1941
Sept. 19 & 20
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1942
April 17.

BETWEEN:

HIS MAJESTY THE KING............PLAINTIFF;

AND

DAVID HUNTER MILLER............DEFENDANT.

*Expropriation—Measure of damages sustained due to severance of property—Depreciation in value of premises.*

*Held:* That where, in expropriation proceedings, there has been a severance of the land expropriated from other land owned by the expropriated party, the measure of compensation for damages sustained by reason of the severance is the depreciation in value of the premises damaged, assessed not only in reference to the loss occasioned by the construction of works on the land expropriated, but also in reference to the loss which may probably result from the nature of their user.

INFORMATION by the Crown to have certain property expropriated on Vancouver Island, B.C., for public purposes, valued by the Court.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Victoria.

*H. A. Beckwith* for plaintiff.

*H. W. Davey* for defendant.

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

THE PRESIDENT, now (April 17th, 1942) delivered the following judgment:

This proceeding relates to the expropriation by the Crown, under the provisions of the Expropriation Act, Chapter 64 of the Revised Statutes of Canada, 1927, of

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certain lands, being parts of Lots 66, 61 and 60, in what is known as Metchosin District, Vancouver Island, in the Province of British Columbia, distant about 20 miles from the City of Victoria, B.C. Though the amount of compensation in dispute is comparatively small, yet the case presents several points of difficulty, later to be mentioned and discussed.

On December 12, 1939, 162 acres of Lot 66, 7·9 acres of Lot 61, and 7·9 acres of Lot 60 were expropriated by the Crown for the purposes of a public work, described as a Forward Observation Post, and designed for national defence purposes. Subsequently, in August of 1940, part of the lands so taken having been found unnecessary for the purposes of the public work for which the same were taken, the Minister of National Defence did, by an amended plan and description, declare that all those parts of the said land save and except a parcel of 34·54 acres thereof, and a right of way therein described, were not required and were abandoned by the Crown, and that it was intended to take and retain only 34·54 acres (hereafter to be referred to as 34 acres) out of the lands taken in December, 1939, and which said 34 acres formed a part of Lot 66; and also a right of way in perpetuity, passing through Lots 66, 60, 61 and 66, "for all and any members, officers and servants of the Department of National Defence of the Dominion of Canada, or its said naval or military services, and all other persons duly authorized by the said Department of National Defence or by any proper officer thereof to pass and repass with or without horses, carriages, carts, motor vehicles and other vehicles over and along the road through the said lots . . . ." The right of way, a continuous strip 30 feet wide, starts from the 34 acres taken and meanders through Lots 66, 61, 60, and back again to Lot 66, until it connects with a public highway some distance off in an easterly direction. The total length of the right of way is, I understand, about 4,500 feet, and comprises, according to the amended plan of expropriation, about 3·07 acres. The lands taken under the original expropriation comprised 162 acres in Lot 66 and which had a shore line of about 11,200 feet on its southwesterly side, and 15·5 acres in Lots 60 and 61, making altogether about 177 acres. The shore line of the

34 acres taken under the amended expropriation, so far as I can make out, is 1,150 feet in length.

The 34 acres taken is rectangular in form, having a mean length of about 1,499 feet from the shore line to the rear, a width of 9,800 at the rear, and, following the sinuous shore line, a width of about 1,150 feet on the Straits of Juan de Fuca. Along the greater part of the shore line of Lot 66 there is formed a narrow bench of low land. The 34 acres taken are hilly and rocky practically from the shore line, incapable of any cultivation, and were said to be the roughest portion of Lot 66. The 34 acres taken were described as the side of a hilltop, which, as I recall it, is a fair description of it, the highest point being called Church Hill, the elevation of which above sea level I cannot recall. Possibly the name of Church Hill is applicable to the whole 34 acres. As already suggested the right of way is very irregular in its course, and is composed of rough, rocky and undulating land.

