDWOOD: My lord, I go one step further; I submit what actually happened, even by the document of agreement before us is merely implementing what actually did transpire in September of the previous year. The deal is exactly the same as was indicated by Mr. Field in his evidence, and was carried out.

I don't want to bore your lordship, or carry it too far, but the Crown's submission is that the deal was consummated, the 9th of September, 1943, and the later commitment of the deal to that written document was delayed by reason of the various difficulties which arose over the winter period, but in any event the proposition as set out in the document of agreement is exactly the same as in Mr. Field's recommendations to the Custodian, and, further, the Custodian spent some time trying to get Kagetsue to agree to the offer, and when Kegetsue would give no formal agreement when the

Custodian had settled the other difficulties he entered into the agreement.

THE COMMISSIONER: On the basis of the material before me, I am unable to say that there was a binding agreement here until such time as this document of the 15th of March, 1944 was executed. The only matter that causes me any concern in that connection is the fact that paragraph 6-D provides for adjustments having been made of the 31st of December, 1943, but that, of itself, I do not consider sufficient to warrant my concluding that a binding agreement was made even as of that date, the formalities of which were to be carried out at a later date.

So, in the circumstances I am holding that the effective date that I am concerned with here, in view of the terms of reference, is the 13th of March, 1944.

I guess, Mr. Baldwin, you may proceed then on that basis.

MR. BALDWIN: I will turn now to the matter of stumpage value, with regard to Block 195.

THE COMMISSIONER: Yes, very well.

MR. BALDWIN: On this matter of stumpage value, your lordship heard evidence as to comparable sales of timber, and also evidence as to the average timber sales -- government timber sales.

THE COMMISSIONER: Can you give me the reference to that evidence?

MR. BALDWIN: Yes, my lord, I will. First of all, let us deal with the government sale contracts, for

the year 1943.

Now, Exhibit 55 at page B.B.29, that is the 1943 Forest Branch Report, showing the average stumpage price as bid on government timber sale contracts.

THE COMMISSIONER: Do you suggest that timber sales bear any relation to blocks of timber such as this with which we are concerned here?

MR. BALDWIN: Yes, my lord, I do. I say those prices are a good deal less than the timber here involved would be, but I think I can relate that quite easily for your lordship by application of the factors in which they differ.

THE COMMISSIONER: At what page of this report is it?

MR. BALDWIN: B.B. 29, my lord.

THE COMMISSIONER: There is something here on Vancouver Island at all, is there?

MR. BALDWIN: It is the Vancouver District, my lord, which includes the Island. You will see that the average there for fir is $2.76, with a range from $1.25 to $6.50; Cedar is $2.95, with a range of $1.50 to $6.50; hemlock is $1.48, with a range from .85 cents to $5.50; balsam is $1.42, with a range from .85 cents to $5.50.

Now, those are stumpage contracts. In other words an operator, as your lordship has heard the evidence, goes in and pays 10%. He pays as he goes. He doesn't pay in advance a lump sum price, and, also, of course, he has no rights to the grounds. He must log the limits within a certain time. I think one witness, Allison, gave evidence

that he could sometimes get a year's extension and I think you will find there are very fair conditions in the contract -- very onerous conditions in the contract, from the point of view of the operator.

Furthermore, these timber sale contracts relate to timber with respect to which royalty must be paid, and that royalty in 1943 was $1.22 for fir and cedar and 60 cents for hemlock and balsam. That appears at page 331 of the transcript, my lord.

THE COMMISSIONER: Can I have those royalty figures again.

MR. BALDWIN: $1.22 a thousand for fir and cedar and 60 cents for hemlock and balsam. Mr. Byers gave that evidence when he was being cross examined by my friend Mr. McPherson at page 331, and with respect to the general value which your lordship can attribute to these timber sale contracts and to the particular page from which we are taking this stumpage price as bid, I would refer your lordship to the bottom of page 335 and the top of 336 of the transcript where Mr. Byers tells your lordship, " My lord, as far as I can . . . . . A: Yes."

THE COMMISSIONER: Now, I do not recall this evidence right offhand, but was this factor taken into consideration, that under a timber sale, as I recall it, a man is required to cut within a limited time, whereas on the E. & N. lands he could hold it for as long as he pleased and pay his taxes.

MR. BALDWIN: I don't recall that being specifically adduced my lord, and I haven't given my specific sum or,

allocated any specific amount to that factor.

