Court 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

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

Interveners

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

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Table of Contents

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Public bodies must be allowed to regulate in the public interest without fear of liability for compensation, absent the most exceptional of circumstances. Public authorities have a unique role in governing society in the public interest and "…make difficult public policy choices that impact people differently and sometimes cause harm to private parties."[1]

2. The choice to provide compensation for regulatory effects should be made by the legislature. Outside of expropriation legislation and other compensatory statutory regimes, there is no general right to receive compensation for the effects of valid regulatory action. Exceptionally, compensation may be available for a *de facto* taking when the two requirements of the "*Canadian Pacific Rail* Test" are made out: (a) through regulatory action, a public authority acquires a beneficial interest in or flowing from property; and (b) the regulatory action results in a corresponding loss of all reasonable uses of the property by the owner.[2]

3. The CPR Test should be maintained. Its two requirements – beneficial acquisition and corresponding loss - reflect a careful balance of underlying public law principles and equitable considerations. *De facto* taking applies where the measure at issue is authorized by legislation and valid at public law. Equitable considerations related to unjust enrichment ensure that, where there is no juristic reason for the public body's acquisition without cost, compensation may be payable to the owner.

4. Continued application of the CPR Test ensures that the valid exercise of statutory authority in the public interest is not fettered by concerns about civil liability to those affected. At the same time, it prevents public authorities from unfairly acquiring objective benefits through regulatory action where there is no juristic reason for an acquisition without compensation.

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[1] *Nelson (City) v Marchi*, 2021 SCC 41 at para 1.

[2] *Canadian Pacific Railway Co v Vancouver (City)*, 2006 SCC 5 at para 30, [2006] 1 SCR 277 [*CPR*].

B. Facts

5. The Attorney General of Canada (Canada) relies on the facts as set out in paragraphs 1–5 and 7–25 of the Judgment of the Nova Scotia Court of Appeal.[3]

PART II – CANADA'S POSITION ON THE ISSUES IN QUESTION

6. Canada intervenes to address the legislature's role in choosing to provide or deny compensation for regulatory effects, and the theoretical justification for the CPR Test governing *de facto* expropriation. Canada's position is that:

1. the choice to compensate for regulatory effects should be left to the legislature; and
2. the CPR Test, which identifies those exceptional cases in which compensation is required for a *de facto* taking, is justified by principles of public law and equity.

PART III – SUBMISSIONS

A. Compensation for Regulatory Effects is a Choice for the Legislature

7. In Canada, legislative supremacy is a core pillar of the public law system.[4] In all cases where the legislature has explicitly addressed the subject of compensation – through *de jure* expropriation legislation, Statutory Compensation (as defined below) or by negating it altogether – the legislature's determination as to the appropriate balance between public and private rights must govern.[5] Courts should defer to the legislature's determination of the appropriate nature or extent of available compensation.

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[3] *Halifax Regional Municipality v Annapolis Group Inc*, 2021 NSCA 3 at paras 1–5 and 7–25 **[Appellant's Record (AR), Volume I, Tab 4, pages 24-26]**.

[4] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 81, [2009] 1 SCR 339.

[5] *Le Groupe Maison Candiac Inc c Canada (Procureur général)*, 2020 FCA 88 at para 72, [2020] 3 FCR 645 [*Groupe Maison Candiac*], leave to appeal to SCC refused, SCC 39272 (10 December 2020); *9255-2504 Québec Inc c Canada*, 2020 FC 161 at paras 221 and 225 [*9255-2504 Québec Inc*]; *CPR*, *supra* note 2 at para 37; *Authorson v Canada (Attorney General)*, 2003 SCC 39 at paras 54-57, [2003] 2 SCR 40 [*Authorson*]; *Melcar Inc c Québec (Ministre de la Voirie)*, [1970] SCR 421 at 424.

