T-1160-90

BETWEEN:

C & B VACATION PROPERTIES INC. and CORPORATION DROVELLE LTÉE,

Plaintiffs,

- and -

HER MAJESTY THE QUEEN,

Defendant

REASONS FOR JUDGMENT

NADON J:

In May 1989, the Defendant expropriated, pursuant to the *Expropriation Act*, R.S.C. 1985, c. E-21 (the "Act"), land owned by the Plaintiffs situated in the Province of Quebec. This litigation arises from that expropriation and is concerned with the value of the Plaintiffs' land at the time of the expropriation.

FACTS

The Plaintiffs are C & B Vacation Properties Inc. ("C & B Vacation") and Corporation Drovelle Ltée ("Drovelle"). At all material times herein, Carl McInnis was the President and principal shareholder of C & B Vacation and Me Gérald Boudreau was the President and principal shareholder of Drovelle.

Carl McInnis was an established property developer in the Municipality of West Hull and by 1988 had also developed and marketed a number of subdivisions in the Ottawa valley.

Gérald Boudreau is a notary by profession. Me Boudreau met Mr. McInnis in the mid-1970's. At first, Me Boudreau acted as notary in connection with subdivisions developed and marketed by Mr. McInnis. Subsequently, Me Boudreau became involved in the planning aspects of Mr. McInnis' subdivisions and in due course Me Boudreau became, in his own right, an experienced developer.

The Plaintiffs' land was expropriated on May 2, 1989 by the National Capital Commission ("N.C.C."). Pursuant to the *National Capital Act*, R.S.C. 1985, c. N-3, the N.C.C. may acquire property in order to meet the objects and purposes for which it was created. Section 10 of the *National Capital Act* states:

> 10. (1) The objects and purposes of the Commission are to
>
> (a) prepare plans for and assist in the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance; and
>
> (b) organize, sponsor or promote such public activities and events in the National Capital Region as will enrich the cultural and social fabric of Canada, taking into account the federal character of Canada, the equality of status of the official languages of Canada and the heritage of the people of Canada.

The property which is the subject of this litigation was known as La Grande Corniche du Parc. It consisted of a 73 lot subdivision[1] on 110.85 acres of land located within the Gatineau Park. The subdivision was situated some 1,200 feet from the west side of Mine Road in West Hull (now known as the Municipality of Chelsea).

In the official plan and book of reference for the Seventh Range of the Township of Hull, Registration Division of Gatineau, the property is described as being part of original lot 14. By a deed of sale dated July 8, 1988, Redmond Quain and Robert Tennant purchased the subject property for the sum of $476,655.00. The deed of sale provides, in part, that the property is sold:

---

[1] Although the subdivision consisted of 73 lots, the present litigation is in respect of 50 lots only since, at the time of the expropriation, the Plaintiffs had already sold 23 lots to individual purchasers. These lots are the subject of separate litigation. In addition, the parties are in agreement that lot 14-57, one of the 50 lots that remained in the Plaintiffs' ownership, could not be developed. As a result, it was given separate treatment by both Mr. Juteau and Mr. Roy, the expert appraisers who gave evidence on behalf of the Defendant and the Plaintiffs respectively.

> [w]ith and subject to all servitudes active and passive, apparent and unapparent, affecting said immovable property, particularly subject to two servitudes of passage in favour of the immovable property hereby sold established in two deeds registered at the Registry Office for the Division of Hull in nineteen hundred and thirteen and in nineteen hundred and fifteen, under numbers 21842 and 23558 respectively; ...

On July 14, 1988, Redmond Quain and Robert Tennant transferred all of their rights in the property to the Plaintiffs. In consideration thereof, the Plaintiffs paid to Messrs. Quain & Tennant the amount which they had disbursed to acquire the property and an additional sum of $124,000.00. The Plaintiffs also paid a sum of $50,000.00 to one Robert McElligott to whom Messrs. Quain and Tennant had previously committed themselves to sell the property. Thus, the Plaintiffs paid a total of $650,655.00 to acquire the property which the Defendant expropriated on May 2, 1989.

On August 29, 1988, the Plaintiffs submitted to the Planning Commission of West Hull a preliminary plan to subdivide their 110 acres. After discussion, the Planning Commission unanimously agreed to recommend to the Council of West Hull that the preliminary plan dated August 24, 1988, prepared by surveyor Hugues St-Pierre, be approved subject to the following conditions.

(a)That the access road leading from the Main Road is to be constructed by the developer.

(b)50 feet right-of-way has to be provided to access the adjacent lots.

(c)Engineer's report required for septic installations.

(d)Development agreement to be signed - amount to be determined by the Roads Committee.

(e)The Parks and Recreation land is to be approved by the Recreation Committee.

On September 6, 1988, by Resolution No. 279-88, the Council of West Hull approved in principle the Plaintiffs' preliminary plan subject to those five conditions.

As I indicated earlier, the subdivision is located approximately 1,200 feet from the west side of Mine Road. The land between Mine Road and the subdivision was owned by the Defendant. In the deed of sale pursuant to which Messrs. Quain and Tennant purchased the subject land, the property is described, in part, as follows:

> An immovable property of irregular figure being PART of original lot FOURTEEN (Pt. 14), according to the official plan and book of reference for the SEVENTH RANGE (R.

> VII) of the Township of Hull, Registration Division of Gatineau, province of Quebec, ...

Until September 1915, original lot 14 belonged to Catherine Blake of Hull. By a deed of sale registered on September 21, 1915 Catherine Blake sold to her sister, Jane Blake, the north half of lot number 14. However, at the time of the sale, the vendor reserved for herself and her heirs and assigns a right-of-way from her property (the south half of lot number 14) to the main travelled road. The deed of sale describes the right-of-way in the following terms:

> The said vendor hereby reserving for herself and her said husband, Michael McCloskey, and their assigns, a right-of-way or road at all times from the Main travelled road that crosses said lot fourteen to the south half of said lot. Said right of way or road to begin at Main travelled road, about seventy-five yards more or less East of bridge on the creek crossing said north half of lot fourteen on said Main travelled road, and extending almost due south through a low valley between almost parallel ranges of hills, running nearly due south from said Main road, until it reaches the north end of said south half of lot fourteen, on high grounds, where said hills merge unto said rising ground. Said track or part of lot to be travelled by said road, to be selected by said vendor and her heirs and assigns: ...

Relying on their understanding of that right-of-way, the Plaintiffs, during the weekend of September 17, 1988, proceeded to clear a strip of about 50 feet from Mine Road to the entrance of their property. On September 23, 1988, the Plaintiffs wrote to the N.C.C. to inform it of their actions and to find out if the N.C.C. was interested in keeping the wood which had been cleared during the previous weekend.

In their letter, the Plaintiffs also informed the N.C.C. that their subdivision "a successivement franchi les trois étapes de l'approbation municipale (comité de planification, comité des loisirs et conseil municipal...)". The Plaintiffs concluded their letter by stating:

> Il nous ferait plaisir de vous rencontrer, si ça vous intéresse, pour vous expliquer nos plans et aussi pour établir des assises de bon voisinage pour le bienfait des futurs propriétaires et du public en général.

On the day that the Plaintiffs wrote to the N.C.C., the building inspector for West Hull, Bernard Benoit, wrote to the Plaintiffs to advise them that they were to immediately stop their activities in connection with the right-of-way. Although he confirmed to the Plaintiffs that they had advised him of their intention to build a road on the right-of-way to provide access from Mine Road to the subdivision, Mr. Benoit informed the Plaintiffs that By-Law 334 of West Hull required them to obtain a road permit from West Hull before undertaking any construction.

I should immediately point out that by September 23, 1988, the Plaintiffs had already commenced to sell individual lots in their subdivision. As of September 1, 1988, the Plaintiffs had published their first price list for the 73 lots. By September 23, 1988, the Plaintiffs had accepted eight offers to purchase lots and had increased their selling prices three times, *viz.* September 8, September 16, and September 22, 1988. These prices were increased in due course a further four times, *viz.* September 29, October 7, October 15, and November 7, 1988.

On October 3, 1988 a regular session of the Council of West Hull was held. During the session an attempt was made to amend Resolution No. 279-88 so as to provide the following:

a)Replace paragraph "a)" by: That the access road from the Mine Road be built by the developer and that the road allowance to the road be ceded to the Municipality, as required to the By-law no. 290.

b)Replace paragraph "E" by: That the Municipality requires payment in cash equivalent to 5% of the Evaluation for the parks and recreation, but the Municipality is ready to consider the access points to the Gatineau Park as partial payment for the subdivision tax providing the said access points are acceptable to the National Capital Commission.

With respect to item (a), the amendment was not successful because the clear purpose of the amendment was to amend By-Law 290. Me Boudreau, who was present at the meeting, pointed out to the Council that they could not amend By-Law 290 by way of a resolution. This matter was of importance to Me Boudreau and the Plaintiffs since article 2.1.c of By-Law 290 provided that the Municipality could approve a subdivision plan which required the construction of an access road if the developer agreed to transfer to the Municipality his right-of-way for the sum of $1.00. Thus, even though the Plaintiffs did not own the land over which they had a right-of-way, this would not prevent them from building a road and then transferring their rights to the Municipality.

On October 14, 1988 Bernard Benoit, the West Hull Building Inspector, wrote to Mr. McInnis advising him, *inter alia*, of the necessity of submitting an engineer's report concerning septic installations on the proposed subdivision lots. Mr. Benoit made it clear to Mr. McInnis that West Hull could not give final approval to his project until the aforesaid report had been submitted and approved by the Communauté régionale de l'Outaouais ("C.R.O."). Mr. Benoit, in his letter, also inquired of Mr. McInnis how he intended to transfer title to West Hull of the 50 foot road allowance. Mr. Benoit reminded Mr. McInnis that these matters had to be resolved to the satisfaction of West Hull before final approval could be given.

On October 21, 1988, Mr. Pierre Gravelle, an engineer employed by the firm of Boileau & Associés Inc. ("Boileau"), submitted to Mr. Benoit the septic installation plan which he had prepared for the Plaintiffs. By his letter, Mr. Gravelle informed Mr. Benoit that, in his opinion, a septic system could be installed on each of the 72 lots.[2]

---

[2] That is 73 lots less lot 14-57.

On November 7, 1988, by Resolution No. 384-88, the Council of West Hull approved Plan No. 40587-15717S concerning lots 14-14 to 14-98, Range VII, Township of Hull, prepared by surveyor St-Pierre on behalf of the Plaintiffs. The Municipality's approval was subject to two conditions, namely: (1) that the parks and recreation tax of 5% be paid in cash; and, (2) that the Plaintiffs enter into a standard Development Agreement with the Municipality. Mr. St-Pierre's plan was filed, as required by article 2175 of the Civil Code of Lower Canada, with the office of the Ministre de l'Énergie et des Ressources du Québec on November 15, 1988. On November 18, 1988, the plan was duly registered at the Gatineau Registry Office.

When it became known in the National Capital region that the Plaintiffs had purchased the property and that they intended to sell lots for residential purposes, opposition to the project began. This opposition came from different quarters, namely environmentalists, animal lovers, cross-country skiers, and cyclists. All of these groups were "ferociously" opposed to any residential community within the Gatineau Park. Evidence of this opposition can be found in the various press clippings which were adduced in evidence. As a result of this opposition, pressure was brought upon the N.C.C. to do whatever it could to prevent the Plaintiffs from completing their venture. For example, in the September 27, 1988 edition of the *Ottawa Citizen*, Ms. Diane Barnes, speaking on behalf of the N.C.C., is reported to have said that the N.C.C. had attempted to purchase the property but had lost to the Plaintiffs. Ms. Barnes is also reported to have stated that the N.C.C. was "hoping to buy the land from McInnis to block the development". Ms. Barnes also stated that the N.C.C. had been in touch with Mr. McInnis and was awaiting his response. The October 17, 1988 edition of *Le Droit*, at page 3, gives the general tone of the opposition to the Plaintiffs' development project. The text reads as follows:

> Un [*sic*] vingtaine de citoyens appartenant à la *Coalition pour la protection du parc de la Gatineau*, qui s'oppose à la construction de 70 maisons, à 300 mètres du lac Pink, ont tenté de se rallier des partisans, samedi, en manifestant à l'entrée du parc de la Gatineau située boulevard Gamelin, à Hull.
>
> Brandissant des affiches sur lesquelles ont [*sic*] pouvait lire en anglais *Pas de projet domiciliaire dans le parc*, les manifestants ont aussi invité les automobilistes, les cyclistes et les marcheurs à signer une pétition par laquelle ils indiquent leur opposition au projet de construction de Carl McInnis sur un terrain situé dans la municipalité de Hull-Ouest.

> Les protestataires, membres du club Alpin du Canada, de la Fédération québécoise de la montagne, et de l'Association canadienne des parcs, distribuaient des feuillets d'information sur lesquels on invitait également le public à écrire ou à téléphoner à Pat Carney, présidente du Conseil du trésor, à la Chambre des Communes, pour qu'elle accorde les fonds permettant à la Commission de la capitale nationale (CCN) d'acquérir le terrain.
>
> On en profitait également pour convier le public à venir rencontrer Jean Piggott [*sic*], présidente de la CCN, ce soir, à 19 h 30, à l'école publique de Chelsea, où elle abordera justement le nouveau mandat de la CCN et ses répercussions sur le parc de la Gatineau.
>
> Selon Harry Gow, vice-président de la Fédération québécoise de la montagne, si l'on n'arrivait pas à empêcher ce projet, les $500,000 que la CCN a décidé d'investir pour protéger le lac Pink seraient une pure perte, puisque le bassin de drainage du site prévu pour la construction se dirige naturellement vers le lac Pink. En outre, a-t-il ajouté, il serait illusoire de penser que des enfants domiciliés à 300 mètres d'un tel lac n'aient pas envie de s'y baigner et ne s'y risquent pas à l'occasion.
>
> La coalition a également fait parvenir une lettre à Clifford Lincoln, ministre de l'Environnement à l'Assemblée nationale, afin de lui demander de tenir une audience mais selon M. Gow, bien que cette démarche ait été faite depuis un certain temps, la coalition n'a pas reçu de réponse ni du ministre ni de son adjoint Robert Middlemiss, député de Pontiac et adjoint parlementaire à l'Environnement.

The October 18, 1988 edition of the *Ottawa Citizen* reports that the then Chairman of the N.C.C., Mrs. Jean Pigott, stated that expropriation of the Plaintiffs' land was a possibility as the Plaintiffs were unreasonable in their demands.

Mrs. Pigott is further reported to have stated that a moratorium on land acquisitions by the N.C.C., imposed by the Conservative Government in 1979, had been lifted the month before. According to Mrs. Pigott, the end to the moratorium would "allow the N.C.C. to go to Treasury Board to purchase property "case by case"".

On October 28, 1988, Mr. Curry Wood, Acting Vice-President, Property Branch of the N.C.C., wrote to Mr. McInnis offering the Plaintiffs the sum of $650,000.00 for the subdivision. On November 16, 1988 Gérald Boudreau wrote to Me Pierre Legault, counsel for the N.C.C., outlining the expenses which the Plaintiffs had already incurred in respect of their property. Me Boudreau's intention was to demonstrate to the N.C.C. that the Plaintiffs' expenses greatly exceeded the amount offered by the N.C.C. to acquire the property.

On November 21, 1988, Me Boudreau again wrote to Me Legault enclosing a copy of West Hull's invoice concerning a parks and recreation tax. The tax payable by the Plaintiffs to West Hull was in the amount of $76,205.00. In his letter, Me Boudreau informed Me Legault that the Plaintiffs expected to receive a more reasonable offer from the N.C.C.. On November 23, 1988, Mr. Wood again wrote to Mr. McInnis offering to purchase the subdivision for the sum of $750,000.00. On November 25, 1988, the Plaintiffs wrote to the N.C.C. rejecting this second offer. The Plaintiffs, after explaining why they considered the offer unacceptable, concluded their letter by stating that the N.C.C.'s offer was a "farce de mauvais goût" and that they suspected that the N.C.C. had never intended to purchase their property.

The Plaintiffs and the N.C.C. continued to correspond with respect to the sale of the subdivision but to no avail. On December 22, 1988, the N.C.C. registered a Notice of Intention to Expropriate the Plaintiffs' property pursuant to subsection 8(1) of the *Expropriation Act*. On December 29, 1988, the Notice of Intention to Expropriate was served upon the Plaintiffs. On May 2, 1989, the Defendant registered a Notice of Confirmation of an Intention to Expropriate. The said Notice reads as follows:

> WHEREAS by an instrument registered in the Registry Office for Gatineau, Province of Québec, on the 22nd day of December, 1988, under number 262-025, Notice was given that Her Majesty the Queen in Right of Canada intended to expropriate, for the purposes of development, conservation and improvement of the National Capital Regional, all the interest in a parcel of land known and designated as being official subdivisions number FOURTEEN, ... of original Lot FOURTEEN (14-14, 14-15, 14-16, 14-17, 14-18, 14-19, 14-20, 14-21, 14-22, 14-23, 14-24, 14-25, 14-26, 14-27, 14-28, 14-29, 14-30, 14-31, 14-32, 14-33, 14-34, 14-35, 14-36, 14-37, 14-38, 14-39, 14-40, 14-41, 14-42, 14-43, 14-44, 14-45, 14-46, 14-47, 14-48, 14-49, 14-50, 14-51, 14-52, 14-53, 14-54, 14-55, 14-56, 14-57, 14-58, 14-59, 14-60, 14-61, 14-62, 14-63, 14-64, 14-65, 14-66, 14-67, 14-68, 14-69, 14-70, 14-71, 14-72, 14-73, 14-74, 14-75, 14-76, 14-77, 14-78, 14-79, 14-80, 14-81, 14-82, 14-83, 14-84, 14-85, 14-86, 14-87, 14-88, 14-89, 14-90, 14-91, 14-92, 14-93, 14-94, 14-95, 14-96, 14-97 and 14-98),
>
> Range SEVEN (R. VII), according to the official plan and Book of Reference for the Township of Hull, Registry Division of Gatineau, Province of Quebec, and two parts of the said original Lot FOURTEEN (Pt. 14), Range SEVEN (R. VII), according to the official plan and book of reference for the Township of Hull, which are more particularly described as follows:
>
> a)Part of Lot FOURTEEN (Pt. 14), Range SEVEN (R. VII) of the said Township of Hull, bounded to the south by Lot FOURTEEN (14), Range SIX (R. VI), Township of Hull, and on all other sides by the official subdivision number NINETY-

SEVEN of said original Lot FOURTEEN (14-97), Range SEVEN (R.VII), Township of Hull,

b)Part of Lot FOURTEEN (Pt. 14), Range SEVEN (R. VII) of the said Township of Hull, bounded to the south by part of Lot FOURTEEN (14), Range SIX (R. VI), Township of Hull, to the south-east by official subdivision number FIFTY-SEVEN of said original Lot FOURTEEN (Pt. 14-57), Range SEVEN (R.VII), Township of Hull, to the east by part of Lot THIRTEEN "C" (Pt. 13C), Range SEVEN (R. VII), Township of Hull, to the north by official subdivision number SIXTY-TWO of said original Lot FOURTEEN (14-62), Range SEVEN (R. VII), Township of Hull, to the north-west and west by official subdivisions number FIFTY-SIX, FIFTY-EIGHT, SIXTY-ONE and NINETY-SEVEN of said original Lot FOURTEEN (14-56, 14-58, 14-61 and 14-97), Range SEVEN (R. VII), Township of Hull,

TOGETHER WITH all servitudes existing in favour of the said parcel of land, particularly a servitude of passage established in a deed registered at the Registry Office for the Division of Hull under number 25558.

NOTICE IS HEREBY GIVEN that Her Majesty the Queen's intention to expropriate all the interests in the aforementioned land is confirmed.

I should point out that the Plaintiffs' subdivision plan comprised 73 lots, namely lots 14-15 to 14-34, lots 14-36 to 14-60, lots 14-62 and 14-63, lots 14-65 to 14-70, lots 14-72 to 14-76 and lots 14-78 to 14-92. The subdivision also comprised three rights of way, namely parcels 14-35, 14-61, 14-64 and 14-77. The future streets of the subdivision would be built on parcels 14-93, 14-94, 14-95 and 14-96.

I should also point out that, as of May 2, 1989, 23 lots had been sold by the Plaintiffs and, therefore, these lots are not the subject of the present litigation. The 23 lots are the following:

Lots 14-19, 14-22, 14-26, 14-27, 14-32, 14-37, 14-40, 14-41, 14-44, 14-45, 14-53, 14-54, 14-55, 14-56, 14-59, 14-68, 14-73, 14-74, 14-79, 14-82, 14-83, 14-88 and 14-92.

Following the expropriation of the Plaintiffs' interest in the 50 unsold lots, the Defendant, pursuant to section 16 of the Act, wrote to the Plaintiffs on July 26, 1989, offering them the sum of $1,380,000.00 for their interest in the expropriated property. On August 23, 1989, the Plaintiffs accepted, on a without prejudice basis, the sum offered by the Defendant, subject to their right to claim additional compensation.