We say it is an onerous provision, as your lordship appreciates, which would tend to make those prices lower than for Deep Bay.

THE COMMISSIONER: It might have the reverse effect, might it not? It might make the E. & N. timber more advantageous to buy because it could be held for --

MR. BALDWIN: That is another way of saying what I have said, I think, my lord. It would depress their timber price and, therefore, relatively our timber is more valuable.

Now, if we take the figures they have given at page B.B 29, if you add the royalty at $1.22 for fir and cedar and 60 cents for hemlock and balsam, and if you also add the sum of 75 cents for the exportability of the Kagetsu timber -- that was a matter of evidence and was variously assessed by Mr. Byers and Mr. Brown, and, I think Mr. Allison also gave evidence on that to your lordship. Some of the evidence was to the effect that in view of the fact there was an export ban in effect at that time, the normal full value of the exportability couldn't be assigned to the timber. Other witnesses said the ban wasn't to be regarded as something that was going to go on for ever but was a temporary measure only, and therefore the exportability factor was worth something.

THE COMMISSIONER: That factor is worth 75 cents a thousand.

MR. BALDWIN: For the purposes of argument, yes, my lord, 75 cents a thousand.

Now then, my lord, we have added those features, the royalty and the exportability to the average price in 1943. Now, remembering that the price as paid by MacMillan was a cash price and he did not pay as he cut, we take off 15% for cash. The evidence of the amount which should go off for cash varied between 10% and 25%. We get a figure for fir of $4.02, for cedar $4.18 .

THE COMMISSIONER: $4.18.

MR. BALDWIN: Yes, my lord. For hemlock $2.41 and for balsam $2.35, and if we apply those stumpage figures to the volumes by species shown to have been on Block 195, by Exhibit 15, and taking as the quantity the amount shown by Mr. Schultz' cruise, 55 million, we get a total figure of $177,120.75.

THE COMMISSIONER: How do you arrive at the break-down?

MR. BALDWIN: I can give it to your lordship. Fir, I refer your lordship to page 2, Exhibit 16. It is a big floppy cruise of 195, with Mr. Schultz' volumes and it is his net figure again, not gross, after his deductions for breaking and cull. 21,971,000 feet, if you apply $4.02 to that quantity, you get $83,323.42. Cedar on the same page, that is a fourth column over, my lord, the net volume there is 6,998,000 feet and applying to that volume a value of $4.18, which is the weighted forest sale price you get

$29,251.64, and yellow cedar, of which there was 68,000 feet only at $4.18, is $284.24. There was a very small quantity there, my lord.

THE COMMISSIONER: Yes.

MR. BALDWIN: And pine, there was only 624,000 feet of that, and taking it at $4.02, which is the same price as fir, and white pine was worth more than fir, but I am taking it at the fir figure, you get $2,508.40.

Hemlock, of which there was 18,207,000 feet at $2.41, gives $43,878.87.

Balsam, of which there was 7,606,000 feet at $2.35, gives $17,874.10, making a total of $177,120.75. Now, that figure has been weighted, as I have indicated to your lordship, by the addition of royalty and the exportability feature, and downward by 15% for cash.

Now, in addition to that there are these other factors which your lordship mentioned earlier, which are very difficulty to aesess in the definite amount, but that figure as we arrive at a total value of the stand of $177,000.00, we submit should be revised upward for several reasons, the first of which is that it is a weighted figure of the average only.

If your lordship looks at page B.B.29, of Exhibit 55, you will see that the range in fir went as high as $6.50 and in cedar also to $6.50., spruce was $6.00, hemlock to $5.50, Balsam to $5.50, and it is a fair conclusion, my lord, that the average grades for that year on which Mr. Schultz gave evidence would be the ones represented by these various sale contracts, and he gave evidence that in

1944 -- I don't have it for 1943 from him -- fir averaged 3% number 1, 52% number 2, 45% number 3., and as I think I have told your lordship, the grades on 195; were higher than that by a lot and the timber was of good quality.

Therefore, we say that figure should be weighted upward for that reason, and yo r lordship heard considerable evidence about th ese timber sale contracts and their nature and the net of the stands which comprised them. At page 338 of the transcript, and again at page 357, there is evidence that in the majority of these cases the net content of the timber was sold at the upset price.

At the same pages of the transcript it also appears that most of these timber sales involved small blocks of timber, which has a depressing effect or is a depressing factor. If you have a small area it is not as economical to log it as if you had a larger area.

