Court File No. 39594

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

BETWEEN:

ANNAPOLIS GROUP INC.

Appellant
(Respondent)

- and -

HALIFAX REGIONAL MUNICIPALITY

Respondent
(Appellant)

- and -

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. When government takes property, it is presumed to owe an obligation to compensate the property owner. This obligation exists regardless of fault, and regardless of whether the property is taken *de jure* or *de facto*.

2. The basic question in this appeal is whether the principle — set out most recently by this Court in *Canadian Pacific Railway Co. v. Vancouver*, 2006 SCC 5 [*CPR*] at para. 32 — that a *de facto* expropriation requires not just a deprivation to a property owner, but also an acquisition of a benefit by government, should be overruled. The Attorney General of British Columbia (AGBC) says it should not be.

3. Instead, this Court should affirm that, for no-fault "takings" liability to exist, government must acquire a beneficial interest in property. The AGBC submits that this is the "bright line" at which point regulation becomes a taking of property warranting compensation.

4. The acquisition of a beneficial property interest by government is a longstanding requirement of *de facto* expropriation in common law Canada and was specifically affirmed in *Manitoba Fisheries* and *Tener*,[1] two cases relied on by the Appellant. This requirement is also consistent with the terms of expropriation laws in common law provinces, including Nova Scotia's *Expropriation Act* — an essential consideration given the statutory origins of liability for expropriation.[2]

5. The law of disguised expropriation, arising under the *Civil Code of Quebec* (CCQ), is distinct from the concept of *de facto* expropriation in common law provinces. If there is a common law equivalent of disguised expropriation it is misfeasance in public office, not *de facto* expropriation.

6. The alternative to a "bright line" test is a deprivation test that examines whether valid government regulation "goes too far." This type of test will be subjective, will be hard to predict,

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[1] *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101 (*Manitoba Fisheries*); *British Columbia v. Tener*, [1985] 1 S.C.R. 533 (*Tener*).
[2] *Sisters of Charity of Rockingham v. R.*, [1922] 2 A.C. 315 at 322 (P.C.); *Canadian National Railway v. Trudeau*, [1962] S.C.R. 398 at p. 405; *Tener*, at para. 24, Wilson J. (concurring); *Teal Cedar Products Ltd. v. British Columbia (Ministry of Forests)*, 2012 BCCA 70 at paras. 23, 24 and 30.

and will involve the judiciary in political disputes. The Appellant admits that such a test — which it says should include "motive" — will be "fact intensive."

7. When there is no acquisition of a beneficial property interest — even when government action interferes with an owner's use and enjoyment of their property — no compensation should be payable unless the legislature chooses to create a scheme for compensating economic losses as a type of social insurance.

PART II – STATEMENT OF ISSUES

8. Whether the two-part legal test for *de facto* expropriation should be changed to eliminate the requirement that government acquire a beneficial interest in, or flowing from, property.

PART III – STATEMENT OF ARGUMENT

The State of the Law

9. Expropriation is the "forcible acquisition" of private property by government,[3] and generally results in the absolute transfer of title.[4] As defined by the Nova Scotia *Expropriation Act*, '"expropriate" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers' where '"land" includes any estate, term, easement, right or interest in, to, over or affecting land.'[5]

10. It is settled Canadian law that zoning changes, development freezes, and other regulatory actions — even when they decrease the value of land — do not constitute expropriation or give rise to a common law right to compensation.[6] While they may impact an owner's use of their property in the public interest, sometimes at significant economic cost, they do not represent the acquisition of a beneficial property interest by government.

11. In the words of this Court:

> The whole purpose of the *Expropriations Act* is to provide full and fair compensation to the person whose land is expropriated. It is the taking of the land which triggers and gives rise to the right to compensation. An owner whose land is caught up in a zoning or

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[3] Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada,* 2nd ed, (Carswell: Scarborough, 1992) at p. 1, Appellant's Book of Authorities, Tab 4.
[4] *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283 (*Nilsson*) at para. 48.
[5] *Expropriation Act*, RSNS 1989, c. 156, ss. 3(1)(c),(i).
[6] *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, [1999] N.S.J. No. 283 (NSCA) (*Mariner*) at paras. 42 and 105; *Nilsson*, at para. 61.