On March 8, 1995, the Defendant again wrote to the Plaintiffs to advise them that they were increasing their offer by an additional sum of $140,000.00. On April 14 and April 21, 1995, respectively, Carl McInnis and Gérald Boudreau accepted, on behalf of the Plaintiffs, the Defendant's increased offer, again on a without prejudice basis subject to their right to claim additional compensation. Thus, when the trial of this action began, the Defendant had paid the Plaintiffs a total of $1,520,000.00.

ISSUES

The following issues call for determination in the present matter:

1. The value of the fifty unsold lots as of May 2, 1989. As a sub-issue, there is a dispute as to whether six of the fifty lots, namely lots 14-29, 14-30, 14-47, 14-48, 14-58 and 14-67 could be developed. The Defendant takes the position that these lots could not be developed because no septic system could be installed thereon.

There is also an issue regarding the value of lot 14-57 which could not be developed since it did not have access to a public road. The Plaintiffs' expert, Gaëtan Roy, is of the view that the lot had a value of $20,000.00. The Defendant's expert, Ron Juteau, is of the view that lot 14-57 had a value of $5,000.00.

2. The extent of the costs which would have been incurred in order to complete the development of the subdivision (the "development costs").

3. The developer's profit, i.e. the sum of money by which a willing purchaser, in this case a developer, would have discounted his offer to purchase the 50 lots in order to take into account such risks as might exist at the time of purchase.

This issue arises by reason of the fact that the Plaintiffs' expert has taken the position that the 50 lots would have been sold by May 2, 1989 had there not been the threat of expropriation. The Defendant's position is that, even in the best of circumstances, the 50 lots would not have been sold by May 2, 1989. Further, the Defendant submits that it was not open to Mr. Roy to speculate as to what sales would have occurred had there not been a threat of expropriation. The Defendant argues that the Act does not allow for speculation since it clearly provides for the assessment of the value of the lots which remain unsold as of the date of the Notice of Confirmation of Expropriation, *viz.* May 2, 1989.

Because he was of the view that all of the lots would have been sold by May 2, 1989, Mr. Roy concluded that there was no reason for him to make any allowance for a developer's profit. Mr. Juteau, for the Defendant, has made an allowance for a developer's profit of 15% of the gross sell-out value of the lots.

THE LAW

The provisions of the Act which are relevant to the determination of the issues are the following:

> 5. (1)Whenever, in the opinion of the Minister, any interest in land is required by the Crown for a public work or other public purpose, the Minister may request the Attorney General of Canada to register a notice of intention to expropriate the interest, signed by the Minister, setting out
>
> (*a*) a description of the land;
>
> (*b*) the nature of the interest intended to be expropriated and whether the interest is intended to be subject to any existing interest in the land;
>
> (*c*) an indication of the public work or other public purpose for which the interest is required; and
>
> (*d*) a statement that is intended that the interest be expropriated by the Crown.
>
> (2)On receiving from the Minister a request to register a notice of intention described in this section, the Attorney General of Canada shall cause the notice, together with a plan of the land to which the notice relates, to be registered in the office of the registrar for the county, district or registration division in which the land is situated, and, after causing such investigations and searches to be made respecting the state of the title to the land as

appear to him to be necessary or desirable the Attorney General of Canada shall furnish the Minister with a report setting out the names and latest known addresses, if any, of the persons appearing to have any right, estate or interest in the land, so far as he has been able to ascertain them.

11.(1)Where a notice of intention has been given, the Minister may,

(*a*) confirm the intention, in the manner provided in section 14,

(i) if no objection is filed with him under section 9 within the period of thirty days referred to in that section,

(ii) if an objection has been filed with him under section 9 within the period of thirty days referred to in that section, after receiving and considering the report of a hearing officer appointed to conduct a public hearing with respect thereto, or

(iii) whether or not an objection has been filed with him under section 9, if a statement to the effect described in subsection 10(11) has been included in the notice of intention; ...

14. (1)The Minister may confirm an intention to expropriate an interest in land to which a notice of intention relates, or a more limited interest therein, by requesting the Attorney General of Canada to register a notice of confirmation, signed by the Minister, setting out,

(*a*) if the interest expropriated is the same as the interest to which the notice of intention relates, a statement that the intention to expropriate that interest is confirmed; or

(*b*) if the interest expropriated is a more limited interest than the interest to which the notice of intention relates, a statement that the intention to expropriate the interest to which the notice of intention relates is confirmed except as expressly specified in the statement.

(2)On receiving from the Minister a request to register a notice of confirmation described in this section, the Attorney General of Canada shall cause the notice to be registered in the office of the registrar where the notice of intention was registered, and if the land to which the notice of confirmation relates is more limited in area than the land described in the notice of intention, shall cause a revised plan of the land to which the notice of confirmation relates to be registered therewith.

15. On the registration of a notice of confirmation,

(*a*) the interest confirmed to be expropriated becomes and is absolutely vested in the Crown; and

(*b*) any other right, estate or interest is, as against the Crown or any person claiming through or under the Crown, thereby lost to the extent that that right, estate or interest is inconsistent with the interest confirmed to be expropriated.

16. (1)Where a notice of confirmation has been registered, the Minister shall,

(*a*) forthwith after the registration of the notice, cause a copy thereof to be sent to each of the persons then appearing to have any right, estate or interest in the land, so far as the Attorney General of Canada has been able to ascertain them, and each other person who served an objection on the Minister under section 9; and ...

25.(1)Compensation shall be paid by the Crown to each person who, immediately before the registration of a notice of confirmation, was the owner of a right, estate or interest in the land to which the notice relates, to the extent of his

expropriated interest, the amount of which compensation shall be equal to the aggregate of

(*a*) the value of the expropriated interest at the time of its taking, and

(*b*) the amount of any decrease in value of the remaining property of the owner, determined as provided in section 27.

(2)For the purposes of this section and sections 26 and 27, the time of the taking of an expropriated interest is,

(*a*) where an election has been made under subsection (3) by the owner thereof, the time specified by him in his election; and

(*b*) in any other case, the time when the notice of confirmation was registered.

26. (1)The rules set out in this section shall be applied in determining the value of an expropriated interest.

(2)Subject to this section, the value of an expropriated interest is the market value thereof, that is to say, the amount that would have been paid for the interest if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.

(11)In determining the value of an expropriated interest, no account shall be taken of

(*a*) any anticipated or actual use by the Crown of the land at any time after the expropriation;

(*b*) any value established or claimed to be established by or by reference to any transaction or agreement involving the sale, lease or other disposition of the interest or any part thereof, where the transaction or agreement was entered into after the registration of the notice of intention to expropriate;

(*c*) any increase or decrease in the value of the interest resulting from the anticipation of expropriation by the Crown or from any knowledge or expectation, prior to the expropriation, of the public work or other public purpose for which the interest was expropriated; or

(*d*) any increase in the value of the interest resulting from its having been put to a use that was contrary to law.

31. (1)Subject to section 30,

(*a*) a person entitled to compensation in respect of an expropriated interest may,

(i) at any time after the registration of the notice of confirmation, if no offer under section 16 has been accepted by him, and

(ii) within one year after the acceptance of the offer, in any other case,

commence proceedings in the Court by statement of claim for the recovery of the amount of the compensation to which he is then entitled; ...

36. (1)In this section,

"basic rate" means a rate determined in the manner prescribed by any order made from time to time by the Governor in Council for the purposes of this section, being not less than the average yield, determined in the manner prescribed by that order, from Government of Canada treasury bills;

"compensation" means the amount of the compensation adjudged by the Court under this Part to be payable in respect of any expropriated interest;

"date of possession" means the day on which the Crown became entitled to take physical possession or make use of the land to which a notice of confirmation relates;

"date of the offer" means the day on which an offer was accepted;

"offer" means an offer under section 16.

(2)Interest is payable by the Crown at the basic rate on the compensation, from the date of possession to the date judgment is given, except where an offer has been accepted.

(3) Where an offer has been accepted, interest is payable by the Crown from the date of the offer to the date judgment is given,

(*a*) at the basic rate on the amount by which the compensation exceeds the amount of the offer, and

(*b*) in addition, at the rate of five per cent per annum on the compensation, if the amount of the offer is less than ninety per cent of the compensation,

and where an offer has been accepted after the date of possession, interest is payable at the basic rate on the compensation, from the date of possession to the date of the offer.

(4) Where an offer is not made until after the expiration of the application period described in paragraph 16(1)(*b*) for the making of the offer, interest, in addition to any interest payable under subsection (2) or (3), is payable by the Crown at the rate of five per cent per annum on the compensation, from the expiration of that period to the day on which an offer is made.

(5) Where the Court is of opinion that any delay in the final determination of the compensation is attributable in whole or in part to any person entitled thereto, or that the person has failed to deliver up possession within a reasonable time after demand, the Court may, for the whole or any part of any period for which he would otherwise be entitled to interest, refuse to allow him interest, except that the Court shall not so refuse by reason only that an offer made to him was not accepted.

39. (1)Subject to subsection (2), the costs of and incident to any proceedings in the Court under this Part are in the discretion of the Court or, in the case of proceedings before a judge of the Court or a judge of the superior court of a province, in the discretion of the judge, and the Court or the judge may direct that the whole or any part of those costs be paid by the Crown or by any party to the proceedings.

(2)Where the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under sections 31 and 32 in respect of an expropriated interest does not exceed the total amount of any offer made under section 16 and any subsequent offer made to the party in respect thereof before the commencement of the trial of the proceedings, the Court shall, unless it finds the amount of the compensation claimed by the party in the proceedings to have been unreasonable, direct that the whole of the party's costs of and incident to the proceedings be paid by the Crown, and where the amount of the compensation so adjudged to be payable to the party exceeds that total amount, the Court shall direct that the whole of the party's costs of and incident to the proceedings, determined by the Court on a solicitor and client basis, be paid by the Crown.

ANALYSIS

Since both the Plaintiffs and the Defendant are relying, to a great extent, on the evidence of their expert appraisers, namely Gaëtan Roy for the Plaintiffs and Ron Juteau for the Defendant, I will begin my analysis of the issues with a summary of their respective evidence.

Both experts agreed that the "subdivision approach" was the best approach in the circumstances of this case to assess the value of the unsold lots. The subdivision approach is explained in Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed. (Toronto: Carswell, 1992) at 218-220 in the following terms:

> In special circumstances the estimate of the market value of land may be made by the land development (subdivision) approach which is a modification of the direct sales comparison approach. It is not a valuation technique of general application.
>
> This approach
>
> may very simply be described as one in which a future potential subdivision is devised, and the selling price of the serviced lots is then estimated; this is then multiplied by the estimated potential number of lots in the subdivision; from the gross potential receipts of the sales, the servicing and development costs are estimated and deducted. The net result must then be discounted by deducting a percentage for future profits. The result is intended to be the present value as of the date of expropriation.
>
> In order to utilize this approach a considerable amount of data must be assembled including a subdivision plan showing the number, size and type of lots from the gross acreage, market data to estimate the market value of the lots, estimates of direct and indirect development costs, estimate of developer's profit and overhead, absorption estimate, and the discount of risk rate.
>
> Courts and tribunals are usually reluctant to rely on the land development (subdivision) approach for two reasons. First, unless a proposed subdivision has actually been officially approved there is always some degree of uncertainty as to whether, and under what conditions, the subdivision would ever have materialized. In such a case
>
> [I]t is speculation added to speculation to endeavour to compensate an expropriated owner on the basis of long-term possible sales at present estimated prices of lots theoretically carved out of acreage after expropriation, but as if no expropriation had occurred....
>
> Second, it is recognized that the approach is "volatile" in the sense that a comparatively minor change, for example in the costing of services, can produce a figure in the end result which will significantly affect the residual value. "As is shown from the variations and permutations of all the figures here, one slip of the pen seems to cost thousand of dollars, so care should be used." Invariably one or more of the following reasons are

given for rejecting the approach in favour of other approaches to the estimation of market value.

Mr. Juteau, at page 15 of his report, summarizes the subdivision approach as follows:

1.The gross sell-out value of the subdivided lots is estimated based on a comparison with sales of comparable lots. Where sites have achieved draft plan approval, or full approval, the number of lots shown in the plan is used.

2.Development costs for the subdivision are then deducted. These development costs comprise both hard costs (roads, services, engineering, surveying), and soft costs (financing, real estate taxes, legal costs, etc.).

3.An allowance for developer's profit is deducted based on a percentage of the gross sell-out price.

4.The resulting value represents the value of the raw land as of the effective date of appraisal.

Mr. Roy, at page 31 of his report, offers his own explanation of the subdivision approach:

In order to estimate the market value of the residential component for the subject land the **Subdivision Approach** is applied since it is the most reliable approach when all of the critical components have been established. Research was undertaken for a comparative analysis of vacant land sales with imminent development potential, but given location and timing of the proposed development, no similar comparable sales were found reflecting similar potential.

The criteria for developing a value estimate by the Subdivision Approach to Value is to firstly **estimate the gross lot value** for the development. Once this has been established, based on a market survey of sales or residential lands, it is necessary to **deduct all of the relevant costs** of bringing these lots to their improved stage. This includes servicing costs, planning and engineering fees, survey fees, legal and real estate fees, realty taxes, municipal levies, development charges and interim financing as well as an allowance for developer's profit. All of the foregoing, however, must be established over a reasonable time period, **known as the absorption period based on the anticipated ability of the marketplace to absorb the serviced land**. The net remaining figure provides the present market value of the raw, undeveloped land in its present state or in this case the net land value for the 50 lots.

As Mr. Juteau explains at point 1 of his summary, the gross sell-out value of the lots is determined by "a comparison with sales of comparable lots". This approach is known as the direct comparison approach. Eric Todd, in *Expropriation and Compensation*, at 181-182, explains this approach in the following way:

> The direct sales comparison approach is preferred by courts and tribunals. In general, the other approaches are more complicated and require the use of more judgmental factors which may detract from the reliability of the resultant appraisal.
>
> The direct sales comparison approach compares the subject property with market data, including the sale prices of comparable properties. From this comparison, and after making appropriate "adjustments", the appraiser reaches a conclusion as to the price, or range of prices, for which the subject property might have been sold, had it been available for sale, at the date of expropriation.
>
> However, while acknowledging the apparent greater simplicity of the direct sales comparison approach it is important to recognize its limitations. First, it is obvious that the approach can be used only if there is reliable market data. The approach cannot be used if there have been no sales of comparable properties, or only isolated sales, or if the subject property is of a type which is not usually bought or sold or, because of peculiar circumstances has no market value.
>
> Secondly, the approach requires that the sale prices of comparable properties and, or, the estimated sale price of the subject property were, or would have been, reached as a result of arm's length negotiations between informed and willing buyers and sellers, none of whom was under any form of compulsion.
>
> Thirdly, even when the comparables are very comparable with the subject property, usually the appraiser must make "adjustments."
>
> The data which is used in the direct sales comparison approach relates either to the subject property itself or to other properties which are considered to be comparable with the subject property. Although there is some overlap between these two categories of data it is convenient to deal with them separately.

This approach is also explained thoroughly by Mr. Roy in his report at page 33. He states that:

> [t]his is the preferred approach to the value of a site because it reflects typical buyer and seller reactions in the market place. It requires the gathering, recording and comparing of similar land sales at times concurrent with the date of appraisal and under comparable conditions. Through a process of adjustment for differences between the comparable sale and the subject property, each comparable sale becomes a basis for indicating the value of the site being appraised. Where relatively large numbers of highly comparable current sales are available, the adjustment process will produced [*sic*] a narrow range of value for the subject site. When adjustments required are inordinately high, due to more extreme differences between the comparables and the site being appraised, a much wider range of value may be indicated for the subject site. When this occurs, it is important to place greatest weight on those sales which require the least amount of adjustment. This method of site valuation is most understood by people generally, and is preferred by the Courts.
>
> In the comparison process, adjustments must be made to reflect observed differences between the comparables and the subject property. The first adjustment is always for time so that the sales are brought to current market levels. This adjustment is based on the real estate market over a certain period of time.
>
> The second adjustment is for locational differences, and accounts for external factors affecting the comparables relative to the subject property. It can include neighbourhood influences, traffic, street pattern, site's southerly exposure, proximity to cross-country ski trails, view of pond or lake, view of mountains, sunset or sunrise, and corner or dead-end influence.
>
> The third adjustment for physical characteristics. These reflect differences with regards to size (area, frontage, shape, width), topography (slope, surface drainage, location of a building on the lot), soil and subsoil conditions (landscaping capability, drainage for septic tank, bearing qualities, existing plantings, filling required).

As I indicated at the beginning of this section, Messrs. Roy and Juteau are agreed as to the approach required to determine the market value of the subdivision. However, notwithstanding their consensus regarding the "approach", the experts did not arrive at the same conclusion with respect to the final value of the 50 lots.

The Roy Appraisal

Mr. Gaëtan Roy, of Pigeon-Roy Appraisals Ltd., was retained by the Plaintiffs to appraise the 50 lots which remained unsold as of May 2, 1989. In a letter dated September 29, 1994, addressed to the attorneys acting on behalf of the Plaintiffs, Mr. Roy stated that, in his opinion, the market value of the 50 lots was $3,575,000.00. During the course of his testimony at trial, Mr. Roy amended a number of his figures. As a consequence of these changes, Mr. Roy's opinion at the end of the trial was that the 50 lots had a market value of $3,383,980.00. Mr. Roy's reasons for arriving at this figure are the following.

The first step taken by Mr. Roy was to select a number of comparable sales. In selecting comparables Mr. Roy eliminated sales which did not pertain to property situated in the Gatineau Park. Ultimately, Mr. Roy selected ten sales of lots, all situated in the Municipality of Kingsmere, which occurred between October 3, 1977 and March 8, 1989.[3] As I understand Mr. Roy's report and his overall evidence, he did not consider sales in the Gatineau Park which did not relate to lots in the Kingsmere area and therefore he did not consider, for the basis of his comparison, the sales of lots in the subdivision in question which occurred between September 1 and December 22, 1988, the date on which the N.C.C. registered the Notice of Intention to Expropriate.

---

[3] The specific dates of the sales considered are as follows:

1. October 3, 1977
2. October 10, 1979
3. November 7, 1985
4. December 18, 1985
5. June 13, 1986
6. August 18, 1986
7. December 7, 1982
8. August 26, 1988
9. August 29, 1988 and
10. March 8, 1989.

These sales are referred by their specific number in Mr. Roy's report. For example, the October 3, 1977 sale is referred to by Mr. Roy as sale number 1.

Mr. Roy then reviewed the ten sales and concluded that between October 1977 and March 1989 the average yearly increase in price was 26% or 2.1% per month, which he rounded out at 2% per month. Mr. Roy explained that the 2% per month increase in value was slightly above the increase in value for that period in West Hull where the percentage of increase was 1.6% per month. Using his percentage of 2% per month, Mr. Roy time adjusted sales numbered 4, 5, 6, 8, 9 and 10. The figures arrived at by Mr. Roy vary from $76,000.00 for sale number 4, $73,000.00 for sale number 5, $73,000.00 for sale number 6, $94,000.00 for sale number 8, $87,000.00 for sale number 9 and $93,500.00 for sale number 10.[4] Mr. Roy then decided that he would use sale number 8 as the "comparable". Why Mr. Roy chose sale number 8 and not sale number 9 is not entirely clear. He appears to have chosen sale number 8 as his "comparable" because it occurred on August 26, 1988, at about the same time that the Plaintiffs' preliminary plan of subdivision was approved by the Council of West Hull. The object of sale number 8 was a lot of 42,561 square feet situated on the north side of Barnes Road, Kingsmere. The vendor, Jeffrey Sugarman, sold the property to Deborah Hines and Stephan Sander for a sum of $80,500.00.

Mr. Roy then expressed the view that lots situated in Kingsmere were in a location superior to those situated in the McInnis/Boudreau subdivision and, as a result, he concluded that a prime lot in the subdivision was worth 7% less than a comparable lot in Kingsmere. Thus, a prime lot in the subdivision would be valued at $87,500.00, which is the time adjusted value of Sugarman sale number 8, being $94,000.00, less 7%. Consequently, the market value of all prime lots in the subdivision would be $87,500.00 except for lot number 14-33 which, in Mr. Roy's opinion, was an exceptional lot. Mr. Roy valued this lot at $95,000.00.

Having established the market value of the best lots of the subdivision, Mr. Roy devised a method by which he would assess the value of all 50 lots. In order to accomplish this task, Mr. Roy prepared an adjustment formula for each lot. This formula is divided into two sections, namely locational differences and physical characteristics. In turn, each section is subdivided into a number of items. Under

---

[4] As Mr. Roy states in his report at page 54 "Sale no. 10 is not a firm sale but gives a good indication of the real estate activity in the Kingsmere area and the Gatineau Park".

locational differences, there are eight points of reference and under physical characteristics there are twelve.

Using his adjustment formula, Mr. Roy "graded" each lot by allowing up to 5 points per item under both locational differences and physical characteristics. The maximum number of points which a lot could obtain was 100. Any lot that obtained 90 points or over was considered by Mr. Roy as a prime lot and thus its market value was assessed at $87,500.00. As I have already said, lot 14-33 was the exception.