At the date of the first expropriation the defendant was the owner of about 770 acres of contiguous lands. The greater portion of these lands the defendant acquired by purchase in 1928, paying therefor the sum of $13,000. A year later he acquired 33 acres in Lot 57 for which he paid $3,300. On a portion of the area first purchased, Lots 59 and 60 I understand, the defendant claims to have expended about $28,000 in improvements upon certain farm lands and on buildings of various kinds thereon. About 100 acres of the property were cleared, drained and arable, and about 200 acres adjacent were partly cleared, and they or a portion of them might be called pasture lands; and this much of the defendant's total holdings constituted a farming area and were occupied and operated as such at the material time, and such farm lands were, I think, about a mile distant from the 34 acres taken. The balance of the defendant's land was rough and rocky and not capable of cultivation. It is claimed by the defendant that the whole of his holdings, the 700 odd acres, were acquired and enjoyed as a unit and that the improvements made on what we may call the farm lands were for the benefit and purpose of the whole area. The whole water front or coast line of the defendant's entire property was on Lot 66, which did not comprise any portion of the arable or farm lands, and the defendant stated he had intended erecting a residence on

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that lot, somewhere near the shore line I assume, but that on account of the taking of the 34 acres from within the larger area of some 450 acres of non-arable lands, for military purposes, and because it broke the continuity of his shore line, these particular lands no longer had any attraction for him for the purposes he had in mind, and he felt obliged to abandon the idea of building a residence thereon. I understand that apart from the farm and pasture lands no improvements of any kind had ever been made on the balance of the defendant's holdings, particularly on Lot 66, but it was attempted by some of the defendant's witnesses to associate this portion of the property as a useful adjunct to the farm lands on the ground that cattle and sheep roamed thereon. I may at once say that I do not think that these lands can properly be regarded as an essential or useful adjunct to the farm lands, or for grazing purposes for farm animals, and I think in the end Mr. Davey felt obliged to abandon this contention. These lands would, of course, provide a certain amount of wood required for fuel or for other purposes in the conduct of the farming operations, but such requirements of the farm lands were not in any sense curtailed by the taking of the 34 acres, because there would be an ample wood supply on the remaining lands and much more accessible.

The defendant and his witnesses envisaged and described the whole land area as a "Farm Estate" or a "Home Estate", and that I understand generally to mean a relatively small area of farming lands combined with a much larger area of rough non-arable lands, with some shore or coast line. Apparently such descriptive terms have some significance in the southern part of Vancouver Island, and perhaps elsewhere, in connection with such a combination of arable and non-arable lands, and comprising also some shore line. The terms mentioned have reference apparently to large holdings of lands of the character I have just mentioned, in the hands of a proprietor whose circumstances are such that he does not have to rely upon any net earnings from such a property. Mr. Hall and Mr. Carmichael, witnesses for the defendant, stated that if the entire property of the defendant were treated as a Farm Estate, and operated as a hobby, it would have a value of $37,600, but if the arable lands were operated as a farm

only, and severed from the remaining lands, their value would be $20,440, thus causing a loss of $17,160 in the value of the defendant's property as a Farm Estate, a loss that is not here directly claimed as damages. I assume this difference in value is based on the fact that the improvements made on the farm lands and buildings cost so much that no farmer could afford to pay the owner what such farm lands had cost the owner, that is, if the farm were to be profitably operated. It was contended from this, by some witnesses at least, that the whole of the defendant's interest in Lot 66, which I understand would be about 265 acres, should be included in the 34 acres taken in computing the compensation here, as the 34 acres taken destroyed the value of the whole 265 acres in that lot, if viewed as a part of a Farm Estate.

Mr. Hall, who is a dealer in real estate, testified that the 34 acres taken were broken, rough, rocky and wild lands, with rocky ridges. The top of Church Hill he described as "beautiful", "panoramic", if viewed as part of a "Farm Estate", and that there was a certain demand for such "Estate" properties. He stated that the 34 acres taken not only detracted from the price which any person would pay for the whole property as an "Estate", but that on such account the same could not now be sold as such, because a good part of the water-front had been taken, and altogether that the value of the defendant's property as a whole had been greatly diminished by the expropriation. The value of the 34 acres taken he put at $50 per acre at the date of the expropriation, about $1,700, for residential purposes, and he stated that the portions of Lot 66 lying southwest and northeast of the lands taken had either become unsaleable or very much depreciated in value because of the severance in the shore line of the property caused by the expropriation, which, he said, would be a prime factor in selling any portion of Lot 66 for residential purposes. He stated also that the taking of Church Hill destroyed or injured the property as an "Estate" because of the extensive view it afforded along the Straits of Juan de Fuca, and across the Straits to the American side, and that this injured the value of the balance of the shore front, on either side of the shore front included in the expropriation.

