S.C.C. File No. 39594

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

BETWEEN:

ANNAPOLIS GROUP INC.

APPELLANT
(Respondent)

- and -

HALIFAX REGIONAL MUNICIPALITY

RESPONDENT
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF BRITISH COLUMBIA, CANADIAN CONSTITUTION FOUNDATION, ONTARIO LANDOWNERS ASSOCIATION, CANADIAN HOME BUILDERS' ASSOCIATION, and ECOJUSTICE CANADA SOCIETY

INTERVENERS

FACTUM OF THE INTERVENER, CANADIAN HOME BUILDERS' ASSOCIATION

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

RAYMAN BEITCHMAN LLP
250 Yonge Street, Suite 2200
P.O. Box 4
Toronto, ON M5B 2L7

Shane Rayman
Conner Harris
Tel: (416) 597-5406
Fax: (416) 869-3411
Email: shane.rayman@rslawyers.com

Counsel for the Intervener,
Canadian Home Builders' Association

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3573
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener,
Canadian Home Builders' Association

LENCZNER SLAGHT LLP
Suite 2600
130 Adelaide Street West
Toronto, ON M5H 3P5

Peter H. Griffin
Scott Rollwagen
Rebecca Jones
Amy Sherrard
Tel: (416) 865-2921
Fax: (416) 865-9010
Email: pgriffin@litigate.com
srollwagen@litigate.com
rjones@litigate.com
asherrard@litigate.com

Counsel for the Appellant,
Annapolis Group Inc.

DENTONS CANADA LLP
99 Bank Street
Suite 1420
Ottawa, ON K1P 1H4

David R. Elliott
Tel: (613) 783-9699
Fax: (613) 783-9686
Email: david.elliott@dentons.com

Ottawa Agent for Counsel for the
Appellant, Annapolis Group Inc.

MCINNES COOPER
1969 Upper Water St., Suite 1300
Purdy's Wharf Tower II
Halifax, NS B3J 3R7

Michelle Awad, Q.C.
Tel: (902) 444-8509
Fax: (902) 425-6350
Email: michelle.awad@mcinnescooper.com

HALIFAX REGIONAL MUNICIPALITY
Legal Services,
3rd Flr., 5251 Duke St.
PO Box 1749, Stn. Central
Halifax, NS B3J 3A5

Martin C. Ward, Q.C.
Tel: (902) 490-4226
Fax: (902) 490-4232
Email: wardm@halifax.ca

Counsel for the Respondent,
Halifax Regional Municipality

CONWAY BAXTER WILSON LLP/S.R.L.
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Colin Baxter
David Taylor
Tel: (613) 288-0149
Fax: (613) 688-0271
Email: cbaxter@conwaylitigation.ca
dtaylor@conwaylitigation.ca

Ottawa Agent for Counsel for the Respondent,
Halifax Regional Municipality

ATTORNEY GENERAL OF CANADA
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, ON K1P 6L2

Robert J. Frater, Q.C.
Tel: (613) 670-6289
Fax: (613) 954-1920
Email: robert.frater@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice Canada, Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Ottawa Agent for Counsel for the Intervener, Attorney General of Canada

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 8th floor
Toronto, ON M7A 2S9

Robert Lawson
Vanessa Glasser
Tel: (647) 467-7763
Fax: (416) 326-4181
Email: robert.b.lawson@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Ontario

ATTORNEY GENERAL OF NOVA SCOTIA
Legal Services, 8th Flr., 1690 Hollis St.
PO Box 7, Stn. Central
Halifax, NS B3J 2L6

Edward A. Gores, Q.C.
Tel: (902) 424-4024
Fax: (902) 424-1730
Email: edward.gores@novascotia.ca

Counsel for the Intervener, Attorney General of Nova Scotia

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3573
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of Nova Scotia

ATTORNEY GENERAL OF BRITISH COLUMBIA
1675 Douglas Street
Victoria, BC V8W 9J7

Phong Phan
Timothy Quirk
Tel: (250) 356-8499
Fax: (250) 356-8400
Email: phong.phan@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of British Columbia

MILLER THOMSON LLP
2700 Commerce Place
10155 - 102 Street
Edmonton, AB 5J 4G8

Malcolm Lavoie
Adrienne Funk
Tel: (780) 429-9706
Fax: (780) 424-5866
Email: mlavoie@millerthomson.com

