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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Interveners

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Attorney General of Ontario ("Ontario") intervenes to respond to the Appellant's ("Annapolis") request that this Court revisit the test for *de facto* expropriation to remove the need for acquisition of a beneficial interest by an authority and to import a consideration of the motive of the public authority as a factor in the analysis.

2. Ontario submits that the *Canadian Pacific Railway Co v Vancouver (City)* [*CPR*][1] test does not need to be revisited as it is settled law and appropriately balances the interests of private landowners and the public at large. Altering the *CPR* test as proposed would significantly impede the provinces' abilities to regulate land use planning within their jurisdictions and the municipalities' abilities to implement provincial planning policies. An authority has no obligation to pay compensation to a private landowner when a statutory expropriation has not occurred and where the existing test for *de facto* expropriation is not satisfied.

3. In this case, the Halifax Regional Municipality ("Halifax") was exercising its legitimate authority to create a non-binding regional municipal planning strategy. Annapolis has not provided evidence that a public park was created and that all reasonable uses of their land were removed. As a result, Annapolis now improperly appeals to this Court to undertake a trial *de novo*, though the test was not at issue in the motion or the appeal below. Aside from the impropriety of raising new issues for the first time at the Supreme Court of Canada, the record shows that although Halifax refused to initiate the secondary planning process, the existing permitted uses of Annapolis' lands remained unchanged.

4. Further, the *CPR* test does not need to be reconciled with *Lorraine (Ville) v. 2646-8926 Québec inc.*, [*Lorraine*] to import a consideration of the motive of a public authority with respect to planning decisions as its application is confined to Quebec civil law. Importantly, there are other legal avenues available to landowners to review the motive of planning authorities, which may give rise to compensation in appropriate circumstances.

B. Statement of Facts

5. In 2006, Halifax city council passed a Regional Municipal Planning Strategy ("2006 RMPS") which acted as a guide for land development in the municipality and set out a non-binding vision for potential future serviced development, including a conceptual boundary for a regional park. The 2006 RMPS included Annapolis' land.[2]

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[1] *Canadian Pacific Railway Co v Vancouver (City)*, 2006 SCC 5.
[2] Hattie Affidavit at para 27; AR Vol III, Tab 12, p 9.

6. On July 31, 2009, Annapolis applied for serviced development by seeking secondary planning approval. This led to a series of events over a number of years, which culminated in Halifax refusing to initiate the secondary planning process by resolution dated September 6, 2016. Annapolis alleges Halifax's denial of Annapolis' request to initiate the secondary planning process amounted to a *de facto* expropriation.[3]

7. In this case, the existing zoning and uses of Annapolis' lands did not change. Halifax did not restrict the existing permitted uses of the land. Nonetheless, Annapolis is seeking compensation as a result of Halifax's denial of Annapolis' request to initiate the secondary planning process. However, Annapolis did not appeal, nor did it seek judicial review to challenge Halifax's decision.[4]

8. Halifax brought a motion for partial summary judgment dismissing Annapolis' *de facto* expropriation claims. The motion judge dismissed the motion. The Nova Scotia Court of Appeal reversed the decision and dismissed the claim that Halifax owed Annapolis compensation for *de facto* expropriation. Annapolis' claims for bad faith and misfeasance in public office remain and were not considered by either court as they were not a part of the motion.[5]

9. Annapolis now appeals the decision of the Nova Scotia Court of Appeal by arguing that the *CPR* test for *de facto* expropriation should be amended and reconciled with this court's decision in *Lorraine.* Annapolis claims that the acquisition of a beneficial interest is not required to make out *de facto* expropriation, and that motive should be a relevant consideration.[6]

PART II – STATEMENT OF ISSUES

10. Ontario responds with its position on the following issues as framed by Annapolis:

i. Should the test for *de facto* taking established by this Court in *Canadian Pacific Railway v Vancouver (City)* be revisited?

ii. Does the exercise of a zoning power which deprives a landowner of the reasonable uses of its land in favour of creating a public park carry an implied obligation to pay compensation?

iii. Is the motive of a government authority relevant in considering whether a "taking" occurs in a *de facto* taking case?

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[3] Appellant's Factum, paras 2, 5, & 7.
[4] *Halifax Regional Municipality v Annapolis Group Inc.*, 2021 NSCA 3 [*Halifax*] at paras 18-19.
[5] *Halifax Regional Municipality v Annapolis Group Inc.*, 2021 NSCA 3 [*Halifax*] at para 2.
[6] Appellant's Factum, paras 10, 73 & 121.

