BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

CHARLES E. MacCULLOCH and THE EASTERN TRUST COMPANY, ... } DEFENDANTS.

1949
June 25, 27, 28, 29 and 30
1951
Jan. 3

Expropriation—Injurious affection—Severance—Loss due to anticipated user of expropriated land—Value of undeveloped building lots not in excess of land taken as acreage.

The Crown in 1946 expropriated land owned by defendants for the purpose of enlarging the Royal Canadian Naval Magazine near Bedford, Nova Scotia. The defendants claim compensation for the value of the land taken, for damages for severance and injurious affection to the remaining land owned by them. Defendant M. in May 1944, had purchased a residence property paying therefor a considerable sum of money and expending a larger amount of money for improvements. For the purpose of protecting this investment, by preventing the construction of any low-class housing, he purchased in 1945 more property adjacent thereto. He also purchased other lands in the vicinity referred to as the Eaglewood and Golf Club properties, the Eaglewood property being shown on a plan as partly in lots. In the expropriation proceedings the Crown acquired parts of both these properties from the defendants. With the exception of the residence property, M. did nothing to develop or improve any of the property acquired by him and except for 10 acres of the Golf Club property, which had been cleared and levelled in part and which was not expropriated, there were no improvements on these properties. From a practical point of view the property at the time of expropriation was completely undeveloped, lacking all roads, electricity and water supply. It was unproductive and totally unsuited for farming purposes. The trees on it had little or no commercial value. M. intended at a later date to develop the property by laying it out in building lots, constructing roads and disposing of the lands in such a way to ensure that any houses he erected thereon would be in keeping with a nearby high class residential district.

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Held: That the surveyed land had no value in excess of the rest of the property taken as acreage since they were completely undeveloped, lacked all facilities, were a considerable distance from water and were quite indistinguishable from the rest of the property.

2. That since nothing had been done to implement the proposed scheme of developing the property by subdividing it into building lots and the outcome of such a plan being highly problematical, relatively little should be added to the value of the land on this count.

3. That defendants are entitled to some allowance for injurious affection both for severance and for possible loss in sale value of some of the property retained due to the use to which the expropriated parts might be put as a magazine; the loss due to severance being occasioned by the fact that a road which M. had planned to construct on the southern end of the subdivision could not now be constructed as it was to have been built on the lands taken and due to an escarpment could not now be constructed at all.

4. That apart from the loss sustained by severance, the compensation to which the defendants may be entitled for injurious affection must be limited to the mischief which may arise from the anticipated use of the properties taken from them; that the danger to be anticipated from an explosion from the magazine existed at the time M. purchased the properties and for such hazard then existing he is not entitled to any compensation.

INFORMATION exhibited by the Deputy Minister of Justice to have the value of land expropriated by the Crown determined by the Court.

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

W. C. Dunlop, K.C., L. A. Kitz and *A. J. MacLeod* for plaintiff.

F. D. Smith, K.C. and *R. M. Fielding, K.C.* for defendants.

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

CAMERON J. now (January 3, 1951) delivered the following judgment:—

The Information exhibited herein shows that certain lands owned by the defendants were taken by His Majesty, for the purpose of a public work of Canada under The Expropriation Act, R.S.C. 1927, ch. 64, s. 9, by depositing

of record a plan and description thereof in the office of the Registrar of Deeds for Halifax County on September 13, 1946, as Expropriation No. 750 (Ex. 1). That expropriation included lands other than those of the defendants. Later, a small part of the lands owned by the defendants and originally included in the expropriation were abandoned by Notice of Abandonment filed in the said Registry Office on January 27, 1948, as No. 768 (Ex. 2), Parcel A shown on the plan attached thereto being released to the defendant MacCulloch. No claim is made in respect of the portion so expropriated and subsequently released. Para. 3 of the Information sets out the legal description of the properties which now remain vested in the plaintiff as the result of the said expropriation, and the title to which was formerly in the defendants.

The parties have been unable to agree upon the amount of compensation money to which the defendants are entitled. By the Information the plaintiff offered the sum of $12,523.00 in full satisfaction of all claims of the defendants, including the value of the land taken and any loss or damage suffered by the defendants by reason of the said expropriation, or any loss they might sustain by reason of any use to which the property might be put. The defendants were permitted at the trial to amend para. 2 of the Statement of Defence and as so amended they claim the sum of $49,275.00 as fair compensation for the value of the lands taken, for damages for severance and injurious affection to the land remaining, particulars of which will be given later.

For many years the Crown has owned and used what is known as the Royal Canadian Naval Magazine near Bedford, Nova Scotia. The property, which is several miles long, lies on the northeast side of Bedford Basin and extended from the water's edge to and across the main road leading from Bedford to Dartmouth. An explosion occurred there in 1945 and in 1946 it was decided to acquire an additional 1,300 acres to the north, the lands now in question being a portion thereof.

In view of the nature of the defendants' claims it is necessary to describe both the properties taken and those retained and their location in regard to the magazine area.

