SCC File No. 39594

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

ANNAPOLIS GROUP INC.

APPELLANT
(Respondent)

and

HALIFAX REGIONAL MUNICIPALITY

RESPONDENT
(Appellant)

and

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, ECOJUSTICE CANADA SOCIETY, CANADIAN CONSTITUTION FOUNDATION, CANADIAN HOMEBUILDERS ASSOCIATION AND ONTARIO LANDOWNERS ASSOCIATION

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. Governments' potential increased liability in *de facto* expropriation for regulatory actions could create a significant impediment to the protection of the environment. Revising the test set out in *Canadian Pacific Railway* ("***CPR***") would affect not only governments' land use powers, but also their ability to protect health, safety, and the environment as expressed through environmental laws.

2. A revised test risks undermining governments' ability and willingness to implement crucial environmental protection measures. These risks are evidenced by, among other things, a fulsome examination of the case law and international agreements cited by the Appellant in support of its contention that the Canadian law of *de facto* expropriation requires revision.

3. Given the risks of liberalizing the test for *de facto* expropriation, this Court must rigorously scrutinize whether there is a compelling need to revisit its unanimous precedent. Ecojustice submits that the Appellant has failed to demonstrate the necessary compelling need, and that this Honourable Court should therefore decline to revise the existing, well-established test.

PART II – ECOJUSTICE'S POSITION ON THE QUESTIONS ON APPEAL

4. The Respondent has posed three questions on this appeal, which overlap in part with issues as framed by the Appellant. Ecojustice submits that the Respondent's formulation more helpfully captures the issues before the Court. Ecojustice will only address Question 2 and takes no position on whether there was an error below or on the proper application of the existing or revised test. Question 2 as formulated by the Respondent states:

   (2) Has the Appellant demonstrated the necessary "compelling" reasons for this Court to depart from its unanimous precedent in *CPR*?

5. Ecojustice submits that there is no compelling reason for this Court to overturn its unanimous precedent in *CPR*. The existing test for *de facto* expropriation strikes an appropriate and effective balance between the protection of private property rights and the need to regulate land use for legitimate public policy objectives, including environmental protection. This Court must be mindful of disrupting that balance by liberalizing the *de facto* expropriation test in the manner championed by the Appellant.

PART III – CONCISE STATEMENT OF ARGUMENT

A. The Appellant has not demonstrated a compelling need to revisit the test established in prior cases and confirmed in *CPR*

6. In its leave application, Ecojustice proposed to make submissions regarding the Appellant's failure "[…] to establish a pressing need for this Court to revisit the [*CPR*] test." Upon review of the Respondent's submissions under "Issue #2"[1], with which Ecojustice generally agrees, Ecojustice will limit its submissions to the following points.

7. The current test for *de facto* expropriation, as expressed by a unanimous Court in *CPR,* strikes an appropriate balance between private rights and the public interest. Crucially, this includes the public interest in government regulation to ensure a healthy and livable environment for current and future generations.

8. This Court has repeatedly recognized the critical importance of environmental protection. In *Spraytech*, Justice L'Heureux-Dubé wrote that "[…] our common future, that of every Canadian community, depends on a healthy environment."[2] Similarly, in *Hydro-Québec*, Justice La Forest noted powerfully that "[…] the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels"[3] [emphasis added]. In this Court's recent decision in *References re Greenhouse Gas Pollution Pricing Act*, Chief Justice Wagner acknowledged that addressing climate change, an environmental issue that poses an existential threat to our communities, requires "[…] collective national and international action."[4]

9. Given this consistent recognition of the importance of regulation to ensure a healthy environment from Canada's highest Court, Ecojustice submits that the law of *de facto* expropriation must account for the need to regulate land and resource use in the public interest. Importantly, the current, well-established test for *de facto* expropriation does not

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[1] Factum of the Respondent at paras 35-139.
[2] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 40, [2001] 2 SCR 241at para 1.
[3] *R v Hydro-Québec,* [1997] 3 SCR 213, 151 DLR (4th) 32 at para 127.
[4] *References re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11, [2021] SCJ No 11, at paras 12 and 167.