So much now for that basis of comparison, my lord, namely the timber sale contracts.

THE COMMISSIONER: Are you relating this matter of stumpage value to both properties?

MR. BALDWIN: Yes, my lord. I have just been dealing with Block 195.

THE COMMISSIONER: Yes, very well.

MR. BALDWIN: A lot of it is applicable to both. Now the figures for comparable sales which your lordship heard given have been generally to the effect that

timber of equal and even inferior quality was touching over four dollars a thousand at that time, or very near to it.

THE COMMISSIONER: Have you any reference to the evidence?

MR. BALDWIN: Yes, my lord, I can give it to you now. There is Mr. Allison's evidence, at page 367, where it is referring to the McGarigle timber. "What was the basis of the purchase . . . . . "

Now, as to that McGarigle timber, while I am on that point, your lordship has heard evidence that the Deep Bay timber was superior and there is evidence as between Deep Bay and Block 195, -- the timber of Block 195 is again superior to that of Deep Bay. So you have heard that timber which is inferior to any of the Kagetsu timber was selling at $4.93 a thousand.

THE COMMISSIONER: What was the date of that sale?

MR. BALDWIN: I think it was 1944, my lord. At page 366 my lord, at the foot of the page. It was April 1944. I think it was April 9th. So, that sale was made on April 9th, 1944.

Now then, at page 372, this is Allison in cross examination, he is again being examined as to this McGarigle timber, and Mr. McPherson asked him, "Would you say that the price . . . . . didn't own them". In other words, that stumpage price of $4.93 per thousand did not include the access into the timber, or the opening up of it. They bought the roads from somebody else. That is comparable to Block 195, which hadn't been opened

up. Deep Bay had been.

Page 297, and this is still Allison, at the foot of the page, he is giving evidence as to what he expected to get. He made a cruise of 16 million and that is what he expected to get, he said.

Then Mr. Brown at page 569, this was the Royston timber that he got from Steckle (Stekko), and the purcahse was in June 1945, which is, roughly speaking, two years later than the Block 195 purchase, and just about a year after Deep Bay. He says what he paid was $4.75 per thousand.

Page 569, the beginning of Mr. Brown's examination in chief. He says, "We assume it was about $4.75, around $4.75 that he paid", and that was in the Deep Bay area, with similar timber. They built a truck road in he says at the foot of the page. (Reading). It was very similar to the Deep Bay operation in which the purchaser put in a truck road later, and he talks about the exportability of the royalty free timber. Mr. Brown was one of the witnesses who didn't put much value on the exportability, because of the temporary ban.

Then Mr. Pretty's evidence at pages 625 and 626. He is there referring to the Dollar contract, where the MacMillan people bought from Alworth. They took an assignment from Alworth of a contract he had with the Dollar people, and Mr. Pretty told your lordship that an analysis of the stumpage that was paid at that time when the MacMillan people took that assignment which was in 1943 -- his

reference to it is at page 623 where he said there was a $2.50 base price paid and at 625 again, he says, (Reading). This, my lord, was one of the contracts that was tied to a certain log price. He had it in the contract that he was to get $2.50 basic and then on an average of all the species 18% of any appreciation above 11, 17 and 26. I am at page 626, my lord, at the top of the page.

So, you would take the logging price -- the going log price and you would get in addition to your $2.50, 18% of the excess of the new log price over these figures of 11, 17 and 26, and then on page 626 at line 11, (Reading), then he says that the stumpage would work out at $2.50 etcetera. At the top of the page he arrives at something around $4.25 or $4.23 a thousand for the Deep Bay timber. I beg your pardon, not for the Deep Bay timber, but the timber in the Dollar contract.

At page 643, Pretty again is talking about the Cowichan area timber. That really goes to the quality of the timber there , rather than anything else, and I referred to that this morning. At page 645, Pretty has something to say about government timber sale. This is in cross-examination and he said, "(reading). At 649, my lord, he revised this figure -- this is the Pretty sale -- of $4.23 upward by 50 cents because he hadn't taken royalty into account and, also, on cross-examination he had gone down from $4.23 to $3.23, but he comes back again to say the 50 cents should go on, bringing the very minimum price to $3.73 and the range

from $3.73 to $4.73 for the Deep Bay timber.