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Unfortunately, the only composite plan filed (Ex. D) is admittedly inaccurate in some details and it was admitted for informative purposes only. However, I find it convenient to refer to that plan in attempting an outline of the properties now in question. For purposes of clarity in description I have quite arbitrarily marked the left side of that plan as "north". When referring to Ex. D it must be kept in mind that while it shows lots 1 to 119 according to the Eaglewood Plan (Ex. 3) which will later be referred to, the unnumbered lots penciled thereon were never shown on any plan; and that lots 86 to 99 are much larger than shown there. The fence marked "Magazine Fence," and which runs east and west, was approximately the original northern limit of the magazine. North thereof were the large blocks marked "Curren" and "Harris," both of which were between MacCulloch's property and the magazine and all of which were expropriated at the same time as the defendants' land.

The layout of the properties will be best appreciated by describing in detail the various purchases made by MacCulloch.

In 1916 the Bedford Land Company laid out a plan of Eaglewood Subdivision, all as shown on Ex. 3. In May, 1944, MacCulloch for $16,500.00 purchased the former Winfield residence located on Parker's Cove and comprising lots 3, 4, 5 and 6, and parts of lots 2 and 7 of the Eaglewood Plan. This property will later be referred to as the residence property. About $17,000.00 was expended in repairs and improvements and it is not disputed that the residence property with those lots was worth approximately $35,000 at the date of expropriation. MacCulloch considered it advisable to protect his substantial investment by securing adjacent property and in November, 1944, he purchased lots 30, 31, 32 and 33 for $2,000.00, and parts of lots 28 and 29 for $700.00. With the exception of parts of lots 32 and 33 sold to his brother, he is still the owner of all these lots.

On October 15, 1945, he acquired a large proportion of the remaining part of the Eaglewood Subdivision for $8,225.00. This part I have outlined in red on Ex. D and in doing so I have attempted to follow the description

given by MacCulloch. The boundaries are not in all cases precise, and from it there must be excluded those parts of lots 32 and 33 sold to MacCulloch's brother, and possibly one other lot. I do not think the acreage of this area was ever determined by a survey but MacCuloch indicated that it totalled 140 acres, and together with lots 28 to 33 totalled about 150 acres. I shall refer to this large purchase as the Eaglewood property, and will assume that its area was 140 acres.

In 1945 MacCulloch took steps to acquire lands to the east of the Eaglewood property and which was formerly known as the Bedford Golf and Country Club property. As shown on Ex. D it lay north of the Harris property and extended to and possibly beyond the 20 foot road shown running east and west at the extreme left centre of Ex. D. It is agreed that this property—which I shall call the Golf Club property—consisted of a dilapidated clubhouse of little or no value and 87 acres of land of which 10 acres only had been cleared. MacCulloch acquired an undivided one-third interest in this property for $1,500.00 and later, it is said, entered into certain arrangements to purchase the remaining two-thirds interest for $11,700.00. I shall have occasion later to refer to these negotiations for the purchase of the two-thirds interest therein.

In this expropriation the Crown acquired from the defendants parts of both the Eaglewood and Golf Club properties. Of the latter they acquired 27·6 acres as shown on Ex. D, that part being marked "Charles MacCulloch—Bedford Golf and Country Club." They also acquired all that part of the Eaglewood property lying between the Golf Club property so taken and Bedford Basin, as enclosed in black lines on the plan; but of this parcel MacCulloch owned only to the strip marked "road." There is some uncertainty as to the acreage contained in this Eaglewood portion so taken.

On Ex. 4 it is shown as 65·8 acres but it is not clear as to whether this acreage includes the 15 surveyed lots, each about 1 acre in extent. Other evidence suggested that it was 59 acres, plus 15 acres contained in the surveyed lots. My recollection is that there was general agreement that

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the part of Eaglewood so taken from the defendants was 76 acres, including the surveyed lots. In all, therefore, the Crown acquired from the defendants 103·6 acres, of which 27·6 acres were in the Golf Club property and 76 acres were in Eaglewood.

There is also some confusion in regard to the total acreage retained by the defendants. MacCulloch says that, excluding the lots purchased with his residence, he bought 150 acres of Eaglewood property (which includes lots 28 to 33—p. 69 of the evidence) and it is admitted that the total Golf Club property comprised 87 acres—a total of 237 acres. The parts acquired by the Crown totalling 103·6 acres, it would follow that the defendants retained 133·4 acres, not 150 acres as suggested by MacCulloch. This conclusion may not be precisely correct, but inasmuch as the acreage was never ascertained by a survey, I have had to accept the oral evidence on this point.

I think it is agreed, also, that prior to the expropriation the southerly boundary of the Eaglewood and Golf Club properties was distant 2,100 feet from the north limit of the magazine; and that following the expropriation MacCulloch's residence was 2,400 feet from the nearest point of the magazine property.

I turn now to a more general description of the area and the nature of the terrain. Bedford Village is located on Bedford Basin about 10 miles from Halifax with which it is connected by a main provincial highway. A side road leads from Bedford to the bridge at Parker's Cove, shown on Ex. 3, and beyond that bridge lies Eaglewood Subdivision. The immediate area on each side of the bridge is very desirable property and there are a number of very fine homes, some of which are occupied only in the summer, but in other cases for the entire year. It is not seriously disputed that the small group of houses there constitutes one of the most attractive residential areas in the Halifax district. They have many advantages such as their location on or close to the waters of Bedford Basin, close to but not on a main highway, low taxes, a supply of electric power, a good road leading to Bedford Village about one-quarter of a mile away, with access to the shops there, and within thirty minutes' motoring distance of Halifax.

