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 -

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

INTERVENERS

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF NOVA SCOTIA

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

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PART I – OVERVIEW & STATEMENT OF FACTS

A. Overview

1. In *Canadian Pacific Railway Co v Vancouver (City)*[1], this Court determined that it is appropriate to ensure municipal governments are given significant planning and policy deference when making land use by-laws and planning decisions pursuant to the legislative scheme authorizing those powers. Governments have considerable authority to regulate land use in the public interest and the Court's role in land use regulation is greatly limited.

2. At the heart of this appeal, as was the case in *CPR*, is the examination of the legislative scheme by which a municipality is authorized to plan and regulate land use and development. A remarkably similar legislative scheme to that in *CPR* authorizes the by-laws, conduct and the resolution made by the Respondent, Halifax Regional Municipality ("HRM") which are in issue here. In *CPR*, on a challenge to the *vires* of the by-law which CPR claimed rendered its lands useless, this Court determined that the by-law was valid and the legislative scheme rendered inapplicable the application of a common law *de facto* remedy. In the absence of a challenge to the *vires* of HRM's planning decisions, and in the absence of any judicial review of HRM's planning use decision-making, there could but be no other conclusion than that reached by the Court below – there are no facts upon which a court could find an expropriation by HRM of the Annapolis Lands.

[1] *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5 (CanLII), [2006] 1 SCR 227

3. The test for *de facto* expropriation set out in *CPR* and in *Mariner Real Estate*[2] is necessarily and appropriately narrow. *De facto* expropriations are rare. The majority of expropriations occur within the well-defined terms of expropriation legislation, or other statutory planning instruments. The extent and form of compensation is set out in these statutes and landowners are often well compensated. These legislative remedies underline the profound encroachment of private property rights represented by expropriation as well as the seriousness with which the Legislature approaches such encroachments. Where "takings" fall outside of the statutory authority, the common law recognizes a limited right to access compensation.[3]

4. Canadian courts have long held that zoning changes and development freezes do not constitute a "taking" and do not give rise to a common law right of compensation. Decision-making within statutory planning legislation involves the application of politics and local policy making. Should planning officials abuse planning powers, such as passing a by-law to down-zone land, the appropriate remedy for the landowner is found in challenging the validity of the by-law rather than claiming an expropriation under what is essentially an illegal use of authority.[4]

5. Nova Scotia submits the necessary elements required to assert a claim for *de facto* or common law expropriation identified in *CPR* are not in need of the change advanced by

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[2] *Mariner Real Estate v Nova Scotia (AG)*, 1999 NSCA 98 ("*Mariner Real Estate*").
[3] *Alberta (Public Works, Supply & Services) v Nilsson*, 1999 ABQB 440, para. 34. ("*AB v Nilsson*"); upheld on appeal, *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 282, paras 39-65.
[4] *AB v Nilsson*, paras 39-41.

the Appellant. The test in *CPR* serves as an acceptable and principled compromise between a municipality's statutory obligation to regulate and plan land use for its residents and a landowner's expectations for land use within that municipality. The facts of this case do not justify changing the *CPR* test for *de facto* expropriation. To accept the Appellant's arguments would result in a significant shift in municipal land use planning law.

B. Facts

6. Nova Scotia accepts the facts as set out in the Respondent HRM's Factum.[5]

7. The Court below held there were no facts upon which a court could determine a taking of the land in issue by HRM and a corresponding deprivation of all reasonable uses of the land.[6] The Court also found no facts in dispute that would support a *de facto* expropriation claim as the land owner has the same land rights both before and after HRM's resolution on September 6, 2016.[7] HRM caused no changes to the Appellant's use of its land.[8] No damages in expropriation could be awarded in respect of HRM's land use and by-law; the Appellant's remedies for damages rest on its other claims.

