S.C.C. Court File No. 39594

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

B E T W E E N :

ANNAPOLIS GROUP INC.

Appellant

- and -

HALIFAX REGIONAL MUNICIPALITY

Respondent

- and -

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Interveners

FACTUM OF THE INTERVENER, ONTARIO LANDOWNERS ASSOCIATION

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

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PART I—OVERVIEW

1. The Ontario Landowners Association (the "**OLA**") intervenes on two issues: (1) Is the motive of a government authority relevant in considering whether a "taking" occurs in a *de facto* taking case? (2) Should the test for *de facto* taking established by this Court in *Canadian Pacific Railway v. Vancouver (City)* ("***CPR***")[1] be revisited? Both questions should be answered in the affirmative.

2. ***First***, where a public authority exercises its regulatory powers for the purpose of evading a statutory compensation requirement that would otherwise apply to it in achieving a public benefit, then a rebuttable presumption should arise that the *de facto* expropriation test is met. This is a balanced approach which recognizes that an improper motive by the public authority should play a role in the *de facto* taking analysis − by requiring it to demonstrate the contrary − but without eliminating the necessary elements of the claim.

3. Such a presumption is consistent with the importance which this Court attributed to an improper motive in the disguised expropriation case of *Lorraine*, and is analogous to presumptions drawn from intentional conduct in other contexts. While the Court of Appeal suggested below that cases involving an improper motive are already addressed through the tort of abuse of public office, this disregards the differences between that cause of action and a *de facto* taking claim.

4. ***Second***, the tests which this Court applies when considering whether to make a change in the common law or overrule its own jurisprudence are satisfied with respect to the requirement in *CPR* that the public authority acquire a beneficial interest in the property. In particular, abandoning this requirement is an appropriate legal development, because the existing law is deficient and the change would be an incremental one whose consequences are capable of assessment.

5. In the alternative, if overruling *CPR* is necessary to achieve this result, then this Court should do so here. The interests of correctness and clarity in the law outweigh any concerns about the uncertainty this may produce.

PART II—POSITION RESPECTING THE APPELLANT'S QUESTIONS

6. The OLA makes the following submissions regarding the Appellant's questions on which it intervenes:

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[1] *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5 ("***CPR***").

(a) Is the motive of a government authority relevant in considering whether a "taking" occurs in a *de facto* taking case? Yes. Where a public authority exercises its regulatory powers for the purpose of evading a statutory compensation requirement that would otherwise apply to it in achieving a public benefit, then a rebuttable presumption should arise that the *de facto* expropriation test is met.

(b) Should the test for *de facto* taking established by this Court in *CPR* be revisited? Yes. Abandoning the requirement in *CPR* that the public authority acquire a beneficial interest in the property is an appropriate legal development, because the existing law is deficient and the change would be an incremental one whose consequences are capable of assessment. Alternatively, if overruling *CPR* is necessary to achieve this result, then this Court should do so here.

PART III—STATEMENT OF ARGUMENT

1. The Role of Improper Motive in *De Facto* Taking Claims

7. The Court of Appeal held that "the motive of the expropriating authority is not a factor" in the *de facto* expropriation analysis.[2] In its view, an "[i]mproper motive does not create an alternative way of proving the claim and cannot compensate for the failure to establish the two required elements of *de facto* expropriation".[3] By contrast, the Appellant submits that a public authority's motive is "highly relevant" in assessing whether its actions constitute an expropriation.[4] This raises the question of what legal role an improper motive should play.

8. The OLA asserts that an improper motive by a public authority is relevant in *de facto* taking claims. Specifically, where a public authority exercises its regulatory powers for the purpose of evading a statutory compensation requirement that would otherwise apply to it in achieving a public benefit, then a rebuttable presumption should arise that the *de facto* expropriation test is met.

9. This presumption does not eliminate the necessity of proving the required elements of the claim, as the Court of Appeal was concerned, but recognizes that an improper motive should still play an important part in the analysis.