But while that particular area may quite properly be described as exclusive and desirable and the building lots there of considerable value, the same cannot be said of the remaining parts of the properties purchased by MacCulloch. The main reason for that distinction is that the remaining parts are totally inaccessible due to the lack of roads. Ex. 3—the Eaglewood Park Subdivision—was laid out in 1916 but the "road" marked on the plan is non-existent beyond lot 23 at the end of Long Cove. There are no markings on the ground indicating the lot boundaries. The only lots provided for on the plan were those fronting on the water or on the far side of the "road", the balance remaining unsubdivided. None of the golf property was at any time subdivided. With the exception of two or three summer cottages on property not owned by the defendants, no buildings had been erected on any of the property except in the immediate vicinity of Parker's Cove Bridge. So far as the defendants' lands are concerned, only one lot had been sold, namely, parts of lots 32 and 33. Excluding his residence property, MacCulloch, from the time of his various purchases, did nothing to open up or improve any of the property so acquired; and when he did acquire them there were no improvements whatever except that about 10 acres of the Golf Club property had been cleared and levelled in part.

Accompanied by counsel for both parties I made an inspection of the premises, but due to the nature of the terrain this inspection was of somewhat limited extent. Prior to the expropriation the entire property (excluding the residence) was heavily wooded except for 10 acres on the Golf Club property which had been cleared, the trees being of little or no commercial value. From the rear of MacCulloch's residence the land rises steeply to the east, culminating in Eagle Rock at a height of about 250 feet at the point where "Eagle Rock" is shown on Ex. D, and then falling to the east and south. In addition to the Eagle Rock Ridge, which is totally unfit for building purposes and which is said to be over 200 feet wide, there are several other cliffs and escarpments running through the area with gulleys and marsh in some places. The whole of the property is extremely rough and uneven and much of it is

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covered with heavy boulders, many of which could only be removed by blasting. Substantial parts of it are so uneven that they could never be used as building lots under any circumstances. From a practical point of view, the property at the time of expropriation was completely undeveloped, lacking all roads, electricity and water supply.

Exs. E and C are two aerial photographs which were admitted for general purposes only but not as defining precisely the defendants' properties. On Ex. C the lands enclosed within the white lines indicate roughly all the lands owned by the defendants prior to expropriation; the red line shows the new northern boundary of the magazine property after expropriation; and that part of the property within the white lines and above the red line show the property expropriated from the defendants. I have marked thereon the location of Parker's Cove and MacCulloch's residence. The former magazine property is shown in part at the top right corner of Ex. C. On Ex. E the white lines show approximately the original east and south boundaries of the defendants' property, and the red line indicates the new northern boundary of the magazine property after the expropriation. Both exhibits were made in 1949. It is to be noted that the road running south-east from the rear of MacCulloch's residence and which is shown in a central position on Ex. C, was constructed by MacCulloch in 1949.

Turning now to the matter of compensation I shall consider first the amount to be awarded for the 103·6 acres taken by the Crown. The principles to be followed have been laid down in many cases. They are summarized in the judgment of Locke J. in *Diggon-Hibben Ltd.* v. *The King,* (1), where at p. 724 he states:—

> The principle to be followed in determining the compensation to be paid to an owner whose property is compulsorily taken cannot be more briefly or clearly expressed than in the judgments of the Judicial Committee in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1914) A.C. 569, and in *Pastoral Finance Association* v. *The Minister,* (1914) A.C. 1083. It is the value to the owner as it existed at the date of the taking and not the value to the taker which is to be determined. That value consists in all advantages which the land possesses, present or future, and it is their present value that is to be determined. As stated by Lord Moulton in the *Pastoral Finance* case (supra), probably the most practical form in which the matter can be put is that the owner is entitled to be paid what a prudent man in his position would

(1) (1949) S.C.R. 712.

have been willing to pay for the land sooner than fail to obtain it. This formula was applied by Duff J. in *Lake Erie and Northern Railway Company* v. *Bradford and Galt Golf and Country Club*, (1917) 32 D.L.R. 219, 229, and has been consistently followed in the decisions of this Court.

In Nichols on Eminent Domain, 2nd Edition, p. 665, the author states:—

> Market value is based on the most advantageous use of the property.
>
> In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.

In *The King* v. *Elgin Realty Co. Ltd.*, (1), Taschereau, J., after referring to the principles which had been followed by the President of this Court, said at p. 52:—

> All these various factors were examined in view of giving to the property its value at the time of the expropriation. And as to the postponed value of the property over its present market value, the President said that it was:
>
> 'the present worth of that postponed value that is to enter into the computation of the compensation to be awarded.'

He also said:—

> I do not mean to say that the defendant, by reason of the special adaptability of its property for particular purposes on account of its size, shape and location, is thereby entitled to a hypothetical or speculative value which has no real existence, and therefore any remote future value must be adequately discounted.
>
> I believe that this is an accurate statement of the law, for the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value. (*Cedars Rapids Manufacturing and Power Co.* v. *Lacoste et al.*, (1914) A.C. 569, at 576.)

Now the property acquired was completely unproductive. It was totally unsuited for farming purposes and the trees thereon had little or no commercial value. MacCulloch's immediate purpose in acquiring it was to protect the large investment he had made in his residence property by preventing the construction of any low class housing. But he also had in mind the possibility at some later date of

(1) (1943) S.C.R. 49.