11. The *CPR* test for *de facto* expropriation does not need to be revisited. Annapolis' proposed modification of the *de facto* expropriation test would detrimentally affect land use planning across the country, and would significantly restrain the functionality of Ontario's land use planning system - in particular, the ability of the province and municipalities to exercise their land use planning authority in that system. This would unduly impact and undermine Ontario's ability to protect provincial interests, as articulated in the Provincial Policy Statement, 2020 and provincial plans, and municipalities' ability to regulate land use, including, for example, to protect public health and safety.

12. The 2006 RMPS and the subsequent decision to refuse to consider Annapolis' secondary plan application does not, and should not, create an obligation to pay compensation. While Annapolis' land was subject to land use regulation, damages cannot be claimed when the land use regulation does not prohibit reasonable use of the land and no beneficial interest has been acquired by the authority.

13. Motive in *Lorraine* is only a relevant consideration under the Quebec *Civil Code* and had no application to this case. However, there are other legal avenues available that consider motive and whether an authority acted in bad faith or for an improper purpose, including appeal and/or judicial review at the tribunal level, or in tort for abuse of public office.

PART III – STATEMENT OF ARGUMENT

A. The Test for *De Facto* Expropriation in *Canadian Pacific Railway v Vancouver (City)* Should Not be Revisited

14. Unless there is a statutory provision mandating this Court try an appeal *de novo*, this Court will review the Court of Appeal decision for error, not hear a case anew.[7] Annapolis is seeking this appeal *de novo*, arguing that but-for the confines of the *CPR* test it would have made out the requisite requirements to prove that Halifax's actions constituted a *de facto* expropriation.

15. As this Court stated in *Salomon v. Matte-Thompson*, "[t]he onus is on the appellants to demonstrate an error in the court of appeal's decision; this Court's role is not to conduct a *de novo* analysis of the trial judge's decision."[8] At the Nova Scotia Court of Appeal, the applicability of the *CPR* test was not at issue.[9]

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[7] *L (H) v Canada (Attorney General)*, 2005 SCC 25 at para 52; *Aventis Pharma Inc v Apotex Inc*, 2006 FCA 64 at para 22.
[8] *Salomon v Matte-Thompson*, 2019 SCC 14 at para 34.
[9] *Halifax* at para 37.

i. Expanding the CPR Test Would Detrimentally Affect the Ability of Ontario and the Common Law Provinces to Regulate their Land Use Planning and Development

16. The "non-constitutional nature of property rights in Canada has situated the balancing of public regulation and private property in legislatures and democratic process, and not in the courts."[10]

17. The most common form of expropriation occurs with the well-defined terms of expropriation legislation or other statutory planning instruments. Under these statutes, the extent and the form of compensation to landowners is clearly set out.[11] *De facto* expropriations are rare. Thus the "taking" of property must be more than a mere restriction on use, except if the restriction is of sufficient severity to remove virtually all of the rights associated with the property holder's interests.[12]

18. Ontario's planning framework is a system led by provincial policy. This framework "provides for appropriate development while protecting resources of provincial interest, public health and safety, and the quality of the natural and built environment."[13] Expanding the scope of the test for *de facto* expropriation would impede planning authorities, including provinces, municipalities, planning boards and even the Ontario Land Tribunal, from regulating planning and development due to concerns of potential claims for compensation by landowners.

19. The *Planning Act* in Ontario sets out the ground rules for land use planning in the province.[14] It establishes land use planning frameworks led by provincial policy,[15] and integrates matters of provincial interest in provincial and municipal planning decisions.[16] Among others, the Provincial Policy Statement, 2020 is one of Ontario's main land use policy documents and includes policies on key issues such as the efficient use and management of land and infrastructure, protection of the environment and resources, and ensuring appropriate

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[10] Douglas C Harris, "A Railway, a City, and the Public Regulation of Private Property: *CPR v City of Vancouver*" in Eric Tucker, James Muir, & Bruce Ziff eds, *Canadian Property Law Stories* (Osgoode Society and Irwin Law, 2012) 455 at 475.
[11] *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283 [*Alberta*].
[12] *Alberta* at para 48.
[13] Affidavit of Sean Kearney, sworn September 20, 2021, para. 7, Motion Record of the Proposed Intervener, Attorney General of Ontario ("MRAGO"), Tab 2, p 4.
[14] *Russell v Health Services Restructuring Commission*, 1999 CanLII 3199 (ON CA) at para 10, 175 DLR (4th) 185.
[15] *Planning Act*, RSO 1990, c P-13 [*Planning Act*], s 1.1(b).
[16] *Planning Act*, s 1.1(c).