Counsel for the Intervener, Canadian Constitution Foundation

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Canadian Constitution Foundation

MCCARTHY TÉTRAULT LLP
Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Brandon Kain
Adriana Forest
Tel: (416) 601-7821
Fax: (416) 868-0673
Email: bkain@mccarthy.ca

Counsel for the Intervener, Ontario Landowners Association

ECOJUSTICE CANADA SOCIETY
520-1801 Hollis Street
Halifax, NS B3N 3J1

Randy Christensen
Sarah McDonald
Tel: (902) 417-1700
Fax: (902) 417-1701
Email: rchristensen@ecojustice.ca

Counsel for the Intervener, Ecojustice Canada Society

TABLE OF CONTENTS

PART I – OVERVIEW

1. Canada does not enjoy a constitutional protection of private property rights. But its legal system still protects the ownership of private property and limits the power of governments to acquire land for public purposes.[1] This legal protection recognizes the social, individual, and economic benefits of securing private property ownership and ensuring that individual property owners are not unfairly burdened to secure benefits intended for the public good.[2]

2. Departing from the Canadian tradition of protection for private property by permitting the sterilization of property through regulation, without compensation, causes higher costs and risks in the development and ownership of property. This decreases the supply of new housing for Canadians and makes housing less affordable.

3. The Canadian Home Builders' Association (**"CHBA"**) is a not-for-profit organization composed of approximately 9,000 companies throughout Canada. Since 1943, the CHBA has advocated for the interests of homebuyers and homeowners at all levels of government.

4. The CHBA urges this Court to refine its test for *de facto* expropriation to align with the traditional protection of property rights and to ensure balance between private rights and public benefits. The CHBA does not argue that the test for *de facto* expropriation set out in *Canadian Pacific Railway Co v Vancouver* (**"*CPR*"**) requires wholesale revision.[3] It instead seeks clarification to focus the analysis of "beneficial interest" on whether the governmental authority has obtained a benefit to the public that an individual landowner should not reasonably be expected to bear without compensation. This definition is consistent with previous case law, related concepts under statutory expropriation schemes, and Canada's traditional protection of the right to ownership of private property.

---

[1] *Lynch v St John's (City)*, 2016 NLCA 35 at para 34 [***Lynch***] (leave to appeal denied [2016] SCCA No 390); *Attorney General v De Keyser's Royal Hotel Ltd*, [1920] AC 508 (HL) at 542 [***De Keyser***].

[2] *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 [***Antrim***].

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

PART II – RESPONSE TO QUESTIONS IN ISSUE

5. The CHBA's submissions focus on the first issue raised by the Appellant. It urges this Court to clarify the meaning of the "beneficial interest" that must be acquired by a public authority to satisfy the requirements for establishing a *de facto* expropriation.

PART III – ARGUMENT

I. The protection of private property rights is itself a public benefit

6. Countries as diverse as the United States, Australia, Malaysia, Ireland, and India, as well as the European Union, all enjoy constitutional protection for property rights.[4] These protections acknowledge the societal benefits associated with strong property rights. Protection of private property ownership is often considered a prerequisite for the defence of other rights.[5] It allows individuals and society to accumulate wealth by providing "both the incentive and security that are necessary to allow [individuals] to confidently save and invest."[6] It also encourages the capital investment, effort, and ingenuity that results in economic growth, employment, an enhanced tax base, and a higher standard of living.

7. Although Canada does not enjoy a constitutional protection for private property rights, it has developed a robust regime of legislative and common law protections of ownership rights. At the heart of that regime is a guarantee of compensation for property owners who are deprived of their property to benefit the public.[7]

8. That regime balances the right to property ownership against the public interest that sometimes requires the compulsory acquisition of private property for public benefits.

---

[4] US Const amend V and XIV§1; *Commonwealth of Australia Constitution Act* (Cth), s 51(xxxi); *Malaysia: Federal Constitution*, s 13(2); *Constitution of Ireland*, s 43; *The Constitution of India*, amend 44, art 300A; Council of Europe, *Protocol 1 of the European Convention for the Protection of Human Rights and Freedoms*, ETS 9, at art 1; NZ *Hansard*, First reading: New Zealand Bill of Rights (Private Property Rights) Amendment Bill 11 May 2005 [**Gordon Copeland**].