In order to grade his lots, Mr. Roy inspected each lot of the subdivision and he met and interviewed a number of people who had purchased individual lots from the Plaintiffs. Mr. Roy also met and interviewed Carl McInnis and Gérald Boudreau. The market value of any lot obtaining less than 90 points was adjusted downwards. For example, lot 14-36 received 84 points and its value was assessed at $81,600.00. Lot 14-38 received 78 points and its value was assessed at $75,900.00. The only lot excepted from the application of this system, other than lot 14-33, was lot 14-57 which had no frontage on the public road. Mr. Roy assessed the value of this lot at $20,000.00.

Having concluded that the best lots of the subdivision were equivalent (less 7%) to the comparables in Kingsmere, Mr. Roy did not attempt to compare the physical characteristics or locational differences of the Kingsmere lots to those of the subdivision. For example, Mr. Roy did not "compare" the lot which was the subject of his Kingsmere sale number 8 to any of the subdivision lots, which, in Mr. Roy's view, were prime lots. Mr. Roy arbitrarily chose the score of 90 as the cut-off point for a prime lot and did not actually score any of the Kingsmere lots.

After estimating the value of each of the 50 lots, Mr. Roy arrived at a value before expenses of $3,856,501.00. This sum includes $3,725,269.00 which represents the gross value of the 50 unsold lots and a sum of $131,232.00 which represents the surplus of interest over interim financing costs. Mr. Roy then deducted from the sum of $3,856,501.00 those expenses which the Plaintiffs would have had to incur to bring their subdivision to completion. On the basis of the information available to him, Mr. Roy concluded that the Plaintiffs would have incurred additional expenses totalling

$472,521.00. Deducting these expenses from his gross lot value of $3,856,501.00, Mr. Roy arrived at a net value of $3,383,980.00 which he rounded out to $3,400,000.00.

I wish to point out that there is disagreement between Mr. Roy and Mr. Juteau with respect to the costs of completing the development of the subdivision. For example, Mr. Roy and Mr. Juteau arrive at very different figures with respect to the costs of constructing the access road and the subdivision streets. This difference of opinion arises by reason of the opinions given to both experts by professional engineers retained by them.

There is also a difference of opinion between Mr. Roy and Mr. Juteau in connection with what has been referred to as the developer's profit and overhead. I have already alluded to this difference of opinion in setting out the issues which must be determined. The difference of opinion arises because Mr. Roy concluded that the 50 lots would have been sold by May 2, 1989. Under this scenario, there is no reason whatsoever to make an allowance for a developer's profit. Such an allowance needs to be made, however, under the scenario proposed by Mr. Juteau. Under this latter scenario there were 50 lots for sale on May 2, 1989. In adopting this position, Mr. Juteau relies on subsection 26(2) of the Act.

Both sides are agreed that if I do not accept Mr. Roy's scenario pursuant to which all of the lots would have been sold by May 2, 1989, then the willing purchaser referred to in subsection 26(2) of the Act must necessarily be one purchaser and not 50 individual purchasers. The parties are also agreed that the willing purchaser must necessarily be a developer who purchases the 50 lots including the access road, streets and park area for the purpose of completing the development and selling the lots to the general public.

Mr. Juteau's opinion is that a developer would necessarily discount the purchase price of the subdivision by a certain percentage in order to allow for profit and for a number of risks which he might be taking in purchasing the subdivision. Mr. Juteau is of the view that a profit/risk discount of 15% is proper in the circumstances. The Plaintiffs do not dispute Mr. Juteau's rationale if I accept his underlying premise that, on

May 2, 1989, 50 lots were available for sale. However, the Plaintiffs do not accept Mr. Juteau's discount of 15%. Rather, they submit that a discount of 7.5% is more appropriate considering that there was very little risk in purchasing the subdivision from the Plaintiffs.

The Juteau Report

In a letter dated January 31, 1995, addressed to the Department of Justice, Mr. Ron Juteau, President of Juteau Johnson Comba Inc., real estate appraisers and consultants, stated that, in his opinion, the 50 unsold lots of the subdivision had a market value of $1,520,726.00 on May 2, 1989. In a letter dated June 2, 1996 (exhibit D-30), Mr. Juteau amended, for reasons that I shall discuss later, the aforesaid figure to $1,500,524.00.

Mr. Juteau is in agreement with Mr. Roy that the subdivision lots were very attractive lots which provided easy access to the cities of Hull and Ottawa. The first step in the subdivision method, as explained by Mr. Juteau, is to estimate the value of the lots in order to obtain the gross sell-out value. In order to achieve this, Mr. Juteau, like Mr. Roy, valued the lots by way of the direct comparison approach which Mr. Juteau explained as follows:

> Each lot has been compared to other lots and the sale prices of the comparables have been adjusted to account for any differences in relation to the subject lot.

Mr. Juteau, in looking for comparables, examined six sales which took place in 1988 and 1989 in Skyridge and Kingsmere, two residential areas situated within the Gatineau Park. Mr. Juteau, after due consideration of the three Skyridge sales, decided to eliminate Skyridge as a comparable because he considered the area to be "eclectic". Mr. Juteau was also of the view that access to and from Skyridge was inferior to that of the subject subdivision and that the level of taxes in the Municipality of Aylmer, within which Skyridge is located, was much higher than the level of West Hull.

Mr. Juteau also eliminated Kingsmere as a comparable although he agreed with Mr. Roy that Kingsmere was the most prestigious area in the Gatineau Park. Mr. Juteau wrote in his report that he had heard people refer to Kingsmere as "la crème de la crème". In Mr. Juteau's opinion, prices were higher in Kingsmere because of the limited supply of property on the market at any given time. Mr. Juteau then decided that the best comparables were those lots of the subdivision which had been sold by the Plaintiffs prior to May 2, 1989. Mr. Juteau explained his reasoning as follows at pages 27 and 28 of his report:

> There is no doubt that the best comparable sales are sales of lots located in the same subdivision as the subject lot. These lots benefitted [*sic*] from the same general locational features, would have been developed with dwellings which met the same minimum standards and ostensibly appealed to the same buyer market segment.
>
> All owners in the subject subdivision would also have been subject to the same restrictive covenants and also would have been responsible for costs associated with road maintenance until this responsibility was transferred to the municipality. The timing of this transfer is uncertain. Owners of the lots outside of the subject subdivision in the Kingsmere area or Meech Lake area are not subject to these restrictive covenants and are not responsible for the maintenance of a private road.
>
> The use of comparable sales located within the same subdivision is especially advantageous in reaching an estimate of market value as no overall location adjustments are required. Location adjustments are typically difficult to quantify and are very subjective, thus reducing the accuracy of a value estimate. However, it is important to note that within the subdivision, individual lot features and characteristics vary substantially and these variations as well as relative location within the subdivision must be taken into consideration.
>
> On the surface, Skyridge sales would seem to be obvious comparable sales on which to base an estimate of the subject property's value. Skyridge is also a residential subdivision, presents relatively comparable topographical features especially in its northern section, and is located within the Gatineau Park, a short distance away from Pink Lake, just as the subject subdivision. However, discussions with real estate agents and with individuals who made offers on lots located in la Grande Corniche du Parc and who are familiar with Skyridge revealed that the hodgepodge mixture of residential development is considered a detriment by many. As well, the steep access road into the subdivision, the inferior access to the City of Ottawa and the substantially higher real estate taxes are all other disadvantages relative to this subdivision. To quantify these differences is quite subjective without supporting market data. A further consideration is that these sales transacted after the date of expropriation and details regarding the sales are only obtained through the benefit of hindsight. Nevertheless, Skyridge offered an alternative to purchasers in "La Grand [*sic*] Corniche du Parc" as evidenced by the purchasers of Lot 41 in Skyridge who had previously purchased Lot 56 in the subject subdivision.

> While from the perspective of physical attributes, the Kingsmere lots transacted in 1988 and 1989 are comparable to the subject property (all are roughly one acre, wooded lots located within the Gatineau Park), other aspects of these properties are very dissimilar to the subject property. One of the major differences lies in the general character of Kingsmere which is a very established, exclusive residential enclave which in addition is located next to a lake. Additionally, comparing the sale of a severed lot in a coveted district where lots very rarely go up for sale (only the two Sugarman sales occurred in the past two and a half years), to a lot situated in a new, 72 lot subdivision with dozens of lots currently for sale, would be a tenuous comparison at best. Further, lots in Kingsmere are on existing paved public roads and can be immediately built on, whereas a private road leads to the subject subdivision and roads are not yet constructed. As well, a purchaser in the subject subdivision is subject to restrictive covenants in his deed.
>
> In the final analysis, due to the difficulty inherent in attempting to objectively quantify adjustments for the previously noted differences between Kingsmere and Skyridge, and La Grande Corniche du Parc and given the many sales within the subject subdivision, it is my opinion that Kingsmere and Skyridge sales cannot be relied upon to provide a reliable and accurate estimate of the subject property's market value. I have therefore relied on sales of lots located within the subject subdivision as these clearly represent the best evidence on which to base an estimate of the subject property's market value.

Thus, having rejected Skyridge and Kingsmere as comparables, Mr. Juteau proceeded to select his comparables from the 23 lots sold between September 2 and December 19, 1988. Because he was of the view that the sales which occurred in September 1988 were on the low side he did not consider them. As a result, Mr. Juteau chose 11 sales as his comparables.[5]

---

[5] These sales are the following:

COMPARABLE SALES - LA GRANDE CORNICHE DU PARC		
Lot #	**Accept. Date**	**Closing Date**
14-23	3 Oct. 88	15 Aug. 89
14-53	4 Oct. 88	28 Feb. 89
14-16	4 Oct. 88	31 Aug. 89
14-50	13 Oct. 88	27 Mar. 89
14-38	13 Oct. 88	1 May 89
14-22	13 Oct. 88	14 Feb. 89
14-46	17 Oct. 88	10 Jul. 89
14-28	17 Oct. 88	1 May 89
14-19	20 Oct. 88	5 Dec. 88
14-79	14 Nov. 88	23 Dec. 88
14-62	19 Dec. 88	31 Aug. 89

The sale prices of the comparables vary from $43,500.00 in the case of lot 14-46 to $78,500.00 in the case of lot 14-79. In Mr. Juteau's opinion, the prices obtained for the 11 lots accurately reflect the market which prevailed at that time.

At page 26 of his report, Mr. Juteau offers the following summary of his review and analysis of the sales activity within the subdivision:

> 1-Judging from the large number of offers to purchase made within a short period of time following the beginning of marketing of the property as well as typical absorption levels in rural subdivisions, it is obvious that there was very strong demand for lots located in the subject subdivision.
>
> 2-Judging also from the large number of offers to purchase made shortly after the onset of marketing and continuing after a first wave of price increases, it is obvious that the lots were initially underpriced and this is likely one of the reasons for the level of interest demonstrated in the property.
>
> 3-The average price of lots sold did not keep up with the average listing price of remaining lots.
>
> 4-Following a short period of frantic sales activity, interest in the subdivision, as evidenced by the submission of purchase offers, dwindled following a second wave of dramatic price increases which saw the average listing price of remaining lots pass from $46,211 to $64,271 in two weeks time.
>
> 5-As evidenced by the long closing times accepted by the vendors on several of the offers, it appears that the vendors were not expecting lot values to appreciate dramatically over the next year as a long closing effectively results in the vendor foregoing additional revenue in periods of rapid price escalations.
>
> 6-With the exception of several sales which had longer than average closing times, the only two sales which stand out as being atypical are those on lots 19 and 79: they were the only sales involving vendor takeback financing (interest-free for several months) and the vendor takeback financing of $73,500 for Lot 79 represents 94% of the purchase price of the lot which percentage is very high and unusual.

Mr. Juteau then time adjusted the sale prices of his comparables from the date on which the purchasers' offers to purchase were accepted by the Plaintiffs until March 2, 1989 at the rate of 1.5% per month. Mr. Juteau's rationale for using March 2 as a cut off date in lieu of May 2 appears at page 35 of his report:

> It would however, be an error to apply the 1.5% rate of increase from the date of acceptance of the offer to the expropriation date since the rate of increase of 1.5% per month was derived not from the dates of acceptance of the paired sales, but from their closing dates. In the subject subdivision, the average time period between acceptance date and closing date is five months. If anticipated closing dates on seven sales were not advanced, the average time period would be 5.6 months. In my opinion, a more reasonable time period between acceptance date and closing date is two - three months and consequently, to allow a reasonable time period before the expropriation date on which a transfer of title occurs and a hypothetical date on which an offer for a lot would be accepted by a vendor, I have adjusted the comparable sales upwards by 1.5% per month from acceptance date to two months prior to the expropriation date or March 2, 1989.

Mr. Juteau also made a financing adjustment in respect of lots 19 and 79. Simply put, because the Plaintiffs financed, without interest, the purchasers for a number of months, Mr. Juteau concluded that the purchasers of lot 19 and 79 saved an amount which was reflected in their offers to purchase.

Thus, having made a financing adjustment in respect of lots 19 and 79, and having time adjusted his prices to March 2, 1989, Mr. Juteau estimated the value of the unsold lots by comparing them to his comparables. Mr. Juteau compared each of the 50 unsold lots with a sampling of seven comparables. In comparing his comparables to the unsold lots, Mr. Juteau further adjusted his comparable sales on the basis of 3 factors, namely "physical", "location" and "other".

With respect to the physical adjustment, Mr. Juteau relied on an assessment of the physical characteristics of the 50 lots made by engineer Michel Charron, who also testified on behalf of the Defendant as an expert witness. Mr. Charron prepared a sheet for each lot entitled "fiche individuelle de pointage". Under Mr. Charron's system a lot could obtain a maximum number of 105 points. The six physical characteristics covered by Mr. Charron's "fiche" are: 1) slope/surface drainage; 2) feasibility of building on the lot; 3) percolation/ground water; 4) bearing capacity of the soil; 5) cut/excavation required; and, 6) the amount of blasting required.

With respect to the adjustment for location, Mr. Juteau compared the location of the particular lot under scrutiny to that of the comparables. Under this heading items such as privacy, southerly exposure, view, proximity to the pond, etc. were considered. The last adjustment made by Mr. Juteau was one that he entitled "other". At page 37 of his report, Mr. Juteau explains this adjustment as follows:

> The "other" adjustment relates to the long closing of Lots 62, 46 and 23 and to the high vendor takeback on Lot 79. The long closings are considered advantageous to the purchasers since they benefit from the escalation in value from the acceptance date to the closing date. In the case of Lot 79, the purchaser with only $5,000 downpayment, can benefit from price increases in excess of his debt servicing costs until the vendor takeback mortgage is repaid. In effect, the purchaser of Lot 79 would benefit in an escalating market from the high leverage he obtains with only $5,000 downpayment.

In order to make it easier to understand the system used by Mr. Juteau, I will give an example of his system as he applied it to lot 14-17, which he valued at $70,000.00. Mr. Juteau's Adjustment Chart in respect of lot 14-17 is the following:

ADJUSTMENT CHART
LOT 17

	Sale #1	Sale #2	Sale #3	Sale #4	Sale #5	Sale #6	Sale #7
Lot Number	62	79	19	28	22	16	23
Time Adjusted Value	$76,775	$79,464	$61,619	$66,719	$69,921	$70,413	$74,713
Physical	--	+ 2%	--	- 2%	--	+ 3%	- 1%
Location	- 6%	- 5%	--	- 1%	--	--	--
Other	- 4%	- 5% to - 10%	--	--	--	- 4%	- 4%

Adjusted Value	**$69,098**	**$69,134 - $73,107**	**$61,619**	**$64,717**	**$69,921**	**$69,709**	**$70,977**

VALUE: $70,000

The reader will note that, for the purpose of valuing lot 14-17, Mr. Juteau used as comparables the sales of lots 14-62, 14-79, 14-19, 14-28, 14-22, 14-16 and 14-23. The first step taken by Mr. Juteau was to determine the score given by Mr. Charron for each of the comparables and for the lot under adjustment. These scores are the following:

14-62:86 14-79:80
14-19:90 14-28:96
14-22: 87 14-16:83
14-2389 14-17: 90

One will note that in Mr. Juteau's opinion, based on Mr. Charron's scoring, adjustments in respect of the physical aspects had to be made between lot 14-17 and lots 14-79, 14-28, 14-16, and 14-23. Mr. Juteau then made a comparison between lot 14-47 and his seven comparables in regard to the location factor.

What Mr. Juteau's adjustment chart shows in respect of lot 14-17 is a comparison between that lot and each of the comparables used by him. Whenever an adjustment, whether for physical, location or other, was in favour of lot 14-17 Mr. Juteau entered a plus percentage under the relevant heading. For example, under the heading "physical", lot 14-79 obtained 80 points from Mr. Charron and lot 14-17 obtained 90 points, resulting in a differential of 10. Mr. Juteau determined that a differential of 5 would generally mean a variation of 1% in the appropriate column. Where the differential was four or less, Mr. Juteau made no adjustment. Thus, under the heading "physical", Mr. Juteau entered plus 2% in that column so as to denote an advantage in favour of lot 14-17 thereby increasing the value of comparable 14-79. The higher the value of the comparable, the higher the value of the lot under adjustment. Conversely, whenever Mr. Juteau inserted a minus percentage next to a comparable lot, that figure would decrease the value of the "comparable" and thus affect negatively the value of the lot under adjustment.

Thus, by comparing lot 14-17 to lot 14-79, Mr. Juteau concluded that the value of lot 14-17 was less than that of the time adjusted value of lot 14-79. Mr. Juteau's opinion was that lot 14-17, in comparison to lot 14-79, was worth somewhere between $69,134.00 and $73,107.00. Mr. Juteau carried out this exercise in respect of each of the comparables and, after proper consideration of the conclusions reached in respect of each "comparable", Mr. Juteau concluded that the value of lot 14-17 was $70,000.00.

Mr. Juteau proceeded in the same manner in respect of all of the unsold lots except for lot 14-57, which, because of its lack of access to a public road, he estimated at a nominal $5,000.00. The other exceptions are six lots which were said to be undevelopable because, in the view of engineer Michel Charron, no septic systems could be installed on them. These are lots 14-29, 14-30, 14-47, 14-48, 14-58 and 14-67. Mr. Juteau estimated the market value of these lots at 15% of their value if developable.

In his original report Mr. Juteau estimated the gross value of the 50 lots at $2,810,500.00. However, on June 2, 1996, Mr. Juteau amended his figure to $2,766,150.00. This amendment was made because Mr. Juteau changed the values which he had given to lots 14-16, 14-23, 14-46, 14-62 and 14-78. I will explain later why Mr. Juteau made these changes and whether, in my view, these changes are valid. Mr. Juteau then turned his attention to the absorption period of the lots, i.e. the time period during which one would expect the lots to be sold. In Mr. Juteau's opinion, most of the 50 lots would have been sold by December of 1989, contrary to Mr. Roy's opinion that the 50 lots would have been sold by May 2, 1989.

Mr. Juteau then examined the costs which would have been incurred in order to complete the development of the subdivision. Mr. Juteau estimated these costs at $1,265,626.00. As part of this figure, Mr. Juteau included a sum of $414,900.00 under the heading "Developer's profit and overhead at 15%". It will be recalled that under that heading Mr. Roy did not allocate any sum since his opinion was that all of the lots would have been sold by May 2, 1989, thus alleviating the necessity of making an allowance for the risk which a purchaser would be taking. Mr. Juteau, at pages 42 and 43 of his report, explains this issue as follows:

> Any purchaser of the subject subdivision in May of 1989 would have to incur costs in both the development of the lots and have to assume risks with regards to the absorption of lots and their sale prices. As well, the new purchaser has certain risks with regards to the sale of undevelopable lots.
>
> Normally, a developer's profit and overhead of 15% to 20% of gross sell out is not uncommon in subdivisions. In the particular circumstances of the subdivision, it already has a history that demonstrates a strong demand for the lots and consequently, the risk is reduced to the developer. The developer must still market the 50 lots and obtain prices at the values estimated by this appraiser. In addition, the developer must invest capital in the actual development of the subdivision and oversee the installation of the infrastructure, the marketing of the lots and negotiations with professionals and governmental agencies.
>
> In regards to these factors, it is my opinion that a developer's profit and overhead at the low end of the range is reasonable. The indicated profit and overhead for the developer as 15% of sell out is therefore $421,575.00.[6]

After proper deduction has been made for the expenses, Mr. Juteau estimated that the Plaintiffs were entitled to the sum of $1,500,524.00.

I now turn to the first issue.

---

[6] This figure now reads $414,900.00.

The Market Value of the 50 Unsold Lots

I begin by stating that I prefer the approach adopted by Mr. Juteau in determining the market value of the unsold lots. I cannot, however, accept all of his conclusions. Consequently, the values at which he has arrived will necessarily have to be modified.