opportunities.[17] Municipalities implement provincial policies and plans in their own planning documents, and their decisions must comply with provincial policy.[18] In their application, these polices can restrict how landowners use their land when purchased for speculative purposes and did not have necessary land use designations and zoning permissions to be developed.[19]

20. Provincial policies are not merely guidelines that municipalities may consider, but something municipalities must follow. The *Planning Act* requires that planning authorities "have regard to"[20] matters of provincial interest, and that decisions that exercise authority affecting a planning matter "shall be consistent with the policy statements"[21] and "shall conform with the provincial plans that are in effect on that date, or shall not conflict with them."[22]

21. These policy documents are essential to an effective land use planning regime in Ontario and are a fundamental component to balancing the rights and interests of landowners on the one hand, and the protection of the public interest on the other.

22. To consider *bona fide* land use restrictions as compensable takings would undermine the foundation of Ontario's provincial policy-led land use planning system and the government's ability to protect the public interest, including public safety. Planning authorities across Ontario, and potentially Canada, would become vulnerable to potential liability to landowners for their statutorily mandated obligation to make planning decisions in conformity with provincial policy.

ii. Claims of de facto expropriation are to be contrasted with other challenges to the legality or appropriateness of planning decisions and impacts to lands

23. Although Ontario's position is that the *CPR* test appropriately balances the interests of landowners and the public at large and need not be revisited, landowners have several legal avenues to challenge or review a planning decision and/or to seek damages for interference with use of private property.

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[17] Ontario, *Provincial Policy Statement, 2020*, under the *Planning Act*, OIC 229/2020 at 1, 4.
[18] *Chadband et al v Carlow/Mayo (Twp)*, 2021 CanLII 88655 (ON LT), at para 19.
[19] *IN8 (The Capitol) Developments Inc v Building Kingston's Future*, 2020 ONSC 6151, at paras 8, 46.
[20] *Planning Act*, s 2. See also *Ottawa (City) v Minto Communities Inc*, 2009 CanLII 65802 (Ont Div Crt) at para 33, 313 DLR (4th) 419.
[21] *Planning Act*, s 3(5).
[22] *Planning Act*, s 3(6).

a. Annapolis Could Have Sought Review at the Tribunal Level

24. Annapolis alleges that Halifax's rationale for its initial deferral to hear its application in 2009 and the eventual refusal of Annapolis' request to initiate the secondary plan process was, "a pretext to prevent development" and keep the lands for a public park, without paying compensation.[23] Annapolis also claims that "HRM did not consider the relevant planning criteria when reviewing Annapolis' secondary planning application."[24] However, Annapolis did not challenge Halifax's decision to refuse its secondary planning application for not "reasonably carry[ing] out the intent" [25] of the 2006 RMPS, or breaching their duty to consider Annapolis' application in accordance with express planning criteria under the RMPS.[26]

25. In Nova Scotia, appeals of development agreements and planning applications are routinely tried at the Nova Scotia Utility and Review Board (NSURB).[27] Under the *Utility and Review Board Act*, the NSURB has sole jurisdiction to decide the cases and matters conferred upon it by approximately 33 statutes, including appeals under the *Halifax Regional Municipality Charter* and the *Municipal Government Act*.[28]

26. The NSURB has in the past presided over cases relating to municipal planning strategies.[29] It was open to Annapolis to bring an application to the NSURB pursuant to one of several legislative provisions including s. 262(2) of the *Halifax Regional Municipality Charter*[30]; and s. 247(1) of the *Municipal Government Act*.[31] Both state that an "aggrieved person" may appeal the refusal of a development agreement on the grounds that the decision of the council does not reasonably carry out the intent of the municipal planning strategy.[32] There are similar

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[23] Appellant's Factum, para 17.
[24] Appellant's Factum, para 25.
[25] *Cameron (Re)*, 2021 NSUARB 8 [*Cameron*] at para 13.
[26] Appellant's Factum, para 16; Hattie Affidavit at paras 48-50; AR Vol III, Tab 12, p 14-15.
[27] *WM Fares Group (Re)*, 2008 NSUARB 14; *Miller (Re)*, 2015 NSUARB 218; *Legros (Re)*, 2019 NSUARB 148; *Ledge Rock Construction Ltd (Re)*, 2015 NSUARB 202.
[28] *Utility and Review Board Act*, SNS 1992, c 11, s 22(1); *Miller (Re)*, 2015 NSUARB 218 at para 17.
[29] *MacIsaac Funeral Home Ltd v Antigonish (Town)*,1991 CarswellNS 759; *Roymac Mobile Homes Ltd v Amherst (Town)*, 1991 CarswellNS 771; *Thompson, Re*, 2020 NSUARB 5; *Cameron*.
[30] *Halifax Regional Municipality Charter*, SNS 2008, c 39 [*Halifax Regional Municipality Charter*], s 262(2).
[31] *Halifax Regional Municipality Charter*, s 265(1)(b); *Municipal Government Act*, SNS 1998, c 18, [*Municipal Government Act*], s 247(2).
[32] *Municipal Government Act*, s 250(1)(b).