8. There are no constitutional limits in Canada on public bodies' legislative powers to restrict private property use.[6] This differentiates Canadian *de facto* expropriation from regulatory takings law in other jurisdictions, such as the United States and Australia. Canadian courts have no constitutional mandate to review and vary legislative decisions about the appropriate distribution of burdens and benefits flowing from land use controls.[7] Statutory authority to impose a measure necessarily implies the public bodies' authority to impose the costs or consequences resulting from the measure on the private property owner.

9. Restrictive and extensive land use regulation in Canada is the norm,[8] and private property owners must bear the costs of compliance. There is generally no right to claim compensation at common law for the regulation of rights or interests in the nature of property, whether real property or other proprietary interests such as licenses or grants. Individuals cannot claim priority over the public interest, as reflected in valid decisions made pursuant to a statutory scheme.

10. Where a public body acquires title to real property through an expropriation statute (*De Jure* Expropriation), legislatures have made a policy choice to provide compensation. *De Jure* Expropriation entails a legal acquisition by the expropriating authority and a corresponding legal loss to the prior owner, with compensation paid pursuant to the applicable expropriation statute.[9]

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[6] *Mariner Real Estate Ltd v Nova Scotia (Attorney General)*, 1999 NSCA 98 at paras 40-42 [*Mariner*]; Paul A Warchuk, *Rethinking Compensation for Expropriation*, 48 UBC L Rev 655 (2015) at 658-659 [**Appellant's Book of Authorities, Tab 8**].

[7] *Mariner*, *ibid* at paras 40-42.

[8] *Mariner*, *ibid* at paras 40-42; *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283 at para 61.

[9] John A Coates and Stephen F Waqué, *New Law of Expropriation* (Toronto: Thomson Reuters Canada, 2021) at §1.1 (Thomson Reuters ProView) [*New Law of Expropriation*] **[Canada's Book of Authorities, Tab 3]**; and see for example *Expropriation Act*, RSC 1985, c E-21 and *Expropriation Act*, RSNS, c 156.

11. Outside of *De Jure* Expropriation, legislatures may choose to deny or provide a right to compensation for the consequences of regulatory measures.[10] Legislation may set out rights to compensation, define an administrative process by which compensation may be sought, or both (Statutory Compensation). For example, species at risk legislation in several jurisdictions provides authority to compensate any person for losses suffered as a result of extraordinary or substantial impacts arising from decisions under those statutes.[11] Statutory Compensation may also be available for "injurious affection".[12]

12. In Statutory Compensation cases, the actions or decisions taken pursuant to statutory authority do not result in the transfer of title to the public authority, or any other legal or beneficial acquisition by the public authority. There is only a loss to the property holder - typically a diminution of value - while the property remains in the owner's possession.

13. *De Jure* Expropriation and Statutory Compensation are entirely statutory in nature and reflect the legislatures' choices regarding the nature and extent of available compensation. Where the legislature has spoken to compensation in these particular circumstances, the statute governs and compensation for *de facto* expropriation would inappropriately interfere with the statutory scheme.[13]

B. The CPR Test is justified and should be maintained

14. The exceptional remedy of compensation for *de facto* expropriation lies beyond *De Jure* Expropriation and Statutory Compensation. It is typically claimed where the effects of statutory actions on the use of property are argued to be so extreme that the courts should characterize the

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[10] *CPR*, *supra* note 2 at para 37; *Manitoba Fisheries Ltd v The Queen*, [1979] 1 SCR 101 at 118 [*Manitoba Fisheries*]; *Authorson*, *supra* note 5 at paras 54-57; *Groupe Maison Candiac*, *supra* note 5 at para 72; *9255-2504 Québec Inc*, *supra* note 5 at paras 221 and 225.

[11] *Species at Risk Act*, SC 2002, c 29, s 64(1); *Species at Risk (NWT) Act*, SNWT 2009, c 16, s 81; *Wildlife Act*, SNu 2003, c 26, s 140.