Mr. Shaw, at page 902, gave evidence on the contract between MacMillan and Fletcher, Fletcher being the Tsable River Logging Company, that went into Deep Bay . His evidence is at line 12, and this was in August 1943 --no, I beg your pardon, my lord, this refers to Block 195, and the sales contract, the MacMillan purchased 195 from the Custodian in June 1943 and sold it to Stoltz or sold the right to cut to Stoltz in August 1943, and under that contract, according to Mr. Shaw, the rates were fir and pine, $4.50 cedar and yellow cedar $3.25, hemlock and balsam $2.00 per thousand. The date of the contract is August 10th, 1943.

Counsel didn't see those contracts, my lord. You will recall you looked at them and summed up their general effect. Excuse me, a moment, my lord, I will see if I can find that page.

MR. BRAIDWOOD: Page 921, my lord.

MR. BALDWIN: Yes, that is right, 921 and 923, thank you. 923, my lord, at the top of the page, is what I wish to draw your lordship's attention to.(reading). But this contract with Stoltz was, as your lordship has found, an unusually onerous one, and yet he was prepared to pay $4.50 or to put it another way the price, had it not been for the presence of the onerous conditions in the contract would have been considerably in excess of $4.25, $3.50 and $2.00 per thousand.

Finally, my lord, there is the general picture with regard to Block 195. The evidence is that it

was a good logging show. Mr. Eustace Smith's report, Exhibit 53, bears that out . So does the Sheehan cruise and Mr. Schultz' evidence is that the stand was uniform, the grades were easy and labour there at Lake Cowhchan was available. You didn't have to have a camp, you could run a crummy and the gravel content of the soil was high, making for easy road construction.

Now, the same points that I have referred to in the transcript apply equally to Deep Bay, my lord, and I have applied to the Deep Bay timber in the same way as I did in the case of Block 195, the timber sale contracts by the government in the year 1944.

THE COMMISSIONER: The Deep Bay timber was the 15th of June, 1943, was it?

MR. BALDWIN: No, it was sold the 13th of March, 1944.

THE COMMISSIONER: Oh, that is the one that we were discussing.

MR. BALDWIN: Yes, that is right. The date of the document my friend conceded for Block 195, was the date of the contract. We were then concerned with Deep Bay and my friend went through some of the evidence.

THE COMMISSIONER: Yes. What difference in time was there between the two?

MR. BALDWIN: They were about a year apart. Now, the average stumpage for that year, 1944, Fir was $2.50, cedar $2.95, hemlock $1.58, and balsam $1.64. These arethe government timber sales contained in the

Forest Branch report for 1944.

MR. BRAIDWOOD: Before my friend proceeds on that on this Exhibit which is before your lordship, I would like my friend to explain to the court, because I will bring it up in any event in my argument, as to why he chooses to take an average stumpage price as bid as opposed to the table for the average stumpage price received which is the next following table which was also put in in evidence by my friend, Mr. McPherson. My friend used the term "timber sales" and I would like him to show the court there were timber sales and not bids.

MR. BALDWIN: I dealt with that earlier.

THE COMMISSIONER: Yes, I recall you did.

MR. BALDWIN: As between the two figures, I refer your lordship to the transcript for the reason why the bid figures were taken rather than the received figures.

THE COMMISSIONER: What was the exhibit again?

MR. BALDWIN: Exhibit 25. The page number is 56 --D.D.37.

THE COMMISSIONER: Could I have that again.

MR. BALDWIN: It was put in for one purpose earlier as Exhibit 25, the whole report.

THE COMMISSIONER: I thought you had previously referred to Exhibit 55.

MR. BALDWIN: I did, my lord.

THE COMMISSIONER: Is that the same thing?

MR. BALDWIN: No, my lord, exhibit 55 are certain pages in the 1943 annual report and Exhibit 56 contains certain pages of this report, the 1944 report, and this report is also in as Exhibit 25. Certain pages

in it are Exhibit 56 but one is D.D.37 from which I am reading which would apply to those figures as we applied them in the other case. Royalty 75 cents, with exportability royalty being $1.42 for fir and cedar and 60 cents for hemlock and balsam and you knock off 15% for cash and we get a figure for fir of $3.86, cedar $4.18, hemlock $2.50 and balsam $2.54.

MR.BRAIDWOOD: My lord, I am wondering how helpful those particular figures are to us. After all, there is consdierable evidence in of the change in price and I will contend the price accelerated in the latter part of 1944. The date we are concerned with is March,1944, and my friend is using the whole year's figure here.