create insurmountable obstacles to the exercise of regulatory power in pursuit of environmental objectives. For example, in *Altius Royalty Corporation* ("***Altius***"), the plaintiffs claimed that federal and provincial regulation of greenhouse gas emissions from their coal plant were a *de facto* expropriation. The Alberta Court of Queens Bench ("**ABQB**") granted the defendants' motion for summary judgment, and stated as follows:

> The plaintiffs invested in a regulated industry with full knowledge that it was a regulated industry. Canada exercised its regulatory powers. […]
>
> Surely, and without more, the law cannot be that a regulator purporting to regulate in the interests of public health and environmental preservation must pay the creator of a health or environmental hazard to stop polluting.[5]

10. The ABQB's decision in *Altius* is but the latest in a line of Canadian court decisions confirming that the exercise of regulatory authority to protect the environment in the public interest cannot, on its own, constitute *de facto* expropriation. For instance, in the Nova Scotia Court of Appeal's oft-cited decision in *Mariner*, Justice Cromwell (as he then was) found that the Province of Nova Scotia's decision to protect the landowners' environmentally fragile and ecologically significant, yet privately owned beach from development was not an expropriation.[6] In that case, the landowners failed to establish that they had been deprived of "virtually all incidents of ownership," or that the Province had acquired an interest in the land.[7] Similarly, in *64933 Manitoba Ltd.*, the Manitoba Court of Appeal dismissed the developer's claim for *de facto* expropriation based on the Province of Manitoba's refusal to permit the construction of a resort within a provincial park.[8]

11. Of course, the current *de facto* expropriation test does protect private property rights from the impacts of environmental regulation in circumstances where the impacts in question truly rise to the level of an expropriation – namely, where there is both a "taking" of all reasonable uses of the property, and a corresponding acquisition by the regulating authority. This is evident in a number of the cases cited by the Parties to this Appeal, including *Lynch*,[9] *Manitoba*

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[5] *Altius Royalty Corporation v Alberta,* 2021 ABQB 3, 23 Alta LR (7th) 105 at paras 43, 45 ["***Altius***"].
[6] *Mariner Real Estate Ltd. v Nova Scotia (Attorney General),* 1999 NSCA 98, 177 DLR (4th) 696 at para 5 ["***Mariner***"].
[7] *Ibid* at paras 90, 107.
[8] *64933 Manitoba Ltd. v Manitoba,* 2002 MBCA 96, 214 DLR (4th) 37 at paras 15, 20.
[9] *Lynch v St. John's (City),* 2016 NLCA 35, 400 DLR (4th) 62.

Fisheries,[10] *Tener*,[11] *Sun Construction*,[12] and *Northern Cross*.[13] Ecojustice submits that, cumulatively, the line of cases applying the *CPR* test illustrates that the current test achieves the appropriate and necessary balance between private rights and the public interest in preserving a healthy environment for current and future generations.

12. The balance achieved by the existing test for *de facto* expropriation is all the more appropriate given the plethora of other legal tools available to property owners impacted by the regulation of land and resource use. These include, among other things, applications for judicial review of regulatory decisions based on substantive or procedural grounds, challenges to the *vires* of regulations or by-laws, or actions in bad faith or misfeasance in public office. Here, Annapolis Group's claims for unjust enrichment and misfeasance in public office are still awaiting determination by a trial court.

B. This Court should carefully consider the need to revise the *de facto* expropriation test given the potential negative ramifications for environmental protection measures

13. Conversely, overhauling the existing *de facto* expropriation test in the manner proposed by the Appellant risks disrupting this careful balance and undermining governments' regulatory authority. Ecojustice submits that a liberalized test will have significant impacts on government's ability and willingness to regulate to protect public interest values, including environmental responsibility and sustainability.

14. The need to protect environmental regulation from *de facto* expropriation claims was insightfully recognized by the ABQB in *Altius*:

> The "taking" cases draw clear distinctions and exceptions for regulation of land use. While no case law on environmental regulation and taking appears to have been cited, in my view, the protections to environmental regulation that may eventually develop in the area from a common law perspective will likely be at least equal to those provided to land development regulation.[14]

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[10] *Manitoba Fisheries Ltd. v The Queen,* [1979] 1 SCR 101, 88 DLR (3d) 462.
[11] *R v Tener,* [1985] 1 SCR 533, 17 DLR (4th) 1.
[12] *Sun Construction Company Limited v Conception Bay South (Town)*, 2019 NLSC 102, 87 MPLR (5th) 256.
[13] *Northern Cross (Yukon) Ltd v Yukon (Energy, Mines and Resources)*, 2021 YKSC 3, [2021] YJ No 4. In *Northern Cross,* a motion to strike a *de facto* expropriation claim on the basis that it had no reasonable chance of success was dismissed.
[14] *Altius* at para 44.