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developing the property by laying it out in building lots, constructing roads, and then disposing of the lots in such a way to ensure that any houses erected thereon would be of a superior type and in keeping with the residences at Parker's Cove. He said that eventually he thought that when the time became opportune he would develop it as he had other lands. In his opinion this was the most advantageous use to which the property could be put. He felt that with the ample means at his disposal, with his equipment for road building and the experience he had gained in promoting other residential subdivisions, such a scheme would be profitable, particularly as he was also interested in the sale of lumber and building supplies. He did not plan to do anything about the matter until he could develop the area to his own satisfaction as it cost but little to carry it; and, in fact, he did nothing whatever to improve the property in any way between the time of its acquisition and the date of expropriation.

For the expropriated property the defendants' claims are as follows:—

(*a*) 15 surveyed one-acre lots (being lots 86 to 99 plus 1 adjacent lot)	$12,000 00
(*b*) 59 acres in Eaglewood Subdivision at $225.00 per acre	13,275 00
(*c*) 27·6 acres in the Golf Club property at approximately $250.00 per acre	7,000 00
	$32,275 00

In support of these claims the defendants relied mainly on the evidence of J. G. DeWolf and Samuel Butler, both of whom have been engaged for over thirty years in Halifax as realtors. Both of these valuators considered first the value to be placed on the surveyed lots which were expropriated, namely, lots 86 to 99. These lots as shown on the Eaglewood Plan contained approximately one acre each. They thought that they could conveniently be sold in lots of one-half acre each, or 30 lots in all. They considered the value of these lots as quite distinct and separate from the remaining acreage which was taken. DeWolf placed a value of $400.00 on each of the 30 lots, which on an acreage basis, would be $800.00 per acre. From that he

made a deduction for grading the roads in front of the lots, thereby reducing the value to $300.00 per lot or $600.00 per acre, a net value of all 30 lots of $9,000.00. Butler valued each of the 30 half-acre lots at $500.00 and after making an allowance for road building placed a value in all of $11,250.00 on the 30 lots, or $375.00 each. Neither one made any deduction for the area which would be taken for the new road which would have had to be built when the acre lots were subdivided, or the cost of any roads leading from these lots to any existing highway or for any lots which might be totally unsuited for building purposes. Neither one in my opinion had any clear idea of the nature of the terrain or how many saleable lots could be produced, or any fair estimate of the cost of development. DeWolf said his inspection was casual, that he got a general idea and nothing more. He said that he did not view it lot by lot or even acre by acre, and that when he looked over the property he was never sure where he was, and that he was never closer than 1,500 feet to some parts. Butler was on the property but once and viewed it only from the top of the new road built by MacCulloch in 1949, and later from the magazine property, taking in all but two or three hours to make his inspection.

On the whole of the evidence I must entirely reject the suggestion that the surveyed lots had any value in excess of the rest of the property taken as acreage. They were shown on the Eaglewood Plan as lots but that gave them no additional value whatever. They were completely undeveloped, lacked all facilities and were quite indistinguishable from the rest of the property. The evidence is that except for the small part of the Golf Club property which had been cleared (but which was not expropriated), all the rest of the property expropriated and retained was of much the same general type. MacCulloch when asked to compare the terrain of the Golf Club property with other lands in that area said that it was very similar and that the area of the Golf Club property taken was of the same general description as the adjacent land, and all wooded. The other evidence amply confirmed that opinion. DeWolf in estimating the value of the expropriated property on the assumption that it could all be divided into

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half-acre lots, gave to each of such lots the same value as he had previously given for the surveyed lots. I am of the opinion, therefore, that no special value should be attributed to the surveyed lots; they were not on the water but a distance of 700 to 1,100 feet therefrom. I propose, therefore, to treat them as acreage and as of the same average value as the rest of the property expropriated and retained. The valuators for the Crown, Messrs. Clarke, Gladwyn & McIntosh, all valued the expropriated property on an acreage basis and I think they were right in so doing.

The claim of the defendants for the 103·6 acres expropriated totals $32,275.00, or an average of $310.00 per acre. DeWolf made his estimate of value in two ways. After allowing $9,000.00 as the net value for the surveyed lots, he placed a value of $225.00 per acre (or $19,485.00 in all) on the remaining part—a total of $28,485.00. Assuming, however, that the 86·6 acres could be subdivided into half acre lots, and after making certain deduction for the part taken for roads and the cost of grading, he estimated that these lots could be sold at $400.00 each—a total of $43,250.00. Adding to that figure $9,000.00 for the value of the surveyed lots, he valued the whole of the property taken when subdivided into lots at $52,250.00—*an average of $500.00 per acre.* Butler gave a valuation of $22,750.00 for the 86 acres when subdivided into lots, and adding to that his value of $11,250.00 for the surveyed lots, estimated that the whole of the property taken was worth $34,000.00 or *an average of $265.00 per acre.* It will be seen, therefore, that even among the expert witnesses called for the defendants there is a very substantial difference of opinion as to the value of the property taken. MacCulloch values it at $310.00 per acre. Butler gave an average valuation of $265.00 per acre, while DeWolf, using the same basis, gave a figure of about twice that amount, namely, $500.00 per acre. But the difference of opinion is not at all surprising under all the circumstances. As I have said, both DeWolf and Butler lacked an intimate knowledge of the property itself. They were endeavouring as best they could to envisage a subdivision which had never been laid out and the nature of which they could but guess at. Until a careful and accurate survey was made there could be no