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[2] *Halifax Regional Municipality v. Annapolis Group Inc.*, 2021 NSCA 3 ("**Appeal Decision**"), ¶75.
[3] Appeal Decision, ¶75.
[4] Factum of the Appellant, ¶128.

10. This Court has recognized that where a public authority exercises its regulatory powers for the improper motive of avoiding a statutory compensation requirement, there is a significant likelihood that a *de facto* taking occurred. As Wagner C.J.C. said in *Lorraine*:

> The concept of expropriation concerns the power of a public authority to deprive a property owner of the enjoyment of the attributes of his or her right of ownership. Because of the importance attached to private property in liberal democracies, ***the exercise of the power to expropriate is strictly regulated to ensure that property is expropriated*** for a legitimate public purpose and ***in return for a just indemnity***. In Quebec, the ***Expropriation Act***… limits the exercise of this power and lays down the procedure to be followed in this regard.
>
> ***When property is expropriated outside this legislative framework for an ulterior motive, such as to avoid paying an indemnity, the expropriation is said to be disguised***. Where a municipal government improperly exercises its power to regulate the uses permitted within its territory ***in order to expropriate property without paying an indemnity***, two remedies are therefore available to aggrieved owners. They can seek to have the by-law that resulted in the expropriation declared either to be null or to be inoperable in respect of them. If this option is no longer open to them, they can claim an indemnity based on the value of the property that has been wrongly taken from them.[5]

11. Establishing a rebuttable presumption of *de facto* expropriation in such cases is a pragmatic judicial response. Where a public authority uses its regulatory powers in order to evade a statutory compensation obligation that would otherwise apply to it in achieving a public benefit, then it seeks to do indirectly what, if done directly, would amount to a *de jure* expropriation. The public authority may therefore be taken to recognize, and indeed intend, that a *de facto* expropriation will occur. While the public authority may still show that this was not the legal effect of its actions, the courts can hardly be faulted for presuming that the public authority's own understanding was correct.

12. A rebuttable presumption is also sound in principle. This Court has repeatedly emphasized the "very familiar principle that you cannot do that indirectly which you are prohibited from doing directly".[6] As a result, in circumstances where a party engages in a disguised scheme "for the purpose of evading what was believed to be the operation of [a] statute", the courts will refuse to give that scheme legal effect.[7] This reflects a basic function of statutory interpretation, i.e., "to suppress

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[5] *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, ¶1-2, *emphasis added*. **See also:** *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101 at 107, 113; *British Columbia v. Tener*, [1985] 1 S.C.R. 533 at 542, 552, 557.

[6] *Husky Oil Operations Ltd. v. Canada (M.N.R.)*, [1995] 3 S.C.R. 453, ¶41.

[7] *General Security Co. of Canada v. Howard Sand & Gravel Co.*, [1954] S.C.R. 785 at 790 (and 794). **See also:** *Esso Standard (Inter-America) v. J.W. Enterprises*, [1963] SCR 144 at 149-151;

subtle inventions and evasions for continuance of the mischief" the Act seeks to prevent.[8] Imposing a rebuttable presumption of *de facto* expropriation in such cases advances legislative intent.

13. Further, the law has long recognized that intentional efforts to deprive a plaintiff of its rights require a unique legal response. As Lord Slynn observed in *Smith New Court*:

> …***[I]t is a rational and defensible strategy to impose wider liability on an intentional wrongdoer***. … Such a policy of imposing more stringent remedies on an intentional wrongdoer ***serves two purposes. First it serves a deterrent purpose*** in discouraging fraud. … ***Secondly***, as between the fraudster and the innocent party, ***moral considerations militate in favour*** of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud…
>
> ***For more than 100 years at least English law has adopted a policy of imposing more extensive liability on intentional wrongdoers than on merely careless defendants***. … Since Victorian times there have been great developments in our law of obligations. But there has been no retreat from the policy spelt out…[9]

14. Consistent with this, courts have held that intentional conduct may give rise to rebuttable presumptions in other contexts.[10] In the law of spoliation, for instance, a finding that evidence was intentionally destroyed creates a rebuttable presumption that the evidence would not have assisted the party who destroyed it, requiring that party to demonstrate to the contrary.[11] Similarly, in the law of passing-off, a finding that the defendant intentionally copied the plaintiff's product creates a presumption of secondary meaning (i.e., that the plaintiff's product had a reputation or goodwill with consumers), which requires the defendant to demonstrate otherwise.[12]

15. A similar presumption should arise in the law of *de facto* expropriation where the public authority intentionally exercises its regulatory powers to avoid a statutory compensation requirement that would otherwise apply in achieving a public benefit.