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Mr. Shanks, manager of the B.C. Land and Investment Co. Ltd., a company which has been in existence for 75 years, and with which Mr. Shanks has been associated for 36 years, described the lands taken, the 34 acres, as a side hill running from the shore line upwards to the summit of Church Hill, and a little over the top of the hill, and that is a fair description of that expropriated area. He was of the opinion that the whole property of the defendant should be considered as consisting of a farm of roughly about 250 acres, and the remainder—including the 34 acres taken—as sites for buildings, which he classified as "home sites". He stated that there was a demand for home sites running from 5 to 10 acres, and he suggested that the lands of the defendant, other than the farm lands, could be divided into small holdings of 5, 10, or 25 acres, as the land would permit, on both sides of the right of way recently constructed by the Crown. Due to various causes he said that people were departing from the idea of holding large estates as playthings, and that the market for such properties was now very limited unless they could be utilized on a revenue-producing basis, but, he said, there was a demand for home sites, and that home sites of the sizes mentioned were marketable particularly if located on the shore line, at $100 per acre. The marketing of small holdings of rough lands along the shore line as home sites appears to be a condition obtaining on Vancouver Island, and perhaps elsewhere in British Columbia, rather than in Eastern Canada, probably due to climatic conditions, but in any event it appears to be a fact that cannot be ignored, and Mr. Shanks stated that people will go long distances to procure such home sites. Mr. Shanks put the value of the 34 acres taken at $10 per acre—which acreage he said was not of a great deal of importance as a home site because it was a high rocky knoll, unless associated with another piece of land—but he said that its value "would be three times that amount because it comes out of the whole and causes injurious affection to the property". By that I understood him to mean that $20 per acre was the injury caused to the balance of Lot 66, and he put this at 7 or 8 hundred dollars, that is to say, he estimated the injurious affection to the rest of the property on the basis of the value

of the lands taken, and which lands he valued at $10 per acre. This method of estimating the injury caused lands contiguous to those expropriated is one entirely new to me and I am not presently prepared to accept it as a sound or practical principle, though according to Mr. Shanks, it is a practice sometimes adopted by land valuators in Victoria. If this practice has merits or is sound in principle it was not made clear to me, though possibly in particular cases it might function as a practical or rough and ready rule. Mr. Shanks admitted great difficulty in estimating the probable injury done the adjacent lands, or the whole property, by the taking of the 34 acres, but in any event he thought it somewhere between $700 and $800. He also expressed the opinion that the use of the 34 acres for military purposes might have a detrimental effect upon the sale of home sites contiguous thereto. He also pointed out, I might add, that the rough lands of the defendant which I have been discussing could not be sold readily unless the same were subdivided, and provided with roads, which would be very expensive of construction, and he suggested that if any sub-division were decided upon it might be based upon the right of way constructed by the Crown, which would save the defendant the cost of a road amounting to some $4,000. It is difficult to say just how practical that suggestion is, and I am inclined to think it is of little assistance at the moment in determining the quantum of compensation in this case.

It seems to me that, as was stated by Mr. Shanks, in forming any estimate of the compensation to be allowed here we must make a distinction between the farm and pasture lands and the balance of the defendant's property; they differ materially in character, in their present or potential uses, and the boundaries of each may be pretty well defined. The farm and pasture lands are in no sense dependent for their operation upon the remainder of the property; they form a distinct operating unit and no doubt this had its beginning back many years. It does not appear to me sound in principle to say that in the expropriation of the 34 acres of rough non-arable lands, out of a much larger area, the same should not be valued apart from the farm and pasture lands. Nor does it seem tenable to me, upon the facts here, to say that the farm