> planning process but not expropriated must simply accept in the public interest any loss that accrues from delay.[7] [emphasis added]

12. The public policy rationale for the "no compensation" position is clear: the impact on private property rights is tolerated in order to accommodate the greater public interest. This is not a legal issue *per se*, but rather a political and economic one that rests with government. It poses repercussions for the ballot box, not the courts.[8]

13. The law of *de facto* expropriation, however, has developed to ensure that property owners are compensated for government regulation that has the effect of expropriation. As stated by the Manitoba Court of Appeal, "To qualify for compensation there must be an expropriation, if not in name, then in effect. The limitation on usage must be balanced by some corresponding acquisition by the authority."[9]

14. The question underlying all *de facto* expropriation claims is: at what point does regulation interfering with property ownership become a taking of property warranting compensation?[10]

15. In response to this question, Canadian law has developed to recognize the possibility that regulatory acts can constitute *de facto* expropriation when two requirements are met (the "Two-Part Test"):

a. an owner loses all reasonable uses of their property;[11] and

b. government acquires a beneficial interest in the owner's property or flowing from it.[12]

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[7] *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 SCR 32 at para. 33.
[8] *Soo Mill & Lumber Co. v. Sault Ste Marie (City)*, [1975] 2 S.C.R. 78 at p. 84; *Hartel Holdings Co. v. Calgary (City)*, [1984] 1 S.C.R. 337 (*Hartel*) at pp. 355-356; *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 126 D.L.R. (4th) 449 (B.C.C.A.), leave to appeal to SCC refused 24941 (2 May 1996), [1995] S.C.C.A No. 439; *B.J. Games Inc. v. Ontario*, [2007] O.J. No. 492 (S.C.J.) at paras. 43-47; *Club Pro Adult Entertainment Inc. v. Ontario (Attorney General)*, [2006] O.J. No. 5027 (Sup.Ct. Jus.) at paras. 63-82, 98-107, aff'd on this point 2008 ONCA 158 at paras. 6-7, leave refused [2008] S.C.C.A. No. 191.
[9] *Steer Holdings Ltd. v. Manitoba*, [1993] 2 W.W.R. 146 (MBCA) 152 (*Steer Holdings*) para 21.
[10] *Nilsson* at para. 49.
[11] *CPR* at para. 30.
[12] *CPR* at paras. 30, 34.

The Two-Part Test

16. To understand why Canadian courts have settled on the Two-Part Test — and why the AGBC argues that it must be maintained — first consider the anatomy of a *de jure*, or statutory, expropriation.

17. In a *de jure* expropriation, government identifies a private property interest that is required for a public purpose. Government then files and serves the requisite forms, surveys, and appraisals on the property owners.

18. Depending on the legislative specifics, the parties then proceed to determine the quantum of compensation owed. In modern Canadian statutes, government must pay for the property it has acquired based on market value.[13] The government acquires the interest, and the former property owner obtains compensation equal to the value of that interest.

19. Compensation is paid <u>because</u> government has acquired a private property interest from an owner.

20. The Canadian common law of *de facto* expropriation properly recognizes that the role of the courts is to identify where government, although failing to file the forms, make the surveys, provide the appraisals, or *formally* obtain the property interest, has nevertheless effected the same result.

21. Conversely, the law of *de facto* expropriation does not, and should not, invite the courts to weigh in on socio-political issues at the heart of regulatory action — e.g., who benefits, who is burdened, how much, in what way — unless such action amounts to government acquisition.

22. The thrust of the Appellant's argument is that *CPR's* Two-Part Test eliminates the distinction between *de jure* and *de facto* expropriation by requiring the taker in the latter case to have obtained a beneficial property interest. But that is not the distinction, as both involve the taking of private property. The real distinction is that one does so through a legal instrument that explicitly authorizes expropriation, and the other does so "in effect" (i.e., *de facto*) through other means.

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[13] *Expropriation Act*, R.S.B.C. 1996, c. 125, s. 31; *Expropriation Act*, R.S.A. 2000, c. E-13, ss. 41, 42; *The Expropriation Act*, C.C.S.M., c. E190, s. 16; *Expropriations Act*, R.S.O. 1990, c. E.26, s. 13; *Expropriation Act*, R.S.N.B. 1973, c. E-14, s. 38; *Expropriation Act*, RSC 1985, c. E-21, s. 26.