THE COMMISSIONER: Yes, I appreciate that. That is a matter for comment by yourself.

MR. BALDWIN: As to that, I submit all these cases show quite clearly that the courts in the past have been concerned with the value arrived at for compensation purposes, etcetera, as the present value of future prospects. It is not market price that your lordship is inquiring into, it is the value, and value is a term which on the authorities has as one of its components, the present assessment of future possibilities.

THE COMMISSIONER: Yes, but one does not ascertain that by looking backwards at what did happen. It is what the expectations were at the time the transaction was completed.

MR. BALDWIN: True, but in 1944 there was a marked upward trend.

THE COMMISSIONER: It would be more noticable in 1945, but I agree there was an upward trend in 1943 and 1944.

MR. BALDWIN: I made up these figures last year, my lord, and we applied them, first of all, to the cut as it had been shown to that date, and for a volume of 27 million feet we found a value of $97,563.00.

THE COMMISSIONER: Let me have your figure again?

MR. BALDWIN: Assuming then as we did when it was first prepared a volume of 27 million feet, those weighted prices, applied to that volume, gave a value of $97,563.00.

THE COMMISSIONER: How do you arrive at your 27 million or how do you estimate it?

MR. BALDWIN: That was the amount of timber that we thought was on the limitssat that time. That was a figure we prepared at the time and the figure we used.

In fact, Mr. Schultz' exhibit 61, has since shown there is more than twice that figure on those limits, and, therefore, you would multiply the figure of 27 million by approximately two.

THE COMMISSIONER: If Schultz is right, it is going to be worthwhile to wait.

MR. BALDWIN: On the face of it, on the quantity that was on these limits, it is a very important one, and it is one on which there was very much more than the basis of sale.

There is just one further point on the comparable sales that I haven't drawn your lordship's attention to, and that is the evidence of Mr. Allison at page 375. He is referring to this McGarigle timber which he bought, at about line 12. (Reading). This is the McGarigle timber, for which he paid $4.93 per thousand. The value in use of the railway at 50 cents per thousand for the timber that remained to be taken out over the road as a truck road -- that valuation of 50 cents per thousand is generally supported by the evidence and particularly by Allison at 368 and Mr. Smith at 807.

THE COMMISSIONER: Before you go into the detail of it, how much of this railway was left at the time of the evacuation? A great deal of steel had been pulled up, hadn't it?

MR. BALDWIN: No, my lord. The steel had been removed to be put in another place. The general trend of the development was that as the main line worked west into these blocks these branch lines would be laid out, they would log and pick up the steel and use it again.

THE COMMISSIONER: I follow that, but wasn't that a fact that only the main line still remained when the evacuation took place?

MR. BALDWIN: No, I don't think so, my lord. He was right up to 617. That was the latest development in the timber.

THE COMMISSIONER: Was 617 the northerly portion?

MR. BALDWIN: No, it is the southerly portion.

THE COMMISSIONER: I recall some evidence that the rail had been pulled out in most of the northerly portion or the spurs in the northerly portion, is that not correct?

MR. BALDWIN: Up here is correct, (indicating), it did go in in there and it came out, and he was just coming into this area (indicating) at the time of the evacuation.

THE COMMISSIONER: He was going towards the south-west corner.

MR. BALDWIN: This was the next block he was developing.

THE COMMISSIONER: So that his main line was in there, but there were no branch lines in there, is that correct?

MR. BALDWIN: I couldn't be sure whether it would be accurate to say that or not, my lord.

MR. BRAIDWOOD: That is my recollection of the evidence, that only the main line was in there, my lord.

THE COMMISSIONER: Well, do you seek to recover this 80 cents per thousand, notwithstanding the fact this had to be a truck operation in the future and the rails and ties had to be lifted and a truck road constructed?

MR. BALDWIN: Yes, my lord.

THE COMMISSIONER: Does that not affect the situation?

MR. BALDWIN: We have ,nevertheless assisted at that, because with respect, the evidence did not say it had to be a truck operation.

THE COMMISSIONER: The evidence of Kagetsu himself was

that he had not taken this out, because the balance could most economically be taken out by truck.

MR. BALDWIN: That is right, but not in the way out as your lordship will appreciate, at the time, but evidence was given it was possible to combine a truck and railway operation.

THE COMMISSIONER: Yes.

MR. BALDWIN: With the timber accessible. Evidence was given, I think it was by Allison, that either the Elk River Company or the Comox Company, anyway some operators did run a combined operation.