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lands have suffered in value, or that the non-arable lands to be found in Lot 66 have been rendered valueless or unsaleable, or that the entire property of the defendant as a unit has been rendered entirely unsuitable for the purposes to which it was devoted at the date of taking, by reason of the expropriation of the 34 acres and the right of way. One answer to all this is that the defendant's particulars of claim do not rest on such foundations, nor do they seem to have been in contemplation. I do not mean by this to exclude any claim for injurious affection occasioned any lands other than those expropriated. Referring more specifically to the contention that the entire property should be regarded as one estate, a combination of arable and non-arable lands, to be used for the purposes of a well-to-do proprietor who is not compelled to use or operate the same with a view to profit or gain, I might observe that I can conceive of cases where such a contention might have great weight, but I am not satisfied that this case falls within that category. Whatever injury may be caused the defendant's property, if viewed as an indivisible unit, that must, I think, fall under the head of injurious affection. And the basis of the defendant's claim for compensation, as shown in the particulars of his claim, would seem to support that view.

Before turning directly to a consideration of the compensation to be allowed here a few preliminary observations might usefully be made concerning certain matters which had their origin immediately following the original expropriation, and before the present proceedings were launched, but into which they now enter. No Information was exhibited following the original expropriation of December, 1939, in fact none followed the amended expropriation of August, 1940, until August of 1941, and then only after the defendant had petitioned His Majesty, under the provisions of the Petition of Right Act, for the granting of a fiat enabling the defendant to proceed against the Crown for the determination of the compensation or relief to be allowed him for the lands taken. However, soon following the original expropriation negotiations were entered into between Mr. Fowkes, solicitor for the defendant, and Mr. Beckwith, solicitor for the Crown, respecting the matter of compensation, and it appears that Mr. Beckwith made an offer of compensation on behalf of

the Crown, in the sum of $3,500, but this offer was rejected. Later Mr. Fowkes offered to accept the sum of $6,000 in full settlement of any compensation to which his client might be entitled, but apparently no agreement was reached and this offer was never accepted. Then, when the amended plan and description were filed Mr. Beckwith made to Mr. Fowkes an offer of compensation by letter for the 34 acres taken thereunder, in the sum of $1,116.10, which was at the rate of $32.80 per acre, and which was the rate per acre claimed by Mr. Fowkes for his client in respect of the 172 acres taken under the original expropriation, and Mr. Beckwith offered an additional sum of $500 for the right of way, altogether $1,666.10, but this offer was not accepted. Mr. Fowkes then claimed, *inter alia,* that the defendant should be paid any expenses he had incurred in connection with the first and partially abandoned expropriation, in cruising the lands then taken and in having the timber thereon valued, and a sum paid his solicitor for his charges for consultations regarding the original taking and for the negotiations carried on with Mr. Beckwith in resepect of the matter of compensation. The solicitors in good faith were endeavouring to negotiate by private treaty a settlement of the amount of compensation, prior to any Information proceedings taken, and that would seem quite a proper and desirable step to take, and it is on that account that such expenditures are claimed as damages in the defendant's particulars of compensation in the present proceeding, and which particulars I shall presently mention. I should point out that it was but natural and proper that the defendant should, following the original expropriation, consult a solicitor as to his rights in the premises, and being an American citizen it is unlikely that he would be acquainted with such rights or as to what steps he should take in the matter.

The amount tendered by the Crown in the Information here is $1,666.10, the precise amount officially authorized and mentioned in the letter of August, 1940, from Mr. Beckwith to Mr. Fowkes, and to which I have already made reference. This amount was reached first by deducting from the sum of $6,000 (the compensation demanded by the defendant under the original expropriation) the sum of $1,700, which was the amount claimed for standing timber on the 177 acres taken under that expropria-