certainty as to the number of lots that would be suitable for building lots, or the length and cost of the roads that would have to be constructed before any sales could be made. Some of these essential matters were estimated in a very rough and incomplete manner and others were entirely overlooked. DeWolf, for example, in estimating the value of the property taken, made no allowance whatever for unsuitable lots or for the area to be taken for roads in the subdivided surveyed lots. But, as to the damages sustained to the property retained by the defendants (of substantially the same type) he conceded that the allowance for road space and unsuitable lots would be 50 per cent. of the whole. Again, in cross examination, he reduced his first estimate of $300.00 per half acre lot to $175.00 after making an allowance for the area for roads, cost of surveys, etc. Moreover, he admitted that he had never sold any property of this type; and that he had no knowledge of the sale of a block of 100 acres covered with trees, where there was no road or water, at a price of $225.00 per acre or anything approaching that figure. Butler admitted that he had had no sales in or near Bedford for a great many years and could not say whether property there was increasing or decreasing in value.

Under the circumstances, I do not feel that I can accept their evidence as of any material assistance in arriving at a conclusion as to the value of the property taken. I have no doubt whatever that in areas concerning which they have a precise knowledge, their opinions as to value would be very helpful, but in this case that knowledge was very incomplete.

As I have noted above, Messrs. Clarke, Gladwyn & McIntosh gave evidence for the Crown. Mr. Clarke is president of the Nova Scotia Trust Company, which company was appointed agent by the Crown to complete the purchase of all expropriated property. While he has had very considerable experience in real estate values in Halifax, he lacked all knowledge of sales of land of this particular type in the Bedford area. He based his value of $100.00 per acre entirely on purchases which he negotiated for the Crown in the other properties expropriated. Mr. Gladwyn has been a realtor in Halifax for thirty years and has had

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very extensive experience in selling and buying all types of property. He has acted as agent for W. D. Piercey who is engaged in the development of new subdivisions as well as in handling builders' supplies. On his behalf, early in 1946 Gladwyn purchased the Crossley property, comprising 300 acres, for $9,000.00, that property lying on the Bedford-Halifax Road directly across the Bedford Basin from the magazine area and having a substantial water front. It was about the same general type of property as that of the defendants. Mr. Gladwyn was engaged with Mr. Clarke in settling claims arising out of the general expropriation, spending about five months in all thereon and going over all the property very thoroughly. While he considered that some parts were better than others, he valued it throughout at $100.00 per acre, both for the part expropriated and that retained. He considered that a good price but was of the opinion that no one could be found who would pay that amount for it, nor would he recommend it to a client as a good investment at that figure. He considered the Harris property to the south to be more valuable. He made his estimate on the basis of his knowledge of what other acreage in the area would sell for.

Mr. C. W. McIntosh, the owner of Acadia Realtors, has been in the real estate business for about thirty years and has had a considerable number of sales in the Bedford area. He inspected the property shortly before the trial and valued the Golf Club property throughout at $100.00 per acre; that of the Eaglewood property taken at $75.00 per acre; and that of the Eaglewood property retained at $100.00 per acre. He expressed the view that when MacCulloch purchased the Golf Club property of 87 acres in October, 1945, for $8,225.00, that was a fair price and represented a proper valuation of the property at that time.

Much of the remaining evidence as to value had to do with sales of small parcels of land in Halifax and the surrounding area, but in my opinion this evidence is of little help in determining the value of the large area here expropriated. In some of those cases the lots were on desirable shore locations; some were on good roads and with electricity available and others were in built-up areas

with all services available. But sale values of those lots bears no relation to the value of the substantial area here taken and which was completely undeveloped and lacked all facilities. However, certain standards of market value are available from sales made at or about the date of expropriation, namely, the sales of the properties here in question and one or two others in the same locality.

In 1922 the Golf Club property, then comprising 128 acres, was sold for $2,800.00 to a local syndicate. A mortgage was placed on the property and in 1940, the Golf Club operation having apparently been unsuccessful, the whole was sold to the Eastern Trust Company for approximately $2,800.00 (or about $14.00 per acre), that company holding it in trust for three of the guarantors of the mortgage, namely, Messrs. Hogan, Winfield and Cobb. Mr. R. V. Harris, K.C., one of the former members of the syndicate and who knew the whole area very intimately, was content at that time to release his interest upon being discharged from his liability as guarantor of the mortgage of $2,200.00, and a nominal payment of $100.00. In 1945 MacCulloch acquired 87 acres of this property by two purchases. From Cobb he purchased a one-third interest for $1,500.00; he negotiated with Winfield for his one-third interest at $6,000.00, but some arrangement having been entered into by which Hogan acquired Winfield's interest for $3,500.00, MacCulloch agreed to purchase the remaining two-thirds interest from Hogan for $11,700.00 under an exchange of letters in March, 1945. This transaction may be open to some question inasmuch as none of the purchase price has been paid or any formal agreement entered into. When the property was expropriated MacCulloch, referring to the purchase of Hogan's interest, said to him, "I would sooner wait to see what was the outcome (of the expropriation)." I have decided, however, that in the light of all the evidence, I should treat this as a bona fide transaction, more particularly as MacCulloch stated that he had originally offered Winfield $6,000.00 for his one-third interest, but that the latter had withdrawn, preferring to deal with Hogan to whom he was under some obli-

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gation. In all, therefore, for the Golf Club property of 87 acres MacCulloch paid $13,200.00—an average of $150.00 per acre.

