BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

ARTHUR MIDDLEBROOK and JOSEPH MUZYKA.....DEFENDANTS.

New Westminster 1965 June 21-25 June 25

Expropriation—Unregistered lease of land in British Columbia for more than three years—Land Registry Act, R.S.B.C. 1960, c. 208, s. 35—Right to compensation.

While s 35 of the *Land Registry Act*, R S B C. 1960, c. 208 renders null an unregistered lease of land in British Columbia for a term exceeding three years as against a *bona fide* purchaser for value without notice, the lessee has an enforceable interest in the land against the lessor and is entitled to be compensated therefor if the land is expropriated.

ACTION to determine compensation payable upon expropriation of property.

Watson T. Hunter and *Harvey A. Newman* for plaintiff.

Lloyd H. Wilson for defendants.

JACKETT P.:—(Delivered orally at the conclusion of the trial) This is an action under section 27 of the *Expropriation Act*, R.S.C. 1952, chapter 106, to determine the compensation payable to the named defendants in respect of the expropriation on December 12, 1962, of property in the Municipality of Matsqui, British Columbia, for a drug addict institution.

For many years before the expropriation, the defendant Arthur Middlebrook was the owner of approximately 91.84 acres of land with a frontage of 1,287.45 feet on the Huntingdon Road, and a depth for the most part of 2,496 feet. At the time of the expropriation, Middlebrook was operating a beef and pig farm business upon the property—that is, he acquired cattle and pigs, and after getting them in shape for market, resold them. He had on the premises, at the time of the expropriation, a new house not quite finished, an old house that was not at that time being used, a very large barn that was adaptable for dairy farming, although it was being used for beef farming and to some extent for pigs, special buildings for pigs, a machine shed, a good well and pump, and other improvements.

Many years before the expropriation, Middlebrook had permitted one Smith to erect a slaughter-house building on

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his farm some 537 feet from the Huntingdon Road and to construct a road giving the slaughter-house access to the Huntingdon Road. At the end of 1958, Smith sold to the defendant Muzyka the chattels and equipment that he had been using in the slaughter-house business, his firm name "The Abbotsford Slaughter-house" and the goodwill of his business, for the sum of $1,850. Muzyka, in the first instance, used the premises on Middlebrook's farm under an understanding that, in consideration therefor, he would do Middlebrook's slaughtering—both any that Middlebrook required personally and any required for Middlebrook's customers—without charge, and would permit Middlebrook to have the waste from the slaughter-house as fertilizer for his farm. After this arrangement had been in force for some time, Middlebrook and Muzyka made an oral agreement for a 99-year lease of a defined area of land for his slaughter-house business and of the access road. In October, 1962, a lease was executed by the two defendants for a 99-year term commencing June 15, 1960. That lease expressly provided that the buildings, fixtures, and equipment on the premises are the property absolutely of Muzyka, and removable by him during the term of the lease. Muzyka was to pay a lump sum consideration for this lease, and Middlebrook was thereafter to pay for his business slaughtering, but was still to have the waste from the slaughter-house for fertilizer.

Middlebrook's title to his farm property was subject to a right of way across one corner of the property in favour of British Columbia Electric Company Limited. The property was expropriated subject to the same right of way, although the Information indicates that the property was expropriated outright. (*See* paragraphs 2 and 3 of the Information). It is, therefore, unnecessary to take any account of this right of way in these proceedings, except to consider whether it reduces the market value of the expropriated property, which I have done in the findings that I am about to state, although I shall not refer to the right of way again.

The Information alleges that the property described therein was taken "except mines and minerals". That exception does not appear in the description of the property expropriated. However, it is conceded by counsel that

Middlebrook did not own the mines and minerals so that the property with which we are concerned in these proceedings is the property as described in the expropriation documents, and in the Information, "except mines and minerals".

The amended Information filed by the Deputy Attorney General of Canada shows that the defendant Muzyka claimed an interest in the expropriated property by virtue of the 99-year lease to which I have already referred, and states that the Crown does not admit that Muzyka had any interest in the expropriated property. A single statement of defence was filed on behalf of both defendants. As amended, that statement of defence alleges that Muzyka did have the 99-year leasehold interest in the expropriated property, and did, at the time of the expropriation, own the buildings, fixtures and equipment on the leasehold property.

There were other encumbrances on the expropriated property at the time of the expropriation, but it is common ground that, under the usual form of judgment, the compensation awarded to Middlebrook will be payable to him subject to his supplying releases in respect of such encumbrances.

It is also common ground that the plaintiff paid Middlebrook $56,000 on account of the compensation to which he is entitled on September 13, 1963, and that the plaintiff paid Muzyka $5,000 on account of the compensation, if any, to which he may be entitled on February 21, 1964. It is also agreed that Middlebrook gave up possession of all the property taken, except the residence and some 18 acres, on February 1, 1963, and of the 18 acres on June 1, 1964. He still has possession of the residence. Muzyka vacated the slaughter-house property on March 4, 1964.