I cannot subscribe to Mr. Roy's opinion that sales in Kingsmere can form the basis of a comparison with the 50 unsold lots. I agree entirely with Mr. Juteau's reasons for distinguishing Kingsmere from the subdivision here in question. I am in agreement with Mr. Juteau for the reasons given by him in reaching his conclusion that the lots sold in La Grande Corniche du Parc prior to the Notice of Intention to Expropriate constitute the true comparables in this case.

Before I proceed further, a few words should be said with respect to Mr. Roy's opinion that all of the lots would have been sold by May 2, 1989. Mr. Roy came to that view because he firmly believed that, had there not been the threat of expropriation, the selling prices in the subdivision would have continued to rise "but at a less spectacular rate". As a result, Mr. Roy concluded that he was almost certain that the 50 lots would have been sold by May 2, 1989. Mr. Roy's opinion on this issue served as the foundation for his further opinion that no allowance should be made for a developer's profit in the circumstances. Had I agreed with Mr. Roy's first conclusion, I would necessarily have agreed with his opinion on the issue of developer's profit. Unfortunately, in the circumstances, I cannot agree with either.

In all likelihood there would have been additional sales in December and during the spring of 1989 and certainly in April and early May 1989. However, to conclude that all of the lots would have been sold by May 2, 1989 requires a great deal of optimism. It is difficult to understand how Mr. Roy could reach such a conclusion on the evidence. I believe that Mr. Juteau's opinion that all of the lots would have been sold by December 1989 is more reasonable and I accept it entirely.

The other reason why I cannot accept Mr. Roy's opinion is that, in fact, the lots were not sold. Because of the wording of the Act, the reason why the lots were not sold is completely irrelevant. What I have to do, and hence what the experts had to do, is determine the market value of the 50 lots at the time of expropriation. This is what Mr. Juteau did but not what Mr. Roy did. Consequently, Mr. Roy's approach cannot be reconciled with the relevant provisions of the Act. A reading of sections 25 and 26 of the Act, which deal with the compensation payable to an expropriated party, cannot lead to any other conclusion.

As I have already indicated, Mr. Juteau concluded that the best comparables were 11 sales of subdivision lots which took place between October 3 and December 19, 1988. Having his comparables in hand, Mr. Juteau then compared each unsold lot to seven of his comparables in order to determine what the market value of the unsold lots was as of May 2, 1989. As a result, Mr. Juteau concluded that the market values for the unsold lots were as follows:

Lot 15	$67,500	Lot 16	$65,500*	Lot 17	$70,000
Lot 18	70,000	Lot 20	71,000	Lot 21	71,000
Lot 23	69,500*	Lot 24	71,500	Lot 25	71,000
Lot 28	72,500	Lot 29	11,000	Lot 30	11,000
Lot 31	71,000	Lot 33	73,000	Lot 34	72,500
Lot 36	58,500	Lot 38	57,000	Lot 39	54,000
Lot 42	56,500	Lot 43	58,000	Lot 46	43,500*
Lot 47	9,000	Lot 48	9,000	Lot 49	60,000
Lot 50	63,000	Lot 51	64,000	Lot 52	66,000
Lot 57	5,000	Lot 58	10,500	Lot 60	63,000
Lot 62	74,000*	Lot 63	69,000	Lot 65	68,000
Lot 66	66,500	Lot 67	10,000	Lot 69	63,500
Lot 70	64,500	Lot 72	62,000	Lot 75	50,000
Lot 76	53,500	Lot 78	49,000*	Lot 80	60,000
Lot 81	59,000	Lot 84	57,000	Lot 85	57,000
Lot 86	60,500	Lot 87	60,000	Lot 89	60,000
Lot 90	59,500	Lot 91	59,000		

*denotes lots subject to a sale contract which had not yet closed on May 2, 1989.

TOTAL ESTIMATED SELLOUT	**$2,777,000**

As appears clearly from the above table, seven lots distinguish themselves by their low values. These are lot 14-57 and lots 14-29, 14-30, 14-47, 14-48, 14-58 and 14-67. It will be recalled that lot 14-57 does not have any road frontage and is physically separated from the other lots in the subdivision by a pond at the south-east corner. With respect to the six other lots, these lots are those which, in the view of engineer Michel Charron, could not be developed. At page 37 of his report, Mr. Juteau's view of these lots is expressed as follows:

> In order to arrive at a market value for the remaining seven lots which are considered not to be developable, consideration was given to their estimated value if they had been developable. The market for these lots is very limited. Value of the lots is speculative since it assumes that a buyer could be found for each of these lots and that buyer would acquire the lot knowing he could not build on it. The value for Lot 57 is even more speculative since it does not have any road frontage and is physically separated from the lots in the subdivision by the pond at the southeast corner of the subdivision.
>
> These seven undevelopable lots would generally only have utility to an adjoining owner or in the case of Lot 57, utility to those lots with a view of Lot 57. It is speculative to predict that there will indeed be a purchaser for any of these lots since, if no building permit can be obtained, the lot will remain in its natural state whether it is owned by an adjoining lot owner or the developer of the subdivision.
>
> Nevertheless, I have estimated the market value of the six lots fronting on a road at 15% of their value as if developable and for Lot 57, because of its difficult access, I have estimated its value at a nominal $5,000.

I wish to state that I accept Mr. Juteau's opinion regarding the market value of the 50 lots subject to a number of adjustments which must be made.

Mr. Burrows, for the Plaintiffs, criticized Mr. Juteau in a number of respects and I will now deal with those criticisms.

Mr. Burrows' first criticism is in regard to Mr. Juteau's decision to time-adjust his comparables to March 2, 1989. Subsection 26(2) of the Act provides that the value of the expropriated interest is its market value at the time of the taking. This is what a willing purchaser will be prepared to pay to a willing vendor for the unsold lots on May 2, 1989. The Act does not distinguish between dates of offers to purchase and closing dates. In my view, in the context of the Act, such a distinction is irrelevant. The time adjustment must be made up to the date of taking. Mr. Juteau's rationale that it would be a mistake to apply the 1.5% monthly increase up to the expropriation date is flawed. It may well be that by the time the closing on an accepted offer takes place, the value of the property has increased but, nonetheless, the vendor must close at the agreed price.

The monthly percentage increase was calculated based on the rising market value of property. All that is considered is the difference, over time, of sale values. These values are only available for closing dates. When one looks at the final sale prices of lots, what one is actually examining are the amounts of offers made and accepted at some unknown date prior to the actual closing. Thus, to say that a sale value always reflects the market value of the property on the closing date is a fiction. However, as what is being calculated here is only the percentage difference between values, it is not necessary to examine anything other than the closing price. If this monthly percentage increase was calculated on closing values but then applied to a fictitious offer date, that would be an error. The figure arrived at must be applied to the same situation from which it was derived in order for it to be accurate. If Mr. Juteau had been able to calculate the percentage increase between various dates of offer then it may have been otherwise. The market will have already accounted for a time lag between the date of offer and the closing date. There is no doubt that the time adjustment must be made up to May 2, 1989. To do otherwise would be to create a fiction for which the Act does not allow.

I now turn to a second criticism of Mr. Juteau's report and evidence. That criticism concerns the value of lots 14-16, 14-23, 14-46, 14-62 and 14-78. At page 38 of his original report Mr. Juteau valued these lots as follows:

Lot 14-16	$69,000	
	Lot 14-23	$71,000
	Lot 14-46	$56,500
	Lot 14-62	$74,500
	Lot 14-78	$64,000

However, during the course of the trial, Mr. Juteau changed the values at which he had estimated the five lots. The reason for the change appears in a letter dated June 2, 1996, sent by Mr. Juteau to counsel for the Defendant. Mr. Juteau's position changed on the basis of a legal opinion given by counsel, presumably to the effect that the offers to purchase made in regard to the five lots were binding upon purchasers and vendors. Thus the vendors, i.e. the Plaintiffs, and their successors, could legally force the completion of the sales. That is why, in his letter of June 2, 1996, Mr. Juteau set out the appraised values, the prices offered by the prospective purchasers and the planned closing dates of these sales. Mr. Juteau then substituted for his original estimates the price of the offers made in respect of the five lots, which total $301,500.00. Mr. Juteau's hypothesis is that, although the N.C.C. expropriated the Plaintiffs, the sales would have been enforced by the willing purchaser. The only change would have been that the Offerors would remit the purchase price to the developer who purchased on May 2. However, since the willing purchaser paid the amounts of the respective offers to the willing vendor on May 2, the vendor was receiving a net benefit because he was receiving the money several months in advance. Also, the willing purchaser had to assume the cost of the money because he would not be reimbursed those sums until the respective closing dates. Thus Mr. Juteau concluded that a willing purchaser, on May 2, 1989, would discount the sum of $301,500.00 by at least 1% per month for the period between the date of purchase, May 2, 1989, and the respective closing dates which vary from July 10 to August 31, 1989.

Mr. Juteau, using his percentage of 1% per month, discounted the sum of $301,500.00 by $10,850.00. He then reduced the gross sell-out value of the fifty lots from $2,810,500.00 to $2,766,150.00, a reduction of $44,350.00.[7]

Mr. Burrows submits that Mr. Juteau is wrong in using the prices offered by the prospective purchasers. He submits that the proper values are the appraised values. I agree.

---

[7] Mr. Juteau's appraised value for the five lots was $335,000.00. As a result of counsel's opinion, he reduced his value to $301,500.00 from which he deducted $10,850.00. The total reduction is therefore $44,350.00.

I must confess that I do not understand the rationale behind Mr. Juteau's decision to abandon the appraised values in favour of what he calls the contract prices. It appears to me that, in the present circumstances, both the Plaintiffs and the prospective purchasers released one another from the commitments which they had made. Because the expropriation occurred prior to the closing dates, neither the Plaintiffs nor the prospective purchasers took the position that the accepted offers were binding and that a closing should take place. All parties walked away from the deal. As a result, the only parties with an interest in these five lots are the Plaintiffs. At no time whatsoever did the Defendant challenge the Plaintiffs' right to bring this lawsuit in regard to the five lots. Consequently, the Defendant cannot now take the position that the offers made in regard to the five lots are binding upon the Plaintiffs. There is no doubt that the Plaintiffs could have, had they decided to take that course of action, pursued their rights against the five prospective purchasers. However, the Plaintiffs did not take that course of action and the Defendant has not challenged that decision.

The market value of the five lots does not depend on whether the Plaintiffs or the prospective purchasers owned the property or had rights thereto on May 2, 1989. The only issue is what a willing purchaser would have paid a willing vendor on that date. The market value of the five lots, as of May 2, 1989, is not equal to the amount of the offers made by the prospective purchasers. The only legal consequence of these offers is that the prospective purchasers and the Plaintiffs could have forced a sale on the terms and conditions of the accepted offers. If the prospective purchasers had claimed an interest in the five lots, the Defendant could not have, with success, contended that the prospective purchasers were only entitled to the amount of their respective offers. The prospective purchasers would have been entitled to the market value of their lots on May 2, 1989. In the same way, the Plaintiffs, who did not in fact transfer title to these lots, are entitled to the market value of their lots on May 2, 1989.

If the Plaintiffs had an interest in the five lots, which they did, and consequently could sell these lots to a willing purchaser on May 2, 1989, the only answer that can be given is that the value of these lots is determined according to subsection 26(2) of the Act which provides that the value of the expropriated interest is the market value thereof.

I am therefore of the view that Mr. Juteau was wrong in amending page 38 of his report. The proper values for lots 14-16, 14-23, 14-46, 14-62 and 14-78 are Mr. Juteau's "appraised values" which amount to $335,000.00.[8]

Further, I am of the view that Mr. Juteau is wrong in taking the position that the willing purchaser, the developer, would have discounted the purchase price because payments in regard to the five lots would not have been made before July and August 1989. In my view, the Act does not allow for such an approach. The Act is predicated upon only one fictitious scenario and that is that, on the date of the taking, the willing purchaser will make an offer, the willing sellor will accept the offer and the willing purchaser will pay the agreed price and the willing sellor will execute the appropriate documents to confer title to the willing purchaser.

---

[8] This figure will obviously have to be modified in the light of these reasons, i.e. time-adjusted to May 2, 1989, etc.

Mr. Burrows attacks another adjustment made by Mr. Juteau in arriving at a market value for the unsold lots. This adjustment is twofold. Firstly, an adjustment was made relating to the long closings of the sales of lots 23, 46 and 62 and the high vendor takeback on the sale of lot 79. Mr. Juteau refers in his chart to these adjustments under the heading "other". Secondly, a financing adjustment was made in respect of lots 19 and 79.

In Mr. Juteau's opinion, the long closings were advantageous to the purchasers as they benefited from a rise in the market from the time their offer to purchase was accepted until the closing date, without having to pay the balance owing. With respect to lot 79, Mrs. Smith, with a down payment of only $5,000.00, could have benefited from a price increase in excess of the debt servicing costs. The supposition is that the purchaser, calculating for herself a net benefit, would have been willing to pay a somewhat inflated price. The consequence of these adjustments in regard to lots 19, 79, 23, 46 and 62 was to lower their values for purposes of comparison with the 50 unsold lots. Because the value of the comparables was decreased, the market value of the 50 unsold lots was also decreased. Mr. Burrows submitted that these adjustments were inappropriate in the circumstances.

I cannot agree with Mr. Burrows that that adjustment is not a proper one in the circumstances. Mr. Juteau examined the relevant transactions and, based on his experience as a real estate appraiser, concluded that the long closings were advantageous to the purchasers. I have carefully considered Mr. Juteau's reasons on this point and I am not prepared to disregard them. I have not been convinced that Mr. Juteau's approach is wrong.

I now turn to the financing adjustment concerning lots 19 and 79. Lot 14-19 was purchased by Paul Whitney for the sum of $62,500.00. Mr. Whitney also purchased lot 14-55 for the sum of $46,500.00. Mr. Whitney testified that, when he was considering purchasing lot 14-55, he was told by the vendors that the price was not negotiable. With respect to lot 14-19, he made an offer of $62,500.00 which the Plaintiffs accepted on October 19, 1988. The agreement of purchase and sale provides for a deposit of $2,000.00 at the time of the offer with the balance payable at the time of closing on April 29, 1989. However, the terms of purchase were changed so that Mr. Whitney closed his sale on December 5, 1988.

By the terms of the deed of sale, the Plaintiffs acknowledge receipt from Mr. Whitney of $14,5000.00, leaving a balance of $49,000.00 payable on or before September 1, 1989, the whole without interest. In the event that the balance was not paid by Mr. Whitney on that date, interest was to be paid at the rate of 13%. It is by reason of these revised terms that Mr. Juteau concluded that Mr. Whitney benefited from almost nine months of interest free financing and that such a benefit amounted to a savings of $4, 777.50. Mr. Juteau deducted that amount from the purchase price and thus used, for purposes of comparison, a value of $57,723.00 for lot 14-19.

Mr. Whitney testified that he had "put pressure on himself" to close his sale early. He appeared to be worried that because the lots were selling very fast, something might happen. He stated that the Plaintiffs' salesman, Mr. Dan Lafleur, had not tried to put any pressure on him to close early. In fact, on December 5, 1988, Mr. Whitney closed not only the sale of lot 14-19, but also the sale of 14-55. In respect of this latter lot, Mr. Whitney paid the balance of the purchase price of $42,500.00.

The issue is whether the sum of $62,500.00 constitutes the market value of lot 14-19 or whether that price should be discounted as Mr. Juteau suggests. When Mr. Whitney made his offer to purchase, he made it with a promise to pay the balance of the purchase price in full on the closing date of April 29, 1989. Mr. Whitney's offer was not conditional on any financing from the Plaintiffs. In my view, that is what one has to consider in ascertaining the prevailing market value for that lot.

Mr. Noël suggested that there was more to this transaction then met the eye. That may well be the case since it is likely that sometime during the month of November the Plaintiffs realized that expropriation of their subdivision was imminent. In those circumstances, it would not be surprising for the Plaintiffs to have been prepared to concede more favourable terms of payment to Mr. Whitney in consideration for an early closing. As a result, Mr. Whitney would become the owner of the lot and the Plaintiffs would get their money when the term of payment expired. However, that in my view does not alter the fact that in October 1988 Mr. Whitney was prepared to offer $62,500.00 for lot 14-19 and that is the proper market value for that lot. Consequently, I cannot agree with Mr. Juteau that a financing adjustment was necessary in regard to lot 14-19. In the result, lot 14-19 shall be time adjusted to May 2, 1989 without a downward adjustment of $4,777.00.

I now turn to lot 14-79, the second lot in respect of which Mr. Juteau felt that a downward adjustment was required. The offer to purchase lot 14-79, similarly to the offer to purchase lot 14-19, was not subject to any financing arrangements. Mr. Barton negotiated the purchase of the lot with Dan Lafleur. Although he had heard rumours of expropriation, Mr. Barton had been informed by someone at the municipality that the N.C.C. would not be expropriating the subdivision. Mr. Barton could not remember who exactly had provided that information to him. The Bartons offered to purchase the lot for the sum of $78,500.00 with a downpayment of $5,000.00, the balance being payable at the closing on April 1, 1989. That offer was accepted by the Plaintiffs on November 10, 1988. From Mr. Barton's testimony, it appears that he had verbally agreed with Mr. Lafleur that, if he required it, the Plaintiffs would agree to a one-year mortgage commencing April 1, 1989. In consideration of Mr. Barton agreeing to close on December 23, 1988, payment of the purchase price would not become due until May 1, 1989, instead of April 1, 1989. In addition, if Mr. Barton so required, the Plaintiffs would agree to a one-year mortgage commencing May 1, 1989, in respect of the balance of the purchase price of $73,500.00 with interest at 12% per annum. The Bartons would then be making monthly interest payments to the Plaintiffs.

In my view, Mr. Juteau was wrong in adjusting downward the purchase price by $3,000.00. The fact that the Plaintiffs agreed to a one-year mortgage at a rate of interest of 12% does not distort the price offered by Mr. and Mrs. Barton to purchase lot 14-79. There was no evidence that the rate of interest of 12% was lower than the prevailing bank interest rates on mortgages. Thus, there was no real advantage conferred to Mr. and Mrs. Barton; instead of obtaining a mortgage from a bank at a rate of interest of 12%, the Bartons obtained that mortgage from the Plaintiffs. I am therefore of the view that the price of lot 14-79 should be time adjusted to May 2, 1989 without a downward adjustment of $3,000.00.

Mr. Burrows also criticized Mr. Juteau for using a monthly increase of only 1.5% for calculating the time adjusted values. Mr. Roy concluded that a proper rate of increase was 2% per month. Mr. Roy examined the increase in value of his Kingsmere sales and noted that in 1979, the N.C.C. purchased, for an average price of $23,750.00, four residential lots situated on Barnes Road (Mr. Roy's sale number 2). Mr. Roy also noted that in 1988, a lot also located on Barnes Road was sold for $80,500.00 (Mr. Roy's sale number 8). Mr. Roy then calculated the increase in value over the nine year period at 2.1% per month, which he rounded at 2.0% per month. Mr. Roy found support for his figure by the relevant data for lot sales in West Hull which revealed a monthly increase of 1.6% per month.

As for Mr. Juteau, he examined residential sales in the municipality of West Hull. Specifically, he examined three sales in Pineridge Estates, one sale in Linkridge Estates and finally three sales in Golden Maples. These sales occurred between July 1987 and May 1989. On the basis of that data, Mr. Juteau concluded that a monthly rate of increase of 1.5% per month was a proper rate of increase. I agree with Mr. Juteau.

The study conducted by Mr. Juteau covers a relatively recent period of time whereas that conducted by Mr. Roy covers a period going back to 1979. There is less distortion in using statistics from a relatively recent period of time. Also, I do not believe that data pertaining to the Kingsmere area is relevant.

Mr. Burrows criticized Mr. Juteau for not taking into account the two sales of lot 13A-24 of Pineridge Estates which occurred on July 8, 1986 and December 20, 1989 respectively. The first sale was for the sum of $25,000.00 and the second sale for a sum of $40,000.00. Thus, over a period of 42 months, the value of that lot increased by 60% or 1.47% per month. According to Mr. Burrows, this figure, if it had been included in table 12 of Mr. Juteau's report, would have taken the average to 2%. Mr. Juteau testified that he did not choose these sales because the earlier one was outside of the two year period.

During his cross-examination of Mr. Juteau, Mr. Burrows pointed out that in respect of the sale of lot 14C-26 of Linkridge Estates there was, at the time of that sale, a writ of seizure before judgment attaching to the lot. Mr. Burrows suggested to Mr. Juteau that such a writ might have had a negative effect on the price offered, and eventually paid, for that lot. Mr. Juteau stated that, had he been aware of that information, he might not have considered the sale of 14C-26. Mr. Burrows also pointed out to Mr. Juteau that his monthly increase of 0.31% for Pineridge Estate's Lot 13A-23 was "out of whack" with the other sales.

Mr. Juteau answered that if he accepted Mr. Burrows' comments and disregarded the 1.57% increase in regard to lot 14C-26 and also the 0.31% in regard to lot 13A-23 but considered the 1.47% increase in regard to lot 13A-24, he would have arrived at an average monthly increase of 1.564%. Thus, Mr. Juteau stood his ground that a proper monthly rate of increase was 1.5%. I see no reason not to accept Mr. Juteau's opinion on this point and I therefore accept his figure of 1.5% as the proper monthly increase.