[12] *Antrim Truck Centre v Ontario*, 2013 SCC 13 at paras 4-5, [2013] 1 SCR 594; *New Law of Expropriation*, *supra* note 9 at §1.1.

[13] *CPR*, *supra* note 2 at para 37; *Authorson*, *supra* note 5 at paras 54-57; *Manitoba Fisheries*, *supra* note 10 at 118; *Groupe Maison Candiac*, *supra* note 5 at para 72.

action as an expropriation, even though there is no legal transfer of property rights and no statute explicitly speaks to compensation in the circumstances.

15. In *CPR*, this Court determined that compensation for *de facto* expropriation may only be provided where two criteria are met:

(a) a regulatory action results in an acquisition by the public authority of a beneficial interest in the property or flowing from it; and

(b) the legal effect of the regulatory action is the removal of all of the property owner's reasonable uses of the property.[14]

16. Whether compensation for *de facto* expropriation is statutory or common law in nature, the CPR Test provides a rational basis for determining its availability.[15] It reflects the underlying public law principles and addresses concerns about the potential inequity of public bodies acquiring beneficial interests at the property owner's expense through the exercise of their regulatory powers. This Court should reaffirm that the legal exercise of regulatory authority does not amount to *de facto* expropriation merely because the consequences for an owner are significant. Rather, no compensation should be payable unless the exercise of regulatory authority also results in the public authority acquiring a valuable benefit without any juristic reason for that acquisition to be free of cost.

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[14] *CPR*, *supra* note 2 at para 30.

[15] Decisions respecting *de facto* expropriation have generally considered whether to award compensation through a statute's compensatory scheme, with *Manitoba Fisheries* acting as an outlier. See *R v Tener*, [1985] 1 SCR 533 at 552 and 565 [*Tener*]; *CPR*, *supra* note 2 at paras 35-37; *Attorney General v De Keyser's Royal Hotel Ltd*, [1920] AC 508 (UK HL) at 542 and 544 [*De Keyser's Royal Hotel*] and *Mariner*, *supra* note 6 at para 37. But see *Manitoba Fisheries*, *supra* note 10 at 118.

(i) Beneficial acquisition is the critical element that justifies compensation

17. A beneficial acquisition by the public body through regulatory means is the fundamental reason that may warrant requiring a public body to pay compensation. In addition to the requirement that the regulatory measure cause the "removal of all reasonable uses of the property",[16] a beneficial acquisition by the public body is the critical element that justifies compensation.

18. To assist in identifying beneficial acquisitions, courts may look to the equitable principles that identify objective benefits in unjust enrichment. A general benefit for the public is not sufficient to establish *de facto* expropriation. Rather, the public authority must acquire an objective benefit for itself as an entity – one that is tangible in the sense that it has monetary value.[17] It need not be a legal transfer of title, but it must at least rise to the level of a beneficial interest that corresponds directly to the plaintiff's loss.[18] The jurisprudence has recognized the following as beneficial acquisitions of a corresponding loss: (1) the use and occupation of the plaintiff's property;[19] (2) the recovery of mineral rights on Crown lands;[20] (3) the use of the plaintiff's goodwill as a going concern;[21] and (4) the right to appropriate upstream groundwater.[22]

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[16] *CPR*, *supra* note 2 at para 30.

[17] Mitchell McInnes, "Objective Benefit" in *The Canadian Law of Unjust Enrichment and Restitution* (Toronto, Ontario: LexisNexis Canada, 2014) at Part II, Chapter 2 (QL) **[Canada's Book of Authorities, Tab 4]**; *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762 at 789-790, para 34 (WL) [*Peel*]; *Kerr v Baranow*, 2011 SCC 10 at paras 37-38, [2011] 1 SCR 269 [*Kerr*].

[18] *Tener*, *supra* note 15 at 552 and 563; *Manitoba Fisheries*, *supra* note 10 at 110 and 118; *Steer Holdings Ltd v Manitoba et al*, 1992 CanLII 2773 (MBCA) at paras 21 and 23 [*Steer Holdings*].