Eliminating the "Benefit" Test?

23. By eliminating the requirement that government acquire a beneficial interest in property, the Appellant seeks to imagine anew the common law of *de facto* expropriation, from a regime that considers whether government has acquired a property interest, to one that focuses solely on the restriction of private property use. The AGBC disagrees with this approach because it would cause confusion, inject the judiciary into what are effectively political decisions and chill necessary regulatory action.

a) History of the Benefit Test

24. The Appellant claims it is restoring takings law to its state before *CPR.* This is false. It is a longstanding requirement of Canadian jurisprudence that government acquire a beneficial interest in property before a court will order that compensation be paid.

25. The Appellant says that in *Manitoba Fisheries,* "the bulk of the Court's reasoning focused not on what the Crown gained but on what the plaintiff lost". This mischaracterizes the *ratio decidendi* of Ritchie J.: "Once it is accepted that the loss of the goodwill of the Appellant's business which was brought about by the Act and by the setting up of the Corporation was a loss of property and that the same goodwill was by statutory compulsion acquired by the federal authority, it seems to me to follow that the Appellant was deprived of property which was acquired by the Crown".[14]

26. Similarly, in *Tener*, Estey J. posed the question that frames his reasons as follows: "What right did the respondent lose and what interest did the government acquire[?]"[15] In her concurring reasons, Wilson J. was clearer that the reason for compensation is that the Crown acquired a beneficial interest in land. For her, *Tener's* interest was analogous to a *profit-a-prendre*, which by operation of law had reverted to the freehold owner, the Crown. Reversion to the Crown was the beneficial interest acquired.[16]

27. In *Tener*, the fact the owner retained bare legal title — a title that could only have value if the enactment were repealed — did not matter. What mattered was that the owner *in effect* held the title for the government. In the language later adopted by this Court in *CPR*, the regulation

[14] *Manitoba Fisheries*, at p. 110 (emphasis added).
[15] *Tener* at p. 556 (emphasis added).
[16] *Tener* at p. 552.

had transferred a "beneficial interest" in the sense familiar from the law of equity. A valuable property interest was acquired by the government from the owner.

28. In *Steer Holdings*, Huband J.A. observed that "compensation is not normally payable unless the authorizing legislation so provides. While the rights of those who have an interest in the property may be curtailed, there is no corresponding acquisition of rights by the designating authority."[17] Huband J.A. denied compensation finding that while there was a "'taking away' in the sense that the legislation limited the plaintiff in what it could do with the property… there was no corresponding benefit or acquisition by the Province of Manitoba."[18]

29. In *Mariner*, Cromwell J.A., as he then was, noted that "both the extinguishment of virtually all incidents of ownership and an acquisition of land by the expropriation authority must be proved"[19] and that "for there to be an expropriation, there must be an acquisition was well as a deprivation."[20]

30. To summarize, *CPR* did not create the requirement of acquisition of a beneficial interest by the Crown; this requirement predates *CPR* and is inherent in the concept of "expropriation" or "taking".

b) Disguised Expropriation and the CCQ

31. The AGBC submits that it would be a misapplication of the law to alter the Two-Part Test from *CPR* to reconcile it with *Lorraine*. *De facto* expropriation is a construct of the common law that focuses on the effect of valid regulatory action. *Lorraine* on the other hand was decided in reference to disguised expropriation, a distinct legal concept arising from the CCQ that focuses on the validity of regulatory action.[21]

32. Further, Article 952 of the CCQ reads: "No owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in consideration of a just and prior indemnity."[22] This language is like the language used in the Australian Constitution and the Fifth Amendment to the US Constitution, both of which prohibit the acquisition of private

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[17] *Steer Holdings* at para. 13 (emphasis added).
[18] *Steer Holdings* at para. 21.
[19] *Mariner* at para. 50 (emphasis added).
[20] *Mariner* at para. 98.
[21] *Lorraine (Ville) v. 2646-8926 Québec inc.*, (*Lorraine)* 2018 SCC 35, paras. 22-27.
[22] *Civil Code of Québec,* CQLR c. CCQ-1991 at art. 952.

property for public use without just compensation. Canadian case law has recognized that while these sources (and their surrounding jurisprudence) may be of assistance, it is vital to "recognize that the question posed in the constitutional cases is fundamentally different."[23]

33. Expropriation is triggered by the gain to the state, not just the loss to the owner. Loss-based remedies are almost always triggered by *fault* and, of course, the Appellant can still make its fault-based arguments. Issues surrounding motive, which may well be relevant to fault, are irrelevant to whether the government has effectively acquired a property right.