[5] Gordon Copeland, *supra* note 4.

[6] Lorraine Finlay, "The Attack on Property Rights" (Paper delivered at the 22nd Conference of the Samuel Griffith Society, 28 August 2012, Perth, Australia) [**Finlay**].

[7] Ontario Law Reform Commission, *Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation* (Toronto: Department of the Attorney General, 1967) at 11; *De Keyser*, *supra* note 1 at 542.

Expropriation is sometimes necessary for the public good. Canada's legislation governing expropriation comprehensively protects expropriated landowners. The courts have reinforced those protections by interpreting them in a manner that ensures landowners are made whole through payment of full and fair compensation,[8] consistent with the common law presumption in favour of compensation when property is taken for public purposes.[9]

9. The development of a legislative regime that robustly protects property owners is consistent with the primacy Canadian law has traditionally placed on the protection of private property rights. That protection by governments (through legislation) and the courts (through the common law) has come about not because it is required – based on constitutional requirements – but because it is necessary for the good of society.

10. *De facto* expropriations, by contrast, create a perverse incentive for public bodies to ignore legislative expropriation schemes in favour of regulations that sterilize property from reasonable uses. This incentive arises where regulation can create a public benefit without engaging a corresponding obligation to compensate the deprived property owner. Although this may be politically convenient as "saving taxpayer dollars," it is anathema to the principle of protecting property ownership and ensuring that property owners are not required to sacrifice greater than their fair share for the public good.

11. Excessive regulation that effectively places a "hold" on private property for a future acquisition, or which prohibits or prevents its development to secure public use or access (for example), confers a meaningful benefit to the public. This is, and ought to be treated as, the acquisition of an interest in the land that should be acquired through the expropriation of a full or partial interest (such as an easement) in the affected property.

12. The negative impacts of this weakened protection of property rights are real – in costs to our governance and economic costs to Canadians. Allowing governments to deny or avoid compensation for the taking of private property damages good governance because it discourages them from proceeding in a manner that will infringe on property rights only to

---

[8] *Expropriations Act*, RSO 1990, c E-26 [**Ontario *EA***]; *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32 at para 33.

[9] *De Keyser*, *supra* note 1 at 542.

the extent necessary.[10] When the cost of sterilizing land for the public good approaches zero, demand naturally increases.[11] Uncompensated takings therefore can lead to more uncompensated takings, to the detriment of secure property ownership.

13. Such an increased threat of *de facto* expropriation without compensation can cause real economic consequences. As the High Court of Australia has cautioned:

> *[t]he threat that legislatures will acquire property without just compensation will result in people electing not to generate property by saving, or developing their property to less than optimal levels, or seeking a greater rate of return to meet the risk of acquisition, or pursuing investment opportunities in jurisdictions which do provide compensation for compulsory acquisition.*[12]

14. Those effects are borne out in the data. Costs from regulation forcing developers to dedicate land to the government or otherwise prohibiting development led to an average increase of 11% in lot cost.[13] This is reflected in Canada's high cost of housing, which is attributable in part to onerous regulatory burdens rather than the cost of building.[14] In Ontario, for example, a municipality whose land is located 50% or more in the Greenbelt (severely restricting its use) will have houses that are on average 14% more expensive than municipalities not similarly burdened.[15] In the City of Toronto, cutting zoning review rates for new homes and increasing the availability of housing development land would cut the average home price by an estimated $70,000.[16]

---

[10] Finlay, *supra* note 6.

[11] James S. Burling, "The Use and Abuse of Property Rights in Saving the Environment" (2012) 1:373 Property Rights Conference Journal 373 at 387.

[12] *ICM Agriculture Pty Ltd v The Commonwealth*, [2009] HCA 51 at para 178.

[13] Paul Emrath, "Government Regulation in the Price of a New Home: 2021" online: (2021) National Association of Home Builders at 5 https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-government-regulation-in-the-price-of-a-new-home-may-2021.pdf>.

[14] Benjamin Dachis and Vincent Thivierge, "Through the Roof: The High Cost of Barriers to Building New Housing in Canadian Municipalities" online: (2018) Commentary No 513 C.D. Howe Institute at 2 <https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Friday%20Commentary_513.pdf> [**Dachis and Thivierge**].

[15] *Ibid* at 15.