Miller v. Ameri-Cana Motel Ltd., [1983] 1 S.C.R. 229 at 238-239; *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765 at 803-804.

[8] *Heydon's Case* (1584), 3 Co. Rep. 7a (K.B.) at 7b, 76 E.R. 637.

[9] *Smith New Court Securities v. Scrimgeour Vickers (Asset Management) Ltd.*, [1996] UKHL 3, [1997] A.C. 254 (H.L.) at 279-280, *emphasis added*. **See also:** *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534 at 544, 553, 565; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, ¶67-71; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, ¶72-73, 75; *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, ¶4, 39, 41, 44-45, 83.

[10] *Baril v. Obelnicki*, 2007 MBCA 40, ¶111.

[11] *Casbohm v. Winacott Spring Western Star Trucks*, 2021 SKCA 21, ¶36-40, 55, leave to appeal refused, 2021 CanLII 66409 (S.C.C.).

[12] *Ray Plastics Ltd. v. Dustbane Products Ltd.*, 1994 CanLII 1241 (Ont. C.A.); *T-Rex Véhicules inc. c. 6155235 Canada inc.*, 2008 QCCA 947, ¶51.

16. The Court of Appeal suggested that cases in which an expropriating authority acts for an improper purpose are already remedied through the tort of abuse of public office, such that there is no need to modify the *de facto* taking test to address this concern.[13] However, the fact that an improper purpose may be relevant to abuse of public office claims does not prevent it from playing a role in *de facto* taking disputes as well. There are many civil causes of action whose elements overlap, e.g., the requirement for "unlawful" conduct in abuse of public office, unlawful means conspiracy, intimidation and the unlawful means tort.[14]

17. Further, the Court of Appeal's suggestion ignores the important differences that exist between the tort of abuse of public office and a *de facto* taking. For instance, abuse of public office does not apply to a public authority that acts unlawfully, but without a specific intent to injure the plaintiff, unless the public authority also knows that its actions are in fact unlawful.[15] No similar knowledge requirement is necessary for the proposed presumption in *de facto* taking cases to arise; the expropriating authority need only exercise its regulatory powers to evade a statutory compensation requirement that would otherwise apply to it in achieving a public benefit. Further, some provinces have imposed procedural restrictions upon abuse of public office claims that do not apply to *de facto* taking allegations, such as the requirement in Ontario that a plaintiff first obtain judicial leave to proceed.[16]

18. Recognizing a rebuttable presumption of *de facto* expropriation in cases where a public authority intentionally evades a statutory compensation requirement ensures that the law will remedy such behaviour regardless of whether a tort claim for abuse of public office is available.

2. The Test for Developing the Common Law in *CPR* is Met

19. The Court of Appeal relied upon this Court's decision in *CPR* to hold that the public authority's acquisition of a beneficial interest in the property (the "**Acquisition Factor**") is a necessary element for *de facto* expropriation.[17] The Appellant submits that this aspect of *CPR* should be revisited and the Acquisition Factor abandoned, so that the *de facto* taking test focuses upon the

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[13] Appeal Decision, ¶83.
[14] *Odhavji Estate v. Woodhouse*, 2003 SCC 69, ¶23-25, 28-32; *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, ¶5, 23, 26, 63-69, 74-76.
[15] *Odhavji Estate v. Woodhouse*, 2003 SCC 69, ¶22-23, 28, 32.
[16] *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17, s. 17.
[17] Appeal Decision, ¶68-69, 71.

scope of the property owner's loss.[18] This means that the principles this Court applies in deciding whether to change the common law or overrule its own precedents will be important on the appeal.