34. There is no conflict to reconcile between *Lorraine* and *CPR.* The underlying causes of action arise from distinct legal bases. To conflate them would disregard the unique legal history and fundamental concerns they each seek to address.

c) Problems Arising from the Appellant's Approach

35. Elimination of the benefit portion of the test raises three difficulties:

a. It undermines the existing body of jurisprudence that acknowledges the need for government to be able to freely, and at times restrictively, regulate private property, taking into consideration broad social factors.[24]

b. It leads *de facto* expropriation law to an imprecise inquiry as to when "regulation ends and taking begins"[25] without the guidepost of government acquisition.

c. Instead of clarifying the law, it will broaden the scope of "compensable regulation", which will inevitably turn on balancing issues generally accepted to fall within the purview of government decision-making.

36. Regulation has both negative and positive impacts on the economic value and potential uses of private property. Planning or environmental regulation may have a negative impact on private property by restricting land development. By contrast, the creation of a public transit system may have a positive impact on surrounding property. Neither of these actions, however,

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[23] *Mariner* at paras. 40-41.
[24] *Hartel* at p. 355.
[25] *Mariner* at para. 48.

attract compensation by government (or conversely payment from the property owner to government when there is a betterment).

37. Property ownership is situated in the context of a larger bargain between the owner and the state. A successful state is necessary for private property to have value. Creation of the successful state requires regulation that, at times, imposes burdens or dispenses benefits on private property. It is only in the narrowest of circumstances that this bargain requires payment from the state. Such circumstances are restricted to when the effect of the regulation is to transfer the beneficial interest in property from the owner to the state.[26]

38. Should this Court accede to the Appellant's position, courts and governments across the country will see a proliferation of claims seeking compensation for negative effects on the value of property stemming from government action. For example, under the current test, the government does not expropriate the owner of a restaurant's leasehold interest when it orders it closed for public health reasons. Closure could very well deprive the restaurant of economic value, but in making such orders, government does not acquire a property interest.

Clarifying the Two-Part Test

39. The AGBC argues that the Two-Part Test establishes a solid framework that needs only slight modification to establish a clear and coherent legal framework.

40. In *CPR*, Chief Justice McLachlin, for a unanimous Supreme Court of Canada, described the benefit portion of this test as follows:

> For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, […][27]

41. The AGBC concedes that the phrase "flowing from it" is imprecise, can be challenging to apply, and is unnecessary. As such, the AGBC submits that the "benefit" portion of the legal test should be refined to mean the "acquisition of a beneficial property interest", full stop.

42. A beneficial interest in property is a legal term of art. It means a proprietary interest enforceable in equity. The classic example is the interest of a *cestui que trust* in trust property.

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[26] *A&L Investments Ltd. v. Ontario (Minister of Housing)*, 1997 CanLII 3115 (ONCA) at p. 13.
[27] *CPR* at para. 30.

43. A beneficial owner enjoys the benefits of property even though title to that property is in another's name. Examples include a mortgagee, an easement holder, a profit-à-prendre holder, the beneficiary of a restrictive covenant, etc.

44. To understand why the acquisition of a beneficial interest is key to creating a coherent law of *de facto* expropriation, consider the difference between a Public Health Officer order that shuts down restaurants, bars, and gyms to prevent the spread of COVID-19 and a municipality requiring a landowner to give an easement to run an underground pipe. It is at once apparent that the argument for compensation is not that the easement is more damaging to the private interests. In fact, the Public Health Order is far more damaging. The true distinction is that in the latter case the municipality acquires a property interest, namely an easement, while in the former the impact on the private business is in no sense an expropriation.

The Bright Line

45. Following from the above, the AGBC says that to establish a claim of *de facto* expropriation a claimant must show both that there is a loss and a corresponding gain, and the loss and gain must be proprietary in nature.