[16] *Ibid* at 17.

II. An expansive meaning for the term "beneficial interest" should be confirmed

15. In *CPR* this Court articulated a two-part test for determining when governmental action rises to the level of a *de facto* expropriation. That test requires that claimants demonstrate that the authority has gained an interest in the property, while they have lost their interest in it through a deprivation of "all [of its] reasonable uses."[17] The interest that must be acquired by the authority is characterized as a "beneficial interest." That term has injected confusion into the application of the *CPR* test and has been interpreted in a restrictive manner that makes claims for *de facto* expropriation a near impossibility to establish.

16. This Court ought to clarify the meaning of "beneficial interest." It should confirm that such an interest includes more than a proprietary or ownership interest that is similar or equivalent to the rights of the *de jure* property owner. Rather, "beneficial interest" should be interpreted in a manner that includes interests which benefit the public at large, and which an individual property owner should not be expected to bear without compensation.

A. History of the term "beneficial interest"

17. Chief Justice McLachlin credited the two-part test she articulated in *CPR* to three preceding cases: *Mariner*, *Manitoba Fisheries*, and *Tener*.[18] But the term itself scarcely appears in those cases. It is not used at all in the foundational *Manitoba Fisheries*. The word "benefit" is only used in *Mariner* at paragraph 68 with respect to the claimant's use of the property. And in *Tener* the terms "benefit" and "beneficial" appear only in Justice Wilson's concurring opinion with respect to the *profit à prendre* right enjoyed by the claimant.

18. A close reading of decisions prior to *CPR* demonstrates the courts' expansive definition of the nature of the interest acquired when considering claims for *de facto* expropriation. At the heart of that jurisprudence is the presumption that legislation does not intend to expropriate property without compensation.[19]

---

[17] *CPR*, *supra* note 3 at para 30.

[18] *Mariner Real Estate Ltd v Nova Scotia (Attorney General)*, 1999 NSCA 98 at 716 [***Mariner***]; *Manitoba Fisheries Ltd. v The Queen*, [1979] 1 SCR 101 [***Manitoba Fisheries***]; and *R v Tener*, [1985] 1 SCR 533 [***Tener***].

[19] *Mariner*, *supra* note 18 at paras 45, 77; *Manitoba Fisheries*, *supra* note 18 at 109; *Tener*, *supra* note 18 at para 51; *Cream Silver Mines Ltd v R*, 1991 CanLII 870 (BCSC) at 21-22 [***Cream***

19. In *Mariner* for example, which is more properly viewed as a claim for *de jure* rather than *de facto* expropriation, the Nova Scotia Court of Appeal held that "property" should not be defined narrowly, and should instead be read broadly enough to include intangible rights and benefits.[20] In *Manitoba Fisheries*, this Court recognized that intangible goods like goodwill, are property that may be taken by *de facto* expropriation. And in *Tener* this Court found that removing an encumbrance on a public park – *i.e.* revoking the claimant's right to mine on the land – preserved desirable qualities in the park and added value for the public and government. Lower courts in *Nilsson* and *Cream Silver Mines* applied this jurisprudence to hold that a public body need not acquire the property for the same purpose as the owner had used it, and that "property" should not be confined to "land."[21]

20. That jurisprudence confirms a broad, purposive reading of the interest acquired by the authority. The effect of the introduction of "beneficial interest" in *CPR* has unfortunately been to narrow the scope of what interests will satisfy the test for *de facto* expropriation.

B. Post-CPR application of "beneficial interest"

21. The *CPR* test, and the ambiguity in the phrase "beneficial interest," has severely limited when and how a *de facto* expropriation may be found. The British Columbia Supreme Court, for example, has held that the claimant must establish what property rights they lost and, with respect to "beneficial interest," they must demonstrate that "those rights have been taken by a public authority."[22] The same Court has held that a claimant must establish an interest equivalent to "property" that is acquired by the authority.[23] But enhanced market value of lands owned by the authority could, by contrast, satisfy the test.[24] The Federal Court has similarly held that in order to demonstrate a "beneficial interest" the claimant

---

Silver]; *Alberta (Minister of Public Works, Supply and Services) v Nilsson*, 1999 ABQB 440 at para 34 [***Nilsson***]; *De Keyser*, *supra* note 1 at 542.