15. A recent decision from the Federal Court of Appeal ("**FCA**") illustrates the threat that a liberalized *de facto* expropriation test poses to environmental protection measures. In a claim arising in Quebec, the FCA found that the application of article 952 of the *Civil Code of Quebec* ("**CCQ**") would likely have made habitat protection measures for a species at risk a disguised expropriation but for an explicit compensation provision in section 64 of the federal *Species at Risk Act* ("***SARA***"). [15]

16. Article 952 of the CCQ is one of the Quebec provisions that the Appellant has urged this Court to replicate at common law.[16] Its potential application to habitat protection for species at risk, including measures under provincial species at risk legislation, is concerning given the urgency with which many species require legal protection. As the Federal Court has noted, "[…] many [species at risk] are in a race against the clock as increased pressure is put on their critical habitat, and their ultimate survival may be at stake."[17]

17. Species at risk in Canada are protected by a patchwork of federal and provincial legislation. Although habitat protection measures implemented at the federal level may be insulated from claims under a liberalized test by virtue of s 64 of the *SARA*, federal protections generally apply only to species on federal lands.[18] Species at risk that reside elsewhere depend on habitat protection measures taken under provincial statutes, many of which do not have similar compensation provisions.[19] The designation of critical habitat for protection under provincial legislation is generally a step taken at the discretion of the responsible Minister – who may be dissuaded from doing so by the specter of increased civil liability.

18. The radical nature of the changes proposed by the Appellant is evident in the materials that it relies upon. The Appellant's supporting materials explicitly advocate that compensation should be payable where mere diminishment of property values results from measures such as

[15] *Groupe Maison Candiac Inc. v. Canada (Attorney General)*, 2020 FCA 88, [2020] FCJ No 614 at para 72 (leave to appeal dismissed [2020] SCCA No 233).
[16] Appellant's Factum, Part III. B.
[17] *Western Canada Wilderness Committee v Canada (Fisheries and Oceans),* 2014 FC 148, [2014] FCJ No 151 at para 101.
[18] *Species at Risk Act,* SC 2002, c 29, ss 34(1), 58(1).
[19] See, for example, *Endangered Species Act, 2007,* SO 2007, c 6; *The Endangered Species and Ecosystems Act,* CCSM, c E111; *Endangered Species Act,* SNL 2001, c E-10.1.

wetland and species protections.[20] If this approach were adopted in Canada, the power to legislate for the public good "would be abridged to an unthinkable degree"[21] and regulation would be transformed into a "luxury few governments could afford."[22]

19. In addition to the risks of liberalizing the test generally, the Court should be wary of the factual context in which it is being asked to revisit the *de facto* expropriation test. Here, the Municipality has not engaged in any legislative or regulatory action that changed the legal status of the Appellant's property. The Municipality merely exercised its discretion to refuse to commence the process that would have led to the Appellant's desired zoning change. The unavoidable implication of recognizing that a *de facto* expropriation claim is arguable in this context would be that landowners may be entitled to their preferred zoning. This would be a radical change to the *de facto* expropriation doctrine. As this Court knows, it is common practice under the current test to draw a distinction between the regulatory impacts on existing uses[23] and impacts on speculative, future uses which are not even permitted under existing zoning[24] – and Ecojustice submits that this is especially appropriate in areas of environmental sensitivity.

C. The international examples cited by the Appellant lack context and would have negative ramifications for environmental protection measures

20. The Appellant argues that the approach in *CPR* should be further developed with reference to international legal principles of takings law.[25] Ecojustice agrees that international experiences offer valuable lessons for this Court to consider but disputes the Appellant's characterization of the international context.