THE COMMISSIONER: Yes, I recall such evidence.

MR. BALDWIN: And our submission, of course, my lord, in this case is your lordship is concerned with the value to the owner as well as just the market price which the assets would fetch. Kagetsu was operating quite happily with his railroad.

THE COMMISSIONER: Kagetsu said on November 8th, 1945, according to the note I have, "The timber remaining on Lot 504 could have been removed by existing railway, but I preferred to leave it. The timber remaining on 504 could not be logged alone except by truck operations. "

MR. BALDWIN: I see.

THE COMMISSIONER: The block of timber in block 276, the south-west corner on Exhibit 13, contains about two million feet that could only be logged by truck.

MR. BALDWIN: 276?

THE COMMISSIONER: 276.

MR. BALDWIN: Yes, that is the smaller portion which your lordship has seen down here (indicating). Has your lordship exhibit 61 there?

THE COMMISSIONER: Yes. You can point it out to me.

MR. BALDWIN: This is the portion that he is speaking of, and some of this, I take it (indicating). But there are two main areas here, as Mr. Schultz shows in his report. There is a big block of timber here, and a big block here (indicating), and then there is that patch (indicating), probably not worth operating.

THE COMMISSIONER: "Here " does not mean much on the notes. The big block you are referring to is in the south-west corner, and the other large block is in the north-west corner. It was in the north-west corner that Kagetsu had pulled his steel, is that not so?

MR. BALDWIN: No, my lord, not in that area. That wasn't cut at the date of the evacuation. He had pulled his steel from this area in the westerly part of 274, which runs between those two big blocks.

MR. BRAIDWOOD: I believe the evidence was that he had pulled it out of 504. Mr. Smith quite clearly gave that evidence the other day.

MR. BALDWIN: If my friend will look at the map he will see 504 also includes this brown area which was logged by Kagetsu.

MR. BRAIDWOOD: It also includes the green and red areas which were not logged. Kagetsu's evidence comes in

at about page 120 to 125 as to what his intentions were.

THE COMMISSIONER: Well, I have not examined the transcript. I have been reading my notes as to what he said. I will have to read the transcript and will do so. I do not know that you need pursue that further, Mr. Baldwin.

MR. BALDWIN: I would like to just say this, it is almost self evident that the steel hadn't been removed from the part which is now shown in green in this map, because this is the area he had logged in here (indicating). All the brown area was logged in here, and he logged in here (indicating). This is where his steel had been removed from (indicating).

THE COMMISSIONER: That is true, but is it not clearly obvious that the steel having been removed from the central portion that you indicate, that it must have involved a decision to pull out what lay north of it by truck rather than by railway?

MR. BALDWIN: I don't think that necessarily follows, my lord. He was working with the railway, and he merely decided to go south instead of north. He might have gone in with the railway again. If you say his evidence is to the contrary, I don't know.

THE COMMISSIONER: Well, I will have to look at that evidence. Does that complete your submission, Mr. Baldwin?

MR. BALDWIN: Pretty well, I think, but if your lordship would bear with me for a second, I will have a look.

With respect to the Deep Bay timber, my lord, your lordship has also got Exhibit 62. That is another method. We have taken the timber sale contracts, and we have taken available sales of private timber and tried to arrive at the stumpage value from those points of view. In Exhibit 62, your lordship has the other approach, which is by working back from the going log prices at the time.

THE COMMISSIONER: That is the second document of Schultz'.

MR. BALDWIN: Yes, my lord. That is the gray volume. I think Mr. Schultz himself described it, or said it would be the price of a certain tract of timberland, bearing in mind all the factors which go to the determination of price, the difficulty or otherwise of getting the timber out and the quality of the timber etcetera. He suggested that would be the most accurate estimate he could give of the price at which a buyer and seller would meet. The buyer would naturally want more and the seller would try to get it at less, but working back on going log prices and subtracting from going log prices, the cost involved in getting the logs to the market from the tract where they were cut was the alternative way of approaching it, and he gave evidence it was in fact the kind of thing he does all the time and has been doing since 1944.

I would point out, my lord, that in Exhibit 62

the witness Mr. Schultz has discounted for cash. He has worked back on the figure that he gets back on page 2 of Exhibit 62, the indicated stumpage value of $4.96 and present worth in 1944 on five equal future payments of 5%. He has discounted it back to the cash price and arrives at a stumpage of $4.30.