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tion, thus leaving a balance of $4,300; that balance, as mentioned in the letter, would give $33.80 per acre for the 34-acre parcel taken under the amended expropriation, or $1,166.10, but apparently that was not intended to include any allowance for the acreage involved in the right of way, nor did the letter indicate that. Then, the balance of the offer of compensation mentioned in the said letter, $500, was for the right of way taken, and that sum of $500 added to the sum of $1,166.10 makes precisely the sum of $1,666.10, the amount of the tender made here by the Crown. In the Information the tender is referred to as "in full satisfaction . . . for the said parcel of land and for the said right of way and in full satisfaction and discharge of all claims of the defendant in respect of the damage or loss, if any, that may have been occasioned to him by reason of the said expropriation and the location and erection of the said signal station on the said lands and by reason of the other lands of the defendant having been injuriously affected by the said expropriation". At the trial Mr. Beckwith contended that the Crown should not be held strictly to the reference to an acreage rate, as made in his letter I assume, and that the actual tender of the Crown was that set forth and described in the Information. In his written argument following the trial Mr. Beckwith contended that $600 would be ample for the value of the lands taken, presumably including the right of way acreage, thus allowing, to use his own words, "$1,000 for injurious affection from the 34 acres parcel and the right of way". There is much, of course, to say for the suggestion that we should be guided entirely by the statutory tender contained in the Information, and not by the offer contained in the letter, though they both seem to be the same in effect. This departure from the terms of the offer of compensation contained in the letter mentioned might be calculated to mislead the defendant in giving consideration to the tender made in the Information, but Mr. Davey, I think, must have understood the position taken by Mr. Beckwith at the trial, and that it was in conflict with the terms of the offer contained in the letter to him, and apparently he acted accordingly, at least to some extent. But there remains the difficulty of determining the exact position of the Crown in respect of an allowance for compensation

for the 3 acres contained in the right of way, which is still far from clear, that is to say, whether the Crown's offer of $500 for the right of way were still open and effective, or whether any of the compensation tendered were intended to include an allowance for the right of way. I do not know if there is any well founded escape from this confusion but at any event there I leave it for the moment.

The amount of compensation claimed by the defendant is $7,650, the particulars of which were filed just before the commencement of the trial, and they are as follows:

| | |
|---|---|
| 1. Value of land contained in parcel 34·54 acres........ | $ 1,166 10 |
| 2. The value of right of way, 3 acres.................... | 101 40 |
| 3. Cost of fencing right of way and parcel 34·54 acres.... | 1,650 00 |
| 4. Injurious affections of remaining land, and expenses incurred by defendant in connection with expropriation and negotiations with plaintiff's solicitor concerning amount of compensation to be allowed for parcel referred to in paragraph one of the Information, and expenses of real estate valuators and timber cruise in connection with paragraphs 1 and 2 of Information.. | 4,732 50 |
| | $ 7,650 00 |

It will be observed that the defendant places the same valuation on the 34-acre parcel as did the Crown. Then in respect of item No. 3 the cost of fencing relates to both the 34-acre parcel and the right of way. However, counsel for the Crown stated at the opening of the trial that the Crown was undertaking to fence the 34 acres, so that much of this item is now eliminated. The greater part of the remaining item, No. 4, must relate to the subject-matter of "injurious affection", after deducting the items of expense which I have already explained and which related to expenditures incurred in connection with the original expropriation, and later in connection with the amended expropriation.

With the foregoing comment upon the amount of the tender of the Crown, and the particulars of the defendant's claim for compensation, I may now proceed to a final disposition of the matter of compensation, under the heads and in the order named in the defendant's particulars of claim. I propose allowing the defendant the amount claimed by him for the taking of the 34 acres, $1,166.10. There was evidence that the value of this parcel of land was of some less value, and there was evidence that it

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was of greater value. I do not think the sum of $1,166.10 is at all an unreasonable amount to allow, and the fact that the Crown made an offer in this amount for this parcel of land, following the amended expropriation, would appear to lend support to this conclusion.

I allow the defendant also the amount of compensation claimed for the right of way, $101.40. By doing so I do not wish to be held as saying that the method followed in estimating the value of the perpetual right of way taken in this case is right in principle, but that is the amount the defendant claims, and I am not sure of the Crown's position in respect of this item of compensation. In any event it is hardly conceivable that it could be said that this amount is excessive, and I must say I have had some anxiety as to its sufficiency.

Now, as to the claim for the fencing of the right of way, and this is not wholly free from difficulty. I was informed by counsel that there was no statutory enactment in British Columbia applicable to such a situation as here obtains, and I am unable myself to find any authority to assist me in this matter. I have no doubt but that there may be cases where an easement is compulsorily taken that the fencing of the same would be obviously necessary, and that the cost of the same should fall upon the expropriating party, but that, I think, would always be a question of fact to be determined by the circumstances of the particular case. I have not been convinced that in this case the fencing of the right of way is necessary, or that any practical or useful purpose would be served by doing so. The reasons advanced in support of such a requirement did not impress me, and I hope I have properly weighed them. As I have already stated, the lands through which the right of way runs are wild and rough lands and never can in any real sense be cultivated, and I cannot quite appreciate how the defendant's interests, presently or in the future, can really be injured by the right of way being unfenced, or how they would be protected by fencing. I do not think therefore this claim can be allowed. In the settlement of the minutes of judgment provision should, of course, be made in respect of the undertaking given by the Crown for the fencing of the 34-acre parcel.