The Developability of Lots 29, 30, 47, 48, 58 and 67

One of the major issues in this case concerns the developability of the above-mentioned lots. The Plaintiffs' position is that septic systems could be installed on these lots and, thus, the lots were developable and could therefore be sold. The Defendant, on the other hand, takes the position that the six lots could not be developed since septic systems could not be installed on them. The value of the six lots to the Plaintiffs, should this issue be decided in their favour, is approximately $450,000.00.

The Defendant's submission that the six lots were not developable is predicated on the opinion of its expert, engineer Michel Charron. On August 15, 1994, Mr. Charron wrote to Mr. Juteau with respect to the developability of each of the fifty unsold lots.[9] The letters sent by Mr. Charron form the basis of his "fiche individuelle de pointage" on which Mr. Juteau relied in part in assessing the value of the lots. In his letters of August 15, 1994, Mr. Charron indicated to Mr. Juteau his concerns with respect to the developability of lots 29, 30, 47, 48, 58 and 67 and sought instructions from Mr. Juteau to investigate, in greater detail, the six lots.

Mr. Charron was authorized by Mr. Juteau to carry on his investigation in respect of the six lots and on August 19, 1994, Mr. Charron wrote to Mr. Juteau to advise him specifically with regard to the developability of the six lots. As a preamble to his opinion, Mr. Charron informed Mr. Juteau with respect to the "paramètres principaux de la réglementation de 1989". The preamble reads as follows:

2- Paramètres principaux de la réglementation de 1989:

A - Pente de terrain récepteur:

i)un élément épurateur de type classique, modifié ou surélevé ne peut être construit que sur un terrain récepteur ayant moins de 10% de pente.

ii)si le terrain récepteur a une pente de 10% à 25%, les branches de l'élément épurateur doivent être placées transversalement par rapport à la pente, en autant que l'on s'assure que l'élément épurateur, qui devra forcément être du type en tranchées puisse être construit en respectant l'espacement de 1,22 mètres (4 pieds) entre le fond des tranchées et la roche, ou la couche imperméable ou le plus haut niveau atteint par la nappe phréatique.

iii)si le terrain récepteur a une pente de plus de 25%, il est interdit d'y construire un élément épurateur.

B - Marges de recul:

i)par rapport aux limites de propriété: l'installation septique ne doit pas être située à moins de 3,04 mètres (10 pieds) de toute limite de propriété.

ii)par rapport aux cours d'eau: l'installation septique ne doit pas être située à moins de 30,48 mètres (100 pieds)

---

[9] Mr. Charron wrote a letter for each of the fifty lots.

de tout lac, rivière, ruisseau, cours d'eau, étang, source ou réservoir.

C- Conditions minimales de sol:

l'élément épurateur ne peut être construit que sur un terrain qui permette d'installer le fond des tranchées d'absorption au moins à 1.22 mètres (4 pieds) au-dessus de la roche ou de la couche imperméable ou du plus haut niveau atteint par la nappe phréatique au cours de l'année.

I wish to point out that Mr. Charron's understanding of the relevant regulations, as appears from section A-i) of his "paramètres principaux de réglementation de 1989" is that a conventional septic system, including the elevated version, cannot be built in an area where the slope exceeds 10%. Mr. Charron and Mr. Gravelle are not in agreement on this point and I shall return to this shortly.

With respect to lots 29 and 30, Mr. Charron concluded that the lots could not be developed because most of the sites upon which a septic system could be built were in an area where the slope was greater than 10%. With respect to those sites which could be found in an area where the slope was less than 10%, these were within 30.48 meters of a stream which ran across the lots.

With respect to lots 47 and 48, Mr. Charron was of the view that the majority of possible sites were in an area where the slope was superior to 10%. As to the possible sites situated in an area where the slopes were inferior to 10%, Mr. Charron dismissed them because the areas were "jugées trop restreint d'y construire un élément épurateur conventionnel". Mr. Charron added that two lots were "très rocheux" and, as a result, did not possess "les caractéristiques essentielles répondant à la définition d'un terrain récepteur réglementaire".

Mr. Charron's comments regarding lots 58 and 67 are almost identical to those he made in respect of lots 47 and 48.

In support of their position that septic installations could be placed on the six lots, the Plaintiffs rely primarily on the evidence of Pierre Gravelle. Mr. Gravelle is no longer employed with the Boileau firm, but while there, he was responsible for the design of septic systems. Prior to the events which have given rise to this litigation, Mr. Gravelle, as an engineer with the Boileau firm, had worked on a number of projects in West Hull for Carl McInnis. In respect of these earlier projects, Pierre Gravelle did the road design and prepared the plans for the septic arrangements. Mr. Gravelle testified that during his career he had prepared plans for septic installations for more than one thousand lots. On only one occasion was Mr. Gravelle not able to locate a suitable site to build a septic installation.

In the summer of 1988, Pierre Gravelle was contacted by Carl McInnis who asked him to conduct a study to determine whether the lots on his subdivision could receive septic installations. The first step taken by Mr. Gravelle was to conduct a spot verification of sites on a number of the lots, measuring the depth of the rock with an iron bar. Mr. Gravelle examined approximately 20% of the lots and subsequently issued a preliminary report to the municipality. In the end, Mr. Gravelle examined every lot of the subdivision.

Mr. Gravelle testified that he drove up the hill where the access road would run with a 4 x 4 vehicle in which he had loaded two barrels of water so as to perform percolation tests required under the C.R.O. By-Law 124. Article 9 of By-Law 124 provides:

> La surface d'absorption doit être calculée en fonction des résultats des essais de percolation dans le sol naturel et du nombre de chambres à coucher. Les essais de percolation doivent être faits suivant la procédure décrite dans l'annexe I de ce règlement.
>
> Dans un élément épurateur où la surface d'absorption est composée d'un remblai, le facteur de percolation "t" doit convenir aux matériaux rapportés mais il ne doit pas être inférieur à 6 minutes, ni inférieur au facteur de percolation du sol naturel sur lequel le lit est construit. Pour un filtre de sable, le facteur de percolation ne doit pas être inférieur à 25 minutes.

Paragraph 1 of Article 9 provides that the percolation tests must be conducted according to the procedure set out in Annex 1 of the By-Law. Mr. Gravelle explained that he dug holes of a minimum depth of 600 mm. He explained that there was no necessity of conducting a percolation test on every lot. He further explained that such a test was performed on approximately one lot out of five. However, Mr. Gravelle stated that with respect to each lot, he looked to see if there was sufficient soil to receive a septic system and whether there was anything that could prevent the installation of such a system. After having conducted the tests required by By-Law 124, Mr. Gravelle concluded that all of the lots were suitable to receive septic installations.

On October 21, 1988, Mr. Gravelle wrote to the C.R.O. enclosing for approval his "plan d'ensemble d'installations septiques". In his letter, Mr. Gravelle pointed out that the absorption tests which he had conducted demonstrated that percolation on the subdivision was excellent. He also pointed out that each lot had been "sounded" and that it was possible to build on each of the lots. With his letter, Mr. Gravelle enclosed the results of his percolation tests.

On the day that he wrote to the C.R.O., Mr. Gravelle also wrote to the Municipality of West Hull, to the attention of Bernard Benoit, the City Inspector, enclosing the "plan d'ensemble d'installations septiques" sent to the C.R.O.. In his letter Mr. Gravelle repeated that percolation on the subdivision was excellent and that he saw no difficulty for building on the lots.

The "plan d'ensemble d'installations septiques" sent by Mr. Gravelle to the C.R.O. and to the municipality was prepared by Mr. Gravelle on September 28, 1988. The plan, bearing number C-1, shows that Mr. Gravelle examined and conducted tests in regard to lots numbers 1 through 60 of La Grande Corniche du Parc.[10]

---

[10] Under cross-examination, Mr. Gravelle was asked by Mr. Noël why his plan C-1 did not cover the 72 lots. Although there were 73 lots, both sides are agreed that lot 14-57 could not be developed. Mr. Gravelle was certain, when he testified, that he had examined all the lots but could not explain why his plan only covered 60 lots. The matter was resolved on June 13, 1996, when, by consent, Mr. Gravelle's plan for the 12 "missing" lots was admitted into evidence as exhibit P-46. Thus, there cannot be any doubt that Mr. Gravelle did indeed examine all of the lots.

The full text of Mr. Gravelle's letter to Mr. Benoit is as follows:

> Nous vous soumettons ci-joint, pour approbation, copie du plan C-1 du projet mentionné en rubrique. Ce plan constitue le plan d'ensemble d'installations septiques.
>
> Peu après notre lettre du 26 septembre, nous avons complété nos études sur ce terrain (lot 14A partie, rang 7, canton de Hull) et préparé ce plan. À noter qu'à cette date, nous n'avions envoyé que le préléminaire [*sic*] comme nous avons toujours fait pour les projets similaires du promoteur, M. McInnis. Le préléminaire [*sic*], dont nous vous envoyons copies de d'autres projets pour exemple, a toujours été suffisant pour obtenir une approbation de principe du projet jusqu'à ce que le plan d'installations septiques soit soumis, quelques fois six mois plus tard.
>
> Vous constaterez que les essais d'absorption montrent que la percolation est excellente. De même, chaque lot a été sondé et il est possible, selon la nature du sol et la profondeur du roc, de construire sur chacun des lots. Évidemment, le propriétaire éventuel d'un lot peut vouloir construire à un autre endroit et celui-ci devra être vérifié à ce moment.
>
> Évidemment, à la municipalité de Hull-Ouest, un rapport individuel doit être préparé lors de chaque demande de permis de construction résidentielle. Nous retrouverons alors la dimension du champ, l'élevation, la localisation exacte etc.
>
> Si toute autre information vous était nécessaire n'hésitez pas à communiquer avec le soussigné.
>
> Veuillez agréer, Monsieur, l'expression de nos salutations distingués.

As I have already indicated, on November 7, 1988 the Municipality of West Hull approved the Plaintiffs' subdivision plan. At that time, Mr. Gravelle's C-1 plan and his opinion that the lots could receive septic installations and therefore be built upon were before the Council. I can only conclude that the municipality was satisfied with the opinion and the reports provided to it by Mr. Gravelle.

Following receipt by the Plaintiffs of Mr. Charron's report dated August 19, 1994 to the effect that six lots could not be developed, the Plaintiffs requested that Mr. Gravelle respond to Mr. Charron. Mr. Gravelle did so in a letter dated May 18, 1995, addressed to Plaintiffs' counsel. Mr. Gravelle's comments regarding the lots can be summarized as follows.

Lots 29 & 30

With respect to these 2 lots, Mr. Gravelle did not deal with Mr. Charron's argument that because of the presence of a stream, sites located within 30 meters thereof could not receive septic installations because he found other suitable sites on both lots which, in his opinion, met the requirements of By-Law 124, i.e. a minimum of 600 mm of natural soil, sufficient percolation, located more than 30.48 meters from a watercourse and a surface of at least 26 square meters having a slope of less than 10%.

Lots 47, 48, 58 and 67

Mr. Gravelle stated that he had been on the subdivision on May 18, 1995, and that in his view it was possible to install a septic system on the sites which he had initially proposed in his C-1 plan, but also on at least one other site which met the requirements of the relevant by-law.

In addition to the evidence of Mr. Gravelle, the Plaintiffs rely on the evidence of Joseph B. Mangione. Mr. Mangione has been a professional engineer since 1964. He is highly experienced with respect to septic installations. Mr. Mangione was asked by the Plaintiffs, following the receipt of Mr. Charron's reports of August 19, 1994, to advise them with respect to the feasibility of installing septic systems on the aforementioned six lots. Mr. Mangione's opinion is that all of the lots could be developed.

On May 11, 1995, Mr. Mangione visited the six lots. With respect to lots 29 and 30, he did not see either a spring or a stream. What Mr. Mangione saw was an intermittent ditch meandering across the south west corner of lot 29 and the front portion of lot 30. In Mr. Mangione's opinion, this intermittent ditch could have been relocated "to the property line and outlet to the proposed roadside ditch". In Mr. Mangione's opinion, there was no problem finding a site on which a septic installation could be built on either lot 29 or lot 30.

With respect to lots 47, 48, 58 and 67, again Mr. Mangione was satisfied that septic systems could be installed thereon. This is how he phrased his opinion regarding lot 48:

> An inspection of this lot has shown there is sufficient soil depth, lot gradient and an area in excess of 1,000 square metres, which could accommodate a sewage disposal system to Outaouais Regional Community By-Law No. 124 in the location shown on the Boileau plan, "Plan d'Ensembles, Installations Septiques", Drawing No. C-1.

For the sake of completeness, I should point out that Mr. Mangione had initially been retained by Mr. Burrows, counsel for the Plaintiffs, in September 1989 when Mr. Burrows acted for individuals who had purchased subdivision lots from the Plaintiffs. As I have already indicated, these lots are not the subject of the present litigation.

For the reasons that follow, I am of the view that septic systems could be built on the six lots and, as a result, the lots could be developed by the Plaintiffs. Firstly, I must confess that I see no reason why I should not accept the clear evidence of Mr. Gravelle which was corroborated by that of Mr. Mangione. Mr. Gravelle testified that he went to the subdivision, visited all of the lots and more particularly the six impugned lots. Mr. Gravelle further testified that after visiting the six lots and conducting the tests required by By-Law 124 and satisfying himself of soil depth, he concluded that septic systems could be installed on these lots. Additionally, after being made aware of the opinion given by Mr. Charron to the Defendant, Mr. Gravelle again went on the subdivision and examined the lots in question in light of the comments made by Mr. Charron in his August 1994 reports. Mr. Gravelle's opinion with respect to the possibility of installing septic systems on these lots remained the same. Mr. Mangione shares the view expressed by Mr. Gravelle.

Mr. Charron was of the view that where the slope of a lot exceeded 10% but was not greater than 25% the only septic system that could be installed was a conventional system which met the requirements of Article 8(J)(i) of By-Law 124. In the preamble to his August 19, 1994 reports to Mr. Juteau which I have quoted hereinabove, Mr. Charron explained what his understanding of the By-Law was.

Mr. Charron's opinion clashed with that of Mr. Gravelle who was of the view that where the slope was between 10 and 25%, an elevated septic system, as defined under By-Law 124 at Article 8(J)(iv), could be installed. According to Mr. Gravelle, paragraph 8(J)(iv) was to be understood by reference to Schema "F" of the By-Law. Paragraph 8(J)(iii) refers specifically to schema "E" and paragraph 8(J)(v) refers to schema "G". If Schema "F" is not to be read in reference to paragraph 8(J)(iv) of the By-Law, then Schema "F" is completely irrelevant. In my view, By-Law 124 provides for the installation of an elevated septic system on a lot where the slope is between 10 and 25% as long as there is a minimum of 600 mm of overburden. I can only conclude that the drafter of the By-Law involuntarily omitted to make reference to Schema "F" when he or she drafted paragraph 8(J)(iv).

In regard to the overburden of the impugned lots, I accept Mr. Gravelle's opinion that he found at least 600 mm of natural soil over the rock on each of the impugned lots and that, as a result, elevated septic systems could be built thereon, as provided by By-Law 124.

Mr. Gravelle was also criticized regarding his calculations of the size of the septic tanks. In my view, that criticism is not well founded.

A few words must be said with respect to Mr. Charron's opinion concerning lots 29 and 30. Mr. Charron was of the view that no septic installation could be installed within 30.48 meters of the stream that runs through lots 29 and 30. Engineers Gravelle and Mangione disagreed with Mr. Charron. Firstly Mr. Gravelle stressed that there were suitable sites outside the 30.48 meters. Secondly, and on this issue he was joined by Mr. Mangione, it was Mr. Gravelle's opinion that what Mr. Charron identified as a stream was not, in fact, a stream but an intermittent watercourse. Both Mr. Gravelle and Mr. Mangione were of the view that this watercourse was simply a drainage problem which engineers routinely dealt with. In his report of May 18, 1995, relating to lot number 29, Mr. Mangione stated his position as follows:

> There is an intermittent ditch meandering across the southwest corner of the lot. The ditch would be relocated to the property line and outlet to the proposed roadside ditch.

Both Mr. Mangione and Mr. Gravelle were adamant that there was no stream on lots 29 and 30. During his testimony, Mr. Gravelle stated that for a watercourse to be a stream, it required a continuous flow of water. In the present case, it was not disputed by the Defendant that the watercourse across lots 29 and 30 was not "continuous". In *McNab* v. *Robertson*, [1897] A.C. 129, Lord Shand, at page 138, offers the following definition of the word "stream":

> ... I think that the term "streams" necessarily means flowing water, and not water which oozes from a piece of marshy ground, and that unless water flows more or less in a channel, and continuously, it cannot be described as water that flows in "streams" leading to the ponds.

I am of the view that the Plaintiffs are correct on this issue. An intermittent watercourse is not, in my view, a stream. It is my view that in order to be able to characterize something as a "stream" or "watercourse" that phenomenon must flow year round. If it does not, it is not subject to the Municipal By-Law.

One final matter has to be dealt with. The Defendant called as a witness Mr. Eric Domingue who is an expert in hydro-geology. He testified that while searching for the stream which ran between lots 29 and 30, he found a spring situated about 46 meters from the culvert on lot 30. Another witness called by the Defendant, Paul Proulx, also testified that he saw a spring in the area of lots 29 and 30. According to Mr. Proulx, the spring covered an area of approximately 30 feet by 30 feet. Mr. Proulx stated that the water came from the undersoil and ultimately ran to a culvert. Mr. Proulx's visit took place on June 22, 1994. However, on a further visit to the site on July 4, 1995, Mr. Proulx could not find any water coming out from the ground. In fact, he could see no water at all. According to Mr. Proulx, this was due to "la sécheresse de l'été". Mr. Proulx did not return to the site after July 4, 1995.

As I indicated earlier, Mr. Gravelle and Mr. Mangione were of the opinion that the intermittent watercourse was a matter of drainage with which they could deal. I am also of the view that if a spring existed on lots 29 and/or 30, that was also a matter which the engineers would address. So that there will be no misunderstanding, I am of the view that even if a spring did exist on lots 29 and/or 30, that would not have

prevented, ultimately, the Plaintiffs from developing the lots. In all likelihood, discussions would have taken place with the Quebec Ministry of the Environment, but I am satisfied that in the end the lots would have been developed and sold.

I am therefore satisfied that the six lots could be developed. I see no reason not to accept the evidence of Mr. Gravelle and Mr. Mangione that the lots could receive septic systems. I wish to make it clear that I am accepting the evidence of these engineers because I am satisfied by the explanations which they gave to justify their conclusions. I prefer their evidence to that of Michel Charron who is, without doubt, a very knowledgeable and competent engineer but who, in my opinion, had a mistaken view of what his role was in these proceedings. Mr. Charron gave me the impression that he believed that his role was to place obstacles in front of the evidence adduced by the Plaintiffs' engineers. On a number of occasions, Mr. Charron gave answers which I thought were most surprising coming from an obviously highly competent engineer. For example, at one point Mr. Charron testified that on certain lots a site chosen by Mr. Gravelle for a septic installation could not be used because it was situated at the rear of the lot and therefore would be very difficult for the sewage disposal truck to service. Mr. Charron appeared to indicate that it would not be possible for the truck to service the sites because the distance between the site and the road would cause problems with "suction". Mr. Charron stated that the distance between the truck and the site should not exceed 30 feet. I then indicated to Mr. Charron that I had seen a sewage disposal truck service a septic system without difficulty, even though the septic system was situated approximately 150 feet from the road, by simply bringing the hose to the septic system. To this comment, Mr. Charron answered that there was no difficulty after all in getting equipment to service a septic system at a distance greater than 30 feet.

All in all, I was not impressed by Mr. Charron's evidence because he seemed to be constantly looking to score points against the Plaintiffs instead of making his own independent and accurate assessment of the facts. He obviously believed that his mission was to find ways of increasing the Plaintiffs' costs in developing the subdivision or, in the case of the six impugned lots, of finding ways to diminish their value.

Mr. McInnis testified that, had he been advised by his engineers that certain lots could not be developed because septic systems could not be built upon them, he would, without doubt, have redesigned his subdivision so as to maximize his values. I have no difficulty in accepting this evidence.

During his evidence, Mr. Juteau testified that if he had come to the conclusion that the six impugned lots were developable, he would have estimated the value of these lots as follows:

Lot 29: $72,500.00
Lot 30: $72,500.00
Lot 46: $56,500.00
Lot 48: $56,500.00
Lot 58: $64,500.00
Lot 67: $66,500.00[11]

Lot 57

Mr. Juteau estimated the value of Lot 57 at $5,000.00 whereas Mr. Roy estimated its value at $20,000.00. Mr. Roy's rationale for estimating the lot at $20,000.00 appears at page 29 of his report:

> As to Lot Number 57, it has no frontage on a public road, but it has walking access through a right-of-way between Lots 60 and 62 and walking access along the rear boundary of Lot 62 and along the east side of the pond, more or less at the subdivision boundary. This lot also represents a plus value for Lot 56 which could have direct access along the southerly limit of the pond. This lot has beautiful mature pine and poplar trees, and adjacent to the east there is another beautiful pond located on N.C.C. land.