The Eaglewood property, comprising 250 acres, was purchased for a syndicate by Mr. Harris in 1909 for $2,400.00. The Eaglewood subdivision was laid out in 1916 and many, if not all, of the lots having frontage on the Bedford Basin were sold or distributed to those interested. Finally, all the remaining part of the subdivision—which includes all of the 140 acres purchased by MacCulloch in 1945—was sold in 1916 to Winfield for $1,000.00. MacCulloch's purchase was negotiated through the Eastern Trust Company and there is every indication that it was quite an ordinary sale from a willing vendor to a willing purchaser. Several of the witnesses regarded the purchase price of $8,225.00 as very fair and no one suggested otherwise. The average cost to MacCulloch of these 140 acres was therefore $59.00 per acre. The two blocks purchased by him comprised 227 acres at a total cost of $21,425.00—an average of $94.00 per acre.

In June, 1945, Mr. R. B. Harris for $4,500.00 acquired the large block marked "Reginald Harris" on Ex. D and lying immediately east of the MacCulloch properties. The witness DeWolf acted for him and it was planned to subdivide the property and sell it for building lots, but due to its expropriation this plan was not carried out. The acreage is not at all clear. DeWolf says it contained 220 acres but Harris put it at considerably less. It had a very substantial frontage on Bedford Basin and extended easterly across the new Bedford to Dartmouth Road and also had the advantage of the old road which could have been put in repair by a small expenditure. The average cost per acre was therefore about $20.00, but I think it may be assumed that the part west of the highway was considerably more valuable than that to the east. It was described as very desirable property which could be more easily converted into building lots than the MacCulloch properties. However, the sale was made by the estate of a deceased person who had held it for many years and the sale price may not fully represent its actual value. It does indicate, however, that within a year of the date of expro-

priation a very large acreage suitable for building purposes could be purchased at a fraction of the value suggested by the defendants' witnesses.

Taking into consideration all the sales to which I have referred, I have reached the conclusion that a fair average market value for all the lands of the defendants, whether expropriated or retained (but excluding the surveyed lots immediately in rear of MacCulloch's residence) would not exceed $94.00 per acre, the average price paid for them by MacCulloch. I estimate that to have been the fair market value as of the date of his last purchase, namely, in October, 1945.

It is necessary, however, to consider two other factors. There is some evidence that between October, 1945, and the date of expropriation there was an increasing demand for building lots, particularly in the Halifax area. That would result in some possible increase in the value of the defendants' properties. A further element which I must consider is the additional value as at the date of expropriation of the potentialities of the property if used in the manner in which MacCulloch had planned to use them. In my opinion, relatively little should be added on this account. Nothing whatever had been done to implement the proposed scheme. The outcome of such a plan was highly problematical. It would take about twenty years at least to complete the development and sale of the lots. The cost of this development might well have rendered the scheme prohibitive. As I have said, the main cost would be the construction of the roads concerning which much evidence was given. Mr. Madden, a witness for the defendants, estimated that it would cost $6,000.00 per mile to build a road of the type constructed by MacCulloch in 1949. I accept the evidence of Mr. P. C. Ahern, a consulting engineer of very wide experience and who travelled over that road, that it had been cleared, stumped and bulldozed to the extent of pushing the boulders to the side of the road and that, while passable for vehicles in dry weather, it could not be used in wet weather. He stated that, without ditches, such a road would not last seven months and that MacCulloch in constructing the road had just scratched the surface. Such a road would be quite

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unsuitable for the type of subdivision proposed by MacCulloch. I accept the evidence of Ahern that the minimum cost of a fair road would be at least $3.00 per running foot, or nearly $16,000.00 per mile. To subdivide the whole area would require several miles of roads so that there is very considerable doubt as to whether a development would result in any profit at all. I have no doubt that the excessive cost of development has prevented any work being done on the property since 1916 when the Eaglewood Plan was first made.

Taking all these factors into consideration, I have reached the conclusion that an allowance of $2,600.00—or $25.00 per acre—would be sufficient to provide for any increase in market value after October, 1945, and for any future advantages which the property might have insofar as they gave the property any additional value on September 13, 1946. In the result, therefore, I find that for the 103·6 acres taken from the defendants they are entitled to compensation at the rate of $119.00 per acre—a total of $12,328.40.

I turn now to the claim for injurious affection for which the defendants claim as follows:—

(*a*) Injurious affection to and severance of other lands remaining (apart from the residence) on the Eaglewood property	$9,000 00
(*b*) Injurious affection to MacCulloch's residence...	5,000 00
(*c*) Injurious affection to other lands of the defendants —the Bedford Golf Club property.....	3,000 00
	$ 17,000 00

At the trial, counsel for the plaintiff admitted that the defendants were entitled to some allowance for injurious affection, both for severance and for possible loss in sale value of some of the property retained, due to the user to which the expropriated parts might be put as a magazine. It is therefore a question of quantum only and again the evidence is very conflicting.