PART II – RESPONSE TO QUESTIONS IN ISSUE

A. The Questions in Issue

8. Nova Scotia accepts the Issues as set in HRM's Factum.[9]

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[5] Respondent's Factum (HRM's Factum) dated October 18th, 2021 at paras. 5—26.
[6] *Halifax Regional Municipality v Annapolis Group Inc*, 2021 NSCA 3 [NSCA Decision], para 85.
[7] *ibid.*, para. 91.
[8] *Ibid.*, para. 93.
[9] HRM's Factum, at paras. 27-28.

B. Position of the Intervener Nova Scotia

9. Nova Scotia respectfully submits that:

> The test in *CPR* serves as an acceptable and principled compromise between a municipality's statutory obligation to regulate and plan land use for its residents and a landowner's expectations for land use within that municipality. There are no compelling reasons for this Court to depart from its unanimous decision in *CPR*.

PART III – ARGUMENT

10. The context out of which this appeal emerges is a civil claim for an alleged failure by HRM to grant an approval to the Appellant ("Annapolis") to develop land. Annapolis alleges that such a failure so deprived it of its development potential that the Court should treat HRM's decision as amounting to an expropriation of the company's lands and compel that HRM compensate Annapolis for taking its lands. The claim is that HRM breached the statute which gives it authority, denied Annapolis natural justice and that HRM is liable for the breach of the statute without seeking to set aside any decisions made by HRM or to quash any land-use bylaws created by HRM governing the Annapolis lands.

11. The Appellant argues the *de facto* expropriation test ought to be broadened, either because *CPR* was wrongly decided in its synthesis of the jurisprudence or that its test ought to be recast so as to allow claims for compensation even where a municipality acquires no interest in a landowner's land and that landowner's reasonable use of its lands has not changed.[10] Nova Scotia submits neither argument should succeed.

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[10] Appellant's Factum, paras 8-9.

12. Nova Scotia submits the breadth of the changes sought by the Appellant to the decision in *CPR* underscores the significance of the answer which this Court gives to it. It has the potential to create a shift in how municipalities and governments make planning decisions in such a way as to insert courts into weighing competing policy matters that are properly left to elected officials.

13. Planning in Canada is essentially the control of land uses. The major power in planning statutes is the control of land uses either by zoning or development control. The benefits that are allocated are essentially land values, as decisions relate to the use individuals can make of their land. Given these decisions have a profound impact on the character and nature of a local community and deal with the details of land uses and the environment, it is clear that many powers over land uses should rest at the local level.[11] Planning requires a reconciliation of the local political nature of decision-making with the need for fairness in the allocation of benefits and burdens and dealing with property rights. This is best achieved by leaving decision-making to local municipal politicians because they are best suited to make such decisions, and by providing for judicial and appellate review of those decisions because planning affects property rights.[12]

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[11] Stanley M. Makuch, *Canadian Municipal and Planning Law*, (Carswell, Toronto: 1993), p. 178 ("Prof. Makuch")
[12] *Ibid.*

14. Planning laws, like the *HRM Charter*[13], allow for appeals from municipal decisions and plans and judicial review of decisions made, or mandamus when it is alleged a municipality arbitrarily refuses to exercise its decision-making.

15. As noted by Prof. Makuch, it is clear that the mere diminution of land value by virtue of a planning decision will not result in the by-law being struck down or compensation being paid in the absence of negligence, even if damage results.[14] Down-zoning of property, with the result that its value is decreased and with the result that the municipality might purchase it at some future date cannot be a basis for an action for damages or to quash the decision. He references the 1958 decision in *Regina Auto Court*[15], where the City actually zoned land for park purposes and the action for damages was dismissed, quoting:

> The city is not required before passing the by-law or any amendment thereafter to negotiate for the purchase or exchange of any property affected thereby or to secure the consent of the owner thereof or to take steps or expropriate such property. It is true, of course, that should the city at any time in the future decide to take over the property for public park purposes it would be necessary then for it to reach an agreement with the owner for the purchase or exchange of the property or failing this to expropriate the property under the appropriate Act.[16]