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[20] Mark Milke, "Stealth Confiscation: How governments regulate, freeze and devalue private property – without compensation," (2012) The Fraser Institute Ch 4 at 15-17.
[21] *O D Cars Ltd v. Belfast Corporation,* [1959] NI 62 at 87, **Book of Authorities of Ecojustice [BAOE], Tab 1**.
[22] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority*, 535 US 302, 152 L Ed 2d 517 and 541 (2002).
[23] See, e.g., *Antrim Truck Centre Ltd. v Ontario (Transportation),* 2013 SCC 13, [2013] 1 SCR 594.
[24] See, e.g., Reasons for Decision of the Nova Scotia Court of Appeal dated January 7, 2021, 2021 NSCA 3 at paras 92-93.
[25] Factum of the Appellant, at para 36(c).

21. The Appellant's assertion that foreign investors have greater protection than Canadians under *CPR*[26] is disputable given the disparate results flowing from arbitration decisions. Specifically, some tribunals have adopted a "sole effects" analysis which only considers the impact on the investment, while other tribunals have utilized a "police power" analysis where a public interest purpose may justify what would otherwise be an "indirect expropriation." [27] These varied approaches, combined with the fact that arbitral rulings have no precedential effect,[28] make it difficult to discern any uniform standard for foreign investment.

22. In any event, the NAFTA provisions that formed the basis of (now Justice) Brown's thesis[29] were rejected when NAFTA was renegotiated and ultimately replaced by the Canada-United States-Mexico Agreement.[30] US investors can no longer bring claims against Canada directly – rather, claims can only be brought if the investor's national government exercises its discretion to do so.

23. This Court should be wary of importing a standard into domestic law that the federal government chose to reject after its experience with that standard. Further, the use of a trade-based standard for expropriation would require the importation of other protections against the excesses of such a standard. Summarizing the law in this area, a UN Conference on Trade and Development document on expropriation stated that:

> [a] bona fide regulatory act (or its application to an individual investor) that genuinely pursues a legitimate public-policy objective (such as the protection of the environment and public health and safety) and complies with the requirements of

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[26] Factum of the Appellant, at para 79.
[27] Ying Zhu, "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space" (2019) 60:2 Harv Int'l LJ 377 at 382, **BOAE, Tab 5**.
[28] *North American Free Trade Agreement*, Canada, United States, and Mexico, 17 December 1992, 32 ILM 289 (entered into force 1 January 1994, revoked 1 July 2020), Article 1136(1).
[29] Russell Brown, "Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience" (2009), 1:3 IJLBE 179 at 184-186, **BOAE, Tab 2**; and Russell Brown "The Constructive Taking at the Supreme Court of Canada: Once More Without Feeling" (2007) 40 UBCL Rev 315, at paras 29 – 35, **BOAE, Tab 3**.
[30] Government of Canada, "Canada-United States-Mexico Agreement (CUSMA) - Investment chapter summary," online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/investment-investissement.aspx?lang=eng>.

> non-discrimination, due process and proportionality may not be designated as expropriatory, despite an adverse economic impact.[31]

24. The Appellant's references to case law from other national jurisdictions likewise lack important context or would otherwise be problematic if implemented in Canada.

25. For example, the Appellant cites the indisputably strong, constitutionally entrenched takings jurisprudence from the US. But Canadian courts have drawn a distinction between jurisdictions where property rights are constitutionally protected, such as Australia and the US, and Canada. In *Mariner*, Cromwell J.A., as he then was, wrote:

> These U.S. and Australian constitutional cases concern constitutional limits on legislative power in relation to private property. […] Canadian courts have no similar broad mandate to review and vary legislative judgments about the appropriate distribution of burdens and benefits flowing from environmental or other land use controls. In Canada, the courts' task is to determine whether the regulation in question entitles the respondents to compensation under the *Expropriation Act*, not to pass judgment on the way the Legislature apportions the burdens flowing from land use regulation.[32]

26. A revised test for *de facto* expropriation aligned with US law would put at risk a number of arrangements well accepted in Canada. For example, legislation that allows authorized intrusions into the immediate airspace over private property (such as for utility lines) without compensation to the landowner would be unconstitutional in the United States[33] but is valid in Canada.[34] A liberalized test could also jeopardize measures to combat climate change such as legislation that declares retroactively, and without compensation, that the pore space under the surface of private land (needed for carbon capture and storage) is vested in and property of the Crown.[35]