By the Information as amended at the trial, it is stated that the Crown is willing to pay to Middlebrook $84,400 by way of compensation for his interest or the interest of any other person in the expropriated land, and for all loss or damage occasioned by the expropriation to Middlebrook or any other person. The Information, as amended at trial, also states that, if Muzyka had a leasehold interest, the Crown is willing to pay to him $8,250 for his interest, and for any loss or damage sustained by him or any other person by reason of the expropriation. While these portions of the

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Information as amended are not as clear as they might be, counsel agreed that these two amounts are cumulative, and that the Information is to be read as stating that the Crown is willing to pay

(*a*) $8,250 for a release of all claims in respect of the expropriation of Muzyka's 99-year lease, if it was a valid interest in the expropriated property, plus

(*b*) $84,400 for a release of all other claims arising out of the expropriation except any possible claim in respect of mines and minerals.

The amended statement of defence claims not less than $15,000 in respect of the expropriation of Muzyka's interest in the expropriated property and not less than $100,000 in respect of the expropriation of Middlebrook's interest, or a total amount in respect of the expropriation of not less than $115,000.

The defendants have the onus of establishing the compensation to which they are respectively entitled. They were represented at the trial by the same counsel, and the same evidence was introduced on behalf of both of them.

Before dealing with the evidence as to the amount of compensation, I must first dispose of the question as to the validity of Muzyka's interest in the land at the time of expropriation. The doubt as to the validity of his 99-year lease is, in effect, based on section 35 of the *Land Registry Act,* chapter 208 of the Revised Statutes of British Columbia of 1960, which reads in part as follows:

> . . . no instrument executed and taking effect after the thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein, shall become operative to pass any estate or interest, either at law or in equity, in the land (except a leasehold interest in possession for a term not exceeding three years) until the instrument is registered in compliance with the provisions of this Act;

Muzyka's lease was not registered, and section 35 undoubtedly makes it a nullity in so far as a *bona fide* purchaser for value without notice is concerned. Muzyka had no legal title. As between the parties, however, Muzyka had, at the time of the expropriation, in my view, an enforceable interest in the land in the same way that a purchaser under an agreement for sale has an interest. It has long since been settled that the holder of such an interest is entitled to compensation under the *Expropriation Act.* I, therefore, reject the attack on Muzyka's right to claim compensation.

With reference to the compensation to which Muzyka is entitled, the evidence led on behalf of the defendants puts his claim at a total amount of $12,500 broken down as follows:

Buildings	$ 4,500	
Land	4,000	
Disturbance	4,000	(being one year's profits)
	$ 12,500	

It is difficult to reach any conclusion as to the market value of Muzyka's leasehold interest in the property at the time of the expropriation. There is no evidence upon which I can make any finding that a reasonably prudent person would have paid him any substantial amount for his leasehold interest, as part of the assets of his slaughter-house business or otherwise. It seems that such small slaughter-house businesses are on the way out in British Columbia. It is said that it is almost impossible to get new licenses for such a business, and that the authorities are becoming more strict in relation to existing ones. There is no doubt, however, that Muzyka's lease does adversely affect the value of the expropriated property for its highest and best use, whatever that may be. Furthermore, Muzyka is a butcher by trade and has shown by the way in which he has developed his business since he acquired it in 1958, putting both his labour and earnings into the development and expansion of the physical assets of the business, that he sets great store on being able to continue to operate his own slaughter-house business. I am satisfied that a reasonably prudent man with Muzyka's trade, interests and desire to pursue the way of life to which he had become accustomed would, had he been in possession of the leasehold property at the time of the expropriation without any interest in the land, have paid $12,500 for the balance of the lease rather than lose the property and with it practically all ability to get any usefulness or return from the quite substantial assets that he had built up around his business. I therefore find that the value to Muzyka of his interest in the expropriated property at the time of the expropriation was $12,500.

The next question is what was the value to Middlebrook of the expropriated property subject to Muzyka's leasehold rights. All the evidence is to the effect that

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Middlebrook's claim must be for market value and that there was no special value for him as an owner in possession. It is a fact that he was using the land for beef and pig farming, and it seems clear that this was not the highest and best use of the land. The defendants' position was that the highest and best use of the expropriated property was as a small fruits farm devoted exclusively to the production of raspberries. Indeed, the evidence from both sides is to the effect that the property in question is specially well suited to a raspberry operation.

The defendants' evidence values all the expropriated land for raspberry production as follows:

(*a*) 47 84 acres that at the time of the expropriation were cleared and ready for raspberries, at $1,250 per acre, or...	$ 59,800
(*b*) 35 42 acres that were cleared and useable as pasture but still had tree stumps, at $800 per acre, or	30,107
(*c*) 8.97 acres of bush and stumps, at $300 per acre, or	2,691
TOTAL LAND VALUE	$ 92,598

The defendants' evidence as to value proceeded on the assumption that none of the improvements on the expropriated property were of value for raspberry production except the new house and the well. A value of $12,140 was placed on the house and a value of $1,000 was placed on the well and pump. The three items therefore result in a value, according to the defendants' evidence, of

Land	$ 92,598
House	12,140
Pump and well	1,000
TOTAL	$ 105,738

From this amount the defendants deduct the sum of $10,000, being the amount, they recognize, by which the value of the property for raspberry raising is reduced through the existence of Muzyka's lease. The claim, in accordance with the defendants' evidence, was therefore rounded off at $95,000.