[19] *De Keyser's Royal Hotel*, *supra* note 15 at 545.

[20] *Tener*, *supra* note 15 at 552 and 563.

[21] *Manitoba Fisheries*, *supra* note 10 at 110 and 118.

[22] *Lynch v St John's (City)*, 2016 NLCA 35 at para 60, leave to appeal to SCC refused, 2017 CanLII 4184 (2 February 2017).

19. The requirement that a public authority acquire a benefit respects the distinction between *de jure* and *de facto* expropriation. Decisions from this Court confirm that the acquired benefit need not flow to the public authority *via* a legal transfer of title to property.[23]

(ii) The CPR Test is supported by public law principles

20. In *de facto* expropriation cases from common law provinces, there is an underlying premise that the regulatory measure is authorized by legislation and is valid as a matter of public law. Where a legislative measure is invalid at public law – whether for excess of jurisdiction, abuse of process or otherwise - it can be challenged on judicial review and quashed.[24] The consequence of quashing the measure is that the property owner will have suffered no loss and there is no basis for awarding compensation.

21. The same principles apply in Quebec civil law.[25] In *Lorraine (Ville) v 2646-8926 Québec Inc*, in the context of applying a time limitation, this Court considered longstanding case law in Quebec that municipalities cannot validly use zoning powers to expropriate property without paying an indemnity.[26] Doing so is considered disguised expropriation under article 952 of the *Civil Code* and is an abuse of power.[27] An owner that is aggrieved by such a by-law should normally seek to have the by-law declared null or inoperable in respect of them.[28] If such a remedy is granted, there is no basis for a compensation claim.

22. In exceptional cases, Quebec civil law recognizes the possibility of obtaining an indemnity for disguised expropriation resulting from administrative action that constructively confiscates

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[23] *Manitoba Fisheries*, *supra* note 10 at 110 and 118; *Tener*, *supra* note 15 at 551-552 and 563.

[24] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at paras 13-15, [2018] 1 SCR 750.

[25] *9255-2504 Québec Inc*, *supra* note 5 at paras 221-225; *Ville de Québec c Rivard*, 2020 QCCA 146 at para 70 [*Rivard*]; *Municipalité Régionale de comté d'Abitibi c Ibitiba ltée*, 1993 CanLII 3768 (QCCA) at 14.

[26] *Lorraine (Ville) v 2646-8926 Québec Inc*, 2018 SCC 35, [2018] 2 SCR 577 [*Ville de Lorraine*].

[27] Art 952 CCQ; *Benjamin c Montreal (Ville)*, 2004 CanLII 44591 (QCCA) at paras 49 and 58-59 [*Benjamin*]; *Sula c Duvernay*, [1970] CA 234 **[Canada's Book of Authorities, Tab 2]**.

[28] *Rivard*, *supra* note 25 at para 70.

property without indemnity, but for which administrative law provides no remedy.[29] The parameters of such a compensatory remedy in civil law are best left to another case with a proper factual basis. For the purpose of this appeal, it is sufficient to note that the principles underlying the CPR Test, including principles of unjust enrichment, are equally relevant in civil law.[30]

(iii) The CPR Test responds to equitable concerns

23. The CPR Test responds to the same concerns that arise in unjust enrichment. The unjust enrichment doctrine is fundamentally concerned with reversing transfers of benefits that occur without any legal or equitable basis.[31] The test for unjust enrichment requires: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment.[32] The third element, juristic reason, requires consideration of both sides of the transfer – the enrichment and the deprivation.[33]

24. Applying unjust enrichment reasoning to *de facto* expropriation cases, the CPR Test requires that the public authority acquire a valuable benefit (the enrichment) at the plaintiff's direct expense (the deprivation). The legislative regime that authorizes the measure is the juristic reason for the loss/deprivation. Unless a statute provides otherwise, the loss imposed through valid regulatory measures is authorized in the public interest and must be borne by the person whose rights are affected.[34]

25. However, if there is a corresponding beneficial acquisition by the public authority, the question becomes whether there is a juristic reason for that acquisition to be free of cost. A statute that speaks directly to compensation informs the juristic reason component of an unjust enrichment

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[29] *Ville de Lorraine*, *supra* note 26 at paras 1-2; *Benjamin*, *supra* note 27 at paras 47-51 and 58-62; and *Rivard*, *supra* note 25 at paras 61-70.