Lot 57, in addition to not having road frontage, is physically separated from the other lots in the subdivision by a pond situated at the south east corner. Demand for Lot 57 is, without doubt, restricted to those lots adjacent to the pond, namely lots 56, 58, 59 and 62. What offer, if any, the owners of these lots would have been prepared to make for lot 57 is difficult to know. In the circumstances, I am of the view that any sum over $5,000.00 is purely speculative and I therefore accept Mr. Juteau's estimate.

---

[11] Obviously, these values will be subject to the adjustments which arise out of my Reasons for Judgment.

Development Costs

The parties disagree over the extent of the costs which would have been incurred by the developer/willing purchaser in order to complete the development of the Plaintiffs' subdivision. As I have already indicated, Mr. Roy concluded that these expenses amounted to $472,521.00. Mr. Juteau, on the other hand, has arrived at a figure of $1,265,626.00. The difference between the two experts is approximately $793,000.00.

For the sake of clarity, I hereby reproduce both Mr. Roy and Mr. Juteau's breakdown of these expenses.

Mr. Juteau:

Expenses

Survey		$ 25,000	
Engineering Fees			
	Plans & Specs.	25,000	
	Supervision of Work	19,000	
Wood Clearing			
	8.3 acres @ $3,500/acre	29,050	
	Road Construction	548,826	
	Construction Contingencies @ 10%		54,883
Hydro		nil	
	Parks and Recreation Taxes	nil	
	Road Construction Permit	300	
Land Transfer Tax		8,850	
	Legal Fees		
	Purchase of Subdivision	6,442	
	Discharge of First Mortgage Upon Sale of 19 Lots		
	19 Lots @ $200/lot	3,800	
	Transfer of Roads to Municipality	800	
	Establishing Right-of-Way and	Reviewing Legal Documents	3,000
Marketing Costs @ 5%		123,775	
	Real Estate Taxes	2,000	
	Financing/Carrying Costs	nil	
Developer's Profit & Overhead @ 15%		414,900	
			1,265,626

Mr. Roy:

		Paid	Unpaid	Total
1)	Survey Costs	$ 33,900.00	$ 4,000.00	$ 37,900.00
2)	Planning Fees	$ 10,000.00		$ 10,000.00

3)	Engineering Fees	$ 13,600.00		$ 13,600.00
4)	Road Construction			
	a)Wood Cutting	$ 4,865.00	$ 10,600.00	$ 15,465.00
	b)Blasting		$ 37,500.00	$ 37,500.00
	c) Access and Main Road		$200,562.00	$200,562.00
	d)Infrastructure		$ 25,160.00	$ 25,160.00
5)	Land Transfer Tax	$ 2,710.00		$ 2,710.00
6)	Bond Fees	$ 450.00		$ 450.00
7)	Park and Recreation Taxes	$ 4,720.00		$ 4,720.00
8)	Subdivision Permits	$ 800.00		$ 800.00
9)	Municipal Taxes	$ 495.00		$ 495.00
10)	Notary Fees	$ 4,625.00		$ 4,625.00
11)	Selling Fees (5%)	$ 55,725.00	$186,263.00	$241,988.00
12)	Hydro and Telephone	N/A	$ 7,800.00	$ 7,800.00
13)	Contingencies		$ 5,000.00	$ 5,000.00
14)	Interim Financing	N/A	$ 41,709.00	N/A
15)	Overhead		$ 17,600.00	$ 17,600.00
16)	Profit (Included in Selling Price)	N/A	N/A	N/A
	Total	$131,890.00	$506,879.00	$738,769.00

Mr. Roy's figures cannot be understood without reminding one's self that his opinion is that the 50 lots were sold as of May 2, 1989. Because of that opinion, Mr. Roy allocated part of the expenses to the lots which had been sold by the Plaintiffs prior to the expropriation. Mr. Roy calculated the total expenses and then divided these expenses by 72 lots. He then calculated the cost per lot and multiplied that figure by 49 (50 lots less lot 14-57) which led him to his total attributable to the Plaintiffs. At page 73 of his report, he explains his rationale:

> Since 23 lots were already sold, a portion of the development costs must be charged to these lots and the remaining costs charged to the unsold lots.
>
> In calculating the development costs on a lot basis, Lot 57 must be excluded and the calculations must be made on a 72 lot basis. Because of the variable selling prices, the selling fees must be excluded from the development costs per lot.

Based on the foregoing, the total development costs (72 lots), excluding selling fees, are in the amount of $496,781.00 ($738,769.00 - $241,988.00) leaving a development cost per lot of $6,900.00 and development costs attributable to the 49 unsold lots of $338,100.00. (Lot 57 excluded). **Rounded to: $338,000.00**.

However, the developers have already paid $76,165.00 for development costs (excluding selling fees) and this disbursement represents an average of $1,058.00 per lot ($76,165.00 divided by 72 lots).

Therefore, the estimated development costs per lot for the 72 lots in the amount of $6,900.00 must be reduced accordingly and the adjusted amount is: $5,842.00 ($6,900.00 - $1,058.00) for total development cost attributable to the 49 unsold lots in the amount of: $286,258.00. **Rounded to: $286,000.00**.

As a result, Mr. Roy concluded that as of May 2, 1989 the net land value was $3,383,980.00. His calculation of that figure appears at page 74 of his report.

NET LAND VALUE - AS OF MAY 2, 1989

Gross Lot Value (50 Unsold Lots)=$3,725,269.00

Surplus of interest over interim
financing costs=$ 131,232.00

$3,856,501.00

Rounded to:$3,800,000.00

Expenses

Selling Fees (50 unsold lots)=$ 186,263.00

Other development costs
(no cost attributable to Lot 57)$ 286,258.00

$ 472,521.00

Rounded to:$ 472,500.00

Net Land Value=$3,383,980.00

Rounded To:$3,400,000.00

As I cannot accept Mr. Roy's opinion, I will follow Mr. Juteau's breakdown of expenses in dealing with this issue. The expenses which appear in Mr. Juteau's breakdown are expenses which had not yet been incurred and/or paid by the Plaintiffs but which, in Mr. Juteau's opinion, would have been incurred and paid by the willing

purchaser/developer. Therefore, in comparing Mr. Juteau's expenses to those of Mr. Roy, it should be kept in mind that Mr. Juteau has not taken into account expenses already paid by the Plaintiffs whereas Mr. Roy shows all of the expenses which, in his view, would have been incurred, whether paid or unpaid. The purpose of the following analysis is to determine whether Mr. Juteau's opinion regarding future expenses is sound.

The debate between the parties relates primarily to the engineering fees, the costs of building the subdivision roads and the access road and, finally, the developer's profit and overhead.

Engineering Fees

With respect to engineering fees, Mr. Roy has allowed $13,600.00. This figure results from 3 invoices sent to the Plaintiffs by the Boileau firm. The first invoice (number 5779) dated October 31, 1988 is for the sum of $4,000.00 and covers professional services rendered in connection with a septic installation study. The second invoice (number 5964) dated January 23, 1989 is for the sum of $3,150.00 and covers professional services rendered to establish a preliminary profile of the access road. The third invoice (number 6759) dated February 22, 1990 is for the sum of $7,450.00 (this invoice was, in due course, reduced by $1,000.00) and covers professional services rendered in connection with the preliminary studies and the preparation of plans and specifications for the subdivision streets. These invoices total $13,600.00 and have been paid by the Plaintiffs.

Mr. Juteau, on the advice given to him by engineer Michel Charron, allowed a sum of $44,000.00 to cover the payment of future engineering fees. According to engineer Charron, $25,000.00 would have been incurred by the developer/willing purchaser in connection with the preparation of plans and specifications and a further $19,000.00 would have been incurred in connection with the supervision of the construction of the subdivision streets and the access road.

With respect to the supervision of the work required to construct the access road and the subdivision streets, the evidence adduced before me is that, in West Hull, the City Inspector supervises the work performed by the contractors at no expense to the developer. Both Pierre Gravelle and Edgar Prud'homme, engineers with the Boileau firm, testified that the practice in West Hull was that the City Inspector supervised the construction of roads. I accept the evidence of these engineers who had considerable experience in dealing with West Hull. Edgar Prud'homme stated that engineers did not attend the construction sites unless problems were encountered.

The evidence of James Nuggent, the President of R.H. Nuggent Equipment Rentals Ltd., was also to the effect that in West Hull the City Inspector supervised the construction of roads. Mr. Nuggent's firm was founded by his father more than forty years ago. The company specializes in the construction of building of all types of roads, excavation and the supplying of gravel and soil for construction work on their own projects as well as those of other contractors Mr. Nuggent has been working for the company for over 20 years. The majority of the road building done by Mr. Nuggent's firm has been in the Hull and Gatineau areas. During his cross-examination by Mr. Noël, Mr. Nuggent stated that he did not remember ever seeing an engineer accompanying the municipality's inspector.

In giving his opinion that supervision fees of $19,000.00 would have been incurred by the developer, Michel Charron explained that his figure was based on his expert assessment of the time which would have been required of the engineer to perform that particular task. Mr. Charron also relied on a document prepared by the Boileau firm entitled "*Cahier des charges générales - applicables à toutes les entreprises et formant partie de tous les contrats*". This document was allegedly prepared by the Boileau firm in connection with the development of the Plaintiffs' subdivision. The document contains the alleged terms and conditions which would form part of every contract entered into by a contractor with the Plaintiffs in connection with the subdivision.

In my view, this document was not prepared specifically for the Plaintiffs' subdivision. Section 1.1 of the "*Cahier des charges générales*" defines the word "propriétaire" as follows:

> Le mot "PROPRIETAIRE" ou les pronoms qui en tiennent lieu, signifie la personne, la société, la municipalité ou autre corps public

> demandant les soumissions, leurs représentants dûment autorisés à agir en leur nom, ainsi que leurs successeurs, conformément aux pouvoirs et aux devoirs de leur charge.

Thus, it is obvious that the document was prepared by the Boileau firm to be used, not specifically by the Plaintiffs, but by all of its clients who might wish to include its terms and conditions as part of their tender documents. In the present case, there is absolutely no evidence that the "*Cahier des charges générales*" was intended to form part of a proposed call for tenders by the Plaintiffs. Mr. Charron relied on a number of provisions contained in the "*Cahier des charges générales*" to conclude that engineers would have to supervise the construction of the streets and the access road. In my view, that proposition cannot be supported on the evidence.

I am therefore of the view that the sum of $19,000.00 would not have been incurred by the developer.

I now turn to the engineering fees which the developer would have incurred in connection with the plans and specifications. As I indicated earlier, Mr. Roy's figure is simply the total of the amounts appearing on the three Boileau invoices. Mr. Juteau's figure of $25,000.00 is based on Mr. Charron's opinion. Mr. Burrows argued that Mr. Charron's view on this issue constituted an academic exercise in that Mr. Charron's intention was to build a road regardless of costs. This led Mr. Burrows to conclude that no one would have hired Mr. Charron to build the streets and the access road. To buttress his argument, Mr. Burrows pointed out that at no time whatsoever did Mr. Charron consult or speak to representatives of West Hull to find out how the City dealt with matters such as the supervision of the construction of streets in its territory. Mr. Burrows argued that Mr. Charron did not act the way a responsible engineer would act upon being retained by a client to prepare plans and specifications for the purpose of building streets in a subdivision. In Mr. Burrows' submission, such an engineer would, without doubt, take into account the costs involved in building the projected streets. Mr. Burrows strongly submitted that Mr. Charron had not given any consideration to the fact that his "employer" would be concerned with costs.

Thus, on the one hand, I have invoices totalling $13,600.00 from the Boileau firm, which both Mr. Gravelle and Mr. Prud'homme consider fair and reasonable in the circumstances. On the other hand, Mr. Charron is of the view that $13,600.00 is inadequate. In fact, in his opinion of August 7, 1994 to Mr. Juteau, Mr. Charron's final figure for engineering fees is $62,500.00. In addition to the $44,000.00 already referred to, Mr. Charron was of the view that sums of $10,000.00 and $8,500.00 would have been incurred by the developer in connection with a "plan d'ensemble pour les installations septiques" and in connection with the "concept" and "relevés topographiques" respectively.

In his summary of the development costs, Mr. Juteau only retained the sums of $25,000.00 and $19,000.00. It is interesting to note that Mr. Charron was prepared to allow a sum of $10,000.00 for the septic installation plan, whereas Mr. Gravelle invoiced the Plaintiffs for $4,000.00 and Mr. Gravelle actually did prepare the plan.

Mr. Charron's evidence on this issue and in regard to road construction costs was that many of the witnesses who testified on behalf of the Plaintiffs were not being truthful. Mr. Charron could not accept that the Boileau firm and the contractors retained by the Plaintiffs to give estimates could do the job at the prices quoted. Thus, in his view, they were not being candid before the Court. I am not prepared, on the evidence before me, to reach such a conclusion.

I accept the $4,000.00 fee for the septic installation plan. The work was done by Mr. Gravelle and, as agreed to between the Boileau firm and the Plaintiffs, an amount of $4,000.00 was invoiced and paid.

With respect to the other invoices for the sums of $3,150.00 and $7,450.00, which relate to the preliminary profiles of the access road and the preliminary study and preparation of plans and specifications for the subdivision streets, I am not entirely convinced that no additional work would have had to be performed by engineers. Consequently, I will increase these fees by 30% ($3,150.00 + $7,450.00 + 30% = $13,780.00). In addition, as Edgar Prud'homme explained, if problems occurred on the construction site, engineers would have to be called. Consequently, I will allow a further sum of $3,000.00 for engineering fees. Thus, the proper fee for engineering services is, in my view, the sum of $20,780.00 ($4,000.00 + $13,780.00 + $3,000.00). Since the Plaintiffs have already paid a sum of $13,600.00 to the Boileau firm, this leaves an outstanding balance of $7,180.00. That amount shall be deducted from the gross sell-out value.

Wood Clearing

Mr. Juteau was advised by Mr. Charron that he should allow a sum of $33,600.00 for clearing the access road and the subdivision streets. Taking into consideration the fact that the access road was cleared in September 1988 and that the Plaintiffs had already paid for that work, Mr. Juteau estimated the costs for wood clearing at $29,050.00, i.e. 8.3 acres at $3,500.00 per acre.

Mr. Roy allowed a sum of $10,600.00 with respect to the clearing of the subdivision streets. This figure is based on an estimate dated October 1, 1988, given to the Plaintiffs by Mr. Jean-Pierre Larocque. Mr. Larocque, who has been a lumberjack for over 25 years, informed the Plaintiffs that he was "ready and willing" to clear the subdivision streets for a lump sum of $1,300.00 per acre. Thus, Mr. Larocque's estimate for clearing 8.3 acres of land is $10,790.00. At the trial, Mr. Larocque testified that his proposal to the Plaintiffs would have allowed him to keep the wood cleared by his employees.

Mr. Charron testified that he had in the past engaged the services of Mr. Larocque. Specifically, Mr. Charron stated that he had retained the services of

Mr. Larocque in connection with the Chanteclerc subdivision where 4,600 linear metres had been cleared. According to Mr. Charron, Mr. Larocque had charged him the sum of $3,500.00 per acre. Why Mr. Larocque charged $3,500.00 per acre for the work done at the Chanteclerc subdivision and quoted $1,300.00 for the work to be done at La Grande Corniche du Parc I cannot say, as the matter was not put to him when he was cross-examined.

In the present instance, I see no reason not to accept Mr. Larocque's estimate of $1,300.00 per acre as the basis for the costs which would have been incurred in order to clear the subdivision streets. Consequently, the amount under the heading "wood clearing" shall be $10,790.00.

Survey

Under this heading, Mr. Juteau has allowed a sum of $25,000.00. Mr. Juteau explained that he had been informed by surveyor Hugues St-Pierre of the firm of Alary, St-Pierre, Durocher & Germain that he would have charged a sum of approximately $25,000.00 to complete the survey work of the subdivision in November 1988.

Mr. St-Pierre explained that he had been retained by the Plaintiffs to survey the subdivision in order to establish its parameters and to prepare the subdivision plan. As appears from an invoice dated November 14, 1988 sent to the Plaintiffs by Mr. St-Pierre's firm, the fee for the work to be carried out was $36,000.00 or $500.00 per lot ($500.00 x 72). Mr. St-Pierre explained that this figure included the placement of four pins per lot.

The sum of $25,000.00 quoted by Mr. St-Pierre represents, according to Mr. Juteau, the cost of additional work which Mr. St-Pierre would have had to perform in order to complete the survey of the subdivision. In other words, Mr. Juteau asserts that $25,000.00 more would have to be spent by the developer/willing purchaser.

I should mention that the Plaintiffs paid Mr. St-Pierre $32,000.00 in November 1988, Mr. St-Pierre's firm having agreed to give the Plaintiffs a credit of $4,000.00. The credit bears the following note: "Credit on staking unfinished". It was not disputed that Mr. St-Pierre did not place four pins per lot. There is a dispute, however, as to why the work was not completed. Mr. St-Pierre's evidence is that he was instructed by Mr. McInnis not to complete the job. This was vigorously denied by Mr. McInnis. In cross-examination, Mr. St-Pierre explained that, out of the $25,000.00 quoted by him to Mr. Juteau, a sum of $5,000.00 would have been incurred in respect of the access road. With respect to the balance of $20,000.00, Mr. St-Pierre explained that the figure was predicated on the assumption that he would have had to return to complete his work in November 1988, 1 or 2 months after he had been instructed to stop. Mr. St-Pierre made it clear that if he had been allowed to complete the work which he began in September 1988, and for which he had quoted a sum of $36,000.00 to the Plaintiffs, there would not have been any additional charge.

For reasons which are not entirely clear, the work undertaken by Mr. St-Pierre's firm was not completed. As I indicated earlier, Mr. St-Pierre's position was that he was asked by Carl McInnis to stop working. However, during his testimony Mr. St-Pierre stated that he "must have" been told to stop instead of being unequivocal on this very important point. On the other hand, Mr. McInnis flatly denied ever having instructed Mr. St-Pierre to stop. I find it extremely difficult to believe that Mr. McInnis, having agreed to pay Mr. St-Pierre $36,000.00, would have asked him to stop before the job was completed. Mr. St-Pierre admitted in cross-examination that to place four pins on each lot would require substantial work on the part of his crew. A minimum of 150 pins would have been required to complete the work in respect of the 73 lots and when he was allegedly asked to stop, Mr. St-Pierre's crew had placed only 51 pins, approximately four to six days of work. Mr. St-Pierre further testified that when he was asked by the N.C.C. to return to the site in the spring of 1994, he was able to locate all but 5 or 6 of the 51 pins which had been placed in the fall of 1988. Mr. St-Pierre remembered that some of his employees had told him that when they were on the subdivision in the fall of 1988, they had encountered people who were not happy with the fact that they were there to perform the survey work.

In the present circumstances it seems to me that the survey work ought to have been completed by Mr. St-Pierre. He charged the Plaintiffs $36,000.00 and did not perform the work for which he was paid. I am of the view that it would not be proper to debit an additional sum of $25,000.00 to the account of the developer/willing purchaser. However, Mr. St-Pierre explained that a sum of $5,000.00 would have been incurred in order for him to do the survey work in respect of the access road. Thus, since the Plaintiffs have paid a sum of $32,000.00, I am of the view that an additional expense of $9,000.00 would have been incurred by the willing purchaser. ($36,000.00 + $5,000.00 - $32,000.00).

Legal Fees

Mr. Roy did not allow for any future payment in respect of legal fees. Because he was of the view that all of the subdivision lots would have been sold by May 2, 1989, the only legal fees that he considered were those incurred by the Plaintiffs in purchasing the subdivision in July 1988. In regard thereto, the Plaintiffs paid notary fees of $4,625.00. That, in the opinion of Mr. Roy, is the extent of the legal fees payable by the Plaintiffs since, in the Province of Quebec, legal fees in respect of the purchase of lots are the responsibility of individual purchasers. However, as I have already made clear, I do not accept Mr. Roy's premise that, as of May 2, 1989, none of the 50 lots would have been available for sale.

As the unsold lots would have been purchased by one willing purchaser, a developer, legal costs would necessarily have been incurred by the purchaser. Mr. Juteau, based on an opinion received from Me Philippe DesRosiers, a notary of the City of Hull, has concluded that the willing purchaser would have incurred legal costs of $14,042.00, which sum is comprised of the following items:

-Purchase of subdivision:	$ 6,442.00
- Discharge of first mortgage upon sale of 19 lots (19 lots @ $200.00 per lot)	$ 3,800.00
-Transfer of roads to Municipality	$ 800.00
-Establishing right-of-way and reviewing legal documents	$ 3,000.00

The sum of $6,442.00 represents the legal fees which the willing purchaser would incur in purchasing the subdivision from the Plaintiffs. This figure is based on

Mr. Juteau's opinion that the value of the subdivision, as of May 2, 1989, is $1,500,524.00. Since the effect of my decision will be to increase the value of the subdivision, the legal fees payable by the willing purchaser to purchase the subdivision will be higher than $6,442.00. As will be seen from my order, the exact value of the lots, and therefore the exact amount of the outstanding legal fees, will be left for counsel to calculate. With respect to the other amounts to be incurred by the willing purchaser, i.e. the sums of $3,800.00, $800.00 and $3,000.00, I accept these figures as representing the legal costs to be incurred.