46. In its contrasting approach, the Appellant views *de facto* expropriation as occurring whenever the effect of government regulation on private interests is sufficiently damaging. This is an inherently subjective task and leads the judiciary into a morass of subjectivity, politics, and unconvincing distinctions. Conversely, the judiciary is well-suited to deciding when a property right has effectively been transferred.

47. The Appellant's proposed change to the test would lead to a situation where regulatory actions by government — which routinely have substantial impacts on businesses, persons, and property — would be subject to compensation claims. The public would be required to compensate for a significant share of regulations made for the public good.

48. By contrast, the bright line test of "did government acquire a beneficial property interest" is:

a. coherent, occupying a well-defined ground between regulation and statutory expropriation;

b. predictable for owners, government, and the courts; and

c. appropriately deferential, respecting the decisions of elected bodies as to when a restriction on property goes "too far" and when compensation should be paid.

49. A coherent and predictable legal test will distinguish between regulatory actions that benefit the public generally and situations where government acquires property.

50. A deferential legal test will respect the decisions of legislative bodies as to when compensation should be paid for interference with property rights that falls short of acquisition.

51. In summary, the AGBC submits that expropriation is triggered by a corresponding gain to the state, as well as loss to the owner. As such, the AGBC submits that the test for *de facto* expropriation ought to require:

a. the removal of all reasonable uses of an owner's property; and

b. the acquisition of a beneficial interest in that property by government.

PART IV – SUBMISSIONS ON COSTS

52. The AGBC seek no costs order and asks that no costs order be made against it.

PART V – ORDER

53. As an intervener that takes no position on the merits of this proceeding, the AGBC seeks no order of this Court.

PART VI – SUBMISSIONS ON PUBLICATION

N/A

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

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PART VII – AUTHORITIES

Caselaw

No.	Authority	Paragraph Reference
1.	*A&L Investments Ltd. v. Ontario (Minister of Housing)*, 1997 CanLII 3115 (ONCA)	37
2.	*Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283	9, 10, 14
3.	*B.J. Games Inc. v. Ontario*, [2007] O.J. No. 492 (S.C.J.)	12
4.	*Canadian Pacific Railway Company v. City of Vancouver*, 2006 SCC 5	2, 15, 22, 24, 27, 30, 31, 34, 40
5.	*Canadian National Railway v. Trudeau*, [1962] S.C.R. 398	4
6.	*Club Pro Adult Entertainment Inc. v. Ontario (Attorney General)*, [2006] O.J. No. 5027 (Sup.Ct. Jus.) aff'd on this point 2008 ONCA 158, leave refused [2008] S.C.C.A. No. 191	12
7.	*Hartel Holdings Co. v. Calgary (City)*, [1984] 1 S.C.R. 337	12, 35(a)
8.	*Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35	31, 34
9.	*MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 126 D.L.R. (4th) 449 (B.C.C.A.), leave to appeal to SCC refused 24941 (2 May 1996), [1995] S.C.C.A No. 43.	12
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12.	*R. v. Tener*, [1985] 1 SCR 533	4, 26, 27
13.	*Sisters of Charity of Rockingham v. R.*, [1922] 2 A.C. 315	4
14.	*Soo Mill, & Lumber Co. v. Sault Ste Marie (City)*, [1975] 2 S.C.R. 78	12
15.	*Steer Holdings Ltd. v. Manitoba*, [1993] 2 W.W.R. 146 (MBCA) 152	13, 28
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No.	Authority	Paragraph Reference
17.	*Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 SCR 32	11

Secondary Sources

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Statutes, Regulations, Rules, etc.

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
1.	*Civil Code of Québec*, CQLR c. CCQ-1991	s. 952
	Code civil du Québec, RLRQ c CCQ-1991	art. 952
2.	*Expropriation Act*, R.S.A. 2000, c. E-13	ss. 41, 42
3.	*Expropriation Act*, R.S.B.C. 1996, c. 125	s. 31
4.	*Expropriation Act*, R.S.C. 1985, c. E-21	s. 26
	Loi sur l'expropriation, LRC 1985, c E-21	art. 26
5.	*Expropriations Act*, R.S.O. 1990, c. E.26	s. 13
	Loi sur l'expropriation, LRO 1990, c E.26	art. 13
6.	*The Expropriation Act*, C.C.S.M., c. E190	s. 16
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