I now turn to the item of claim referable to legal and other expenses incurred and disbursed in connection with the original expropriation, and also expenses entirely attributable to the amended expropriation and the trial of this suit. Evidence was given of the particulars of such disbursements and expenses, but they do not appear in the defendant's particulars of claim, being bulked with a claim for the injurious affection of the remaining lands of the defendant. As I have already explained, no Information was ever exhibited in connection with the original expropriation, but notwithstanding this the solicitors of the respective parties endeavoured to agree upon the compensation to be paid the defendant therefor, and in doing so the defendant incurred an expense of $68 in a cruising of the timber on the 177 acres taken in that expropriation, and, he paid his solicitor $350 for legal expenses for consultations in respect of that expropriation, and his solicitor's negotiations with the Crown's solicitor in respect of the matter of compensation. I am now referring solely to the original expropriation. When the amended expropriation was made, the situation was altered very much because the area taken was only 34 acres instead of 177 acres, and the matter of the right of way arose for the first time. In the second expropriation the defendant abandoned any claim as to the timber on the 34-acre parcel and on the right of way, because he regarded any small amount of timber on the 34-acre parcel and the right of way as of little value and not worth pressing. In preparation for the hearing of this proceeding the defendant incurred certain expenses, in connection with the services of three different persons who gave opinion evidence in respect of the value of the lands taken, and generally upon the question of compensation. I think that any expenses incurred by the defendant, and referable to the original expropriation constitute a fair claim for damages in this proceeding and I allow the sum of $68 paid by the defendant for cruising the timber on the 177 acres taken under the first expropriation. I do not think this amount could well be taxed in the present proceeding. As to the solicitor's bill of $350 paid by the defendant I allow one-half of that amount because it cannot be said that the whole of this amount is attributable to the original expropriation. In respect of expenses incurred in

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preparation for the present case, those must be taxed in the usual way, if taxable. I may dispose of this point by quoting what I said in respect of a similar claim in the case of *The King* v. *Shapiro* (unreported). I there said:

> Now, as to the claim for the two items of damages which I have earlier mentioned. I agree that there should be some provision whereby the expropriated party, when recovering more than the amount tendered, should be allowed a reasonable amount, by the Court or the taxing officer, for necessary, relevant and useful services performed by real estate experts in establishing what is the fair valuation of any property expropriated. In the case of *The King* v *Messier* (1), an expropriation case, my brother Angers J included in his award of compensation an allowance for some such services. I have not been able to convince myself that there is authority for this, and up to that time, so far as I know, such had not been the practice in this Court. The tariff of taxable costs pertaining to opinion evidence in expropriation proceedings is entirely inadequate and I and my brother judge agree that this tariff should be amended and this will be done, and we agree that this method will best tend to remove any doubt as to the authority for some allowances in such cases. I think it is preferable that this matter be under the direction and control of the taxing officer. Presently I do not see my way clear to entertain this particular claim of the defendants, some of which I assume, is taxable.

There remains for consideration the final item of the defendant's claim for compensation, namely, that for compensation for damages to be sustained by him by reason of the severing of the lands taken from his other lands, or otherwise injuriously affecting such lands, and which lands are in physical contiguity with the lands taken. This is, I think, a case where the measure of compensation is the depreciation in value of the premises damaged, assessed not only in reference to the loss occasioned by the construction of the authorized works, but also in reference to the loss, which may probably result from the nature of their user. In other words, the use for which the works have been constructed is an element in determining the amount payable to the owner, so far as such use has a tendency to depreciate the value of the lands which are affected. This is, of course, a difficult question to determine with any precision, and one, considering the relatively small amount in debate, that the parties themselves might well have settled between themselves. The Crown in its tender made no specific admission of or allowance for such a claim in his Information, although Mr.