20. In its Factum, the Respondent argues that the criteria applied by this Court when deciding whether to deviate from one of its previous decisions are not satisfied in this case. However, the Respondent cites only the conditions applied by this Court when deciding whether to ***overrule*** one of its previous decisions.[19] As explained below, it is not necessary for this Court to overrule *CPR*, because rejecting the Acquisition Factor would only be an ***incremental change*** in the common law, which is assessed under different criteria than those addressed in the Respondent's Factum. In the alternative, even if this change would not be incremental and *CPR* must be expressly overruled, the conditions necessary to do so are satisfied in this case.

21. ***First***, this Court has repeatedly recognized "the basic flexibility inherent in the common law",[20] and developed it where: (a) the existing law is wanting; and (b) the change in question is an incremental one whose consequences are capable of assessment.[21] Both requirements are met here.

22. As to whether ***the existing law is wanting***, the Appellant identifies several difficulties with the Acquisition Factor that reflect the same concerns this Court has recognized in finding the law to be deficient before:

(a) the Acquisition Factor creates legal incoherence, because it collapses the distinction between *de jure* and *de facto* expropriation, and means that Canada provides greater expropriation rights to foreign investors than to its own residents;[22]

(b) the Acquisition Factor also creates legal uncertainty, because the *CPR* Court provided limited guidance as to what the acquisition of a beneficial interest in property or flowing from it actually means;[23]

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[18] Factum of the Appellant, ¶9, 36-120.
[19] Factum of the Respondent, ¶36-40.
[20] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, ¶35.
[21] *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34 ("***Friedmann***"), ¶42; *Bhasin v. Hrynew*, 2014 SCC 71 ("***Bhasin***"), ¶1, 33-34, 40-41, 62, 66, 92.
[22] Factum of the Appellant, ¶9, 36, 52, 79, 90, 92, 96; *Bhasin*, ¶32-33, 40-41, 47-48, 52, 62.
[23] Factum of the Appellant, ¶51, 109; *Bhasin*, ¶39-41, 52, 62.

(c) the existing law is inconsistent, since the Acquisition Factor was not recognized by this Court in *Manitoba Fisheries, Tener* or *Lorraine*, nor by many intermediate courts of appeal;[24]

(d) the Acquisition Factor is out of step with the law of other jurisdictions which are major trading partners of Canada, e.g., the United States and the United Kingdom;[25] and

(e) there is considerable academic support for abandoning the Acquisition Factor.[26]

23. As to whether the ***proposed change is incremental***, the rejection of the Acquisition Factor would not amount to "the reversal of some settled rule", but an adjustment to "a complex and troublesome area of the common law".[27] The introduction of the Acquisition Factor in *CPR* was not necessary to the disposition of that appeal, had little precedent apart from *Mariner*, and is inconsistent with decisions of this Court decided both before (*Manitoba Fisheries*; *Tener*) and since (*Lorraine*). Accordingly, the development would simply "clarify the common law given two strands of conflicting authority, each with some claim to precedent".[28]

24. Further, the consequences of the change are capable of assessment. Many jurisdictions outside of Canada already recognize *de facto* taking without the Acquisition Factor. These "models permit us to predict that the proposed changes would function efficiently and would not introduce new, unforeseeable problems".[29]

25. ***Second***, and in the alternative, if this Court finds that abandoning the Acquisition Factor is not an incremental change but would require that *CPR* be explicitly overruled, the test for doing so is met here as well. In *Vavilov*, this Court explained when it will overrule its own precedents:

> …[T]his Court has in the past revisited precedents that were determined to be ***unsound in principle***, that had proven to be unworkable and unnecessarily complex to apply, or that had