DeWolf's opinion was that no one could tell precisely the extent of the damage sustained by the defendants; some might object and others might not object to purchasing

lots somewhat closer to the magazine area. Admitting that his basis was entirely an arbitrary one, he estimated the loss to the residence at 20 per cent—or $7,000.00, and as to the remaining property at 25 per cent of his estimated value throughout—or $8,437.50 on an acreage basis and $11,250.00 on a lot basis. His values were made at $225.00 per acre and $400.00 per lot. Finally, he said that there was a question in his mind as to whether 10 per cent or 50 per cent should be allowed for injurious affection.

Butler also estimated that the loss to the residence property was $7,000.00; and that on the basis of each lot being worth $300.00, 25 per cent should be allowed for injurious affection, or $9,844.00—a total in all of $16,844.00.

Clarke and Gladwyn agreed that there was some loss due to severance occasioned by the fact that a road which MacCulloch had planned to construct on the south end of the subdivision could not now be constructed inasmuch as it was to have been built on the lands taken and, due to the escarpment, could not now be constructed at all. In their opinion there was no injurious affection to the properties retained by reason of the use to which the enlarged area of the magazine might be put. They had allowed about $3,000.00 for losses sustained by severance.

In MacCulloch's opinion the additional hazard created by the extension of the magazine and its possible use for storage of high explosives, depth charges and the like, would prevent the sale of any lots adjacent to the magazine and would greatly depreciate the value of all the property retained. He was of the opinion that as explosions had previously occurred, builders would be afraid to purchase lots in his subdivision or, in any event, would offer less than they would have paid prior to the expropriation.

The danger to be anticipated from an explosion at the magazine existed at the time MacCulloch made his purchases and for the hazard then existing he is, of course, not entitled to any compensation. Moreover, he is not entitled to any compensation for any additional danger which might arise by the extension and use of the magazine

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on the Curren and Harris properties. In the case of *Sisters of Charity of Rockingham* v. *The King* (1), Lord Parmoor in giving the judgment of the Judicial Committee of the Privy Council said at p. 328:—

> The limitation of the amount of compensation to the anticipated construction of authorized works upon lands actually taken from the appellants has a special importance in a case like the present, where the shunting yard has been largely laid out on land which has not been taken from the appellants, and which has never been part of their property. This limitation, which is plainly expressed in all the leading English decisions, is again restated in *Horton* v. *Colwyn Bay Urban Council*, (1908) 1 K.B. 327, in which it was held that as the acts of user, the contemplation of which caused the depreciation, would be done on lands not the property of the claimant, the claimant was not entitled to any compensation.
>
> The problem of applying the above principles in a case where the mischief complained of has arisen partly on lands taken from the claimants, and partly on other lands outside their property, can only be settled by a consideration of all the circumstances in a particular case Clearly in this case the appellants are entitled to a less amount of compensation than if all the lands taken in the laying out of the shunting yard had belonged to them, but on the other hand, the fact that other lands are comprised in the scheme in addition to the lands taken from the appellants, does not deprive the appellants of their right to compensation, so long as their claim is not extended beyond mischief which arises from the apprehended legal user of the two promontories as part of a railway shunting yard.

Apart, therefore, from any loss sustained by severance, the compensation to which the defendants may be entitled for injurious affection must be limited to the mischief which may arise from the anticipated user of the properties taken from them.

It is agreed that up to the date of the trial no buildings had been constructed upon the lands taken from the defendants, or, in fact, on any of the 1,300 acres expropriated in 1946, nor had any use been then made of such lands which would increase the hazard previously existing. G. M. Luther, Director of Armaments Supply, who had the magazine under his direct supervision, gave evidence for the plaintiff. He states that the exact cause of the 1945 explosion was not known but that it was found that an unusually large quantity of explosives had been stored in the open. It was decided that the then area was too cramped because of the existence of administrative buildings and repair shops or laboratories within the storage area, and

(1) (1922) 2 A.C. 315.

that additional lands should be acquired in order to remove these buildings from the immediate storage area, thereby rendering the general operations less hazardous. He pointed out that the safety precautions had been revised and improved, that the property was entirely surrounded by fences, that guards checked and supervised all those entering the magazine property, and that in 1949 the explosives on hand were less than half of those in 1945 and none were stored outside. The explosives are now stored in about twenty buildings in such a way that, if an explosion should occur in one, it is anticipated that the others would not be affected. Each storage building is protected by cement or earth flash-walls somewhat higher than the buildings themselves and designed so as to localize the effect of any accidental explosion. Mr. Luther considered that under conditions existing at the time of the trial there was much less hazard than in 1945 and that when the proposed additions were completed, the hazard would be still less. He stated that some of the employees (there are about 140 in all) and their families resided on the magazine property itself and that, knowing the conditions as he did, he would have no hesitation in residing in a house quite close to it. He admitted, however, that while every possible precaution had been taken, there was always the possibility of failure to observe the regulations and therefore a potential hazard. He could not speak of the future plans for the magazine but indicated that in the event of a war it is probable that full use would be made of the entire area and that much larger quantities of explosives would be stored than at present. This is not the main Naval magazine but merely a "ready use" magazine for the Fleet based on Halifax. Mr. Luther admitted that there was always the potential hazard to life and property in handling explosives and that the results of an explosion are freakish and unpredictable. He was of the opinion, however, that the progress of an explosion would be deflected upward by the presence of any hills such as existed at Eagle Ridge.