Marketing Costs

Again, because I do not accept Mr. Roy's premise that none of the lots would have been available for sale on May 2, 1989, I subscribe to Mr. Juteau's opinion that a marketing cost of 5% of the gross sell-out value is reasonable. The figure which appears in Mr. Juteau's summary is $123,775.00[12] and is based on a gross sell-out value of $2,766,150.00.

Since the effect of my decision will be to increase the gross sell-out value of the subdivision, the marketing costs to be incurred by the willing purchaser will exceed the amount allowed by Mr. Juteau.

Real Estate Taxes

Mr. Juteau has allowed a sum of $2,000.00 in regard to real estate taxes and I accept his figure.

---

[12] This figure appears to be an error. The revised gross sell-out value (see D-31) is $2,766,150.00. Thus 5% of this figure is, according to my calculations, $138,307.50.

Land Transfer Tax

I agree with Mr. Juteau that the land transfer tax must be calculated as suggested by Me DesRosiers in his letter of August 12, 1994. Specifically, Me DesRosiers advised Mr. Juteau that the land transfer tax was 3/10 of 1% up to $50,000.00 and 6/10 of 1% on the excess. On the basis of his conclusion that the value of the 50 unsold lots was $1,500,524.00, Mr. Juteau's calculations led him to conclude that the amount payable in respect of the Land Transfer tax was $8,850.00. Again, as my decision will have the effect of increasing the value of the 50 lots, the amount payable under this heading will also be increased.

Road Construction Permit

I accept Mr. Juteau's evidence that a sum of $300.00 would have been incurred by the developer in order to obtain from West Hull a road construction permit.

Road Construction Costs

The major disagreement between the parties is in respect of the costs of building the access road and the subdivision streets. As appears from Mr. Roy's summary of expenses, he has allowed a sum of $263,222.00 which is broken down as follows:

Blasting: $ 37,500.00
Access and Main Road:$200,562.00
Infrastructure: $ 25,160.00

Mr. Juteau's figures are much higher than those which appear in Mr. Roy's report. Mr. Juteau has allowed a sum of $548,826.00 for the construction of the access road and the subdivision streets and, in addition, he has allowed a further sum of $54,883.00 for construction contingencies at 10%, for a total allowance of $603,709.00. Mr. Juteau's figures are based on the opinion, dated August 7, 1994, given to him by engineer Michel Charron. That opinion is as follows:

Opinion sur le coût probable de construction
basé sur des renseignements fournis en avril 1989

Item	Désignation des ouvrages	Quantité	Unité	$Unitaire	Produit
1,0	**Rues de la subdivision et chemin d'accès**				
1,1	Déboisement	9,60	acres	3 500,00 $	33 600,00 $
1,2	Excavation, terrassement préparation et mise en forme	23250,00	m.cu.	2,80 $	65 100,00 $
1,3	Déblai de première classe	8000,00	m.cu.	25,00 $	200 000,00 $
1,4	Coussin de sable classe A - 150 mm	26000,00	m.car.	2,25 $	58 500,00 $
1,5	Pierre concassée 0-63, épaisseur 25mm	26000,00	m.car.	4,25 $	110 500,00 $
1,6	Pierre concassée 19-0, épaisseur 150mm	23250,00	m.car.	3,40 $	79 050,00 $
1,7	Fossés	4600,00	m.	5,00 $	23 000,00 $
1,8	Ponceau 450 dia., épaisseur 2,0 mm, x 13 mm. (jauge 14)	100,00	m.	110,00 $	11 000,00 $
1,9	Ponceau 600 dia., épaisseur 2,0 mm, x 13 mm. (jauge 14)	15,24	m.	110,00 $	1 676,40 $
2,0	Alimentation éléctrique [*sic*]	1,0	globale	65 000,00 $	65 000,00 $
Total					**647 426,40 $**

Items 1.1 and 2.0 of Mr. Charron's above opinion do not form part of Mr. Juteau's road construction costs. Thus, the sums of $33,600.00 and $65,000.00 ($98,600.00) must be deducted from the sum of $647,426.40 leaving a sum of $548,826.40.

I will deal first of all with the evidence adduced by the Plaintiffs. Mr. Roy's figures are based on a number of estimates given to the Plaintiffs. Firstly, the sum of $25,160.00 is based on an estimate dated April 19, 1990, given to the Plaintiffs by Lavell Construction re: "préparation de l'infrastructure de 34,000 m.car. - déboisement exclus". Mr. Lavell's quote is in regard to the subdivision streets only. Secondly, the sum of $200,562.00 is based on two estimates, both dated February 13, 1990 given to the Plaintiffs by R.H. Nuggent Equipment Rentals Ltd.. The first estimate, in the sum of $34,586.60, is in respect of the construction of the access road from Mine Road to the entrance of the subdivision. The second estimate, in the sum of $165,975.50, is in respect of the construction of the subdivision streets. The last quote, dated April 10, 1990, for the sum of $37,500.00 is a quote from Castonguay Frères Ltée to the Plaintiffs. This quote covers the following work:

> Le prix pour les travaux de dynamitage est de $12.50 du mètre cube, pour 3 000 m^3 dans environ 80 m linéaire [*sic*] et environ 10 m de large. Castonguay et Frères s'engage à fournir l'équipement nécessaire pour ce projet.

The evidence of the contractors who appeared before me in support of the Plaintiffs can be briefly reviewed. Mr. Edward Lavell has been a road builder for approximately 20 years in both Quebec and Ontario and has built approximately 100 roads for different subdivisions. Mr. Lavell constructs the base of the road but he does not complete the road. When asked by the Plaintiffs to give a quote, he went to the Plaintiffs' subdivision in order to inspect it. Mr. Lavell testified that he "did not notice anything out of the ordinary" with this subdivision. When he walked the subdivision in April 1990, accompanied by Mr. McInnis, Mr. Lavell had in hand an engineer's profile, prepared by Edgar Prud'homme. Mr. Lavell explained that he normally worked on an hourly basis at the rate of $80.00 per hour but that, in this case, he had been asked by Mr. McInnis to quote a fixed price. After visiting the subdivision, Mr. Lavell made his calculations and, on April 19, 1990, he sent the Plaintiffs his quote of $25,160.00 (34 000 square meters at $0.74 per square meter). Mr. Lavell explained that in West Hull the width of the platform was 24 feet but that he would have to clear a path 40 ft. wide to allow for ditches. It was estimated that the work would take approximately 3 to 4 weeks, working 10 hours a day, 5 days a week. Mr. Lavell testified that when he visited the subdivision with Mr. McInnis and when he gave his quote to the Plaintiffs, he fully expected to build the platform for the subdivision streets as he was not aware that the Plaintiffs' subdivision had been expropriated by the Defendant.

Mr. Lavell also explained that it was understood that he would be working with whatever material was on the subdivision. The quote concerned only the building of the platform on the subdivision streets and had nothing to do with the access road. Mr. Lavell informed the Court that he had worked on Golden Maples I where there was more rock than at La Grande Corniche du Parc.

In cross-examination, Mr. Lavell stated that he had previously worked on five other subdivisions for Mr. McInnis. He again stated that he was not aware, when he gave the quote, that the Plaintiffs' subdivision had been expropriated. He added, however, that he had been informed of the expropriation by Mr. McInnis after he had given his quote. Before April 1990, Mr. Lavell had never seen the Plaintiffs' subdivision. Mr. Lavell explained that his quote did not include the removal of material from the site nor did it include the removal of shrubs. He further indicated that when giving the quote he was not aware of the extent of filling that would have to be done. He explained that if a great amount of filling had to be done, his price would obviously have been higher. When he gave his quote, Mr. Lavell was aware that the average slope of the streets, as provided by the engineers, was 12%. He also stated that, based on his experience, the "steepness of streets in Hull West in 1988-1989 was somewhere between 7 to 12%". He also explained that he was not aware that some of the streets had slopes of up to 15% but he added that a slope of 15% was "in my favour". He reiterated his earlier comment that there was less rock at La Grande Corniche du Parc than at Golden Maples I.

In redirect, Mr. Lavell stated that the work that he had done at other subdivisions for Mr. McInnis was no doubt more difficult than the work which he would have had to do at La Grande Corniche du Parc.

Mr. Nuggent of R.H. Nuggent Equipment Rentals Ltd., testified that he was the "estimator" for contracts sought by the company. Quantities for a job are determined, according to Mr. Nuggent, on the basis of engineering plans and profiles. He informed the Court that in West Hull, between 1980 and 1988, his company had been involved in the construction of about 50 roads. Among the company's clients during that period were the Municipality of West Hull, the N.C.C., the Ministry of Transport and private clients who were developing subdivisions. When asked about the slopes of roads, Mr. Nuggent answered that he built these slopes according to the plans and specifications prepared by the engineers. He stated that he did not remember the exact requirements of the Municipality of West Hull. He testified that before starting construction, he always obtained the profiles prepared by the engineers.

Mr. Nuggent further explained that he had built a number of roads for Mr. McInnis in Golden Maples I and other subdivisions. Before quoting on these jobs for Mr. McInnis, Mr. Nuggent's practice was to obtain the plans and specifications from Mr. McInnis. Mr. Nuggent did not remember ever being supervised by an engineer on jobs for Mr. McInnis.

With respect to La Grande Corniche du Parc, Mr. Nuggent was asked to give a quote for the construction of the road bed for the streets and the access road and for the removal of material on the access road. Before quoting, Mr. Nuggent walked the property with Mr. McInnis. The access road had already been cleared when he saw the property. He indicated that he had not spent much time on the site because he would rely primarily on the plans and specifications prepared by the engineers. Mr. Nuggent was shown the profile of the subdivision streets prepared by engineer Edgar Prud'homme (P-19) and he indicated that the profile was the type of document he would have used to prepare his estimate. He would also examine closely a document entitled "Bordereau des quantités" (D-5, Tab 28, see p. 3 of 3) prepared by the Boileau firm.

Mr. Nuggent then explained in detail how he would go about building roads on a subdivision like the present one. In so doing, Mr. Nuggent explained items 1 to 10 which appear on both of his estimates of February 13, 1990. Mr. Nuggent explained, for example, that no sand base was required on this subdivision because sand was only required when there was clay or an unstable base. Mr. Nuggent was asked a question regarding sand as a base because Mr. Charron, in his opinion, advised Mr. Juteau and so testified before me, that a "coussin de sable classe A-150 mm." would be required. (See item 1.4 of Mr. Charron's opinion). For item 1.4, Mr. Charron was of the view that an expense of $58,500.00 would be incurred.

After providing these explanations, Mr. Nuggent stated categorically that he had no qualms about his quotes of $165,975.50 and $34,586.60. As far as Mr. Nuggent was concerned, there was nothing unusual about the work which he would have had to perform on the McInnis subdivision. He indicated that he had recently built streets for the Juniper subdivision situated off Scott Road and that these streets were very similar to those that he would have built for the McInnis subdivision in that, *inter alia*, the slopes were of the same steepness. Mr. Nuggent also saw no "real" difference between the streets in Golden Maples I and those in the present subdivision. He stated that all of his streets had been accepted by the different Municipalities in which they had been built, including Juniper and Golden Maples which were built in West Hull. In cross-examination, Mr. Nuggent conceded that when he gave his quote for the access road, he knew that he would not be doing the work. Furthermore, he stated that if the client for La Grande Corniche du Parc had not been Mr. McInnis, his quote would probably have been 10% higher than what it was. Mr. Nuggent had no doubt that engineer Edgar Prud'homme's profile was sufficient for him to build the streets. He also stated that stonedust was very common for roads in West Hull since it was less expensive than crushed gravel, being about $1.50 to $2.00 per metric ton. He could not recall ever seeing an engineer accompanying West Hull's inspector, Mr. Gervais, during one of his inspections.

The next witness was Mr. André Prud'homme who had been with Castonguay Frères Ltée for 15 years. His employer's business is primarily "forage et dynamitage" for the account of contractors and/or developers. Mr. Prud'homme worked for Mr. McInnis at the Golden Maples I subdivision. In April 1990, he was provided with information regarding La Grande Corniche du Parc and was requested to provide a quote. I have already set out the details of this quote.

Mr. Prud'homme made it clear that the quote given to Mr. McInnis was a quote which he would have given to anyone in West Hull who would have made a similar request. Thus, he had not made any concessions because the work to be done was for the account of Mr. McInnis.

In cross-examination, Mr. Prud'homme explained that he had not been to the subdivision prior to giving his quote. Rather he was given a plan and "numbers" by Mr. McInnis. He did not discuss the work to be done with Mr. Gravelle nor with Edgar Prud'homme. He conceded that "normally" he would have visited the site. He simply gave his quote based on the quantities with which he was provided.

The following witness who testified for the Plaintiffs was engineer Edgar Prud'homme. Mr. Prud'homme joined the Boileau firm in 1972 and has been active since then in the design and construction of roads. He has been in charge of Boileau's civil division since 1976. Before La Grande Corniche du Parc, Mr. Prud'homme was involved in subdivisions similar to the present one, namely Golden Maples I and II and Chelsea Gardens, all for the account of Carl McInnis. He was contacted in 1988 by Carl McInnis and asked to go to the subdivision to examine the feasibility of his project. After attending the site with Mr. McInnis, Mr. Prud'homme formed the opinion that the project was feasible and, as a result, he requested Pierre Gravelle to start working on the septic installation plan. Mr. Prud'homme explained that the quantities of material which appear in Mr. Nuggent's estimate regarding the subdivision streets were calculated by him. Mr. Prud'homme then explained that he had prepared a profile of the subdivision streets in February of 1990 but that he knew by that time that the streets would never be built. Mr. Prud'homme described the subdivision as a "standard subdivision" in a mountainous area. He indicated that an engineer had to adjust his design to the reality before him, to take account of things such as mountains and to work with the features of the land and not against them.

Mr. Prud'homme explained that Mr. Gravelle had prepared the profile for the access road and that he had supervised Mr. Gravelle's work. Mr. Prud'homme stated that slopes of 10% or less were "ideal" but that was not always possible. He explained that, as could be seen from his profile, there were a number of slopes above 10% by reason of the hills in the subdivision. Mr. Prud'homme explained that the work which eventually led to his profile had begun in the fall of 1989. However, the data used by Mr. Prud'homme was collected on the site in the fall of 1988. During his testimony, Mr. Prud'homme testified that Mr. Nuggent was well known to him, having worked with him on a number of occasions.

The other engineer called by the Plaintiffs was Mr. Pierre Gravelle who at the relevant time was also an engineer with the Boileau firm. His practice was mostly restricted to rural roads. In the fall of 1988, he was asked by Mr. Prud'homme to prepare a profile for the construction of the access road. Mr. Gravelle explained that he was able to prepare his profile without the necessity of survey work being done since the wood had already been cleared when he began. He explained that an engineer's profile was required in order to ascertain the quantities of materials required to construct the road. Mr. Gravelle stated that he was satisfied that he had enough information to prepare his profile. It was not, in his opinion, a complicated situation. He stated that his profile would be sent to his client but not to the Municipality of West Hull.

During his testimony, he stated that the width of the access road, as required by the Municipal Standards, was 24 feet. He also explained that there was no necessity of providing a sand base because there was no clay in the soil. The materials in his design were identical to those of the designs which he had done for other projects which had been accepted by West Hull. He examined Mr. Nuggent's quote in regard to the access road and stated that the quote appeared reasonable. He also stated that he had full confidence in Mr. Nuggent who was an "excellent man". Mr. Gravelle testified that the contractors would make adjustments in the field as they became necessary. He also explained that the materials and quantities which appear in Mr. Nuggent's quote regarding the access road were the materials and the quantities which he had prescribed.

Mr. Alcide Cloutier, the secretary-treasurer of Chelsea, was called by the Plaintiffs to give evidence. Mr. Cloutier identified an excerpt of the Minutes of a meeting of the Council of West Hull held on April 5, 1983. During that meeting, the Council adopted as the Municipality's road standards a document entitled "La Corporation Municipale du Canton de Hull, Partie Ouest - Municipal Road Standards, March 1983" which standards were "to be used by both the Roads Committee and road foreman in the provision of recommendations to Council in accordance with By-Law 290".

Section 1.2 of By-Law 290 reads, in part, as follows:

> The Road Committee shall be activated by the Committee Chairman as required to study and determine the suitability and, if necessary, the degree of repairs to be carried out on existing private roads to be taken over by the Municipality. Furthermore, the Committee shall review proposals submitted by owners for the construction of new roads within the Municipality.
>
> The Committee shall evaluate existing and new private roads in accordance with the following considerations and report recommendations to Council.
>
> -Municipal Road Standards
> -public safety and forseeable [*sic*] traffic speed and volume
> -present or future expense to taxpayers of the Municipality.

Mr. Cloutier explained to the Court that the aforesaid road standards were the road standards in force in West Hull in 1988. He further explained that his letter of July 4, 1995, to the effect that a document entitled "guide de construction routière", prepared by the Boileau firm and dated June 1981, was in force in 1988 was in error. He explained that he had received a call requesting a copy of the "applicable legislation" for West Hull in 1988 and that he had asked someone in his office to provide such a copy. However, he made it clear that the contents of that letter was incorrect since the relevant standards were those approved by the Council at its April 5, 1983 meeting. The extract from the Minutes of the Council and the relevant standards were filed in evidence as exhibits P-44 and P-45 respectively. I now turn to Mr. Charron's evidence.

As I indicated earlier, Mr. Juteau's figures come from Mr. Charron's opinion. Mr. Charron, during his testimony, made it clear that he believed that Edgar Prud'homme, Pierre Gravelle, Edward Lavell, James Nuggent and André Prud'homme had not told the truth. This opinion stemmed from Mr. Charron's belief that the engineers and the contractors could not have done the work in respect of which they provided estimates at the prices which appear in those estimates.

Mr. Charron explained that his road construction costs were based on a road of 28 feet in width which would include the finished surface and shoulders. Both Mr. Gravelle and Edgar Prud'homme testified that Mr. Charron was incorrect in using a width of 28 feet as the West Hull municipal road standards prescribed a width of 24 feet. I agree. Section 1.2 of the West Hull municipal road standards provides as follows:

> 1.2Width of Pavement
>
> The width of pavement (finished surface and shoulders) for a rural local road shall be 7.32 metres (24 feet) minimum as shown on plate No. 1.

During cross-examination, Mr. Charron conceded that if I found that the width of the road was 24 feet in lieu of 28 feet, then his quantities/figures were too high. He added that this would not affect his figures for item 1.7, i.e. ditches, but that it would mean a lesser cost for items 1.8 and 1.9, i.e. the culverts. Mr. Charron added that this "error" would not affect his costs in regard to the amount of blasting required to build the access road and the streets.

Mr. Charron criticized Edgar Prud'homme's profile of the subdivision streets which he first had occasion to see in June 1995. In Mr. Charron's opinion, Mr. Prud'homme's profile was not "sufficient" to allow the client to ascertain the extent of the costs involved in building the streets as the client would not know what quantities of material were required. In short, Mr. Charron was of the view that on the basis of Mr. Prud'homme's profile, one could not make proper calculations in estimating the cost of construction. When asked why Messrs. Castonguay, Nuggent and Lavell had prepared estimates and testified that they could, in fact, do their work on the basis of Mr. Prud'homme's profile, Mr. Charron answered that they were not being candid.

When it was put to Mr. Charron in cross-examination that Edgar Prud'homme's evidence was that his design of the streets was identical to the design of streets for some of Mr. McInnis' other projects, Mr. Charron replied that that meant that the other designs were also "mal faits".

Mr. Charron's next line of attack concerned the materials and the prices which appear in the estimates of Messrs. Nuggent and Lavell.

Specifically, Mr. Charron criticized the prices quoted by both Mr. Lavell and Mr. Nuggent under the heading "préparation de l'infrastructure". I again point out that Mr. Lavell's quote is in regard only to the subdivision streets. Mr. Nuggent's quote regarding the subdivision streets does not include the "préparation de l'infrastructure". Mr. Nuggent's quote refers specifically to the quote given by Mr. Lavell in regard thereto. With respect to the access road, Mr. Nuggent's quote does not include the "préparation d'infrastructure".

Mr. Charron criticized Mr. Lavell's quote of $0.74 per square meter and that of Mr. Nuggent of $1.00 per square meter. Mr. Charron's figure is $2.80 per square meter. The combined quotes of Nuggent and Lavell amount to a sum of $30,360.00. The figure which appears in Mr. Charron's opinion is $65,100.00. Mr. Charron stated that Mr. Nuggent's quote of $5,200.00 was "very very cheap", even "insufficient". Mr. Charron then criticized the quote given by André Prud'homme of Castonguay Frères Ltée. with respect to "travaux de dynamitage". Mr. Prud'homme quoted a figure of $12.50 per cubic meter for a total quote of $37,500.00 to do the blasting. (3 000 square meters x $12.50 = $37,500.00).