27. The Appellant cites the US *Murr* case for the "possibility of the finding of a regulatory taking even without a total deprivation".[36] With respect, it is hard to reconcile this reading of the case with its interpretation in the US context. In *Murr,* siblings inherited two adjacent lots

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[31] United Nations Conference on Trade and Development, "Expropriation: UNCTAD Series on Issues in International Investment Agreements II" (New York and Geneva: UNCTAD, 2012) at xiii.
[32] *Mariner* at para 41.
[33] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 US 419 (1982).
[34] See, e.g., *Hydro and Electric Energy Act*, RSA 2000, c. H-16, s 37.
[35] See, e.g., *Mines and Minerals Act*, RSA 2000, c. M-17, s. 15.1
[36] Factum of the Appellant, at para 85.

that were subject to restrictions under the federal *Wild and Scenic Rivers Act,* which resulted in an inability to build any dwelling on the smaller of the two lots or even sell the smaller lot. The majority in *Murr* upheld treating the legally separate properties as a single property for the purposes of the takings analysis, with the result that no taking was found because of the remaining uses on the larger lot.[37] In fact, *Murr* is important for introducing into takings law the concept that property restrictions may actually enhance the value of property:

> The Court's [analysis] presents a significant contribution to takings law by embracing the way in which restrictions on one property can produce offsetting benefits on other, economically related properties.[38]

28. Further, reference to US case law by the Appellant would be incomplete without also considering the robust doctrine of exemptions or defences to takings claims in the US that serve to moderate American jurisprudence. For example, takings claims have been defeated where government regulatory actions prohibit nuisance,[39] ensure public access to features on private lands,[40] and further the public trust doctrine. [41]

29. In Australia, a jurisdiction not referenced by the Appellant, governments must obtain a beneficial interest to make out a successful *de facto* expropriation claim despite constitutional protection of property rights.[42] In *Commonwealth v. Tasmania*,[43] the provincial government's plans to construct a dam in a wilderness area were prohibited by legislation requiring federal consent. This effectively sterilized the property's potential use. The majority of the High Court held that this did not require compensation:

> To bring the Constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.

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[37] *Murr, et al v. Wisconsin et al,* 137 S. Ct. 1933 (2017), at 1957.
[38] "*Murr v. Wisconsin", Harvard Law Review,* 131 Harv. L. Rev. 253, Nov 10, 2017.
[39] David Callies, *Regulatory Takings After* Knick: *Total Takings, The Nuisance Exception, and Background Principles Exceptions: Public Trust Doctrine, Custom, and Statutes* (Chicago: American Bar Association, 2021) at 77-79 (Chap 5, Parts A-B) ["***Regulatory Takings***"]**, BOAE, Tab 4**
[40] See, e.g., See, e.g., *State ex. Rel Thornton v. Hay,* 254 Or. 584, 462 P.2d 671 (1969) and *US v. Saint Thomas Beach Resorts,* 386 F. Supp. 769 (D.VI. 1974).
[41] *Regulatory Takings* at 33 (Chap 2, Part A), **BOAE, Tab 4**
[42] *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 51(xxxi).
[43] *Commonwealth v Tasmania,* [1983] HCA 21, 158 CLR 1.

D. Conclusion

30. There is no compelling need to revisit the *de facto* expropriation test. The test expressed in *CPR* strikes an appropriate balance between the protection of private property rights and the public interest in ensuring a livable environment for present and future generations. Revising the test in the manner proposed by the Appellant would disrupt this balance, and in particular would have significant ramifications for governments' ability and willingness to regulate in the public interest, including to protect the environment. Ecojustice respectfully submits that the Court must be cognizant of the potential impacts of its decision on environmental protection measures and should decline the Appellant's request to liberalize the test for *de facto* expropriation.

PART IV – SUBMISSIONS ON COSTS

31. Ecojustice seeks an Order from this Honourable Court that there be no costs awarded to or against it in relation to the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of November, 2021.

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Randy Christensen
Sarah McDonald

Counsel for the Intervener,
Ecojustice Canada Society

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