administrative tribunals responsible for reviewing land use planning decisions throughout Canada.

b. Annapolis Could Have Brought an Action to Quash the 2006 RMPS for Illegality

27. Annapolis also had the option of commencing an application to the Nova Scotia Supreme Court for judicial review[33] of the decision to enact the 2006 RMPS pursuant to s. 207(1) of the *Halifax Regional Municipality Charter*. Section 207(1) states that a party can "apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the Council, in whole or in part, for illegality."[34] This court in *London (City) v RSJ Holdings Inc.* stated that "illegality" in its ordinary meaning, "is a broad generic term that encompasses any non-compliance with the law."[35]

28. Annapolis references a series of cases that demonstrate that land use regulations attempting to remove private uses or designate private lands for public use are routinely quashed.[36] Given the broad construction of the term "illegality," Annapolis could have initiated an application for judicial review, to test its allegations that Halifax had enacted the 2006 RMPS to avoid paying compensation.

c. Annapolis Could Have Brought an Action in Tort for Trespass to Land

29. Annapolis has previously claimed, and continues to allege, that Halifax encouraged the public to use the Annapolis lands as a park by promoting hikes and other outdoor activities on their lands, and promoting trails across Annapolis' lands by permitting the posting of Halifax's branded trail signs.[37] If Annapolis' allegations are true, Annapolis could have pursued an action in trespass against either members of the public or Halifax.

B. There is No Implied Obligation to Pay Compensation

30. If Annapolis fails to prove both elements of the *CPR* test, there is no *de facto* expropriation, and thus no basis for compensation. The 2006 RMPS created a non-binding vision

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[33] *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 at paras 25, 27, 57, 110 DLR (4th) 1; also see *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13 at para 27; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 10-12.
[34] *Halifax Regional Municipality Charter*, s 207(1); *London (City) v RSJ Holdings Inc*, 2007 SCC 29 [*London (City)*] at paras 35-39.
[35] *London (City)* at para 35.
[36] Appellant's factum para 117; *Columbia Estate Company Limited v District of Burnaby*, 1974 CanLII 1101 (BCSC) at 130, 49 DLR (3d) 123; *Hall v Maple Ridge (District)*, 1993 CanLII 332 (BC SC); *Russell v Shanahan*, 2000 CanLII 17036 (ON CA), 196 DLR (4th) 558.
[37] Appellant's Factum, para 23.

for possible future serviced development, and never amounted to an acquisition of a beneficial interest in Annapolis' land. Neither the 2006 RMPS nor Halifax's 2016 decision refusing Annapolis' request to initiate the Secondary Plan process altered the zoning or permitted use of Annapolis' lands. As a result, there is no basis for Halifax to compensate Annapolis.

C. The Motive of a Government Authority is Not Relevant in Considering Whether A "Taking" Occurs in a *De Facto* Taking Case

i. Lorraine Does Not Apply and Motive is Not a Relevant Consideration

31. Annapolis submits that the *CPR* test should be changed to reconcile the decision by this court in *Lorraine,*[38] by importing a consideration of motive on the part of the planning authority. In *Lorraine,* this court was reviewing whether the lower court had properly dismissed the claims the bylaws were a nullity and inoperable due to the significant delay since the original bylaw had been enacted. The claims for an indemnity arising from a disguised expropriation and any issues relating to motive were not before the court at the motion or on appeal. This case does not elucidate any new considerations for the common law test for *de facto* expropriation.

32. Further, the decision in *CPR* need not be reconciled with *Lorraine*, because the decisions arise from two separate legal regimes; one for "disguised" or "constructive" expropriation under the Quebec *Civil Code,* and the other for *de facto* expropriation under the common law. The jurisprudence arising from the civil law and common law is distinct, with entirely different analyses and considerations. Importing motive into the analysis of *de facto* expropriation conflates two separate analyses that were created for different purposes and remedies.