[30] Arts 1493-94 CCQ.

[31] *Moore v Sweet*, 2018 SCC 52 at paras 35 and 55, [2018] 2 SCR 303 [*Moore*]; *Peel*, *supra* note 17 at 788, para 30 (WL).

[32] *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 30, [2004] 1 SCR 269; *Kerr*, *supra* note 17 at paras 31-32; *Moore*, *ibid* at paras 36-38 and 55.

[33] *Moore*, *ibid* at paras 55-59.

[34] *Steer Holdings*, *supra* note 18 at para 1.

analysis. A statute that explicitly denies compensation provides a juristic reason why the public authority may retain the benefit without compensating the plaintiff. A statute that provides for compensation in limited circumstances, or to a defined extent, dictates the juristic terms on which the public authority may retain the acquired benefit. In exceptional circumstances, where a statute is silent on compensation but leads to valid action that (a) removes all reasonable uses of the plaintiff's property, and (b) results in the public body acquiring a corresponding objective benefit, a *de facto* taking may result.

26. *De Keyser's Hotel* supports the unjust enrichment comparison. The Crown took possession of the plaintiff's hotel for its administrative purposes during World War I pursuant to regulation. The *Defence Act, 1842* contemplated that the Crown would compensate owners of property that it occupied for defence purposes. Compensation was not provided, despite being contemplated in the statute. In these circumstances, there was a juristic reason for the deprivation of the plaintiff's use and occupation of the property (the regulations), but no juristic reason for the Crown's acquisition of the use and occupation without compensation.

27. This rationale is further supported by this Court's decisions which have treated regulatory action as *de facto* expropriation. In *Manitoba Fisheries*, the statute authorized the Crown to remove the plaintiff's goodwill (the deprivation) and acquire that goodwill for itself (the corresponding beneficial acquisition). The legislation contemplated that the deprivation would not occur without compensation, albeit for assets and through an agreement between Canada and the province. While there was a juristic reason for the deprivation (the legislation), there was no juristic reason for the corresponding beneficial acquisition to be without cost because the statute contemplated that compensation would be paid.

28. Similarly, in *Tener*, the Crown acquired an objective benefit (recovery of a portion of the original mineral rights grant) that corresponded with the plaintiff's loss (the original mineral rights grant). The *Park Act*, under which the permit was refused, provided that there was a right to claim compensation for expropriation. There was no juristic reason for allowing the Crown to retain the acquired benefit without compensation.

29. The unjust enrichment theory similarly grounds the granting of an indemnity in disguised expropriation cases in civil law.[35] For example, in *Ville de Montréal c Robidoux*, the Quebec Court of Appeal explained that in cases amounting to quasi-expropriation, a public authority that acquires a benefit at the expense of a private owner must compensate the owner that is correspondingly deprived of its property.[36] The obligation to compensate is based in the law of unjust enrichment. In cases where the public authority has not acquired an objective benefit without a juristic reason (an unjust enrichment), the court will not award compensation for disguised expropriation.[37]

PART IV – COSTS

30. Canada does not seek costs and requests that no costs be awarded against Canada.

PART V – ORDER SOUGHT

31. Canada makes no submissions respecting the proper disposition of the appeal.

DATED AT WINNIPEG, MANITOBA this 23rd day of November, 2021.