(1) (1941) Ex. C.R. p. 30

Beckwith in his written argument stated that if the compensation for the lands taken were fixed at $600, the amount of the tender would leave "$1,000 for injurious affection for the 34-acre parcel and the right of way". It would be difficult to construe this as an admission that the lands of the defendant not taken had been injuriously affected by the taking of the 34-acre parcel and the right of way, because if the value of the lands taken exhausted the tender there would be nothing remaining applicable to compensation for the lands injuriously affected. However, it was a concession that in a certain event a portion of the tender might be applied as compensation for lands injuriously affected. I am of the opinion that the defendant is entitled to some compensation under this head although I find some difficulty in determining the amount, but that is usual in such cases. Mr. Shanks, a witness on behalf of the Crown, stated that what I have been referring to as the rough lands, the lands of the type contained in Lot 66, were in demand for small home sites, and I understood him to say that sites adjoining the shore line would particularly be in demand. Now to take 34 acres out of these lands, one end of which bounded on the shore line, and sever them from the other lands, is not a matter of little consequence, and the fact that the defendant acquired his entire holdings of land to be held as a unit by himself, is one not to be entirely disregarded. The taking of this area severed its shore line from the shore line on either side, and to the extent I have already described. While the shore line of the 34-acre parcel, or even the whole parcel, may not have been suitable for home sites on account of the fact that the land rose rather abruptly from the shore, still it would not follow that communication from and along the shore line of this parcel, to the shore line on either side, was not possible, or could not be made possible. Moreover, as Mr. Shanks stated, the 34-acre parcel along with a certain quantity of adjacent lands might have been quite suitable and attractive as a home site. In any event, the expropriation of this area severs quite an area of land from adjacent lands, and it breaks the physical contiguity of the shore line which is not a matter to be treated at all lightly, and this must, I think, injuriously affect at least quite a portion of the lands not taken. While I am not disposed to attach

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much value to the panoramic view from Church Hill, yet I should not like to say it would not be an element in the valuation of immediately adjacent lands if Church Hill were still a part of it. Again the use of the 34 acres for military purposes, cannot but fail, in my opinion, to cause some injury to the value of the remaining lands. The occupation of the 34 acres for military purposes is not, at least, calculated to enhance the value of or promote the sale of the surrounding lands, and in fact I think it must tend to depreciate somewhat the valuation of the other lands. The fact that the 34-acre parcel is to be occupied and used as a "Forward Observation Post" may mean that guns are not to be employed on that public work, but rather somewhere in the rear. This was a matter which was not made too clear but I feel that I must assume that for the present guns are not to be employed on this public work, but if they were that would, of course, be a more serious matter, as Mr. Shanks pointed out. But in any event, the occupation of this area for military purposes is not likely to be acceptable to persons contemplating the purchase of small home sites on the defendant's other lands near by, and I think it must to some extent affect such other lands. Then the meandering right of way, well on to a mile in length, obviously must cause some injury to the lands through which it runs. It is hardly the sort of road or highway the owner of the land would construct if he were contemplating a subdivision of his lands through which it runs. I think it may fairly be said that the right of way was not laid out with any view whatever as to the interests of the defendant in the area which it traverses. The right of way not only causes a severance but I think it must injuriously affect somewhat the adjacent lands, in the eyes of potential buyers. While this right of way is intended solely for the use of the Crown, yet, it is well known that in such cases a right of way usually becomes more or less a public right of way, and the public soon come to disregard the fact that the Crown has an easement only in the right of way lands, and this invasion by the public is seldom discouraged or restrained by the Crown. The right of way may prove ultimately to be of some value to the defendant, but I have no right upon any evidence before me to assume any probable realization of this. On

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the whole, I think the defendant is entitled to some allowance for compensation under the head of this claim, and this I fix at $2,000.

There will therefore be judgment for the defendant for the total of the several amounts I have allowed as compensation, which I calculate to be $3,510.50. The defendant will be entitled to interest at the usual rate upon the compensation allowed from the appropriate date or dates. There would seem to be some confusion as to the date of the taking of the 34-acre parcel but I have no doubt counsel will be able to agree upon this upon the settlement of the minutes of judgment. The defendant will have his costs of the proceeding.

*Judgment accordingly.*