There is just one other thing I would like to say, and that is, that the figure which has been given by Mr. Eustace Smith on the Deep Bay timber, for example, of $2.00 per thousand is, we are submitting, wholly unreasonable and you only have to consider that one angle of approach to realize how unreasonable it is. The royalty payable at that time was $1.22. Now, Mr. Smith's timber of $2.00 means that timber, which wasn't royalty free like this was, would be worth about 75 cents a thousand.

Your lordship, will also recall, and it appears in the claim, that about something over two million feet of this in Deep Bay -- on the Deep Bay limits was already felled and bucked, which makes it that much more valuable.

I would like again to draw your lordship's attention to the fact that when the Custodian sold these limits in both contracts, and in the invitation for tenders it was a stipulation that the timber was offered for sale and I will read it from Exhibit 36 which is the advertisement for sale of Block 195 "This timber is offered . . . . . continuous operation

And there was a similar condition in the other advertisement for sale, Schedule 4, it wasn't given quite as prominent a place, but page 2, of schedule 4 in Exhibit 45. "Timber lands will be sold subject to a warranty requiring the removal of the timber within a reasonable time". It isn't as stringent as the advertisement for Block 195.

I don't think I need go much further, my lord, in view of Mr. Norris' submission in opening to your lordship this morning, except to just stress this again, that our submission is we think the facts quite fairly show that the Custodian with the best thought in the world was in the position of a forced vendor. He didn't have the resources. He did a good job, as good as he could under the circumstances. They were difficult times but he just didn't have the wherewithall to be a prudent vendor. He was a forced vendor.

Broadly speaking, our claim as to the timber limits is that he sold the limits -- block 195 was sold as 31 million feet, which has since been cruised by Mr. Schultz in his stump cruise at 55 million. We say as to the quantity there the Custodian did not act as a prudent vendor because he did not really know what he had. The same thing with Deep Bay which was cruised at 13 million feet standing timber and Mr. Schultz' report, Exhibit 61, they report shows 56½ million of recoverable merchantable timber, and that is disregarding again the timber between 12 and 18 inches d.b.h.. So as to the quantity we say the Custodian sold the limits

for too little, and he was not a prudent vendor in that respect, and also we say that the price that he got, or the prices were out of line with comparable sales and with the value of the timber as shown by the various approaches in comparison with government timber sale contracts and with the cost analysis of Exhibit 62, prepared by Mr. Schultz.

Your lordship will not overlook, I know, the application of Mr. Norris's submission this morning as to the value to the owner and what is fair compensation to this claimant.

THE COMMISSIONER: I have already had that argument.

MR. BALDWIN: Yes. What I meant was, its application to these particular facts. For example, with regard to the Deep Bay limits, there was some evidence given by Mr. Skelding, I think it was, that there was over forty buildings that were not suitable for people other than Japanese, because in some intances the bunks were too short.

THE COMMISSIONER: That is getting very close to damages arising out of the operation of the evacuation policy. I am afraid I cannot hear you on that, because, we have to proceed here on the assumption there was nothing questionable in any sense in the operation of the evacuation policy. Now after the Japanese were away from this community the buildings were not adaptable to other loggers.

MR. BALDWIN: Well, my lord, I don't think it is

awarding damages to take into account the fact that Kagetsu had a very happy little community there. He had his baseball field and community hall and all this organization.

THE COMMISSIONER: I appreciate that.

MR. BALDWIN: Taking all that into account isn't certainly giving the claimant damages for having been evacuated. It takes into account the value to him of what he owns.

THE Commissioner: I appreciate your submission, Mr. Baldwin I doubt if I can agree with you, but I will give it consideration.

MR. BALDWIN: Thank you, my lord. I hope I won't have to say anything in reply to my friend, but I do want to take this opportunity of tahnking your lordship very much, for the courteous and patient hearing you have accorded the claimant.

THE COMMISSIONER: Mr. Braidwood, you are certainly not going to be able to finish tonight.

MR. BRAIDWOO:D: I am afraid not, my lord. I couldn't attempt to finish under a couple of hours at the least, and I wouldn't like to start and be interrupted once I get going.

(Discussion re adjournment)

THE COMMISSIONER: We will adjourn now until I have completed my judicial work with the Court of Appeal and you will get right on following that, and this claim will have priority.

(PROCEEDINGS ADJOURNED SINE DIE)

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

J. C. Thurlow

Deputy Official Stenographer

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