In Mr. Charron's opinion a sum of $25.00 per cubic meter was a more realistic figure and, in his view, the proper figure was not 3 000 cubic meters but rather 8 000 cubic meters. Thus, Mr. Charron's figure is $200,000.00.

Mr. Charron then pointed out that the Boileau firm's "bordereau des quantités" did not provide for what he called a "coussin de sable classe A". Under this heading, Mr. Charron's opinion was that $58,500.00 would have to be spent to cover a surface of 26 000 square meters (26 000 x $2.25). Mr. Charron pointed out that item number 9 of Mr. Nuggent's quote regarding the subdivision streets, i.e. "emprunt classe A", was not what the relevant legislation required. He added, however, that the figures which appeared at item 5 of Mr. Nuggent's quote regarding the access road, i.e. "emprunt classe A", were comparable to his figures. At item 5 of his quote regarding the access road, Mr. Nuggent gave a price of $3,750.00 for 500 tons of "emprunt classe A" at $7.50 per metric ton.

Mr. Charron then moved to his item number 1.5 where he prescribed the use of crushed stone at a cost of $110,500.00. He pointed out that Boileau's "bordereau des quantités", which formed the basis of Mr. Nuggent's quotes, substituted pit run gravel for crushed stone. Mr. Charron stated that the relevant legislation did not allow for the use of pit run gravel and that, furthermore, crushed stone was far superior.

Mr. Charron arrived at a figure of $79,050.00 with respect to his item 1.6 on the basis of $3.40 a square meter ($3.40 x 23 250). Mr. Charron pointed out that Mr. Nuggent's estimates did not provide for the use of crushed stone, but rather for the use of less expensive crushed gravel.

The next item dealt with by Mr. Charron is the ditches along the streets. Mr. Charron's calculations are based on a figure of 4 600 meters at $5.00 a meter for a sum of $23,000.00. Mr. Nuggent (streets and access road) shows figures of 4 360 linear meters at $3.65 a meter for a total sum of $15,914.00.

Finally, Mr. Charron turned his attention to items 1.8 and 1.9 of his opinion which deal with culverts. Mr. Charron pointed out that the applicable legislation required culverts of a minimum gauge of 14 and a diameter of not less than 450 mm (18 inches). Mr. Charron's figures for culverts are $11,000.00 and $1,676.40 for a total of $12,676.40. The figures which appear under this heading in Mr. Nuggent's quotes are $1,066.00, $3,031.20 and $2,357.60 for a total sum of $6,454.80.

Mr. Charron's criticism of Mr. Nuggent, and hence of the Boileau firm, was that the culverts which Mr. Nuggent intended to use did not meet municipal standards. Firstly, the culverts proposed by Mr. Nuggent were not made of corrugated galvanized steel pipes as required by the municipal standards and secondly, their gauge was not of a minimum of 14.

Mr. Charron's total figure for items 1.2 through 1.9 is $548,826.40. In addition, Mr. Charron advised Mr. Juteau that he should make an allowance of 10% for contingencies. Thus, Mr. Charron's total figure for the building of the streets and the access road is $603,709.04. On the other hand, the total of the estimates given by Mr. Nuggent, Mr. Prud'homme and Mr. Lavell amounts to $263,222.10. Thus, the difference between the Defendant's estimate of the costs required to build the streets and the access road and that of the Plaintiffs is $340,486.94.

My review of the municipal standards leads me to conclude that Mr. Charron's criticism of the culverts prescribed by the Boileau firm is well founded. Section 3.3 of the municipal standards clearly provides that culverts shall be of corrugated galvanized steel pipes with a minimum gauge of 14 and a diameter of not less than 450 mm (18 inches). The culverts which appear in Mr. Nuggent's estimates are not in accordance with the requirements of section 3.3.

I am also in agreement with Mr. Charron that the use of pit run gravel is not in accordance with the municipal standards. Section 2.3 of the municipal standards prescribes the use, as a base and sub-base, of crushed gravel or rock, but not pit run gravel. This material is only allowed as a sub-base in the case of existing private rural local roads which are dealt with in Part II of the Municipal Standards (see section 2.0 thereof).

With respect to the base of the road, the municipal standards provide for the use of crushed gravel or stone. Mr. Nuggent's estimates, based on the "bordereau des quantités" prepared by the Boileau firm, provide for the use of crushed gravel as a base for the access road and the subdivision streets.

One of Mr. Charron's major criticisms of Mr. Edgar Prud'homme's profile is that the streets are too steep. Mr. Charron explained that the municipal standards require that slopes not exceed 10%, except in special cases when the municipality would allow slopes of up to 15%. Section 1.1 of Part I of the Municipal Road Standards provides as follows:

> The maximum road gradiance shall be 10%; however, in special cases, the municipality may authorize slopes up to a maximum of 15%. Within a 30.5 meters (100 feet) radius of an intersection, the radiant shall not exceed 10%.

Mr. Charron's position was simply that the subdivision streets were not "special cases" and therefore the slopes would have to be brought down to 10% or less.

Messrs. Mangione, Prud'homme and Gravelle did not agree, once again, with Mr. Charron's views. These engineers opined that it was quite normal to have slopes up to 15% in hilly municipalities such as West Hull. Edgar Prud'homme testified that West Hull routinely accepted slopes of up to 15%. Mr. Prud'homme explained that if engineers could not adjust their profiles to "reality", it would be extremely difficult to build streets. Mr. Mangione testified that slopes up to 15% were common and that they "worked quite nicely". The only representative of the Municipality of West Hull who testified was Mr. Alcide Cloutier, its secretary-treasurer who, in 1988, was the Director of Technical Services. Mr. Cloutier stated that exceptions to the rule were necessary since Chelsea ("ex-West Hull") was "very hilly". No other representative of the Municipality was called as a witness.

Thus, all I have before me is the evidence of three highly experienced engineers, two of whom had considerable experience in building streets in the Municipality of West Hull, that the Municipality would have allowed slopes above 10%. I accept this evidence and find that West Hull would have allowed the Plaintiffs or the willing purchaser to build streets with slopes of up to 15%. Mr. Charron's position seemed to be that "special cases" meant situations where engineers could not reduce the slope to 10% or less. If that were true, there would be no necessity of providing for "special cases" in Section 1.1 of the Municipal Standards since I cannot possibly conceive of instances where engineers would be unable to reduce a slope to 10% or less.

It seems to me that it would not have been difficult for Mr. Charron to contact West Hull's Road Committee and/or road inspector in order to find out what the Municipality's practice was in 1988-1989. Also, the Defendant could have called someone from the Municipality to testify in regard to the Municipality's practice. In these circumstances, I can only conclude that the evidence which would have been given by a representative of the Municipality would not have supported the position taken by Mr. Charron. It should also be borne in mind that there can be no doubt that the Municipality would and did show great interest in the development and the sale of the subdivision lots. Consequently, it cannot be doubted that the Municipality would have, in all likelihood, done what it could to accommodate the Plaintiffs and their engineers. It is also significant that Mr. McInnis had built seven other subdivisions in West Hull with slopes similar to those of the present subdivision.

Pierre Gravelle testified that he had recently designed a road in West Hull where there was a slope of 14.5% and that the Municipality had accepted the road. There was also evidence that the slope into the entrance of Golden Maples I was 13.5%.

It is also significant that no contractors were called by the Defendant to testify with respect to the quantities suggested by Mr. Charron and with respect to the figures which, in his view, were appropriate. Mr. Charron's figures came from "his office". In other words, these were the figures which Mr. Charron considered appropriate based on his experience and training. Mr. Burrows qualified Mr. Charron's quantities and figures as an academic exercise on his part to build the perfect road.

Mr. Charron testified that his quantities were approximately 30% higher than Boileau's quantities. During his cross-examination, Mr. Charron stated that, if he accepted Mr. Prud'homme's profile at face value and if the Municipality of West Hull accepted the profile and hence the slopes up to 15%, his calculations of the quantities would be within 10% of those arrived at by Boileau.

With respect to the costs which would have been incurred to do the work, Mr. Charron did not obtain quotes from contractors in the way that the Plaintiffs did. I cannot subscribe to Mr. Charron's opinion that the contractors and the Boileau engineers were not testifying in a truthful manner.

As I indicated earlier, Mr. Charron used a road width of 28 feet in lieu of 24. As a result, his figures concerning items 1.2, 1.5, 1.6, 1.8 and 1.9 must be reduced by 17%. This means a reduction of $44,545.42. Also, with respect to Mr. Charron's item 4, "coussin de sable A - 150 mm", in respect of which Mr. Charron arrives at a figure of $58,500.00, it is my view that it would not have been necessary to incur this expense. Messrs. Mangione, Gravelle and Edgar Prud'homme were all agreed that a sand base was not required where the soil did not contain any clay. It was the view of these engineers that because the soil at La Grande Corniche du Parc was "rocky", no sand was required.

I am also of the view that the figure of $200,000.00 appearing at item 1.3 of Mr. Charron's opinion, "déblai de première classe", is excessive. I have come to that view because I cannot agree with Mr. Charron that the Municipality would not have allowed the Plaintiffs, nor the willing purchaser, to build streets with slopes between 10 and 15%. As a result, the amount of money which would have had to have been spent on blasting would have been greatly reduced. Although I believe that Mr. Charron's figure is excessive, I am of the view that Mr. Castonguay's figure of $37,500.00 is on the low side. It will be recalled that Mr. Prud'homme testified that before giving his quote he had not visited the subdivision. He had simply been given a plan and "numbers" by Mr. McInnis. At no time did Mr. Castonguay discuss the work which he would have to perform with engineers Gravelle and Edgar Prud'homme. In those circumstances, it is my view that a sum of $75,000.00 is a more realistic figure and it provides a reasonable cushion for unexpected surprises.

Thus, so far, I have reduced Mr. Charron's costs and hence Mr. Juteau's costs, by a sum of $228,045.00. Leaving aside Mr. Charron's construction contingencies at 10%, this reduces his road construction costs to a sum of $320,781.00. The difference between that figure and Mr. Roy's figure of $263,222.00 is $57,559.00. To Mr. Roy's figure must be added the additional sum of $37,500.00 which, in my view, must be allowed in respect of blasting. The difference between the parties is now only $20,059.00.

As part of their rebuttal evidence, the Plaintiffs called engineer Edgar Prud'homme. Mr. Prud'homme stated that, as a result of Mr. Charron's testimony, he realized that additional work would have to be performed on street 14-95. Specifically, retaining walls would have to be built at a cost of $14,475.00. If I add this additional sum to Mr. Roy's road construction costs, the difference between the parties is under $6,000.00. Using Mr. Roy's figure of $263,222.00 and adding thereto the sums of $37,500.00 and $14,475.00, I arrive at a total expenditure of $315,197.00.

I am therefore of the view that the sum of $320,000.00 is a realistic figure for the cost of building the access road and the subdivision streets. Further, I believe that an allowance for construction contingencies at 10% is appropriate and reasonable. Thus, the figure which, in my view, must be allowed for the cost of building the roads on the subdivision is $352,000.00 and not the figure of $603,709.00 which appears in Mr. Juteau's summary of costs.

Consequently, it will not be necessary to pursue a more detailed comparison of Mr. Charron's quantities/prices with those of the Plaintiffs. I have already highlighted what appear to be the areas of disagreement. Had it been necessary, however, I would have accepted Messrs. Gravelle and Prud'homme's "bordereaux des quantités" in preference to Mr. Charron's quantities. To repeat what I have already said, the evidence does not support Mr. Charron's contention that the Boileau engineers and the contractors retained by the Plaintiffs to provide estimates were not being truthful.

Developer's Profit and Overhead

In his summary of the development costs, Mr. Juteau has allowed a sum of $414,900.00 in respect of developer's profit and overhead at 15%. At pages 42 and 43 of his report, he explains why he came to that conclusion:

> Any purchaser of the subject subdivision in May of 1989 would have to incur costs in both the development of the lots and have to assume risks with regards to the absorption of lots and their sale prices. As well, the new purchaser has certain risks with regards to the sale of undevelopable lots.
>
> Normally, a developer's profit and overhead of 15% to 20% of gross sell out is not uncommon in subdivisions. In the particular circumstances of the subdivision, it already has a history that demonstrates a strong demand for the lots and consequently, the risk is reduced to the developer. The developer must still market the 50 lots and obtain prices at the values estimated by this appraiser. In addition, the developer must invest capital in the actual development of the subdivision and oversee the installation of the infrastructure, the marketing of the lots and negotiations with professionals and governmental agencies.
>
> In regards to these factors, it is my opinion that a developer's profit and overhead at the low end of the range is reasonable. The indicated profit and overhead for the developer at 15% of sellout is therefore $421,575. This represents approximately $8,431 per lot. Considering the estimated lot prices in the subdivision and the development expenses, this is felt to be a reasonable figure.

Mr. Juteau's 15% is based on his gross sell-out value of $2,766,150.00. Needless to say, by reason of my decision, the gross sell-out value will be considerably higher.

Mr. Juteau concluded that a developer's profit and overhead of 15% was reasonable in the circumstances of this case. The Plaintiffs take issue with Mr. Juteau's conclusions and submit that I should allow a developer's profit and overhead of 5% to 7.5% only.

Mr. Noël submitted that there were a number of risks which would have been considered by the willing purchaser on May 2, 1989. Mr. Noël submitted that the willing purchaser was knowledgeable and referred me to the decision of Walsh J. of this Court in *Benmar Development Corp.* v. *The Queen*, [1971], 3 L.C.R. 134. At 151, Walsh J. stated:

> It must be borne in mind that it is the value of the property as a whole which must be considered and that this value cannot be determined by the prices which suppliant could obtain by selling individual lots a few at a time. The market value is what an informed purchaser, having knowledge of all the facts and not obliged to buy, would pay dealing at arm's length with a similarly informed vendor not obliged to sell. If such a purchaser is going to buy the property *en bloc* as a speculative real estate development he anticipates making a profit on the eventual sale of same and it is he and not the vendor who will benefit from these future speculative profits and this will be reflected in the price which he is prepared to pay.

Mr. Noël submitted that the willing purchaser would have been aware of six risks at the time of his purchase on May 2, 1989. These risks, according to Mr. Noël, were the following:

1.the access road;
2.the preliminary stage of the subdivision;
3.the access road and street designs were not final;
4.substantial costs relating to blasting;
5.the 7 lots which could not be developed;
6.environmental issue.

With respect to the risk relating to the access road, I agree entirely with Mr. Burrows that that risk did not exist. Mr. Burrows submitted that the N.C.C., in expropriating the Plaintiffs' right-of-way, had *de facto* recognized the Plaintiffs' right. Mr. Burrows also submitted that at no time whatsoever, prior to May 2, 1989, had the N.C.C. taken issue with respect to the Plaintiffs' right-of-way. Also, Mr. Burrows submitted that there could not be any doubt that the Plaintiffs intended to build the access road into their subdivision on the right-of-way. Mr. Burrows referred me to the 1915 deed of sale pursuant to which Catherine Blake sold to her sister the north half of lot 14 and more particularly to the description of the right-of-way which appears in the deed of sale. I have already quoted the relevant portion of the deed of sale at p. 4 of my Reasons. Mr. Burrows also addressed Mr. Noël's argument that the Plaintiffs' right-of-way was prescribed by reason of 30 years of non-use. Mr. Burrows argued that there was no evidence to support that contention. I agree with Mr. Burrows that there is no evidence to support that contention and I also agree that there can be no doubt that the Plaintiffs' access road was going to be built on land in respect of which the Plaintiffs had a right-of-way. Thus, I agree with Mr. Burrows that there was no risk.

Mr. Noël's second risk is the fact that the subdivision was only at a preliminary stage. The evidence before me was that the Municipality of West Hull had given approval to the Plaintiffs' subdivision plan on November 7, 1988. Consequently, the Plaintiffs were in a position to sell their lots. When the City gave its approval, it had before it Mr. Gravelle's septic installation plan but not the access road and subdivision streets profiles. Engineers Pierre Gravelle and Edgar Prud'homme testified that, in order to obtain approval of a subdivision plan, there was no requirement that the developer provide the municipality with profiles of the intended streets. Obviously, on May 2, 1989, the subdivision was at the same stage of development as it was in November 1988. It could not be otherwise considering that the N.C.C. had filed a Notice of Intention to expropriate only shortly after the Plaintiffs' subdivision plan had been approved. In fact, the N.C.C. raised the spectre of expropriation as early as November 1988.

The third risk, according to Mr. Noël, is the fact that the designs for the streets and the access road were not final. I have already canvassed the evidence on that issue and it cannot be said that the designs were final. On the other hand, the contractors who were asked to provide estimates to the Plaintiffs all testified that the profiles prepared by the Boileau firm were sufficiently detailed to allow them to provide estimates and hence to do the job covered by the estimates.

Mr. Noël also argued that the subdivision streets had not been approved by West Hull's Road Committee. He further argued that in regard to obtaining approval of the subdivision streets, the Plaintiffs did nothing whatsoever from the middle of September 1988 onward.

Another problem which, according to Mr. Noël, would have been in the mind of the willing purchaser, is the fact that 27% of the slopes on the subdivision streets, as per Mr. Prud'homme's design, exceeded 10%. Accordingly, in the Defendant's submission, these slopes would have to be reduced and, as a result, the streets would encroach on a number of lots. Consequently, substantial costs would have to be incurred. Another risk which the willing purchaser would have to consider is the fact that seven lots could not be developed. I have already decided that six of these lots could be developed.

The last risk raised by Mr. Noël is the one that he referred to as the "environmental issue". Mr. Noël referred to the *Environment Quality Act*, R.S.Q., c. Q-2, and to paragraph 3(2)(c) of the Règlement relatif à l'application de la Loi sur la qualité de l'environnement, which provides that roads cannot be built within 60 meters of a watercourse "à débit régulier". In Mr. Noël's submissions, this regulation posed a problem in regard to the construction of the access road. Mr. Noël also pointed out that there was a stream at the rear of lots 78 and 79 and that consequently the streets were within 60 meters of that stream. Mr. Noël pointed out that under section 22 of the *Environment Quality Act*, the road and/or streets could not be built without obtaining a certificate of authorization from the Minister of the Environment.

In short, Mr. Noël's argument was simply that the willing purchaser, as of May 2, 1989, would have been aware of the aforesaid risks and consequently would have made an allowance for those risks in the price offered. Mr. Noël submitted that an allowance of 15% was more than reasonable.

I have already commented on Mr. Noël's arguments with respect to the Plaintiffs' right-of-way over the land where they intended to build the access road. I need not say more. With respect to the risk that either the access road or the subdivision streets could not be built, that risk was, in my view, minimal. The municipality would have, no doubt, approved the building of the access road and the subdivision streets. I cannot see on what basis the municipality would refuse to give its approval. With respect to the environmental issue relating to the construction of the roads, delays might have occurred but, in the end, I am satisfied that the engineers would have found solutions to any problem that might have existed.

I began this part of my Reasons by quoting Mr. Juteau's rationale in concluding that an allowance of 15% was reasonable. It goes without saying that the willing purchaser/developer is not buying the property for the sake of buying it. He is buying the property in order to make a reasonable profit on his investment. Thus, as the risks facing the purchaser decrease, the percentage of the allowance must also decrease.

Mr. Juteau was confident that all of the lots in La Grande Corniche du Parc would be sold by the end of 1989. Mr. Juteau was also confident that the roads would be built during the summer of 1989. At page 40 of his report he states that:

> We do not foresee any difficulty in constructing the roads during the summer of 1989 given that the roads are not paved and are constructed to rural standards.

In allowing a developer's profit and overhead of 15%, Mr. Juteau considered as a certain risk the fact that seven lots could not be developed. I have concluded that six of those lots could in fact be developed and presented little or no risk.

I am not to be taken as saying that there were no risks facing the willing purchaser on May 2, 1989. What I am saying, however, is that these risks were not substantial. There was a real possibility that, by the end of 1989 or early 1990, all of the lots would have been sold and the subdivision would have been completed. Consequently, the willing purchaser would have recouped all of his expenditures plus a reasonable profit within a period of approximately 8 months. In these circumstances, it is my view that an allowance of 10% for developer's profit and overhead is reasonable.

CONCLUSION

For the above reasons, the Plaintiffs' action will be allowed with interest and the additional indemnity provided under article 1619 of the Civil Code du Québec (C.C.Q.). The parties will calculate, in accordance with these reasons, the specific amount of compensation to which the Plaintiffs are entitled. Should the parties be unable to agree on the amount of compensation, they shall advise me no later than May 1, 1997. Should the parties agree, they shall advise me forthwith and a Judgment for

the agreed amount shall be entered. As the amount of compensation payable to the Plaintiffs exceeds the total amount of the offers made by the Defendant, the Plaintiffs, pursuant to subsection 39(2) of the Act, are entitled to costs on a solicitor-client basis.

"MARC NADON"
JUDGE

Ottawa, Ontario
March 26, 1997