33. The SCC in *Lorraine* stated in obiter that courts may be able to consider motive in its analysis of disguised expropriation.[39] However, this consideration is strictly in regards to interpreting Article 952 of the Quebec *Civil Code*.[40] This is a different remedy than that flowing from a finding of *de facto* expropriation, where compensation is awarded. The remedy under Article 952 is more akin to remedies sought at the tribunal level. The Court in *Mariner* states that claims of *de facto* expropriation are to be "contrasted with administrative law challenges to the legality or appropriateness of planning decisions."[41]

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[38] *Lorraine (Ville) v 2646-8926 Quebec Inc*, 2018 SCC 35 [*Lorraine (Ville)*].
[39] *Lorraine (Ville)* at para 2.
[40] *Lorraine (Ville)* at para 23; *Civil Code of Quebec*, CQLR c CCQ-1991, art 952.
[41] *Mariner Real Estate Ltd v Nova Scotia (Attorney General),*1999 NSCA 98 [*Mariner*] at para 50.

34. The Nova Scotia Court of Appeal correctly stated that "[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."[42] The doctrine of *de facto* expropriation was developed to analyze whether the effects of the regulation amounted to a constructive taking.[43] A consideration of motive is not relevant and does not provide any useful benefit in this analysis because it does not matter if there was an improper purpose, bad faith, or ill intent on the part of the public authority. If the claimant still has reasonable uses of its land, and no beneficial interest has been acquired, it cannot be said that their property has been taken, and thus no compensation ought to be paid.

ii. There are Existing Legal Avenues that Address Motive

35. In addition to pursuing an appeal or a judicial review of Halifax's decision, there are existing legal avenues that permit a review of the conduct of the public authority.

36. As stated in *Mariner*, planning decisions may be attacked as *ultra vires* if they are enacted "for a confiscatory or other improper purpose if such purpose is not one authorized by the relevant grant of zoning power."[44] Rather than seeking to expand the *CPR* test, Annapolis could have sought judicial review of the 2006 RMPS and/or the refusal to consider the secondary planning application as being made in bad faith or for an improper purpose. In *Hauff v Vancouver (City)*, the court quashed a zoning bylaw enacted by the City of Vancouver after finding that it had acted in bad faith by passing a bylaw for the purpose of depressing the value of land it wished to purchase.[45]

37. Aside from the *de facto* expropriation claim, Annapolis is also pursuing damages against Halifax in tort for abuse of public office based on its allegations that Halifax's decision to refuse to initiate the secondary planning process was in bad faith, and that Halifax had no intention to approve any plan that Annapolis put forward.[46] The Nova Scotia Court of Appeal granted Halifax's motion for summary judgment of the *de facto* expropriation claim, however Annapolis' claims against Halifax in bad faith and abuse of public office were not before the court.

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[42] *Halifax* at para 75.
[43] *Mariner* at para 50.
[44] *Ibid*.
[45] *Hauff v Vancouver (City)*, 1981 CanLII 437 (BC CA) at paras 5, 15, 16, 28 BCLR 276; *CPR v Vancouver (City)*, 2004 BCCA 192 at para 87.
[46] Appellant's Factum, para 5.

38. The tort of abuse of public office takes into consideration both motive and bad faith in its analysis when reviewing the actions of government employees.[47] This Court stated in *Odhavji Estate v. Woodhouse* that there is a broad range of misconduct that can found an action for abuse in a public office.[48] In *Alberta (Minister of Infrastructure) v Nilsson* [*Nilsson*], the claimant brought an action in tort for abuse of public office when its request to develop land for a trailer park was refused.[49] The claimant alleged that a development freeze prevented it from "exercising all reasonable rights of private ownership," amounting to a *de facto* expropriation and entitling him to compensation.[50] The Alberta Court of Appeal upheld the trial decision, which held that enacting a regulation to freeze land to protect a transportation and utility corridor, the City showed "dishonesty and bad faith."[51] To date, Annapolis' claims in bad faith and for abuse of public office are still outstanding.

PART IV, V & VI – NOT APPLICABLE

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

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Robert Lawson and Vanessa Glasser
Counsel for the Intervener,
Attorney General of Ontario

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[47] *First National Properties Ltd v McMinn*, 2001 BCCA 305 at paras 38-39.
[48] *Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras 19-20.
[49] *Alberta* at para 3.
[50] *Alberta* at para 44.
[51] *Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 1999 ABQB 440 at para 162.

PART VII - TABLE OF AUTHORITIES

Caselaw

Authority	**Paragraph Reference**
Alberta (Minister of Infrastructure) v Nilsson, 2002 ABCA 283.	17, 38
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