[20] *Mariner*, *supra* note 18 at para 68.

[21] *Nilsson*, *supra* note 19 at para 55, citing *Steer Holdings Ltd v Manitoba*, 1992 CanLII 2773 (MB CA), [1993] 2 WWR 146 (Man CA) at 152 [***Steer Holdings***]; *Cream Silver*, *supra* note 19.

[22] *Wu v Vancouver (City)*, 2017 BCSC 2072 at para 118.

[23] *Compliance Coal Corporation v British Columbia (Environmental Assessment Office)*, 2020 BCSC 621 at para 95 [***Compliance Coal***].

[24] *Ibid* at para 96.

must identify "an asset that the government acquired."[25] The Nova Scotia Court of Appeal in the decision below likewise employed an unduly narrow definition of "beneficial interest." It held that the *CPR* test required that "*land* must actually be taken from the owner *and acquired by the authority*."[26]

22. These examples illustrate the unduly narrow interpretation that has resulted from *CPR*'s injection of the term "beneficial interest" into the analysis. It has been read as requiring that a tangible asset, such as an interest in land, must be acquired by a public authority in order to qualify as a "beneficial interest." They have gone further and suggested that there must be some equivalence between the interest of which the claimant is deprived and the "beneficial interest" acquired by the authority. This narrow interpretation is inconsistent with the expansive definition dictated by the jurisprudence preceding *CPR*, and it creates confusion. The meaning of "beneficial interest" should be clarified to provide guidance to future parties and decision-makers to ensure the protection of private property.

C. *A "beneficial interest" to the public satisfies the test*

23. While the second prong of the *CPR* test requires that all, or nearly all, of the *owner's* bundle of rights be extinguished to constitute *de facto* expropriation, it ought not be a requirement that the public authority *obtain* the entire bundle of rights for compensation to arise.

24. The interest acquired should not be "making direct use of the owner's property in the same manner as the owner would have."[27] The very nature of a *de facto* expropriation dictates that the benefit the authority acquires will likely be different than that with which the landowner is concerned.[28] The asymmetrical nature of the interests at issue dictate clarification of the term "beneficial interest" accordingly.

---

[25] *Magnum Machine Ltd (Alberta Tactical Rifle Supply) v Canada*, 2021 FC 1112 at para 39.
[26] *Halifax Regional Municipality v Annapolis Group Inc*, 2021 NSCA 3 at para 71(*i*) [emphasis added].
[27] *Nilsson*, *supra* note 19 at paras 54-55.
[28] Shawn H.T. Denstedt and Ryan V. Rodier, "What Happens When Developers Can't Develop: Can and Should Resource Developers be Compensated When They Can't Develop Their Assets?" (2010) 48:2 Alb LRev 331 at 360.

25. This Court has affirmed the "unique role of public authorities in governing society in the public interest."[29] Exercise of the power of expropriation is, consistent with that role, taking of property by an authority for a public work, public benefit, or other public purpose.[30] Claims for *de facto* expropriation ought to recognize that the deprivation of property rights suffered by a private owner in such circumstances will be undertakings for a public good or benefit. It is that benefit which should inform the analysis of "beneficial interest."

26. The Newfoundland and Labrador Court of Appeal's decision in *Lynch v St John's (City)* is instructive. The claimant owned lands across which groundwater drained into a river used by the City of St. John's for its water supply.[31] The City enacted regulations forcing them to keep their land in its "natural state" and prohibited residential development of the lands. It also denied permits to develop the land for any other non-residential purpose.[32] The Court found that the City gained a "beneficial interest" by ensuring a continuous flow of uncontaminated ground water across the property, which protected its water supply.[33]

27. The CHBA submits that this Court should clarify the term "beneficial interest" in a manner focussed on the public benefit that is secured by the deprivation of the owner's reasonable use of their property. That approach is consistent with this Court's protection of property rights, its jurisprudence in analogous situations, and international legal principles.