Two different opinions as to the value of the expropriated property were put before the Court by the plaintiff. The first opinion for the plaintiff was based upon the view that the highest and best use of the expropriated property was for dairy or mixed farming. On that basis, the expropriated property was valued as follows:

Land		
52 acres of cleared land at $850		$ 44,200
39.87 acres of uncleared land, at $350		13,954
TOTAL LAND VALUE		$ 58,154
Improvements		
House	$ 11,000	
Machine shed	400	
Barn	4,000	
Old shed	500	
Well and water system	1,000	
Family orchard and shrubs	100	
		17,000
TOTAL PROPERTY VALUE		$ 75,154

This approach was tested by comparison with sales of dairy and other farms, which, it was thought, showed a value for the expropriated property of .. $ 73,500

Putting the two conclusions together, the first opinion for the plaintiff was that the property was worth ..... $ 74,000

The second opinion for the plaintiff was based on a view that the highest and best use for the expropriated property was as a dairy farm combined with some raspberry production, with a view to changing over a period of time to raspberry production to the exclusion of dairy farming. On this view the land was valued as follows:

37 acres of cultivated area, at $850 per acre, or	$ 31,450
18 acres of pasture at $750	13,500
32.5 acres of rough pasture and hill area, at $450	14,625
4.34 acres of bush and swamp at $300 per acre	1,302
TOTAL LAND VALUE	$ 60,877

and the improvements were valued as follows:

House and well	$ 13,000	
Barn and silo	5,000	
Machine shed	300	
		18,500
TOTAL PROPERTY VALUE		$ 79,177

On testing this approach by a comparison with the sales of farms, a value of $76,000 was reached, and the second opinion for the plaintiff was then expressed, that the expropriated property was worth $77,000 at the time of the expropriation.

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Both of the opinions expressed on behalf of the plaintiff were based on the assumption that Muzyka's lease was non-existent, and that some allowance would have to be made for whatever effect it might have on value for the uses on which those opinions were based. I do not think any better estimate of that amount can be made than that contained in the defendants' evidence, and I adopt the amount of $10,000 accordingly. In effect, therefore, the opinions given for the plaintiff as to the market value of Middlebrook's interest in the expropriated property are $64,000 and $67,000, respectively.

There are certain aspects of the defendants' evidence that I cannot accept without qualification. I am satisfied that insufficient allowance was made for improvements in analyzing the prices of some of the sales that were relied on. I am not satisfied that an arbitrary addition of $400 as the cost of clearing is a proper way of determining market value of cleared land on the basis of a sale of uncleared land. No evidence was given to show the relationship of prices as of December 1962, the date of the expropriation, to prices in 1964 and 1965 when some of the sales relied upon took place. On the whole, I am of opinion that the acreage rates adopted in the defendants' case are substantially higher than a willing purchaser would have paid or a willing vendor would have demanded for the expropriated property at the time of the expropriation.

On the other hand, I am of opinion that, as of the time of the expropriation, having regard to all the potentialities of the expropriated property, a purchaser would have been willing to pay something more than the amounts set out in the plaintiff's evidence.

I am of the view that such amount need not necessarily be computed by applying a number of different rates to the acreages of different classes of lands comprised in the expropriated property. Having considered all the potentialities, as revealed by the evidence, of the expropriated property, and the state of the market for properties such as the expropriated property, I am of the opinion that a reasonably prudent purchaser, as of the date of the expropriation, would have paid $70,000 for the land, and would have paid an additional $20,000 for the improvements that were on it at the time of the expropriation. I therefore find

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that the market value of the expropriated property at the time of the expropriation, except mines and minerals, was $90,000. Deducting $10,000 for Muzyka's lease, I reach the sum of $80,000 as being the market value of Mr. Middlebrook's interest in the land.

I therefore direct that judgment be entered in the form usual in expropriation cases in this Court:

(a) in favour of the defendant Muzyka in the sum of $12,500 (less the advance of $5,000 that has been paid to him) with interest on the sum of $7,500 from March 4, 1964, to this date, at the rate of 5 per cent. per annum;

(b) in favour of the defendant Middlebrook in the sum of $80,000 (less the advance of $56,000 that has been paid to him) with interest at the rate of 5 per cent. per annum on

(i) $51,000 from the date of the expropriation to February 1, 1963,

(ii) $68,000 from February 1, 1963, to September 13, 1963, and

(iii) $12,000 from September 13, 1963, to this date.

The defendants will have their costs. If there is any difficulty in settling the Minutes of Judgment, the matter may be spoken to.