"DAYNA ANDERSON"

Dayna Anderson

Counsel for the Intervener
The Attorney General of Canada

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[35] *Montréal (Ville) c Robidoux*, [1979] CA 86 (QCCA) [*Robidoux*] **[Canada's Book of Authorities, Tab 1]**. See also Arts 1493-94 CCQ.

[36] *Robidoux*, *ibid* at para 12; *Benjamin*, *supra* note 27 at paras 49 and 59-62.

[37] *Rivard*, *supra* note 25 at paras 64-70.

PART VI – LIST OF AUTHORITIES

Case Law		**Referred to in Factum at Para(s):**
1.	*9255-2504 Québec Inc c Canada*, 2020 FC 161	7, 11, 21
2.	*Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283	9
3.	*Antrim Truck Centre v Ontario*, 2013 SCC 13, [2013] 1 SCR 594	11
4.	*Attorney General v De Keyser's Royal Hotel Ltd*, [1920] AC 508 (UK HL)	16, 18, 26
5.	*Authorson v Canada (Attorney General)*, 2003 SCC 39, [2003] 2 SCR 40	7, 11, 13
6.	*Benjamin c Montreal (Ville)*, 2004 CanLII 44591 (QCCA)	21, 22, 29
7.	*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339	7
8.	*Canadian Pacific Railway Co v Vancouver (City)*, 2006 SCC 5. [2006] 1 SCR 277	2, 7, 11, 13, 15, 16, 17
9.	*Garland v Consumers' Gas Co*, 2004 SCC 25	23
10.	*Halifax Regional Municipality v Annapolis Group Inc*, 2021 NSCA 3	5
11.	*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, [2018] 1 SCR 750	20
12.	*Kerr v Baranow*, 2011 SCC 10, [2011] 1 SCR 269	18, 23
13.	*Le Groupe Maison Candiac Inc c Canada (Procureur général)*, 2020 FCA 88, [2020] 3 FCR 645, leave to appeal to SCC refused, SCC 39272 (10 December 2020)	7, 11, 13
14.	*Lorraine (Ville) v 2646-8926 Québec Inc*, 2018 SCC 35, [2018] 2 SCR 577	21, 22
15.	*Lynch v St John's (City)*, 2016 NLCA 35 leave to appeal to SCC refused, 2017 CanLII 4184 (2 February 2017)	18

Case Law		**Referred to in Factum at Para(s):**
16.	*Manitoba Fisheries Ltd v The Queen*, [1979] 1 SCR 101	11, 13, 16, 18, 19, 27
17.	*Mariner Real Estate Ltd v Nova Scotia (Attorney General)*, 1999 NSCA 98	8, 9, 16
18.	*Melcar Inc c Québec (Ministre de la Voirie)*, [1970] SCR 421	7
19.	*Montréal (Ville) c Robidoux*, [1979] CA 86 (QCCA), 1979 CarswellQue 477 **[Canada's Book of Authorities, Tab 1]**	29
20.	*Moore v Sweet*, 2018 SCC 52, [2018] 3 SCR 303	23
21.	*Municipalité Régionale de comté d'Abitibi c Ibitiba ltée*, 1993 CanLII 3768 (QCCA)	21
22.	*Nelson (City) v Marchi*, 2021 SCC 41	1
23.	*Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762	18, 23
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27.	*Ville de Québec c Rivard*, 2020 QCCA 146	21, 22, 29
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28.	*Code Civil du Québec*, CCQ-1991, Arts 952, 1493-94 *Civil Code of Quebec*, CCQ 1991, Arts 952, 1493-94	21, 22, 29
29.	*Expropriation Act*, RSC 1985, c E-21 *Loi sur l'expropriation*, LRC (1985), ch E-21	10
30.	*Expropriation Act*, RSNS, c 156	10
31.	*Species at Risk Act*, SC 2002, c 29, s 64(1) *Loi sur les espèces en péril*, LC 2002, ch 29, s 64(1)	11
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