28. The Court need look no further than the first principles underlying the protection of private property rights in our jurisprudence. Lord Atkinson's presumption of compensation from *De Keyser* – arguably the cornerstone of this concept – is built on the principle that a government cannot be presumed to intend "that one man's property shall be confiscated for the *benefit* of others, or of the public, without any compensation […]."[34]

---

[29] *Nelson (City) v Marchi*, 2021 SCC 41 at para 1.
[30] See e.g. *Expropriation Act*, RSC 1985, c E-21 at s 4(1); see also *Expropriation Act*, RSNS 1989, c 156 at subs 101(*c*) and (*d*), *Expropriation Act*, RSNB 1973, c E 14 at s 4(*b*), *Expropriation Act*, RSPEI 1988, c E-13 at s 3; *Expropriation Act*, RSNL 1990, c E-19 at subs 3(*a*) – (*p*).
[31] *Lynch*, *supra* note 1 at para 5.
[32] *Lynch*, *supra* note 1 at para 22.
[33] *Lynch*, *supra* note 1 at para 60.
[34] *De Keyser*, *supra* note 1 at 542, citing *London and North Western Ry Co v Evans*, [1893] 1 Ch 16, 28 [emphasis added].

29. Since *CPR* this Court has acknowledged those first principles in its analysis of claims for "injurious affection where no land is taken." Such claims, though a right provided by statute, compensate landowners who suffer damage by virtue of government action without a formal acquisition of their property.[35] This Court focuses the analysis on whether, in the circumstances, it is unfair for the private landowner at issue to bear a disproportionate burden for the public good.[36] The CHBA's proposed analytical approach to "beneficial interest" harmonizes these related concepts to bring clarity to the law. *Lynch* similarly incorporated those principles into the *de facto* expropriation analysis.[37]

30. The incorporation of such a balancing addresses concerns about "opening the floodgates" to claims for compensation that would unduly burden the public purse or impair the ability of government to regulate. The framework recognizes that some regulations create both public and private benefits that a private landowner must, in fairness, bear. A shoreline preservation bylaw may, for example, extinguish "all reasonable uses" of waterfront property. But if it is intended to prevent erosion that would harm the landowner's remaining property then it is fair for them to bear that burden. Similarly, regulations of general application (like public health and safety protections), would not attract compensation as they constitute a reasonable and proportionate burden to be borne for the public good.

31. Focusing the analysis of "beneficial interest" on the public benefit acquired by the authority will also align with this Court's recent consideration of the concept of "disguised expropriations" in Quebec civil law. *Lorraine (Ville) v 2646-8926 Quebec inc.* recognized that governments ought not confiscate property through regulation in an effort to avoid paying fair compensation.[38] "Disguised expropriations" are a civil law equivalent to *de facto* expropriations. In Quebec, a claim for disguised expropriation will fail where "the

---

[35] See for example Ontario *EA*, *supra* note 8 at s 1 "injurious affection."
[36] *Antrim*, *supra* note 2.
[37] *Lynch*, *supra* note 1 at paras 43-44, 68-69.
[38] *Lorraine (ville) v 2646-8926 Québec inc.*, 2018 SCC 35.

regulation does not effectively cause the appellants' property to become essentially public,"[39] mirroring the public benefit focus urged by the CHBA.

32. The remedies available for disguised expropriations are similar to those available to property owners in common law jurisdictions. They can, for example, seek to have an offending bylaw nullified for bad faith or other illegality.[40] In the alternative, they can apply for damages as compensation for the value of the *de facto* expropriated property.

33. Finally, the approach urged by the CHBA is consistent with jurisprudence from other jurisdictions to which this Court frequently turns for guidance. The United States Supreme Court, for example, has directed that courts considering claims for regulatory takings must assess whether the burden that a regulation imposes on a landowner is out of proportion to the benefit they receive as part of the community.[41]

PART IV – COSTS

34. The CHBA requests that no costs be either awarded for or against it.

PART V – ORDER SOUGHT

35. The CHBA requests permission to present oral arguments, not to exceed five minutes, at the hearing of this appeal.

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

Shane Rayman
Conner Harris
Counsel for the Intervener, Canadian Home Builders' Association

---

[39] *Wallot c Québec (ville de)*, 2011 QCCA 1165 at para 51, original French text : « le règlement ne fait pas en sorte que la propriété des appelants est devenue virtuellement publique. »

[40] *Municipal Act, 2001*, SO 2001, c 25 at s 273; *Fortin v Sudbury (City)*, 2020 ONSC 5300 at para 56.

[41] *Penn Central Transportation Co v New York City*, (1977) 438 US 104 at 438 US 123.

PART VII – TABLE OF AUTHORITIES & LEGISLATION