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[24] Factum of the Appellant, ¶9, 36, 52, 54-66, 71, 73-77; *Friedmann*, ¶43; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶118.
[25] Factum of the Appellant, ¶53, 78-88; *Friedmann*, ¶43; *Bhasin*, ¶32, 41, 57-59, 82-85.
[26] Factum of the Appellant, ¶91; *Friedmann*, ¶43; *Bhasin*, ¶32, 36, 41, 47, 59-61, 73, 80.
[27] *Bhasin*, ¶40.
[28] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, ¶16. **See also:** *Watkins v. Olafson*, [1989] 2 S.C.R. 750 at 765.
[29] *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.*, [1997] 3 S.C.R. 1278, ¶38. **See also:** *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, ¶97, 112-114; *Bhasin*, ¶82-85; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, ¶62, 73, 164.

> ***attracted significant and valid judicial, academic and other criticism***… Although ***adhering to the established jurisprudence*** will generally promote certainty and predictability, in some instances doing so ***will create or perpetuate uncertainty in the law***… In such circumstances, "following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law"… These considerations apply here.[30]

26. In its Factum, the Respondent suggests that the above passage from *Vavilov* establishes three circumstances in which this Court may overrule its prior jurisprudence: (i) the precedent is unsound in principle; (ii) the precedent has proven to be unworkable and unnecessarily complex to apply; or (iii) the precedent has attracted significant and valid judicial, academic, and other criticism.[31]

27. However, these circumstances are merely ***examples*** of when overruling may occur, not a closed list of categories. The core question which must be asked before this Court will overrule its own precedents is "whether it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct the error"?[32] In this case, the "balancing exercise between the two important values of correctness and certainty"[33] weighs in favour of overruling *CPR*.

28. Indeed, Professor Hogg has observed that *CPR* is not only inconsistent with *Manitoba Fisheries* and *Tener*, but is unfair and creates uncertainty by undermining the coherence of Canada's expropriation laws:

> In *Canadian Pacific*, the Court restated the test for a constructive (or de facto) taking. McLachlin C.J. said that two requirements had to be met: "(1) an acquisition of a beneficial interest in the property, or flowing from it, and (2) removal of all reasonable uses of the property." The Court held that neither requirement was met. … ***The result seems unfair, and a departure from Manitoba Fisheries and Tener, in neither of which was there an acquisition by the Crown of a beneficial interest in property.*** Indeed, if that requirement were ***taken literally, it would be the end of compensation for constructive (or de facto) takings***, because the acquisition of an equitable interest in property is an actual taking (or expropriation).[34]

29. In these circumstances, there are no compelling considerations that require adhering to the incorrect *CPR* precedent. Further, the fact that the law of *de facto* expropriation involves the exercise of regulatory powers by public authorities underscores why overruling *CPR*, if necessary, should

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[30] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("***Vavilov***"), ¶20.
[31] Factum of the Respondent, ¶36.
[32] *Canada v. Craig*, 2012 SCC 43, ¶27.
[33] *Canada v. Craig*, 2012 SCC 43, ¶27.
[34] P.W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Carswell: Toronto, 2006+), §29.8, *emphasis added*, Book of Authorities of Ontario Landowners Association, Tab 1.

occur. In *Vavilov*, where this Court overruled decades of its own precedents, the majority recognized the "countless public bodies and regulatory regimes" that have "made administrative decision making one of the principal manifestations of state power in the lives of Canadians", holding that "[g]iven the ubiquity and practical importance of administrative decision making, it is essential that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed".[35]

30. A similar need for clarity applies to the question of when public authorities will liable for *de facto* expropriation based on the exercise of those regulatory powers.

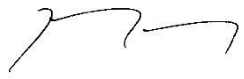
PART IV—SUBMISSIONS CONCERNING COSTS

31. The OLA requests that no costs be awarded either for or against it.

PART V—ORDER SOUGHT

32. The OLA makes no submission regarding the appropriate order in this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of November, 2021.



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[35] *Vavilov*, ¶4-5.

PART VI—TABLE OF AUTHORITIES

AUTHORITY	Paragraph(s) Referenced in Memorandum of Argument
Legislation Relied Upon	
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