There is a good deal of evidence which would indicate that building in the Bedford area and the Parker Cove area has not been affected in any material way by the

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extension of the magazine property and that land values there have not decreased. MacCulloch's brother constructed a very substantial residence on lots 32 and 33 after the expropriation. Harold Lightfoot lives in Bedford about one-quarter of a mile from MacCulloch's residence and his property is a very substantial and valuable one. He went there first in 1946 as a tenant but expects to purchase the property and has made the owner an offer. Mrs. Black in 1946 bought a lot next to Lightfoot and in 1949 constructed a house valued at $10,000.00. Harry Barnes purchased a lot in that area in 1947 with knowledge of the 1946 expropriation but not its full extent and he has made substantial improvements to the property. He is somewhat concerned about the safety of his family and a possible lessening of the value of his property, but may sell or possibly enlarge the building and reside there. Ronald Shaw bought a lot adjacent to Barnes in 1944 and erected a substantial residence thereon, selling it in 1948 for $17,000.00. He said that the construction and enlargement of the magazine did not affect him in any way. This property was again sold in 1949 for $18,000.00. Mr. E. Ford in 1944 purchased lot 36, paying $2,500.00 for the lot and the summer cottage. It is within a very short distance of MacCulloch's residence. He intended to build a substantial home thereon but due to the high cost of construction, the necessity of living in Halifax during the winter, and having some concern about the proximity to the magazine, he has not as yet done so. He did make some improvements to the property in 1948. He says that he would not sell his property and wants to live there if it is reasonably safe.

Other evidence would indicate that a great deal of building—both residential and otherwise—has taken place since 1946 in or near Bedford and all along the road leading from Bedford to Halifax, including properties on that road fronting on the Bedford Basin and directly across from the magazine area. Some of these buildings are large churches and schools. Butler said that notwithstanding the 1945 explosion there was more building of more valuable properties in that area than previously.

Taking all the evidence into consideration, I have come to the conclusion that the defendants are entitled to some compensation for injurious affection to the lands retained, but that they have failed to establish that such damages are in any way substantial. It is indeed a difficult matter to assess such damages in any precise manner, limited as they must be to the mischief which may arise by the anticipated user of the magazine on the properties taken from the defendants. It is reasonably clear that some loss in value may be anticipated in connection with the area immediately adjacent to the new magazine boundary. On the other hand, I am satisfied that as to the residence property and the lands immediately in rear thereof—all admittedly of much greater value than the other portion of the retained area and all protected to some extent by the existence of the hill property to the rear—the injury to be anticipated is practically negligible. On the whole, and taking all the factors into consideration, I am of the opinion that an award of $6,000.00 for all damages and loss occasioned to all of the properties retained by the defendants, and whether occasioned by severance or by the apprehended user of the property acquired, or otherwise, would be fair and reasonable compensation. In all, therefore, the compensation to which the defendants are entitled amounts to $18,328.40.

The amount now awarded to the defendants being in excess of that set out in the Information, the defendants would normally be entitled to 5 per cent interest from September 13, 1946, to this date (sec. 32 of The Expropriation Act). I am informed, however, that at some later date an amount in excess of that mentioned in the Information was tendered to the defendants and refused, but I am not informed as to the amount of such tender. As to interest, therefore, my ruling must be that if the amount so tendered is less than the sum I have awarded, the defendants are entitled to be paid interest at the rate of 5 per cent per annum from September 13, 1946, on $18,328.40 to this date; but if the amount so tendered be equal to or in excess of $18,328.40, then the defendants will be entitled to interest at 5 per cent on that sum from September 13, 1946, to the date of such tender only. If there be any difficulty about this matter it may be spoken to.

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A similar disposition must be made as to costs. If the amount of the tender so made is less than $18,328.40, the defendants are entitled to their full costs, after taxation; but if the amount so tendered is equal to or in excess of $18,328.40, the defendants will be entitled to their taxed costs up to the date of such tender and the plaintiff will be entitled to taxed costs thereafter.

There will therefore be the usual judgment declaring that the expropriated lands described in para. 3 of the Information are vested in His Majesty the King as from September 13, 1946. There will also be a declaration that the amount of compensation money to which the defendants are entitled is the sum of $18,328.40, with interest and costs as hereinbefore provided; and that the defendants are entitled to be paid the said sums upon providing such necessary releases and discharges of all claims either in respect of the expropriated lands or in respect of the compensation money as counsel for the plaintiff may require. This latter provision is made because of some uncertainty as to the actual interest of Hogan, Winfield and Cobb in the Golf Club property. The Eaglewood property was registered in the name of the defendant MacCulloch and the Golf Club property in the name of the Eastern Trust Company, that company apparently being trustees for Hogan, Winfield and Cobb. At some date after the expropriation, Hogan indicated that he still had an interest therein but at the trial he stated that he had notified the Eastern Trust Company that his interest had been assigned to MacCulloch. In view of the uncertainty as to the exact situation, I think the plaintiff is entitled to receive such releases as counsel may require.

Judgment accordingly.