16. Down-zoning does not have to be treated differently than any other form of zoning as long as it is for the purpose of ultimately providing services (park land) or preventing nuisances (a green belt buffer).[17] Such a by-law prevents the entire municipality from bearing the

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[13] *Halifax Regional Municipality Charter, SNS 2008,* c 39, ("*HRM Charter*")
[14] *Ibid.*, p. 220
[15] *Regina Auto Court v City of Regina,* 1958 CanLII 164 at 13 (Sask. Q.B.)
[16] Prof. Makuch, p. 221.
[17] *Ibid.* p. 222

whole cost of the particular benefit, be it park or playground, because a certain portion will be borne by the owner as a result of the down-zoning. But this is the case in all zoning matters. Who bears the burdens and who benefits from zoning decisions are not allocated by the market, but in accordance with the local community views as to how benefits and burdens should be allocated.[18]

17. Prof. Makuch states this Court's decision in *City of Vancouver v Simpson* is a practical application of the principle that planning decisions should not be overridden only because of an attempt to shift burdens. Shifting burdens is the essence of planning and should be done by municipal councils to which the powers are given. To do otherwise is to move down the "slippery slope" should courts be persuaded to intrude beyond an absolute prohibition of uses. He advises "the courts would be well advised to stay with their traditional approach which is in keeping with the general assumptions of no compensation for planning decisions and of allowing municipalities to allocate the benefits and burdens of planning."[19]

18. The Court in *AB v Nilsson*[20] relied on this Court's decision in *Simpson*, which found a refusal to approve subdivision approval to a landowner because the city had plans to create a park in the future did not amount to an expropriation as the city official had acted within his powers, for the proposition that a different remedy was available should public powers be exercised improperly to affect private property rights. This proposition was confirmed

[18] *Ibid*., p. 223
[19] *Ibid*., p. 223.
[20] *AB v Nilsson*, paras. 39-41

by the Alberta Court of Appeal, where in part the Court relied on the decision in *Mariner Real Estate*, that extensive and restrictive land use regulation is the norm in Canada and that such regulation has, almost without exception, not been found to constitute compensable expropriation. Regulation of land use which decreases land value is not an expropriation.[21]

19. HRM's powers are derived from the *HRM Charter*, an Act of the Nova Scotia Legislature. The *HRM Charter* grants extensive powers to HRM to determine how land within its limits can be used: it has the power to zone land, the power to plan for land development and the power to issue development permits. The power to zone land allows HRM to establish permissible uses for particular zones or areas and is exercised by passing zoning by-laws. The power to plan for development allows HRM to set a vision and course for future development and is exercised by preparing and revising development plans. Zoning by-laws designate actual permitted uses, while planning strategies are directed to preserving land for future non-actualized uses. Zoning by-laws and planning strategies may have the effect of restricting how the designated land may be used without giving rise to claims of expropriation. This is consistent with Canadian planning law and the common law approach to *de facto* expropriation, as synthesized by this Court in *CPR*.

20. Where public powers are improperly exercised to affect private property rights, the appropriate remedy is to be found in challenging the validity of the enactment, or the reasonableness of decision-making by way of a judicial review rather than claiming an

[21] *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283, paras 57-61.

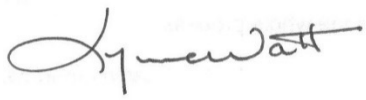
expropriation under what is essentially an illegal use of authority.[22] *De facto* expropriation is limited in Canadian law due to restrictions imposed by two principles: valid legislation or action taken lawfully with legislative authority may significantly restrict an owner's enjoyment of private land; and courts may order compensation for such restriction only where legislation authorizes it.

21. Similarly, should the conduct of the Crown or an agent of the Crown amount to an abuse of public authority, the appropriate remedy for damages arising from such conduct is through a claim in tort.[23]

PART IV – COSTS

22. The Intervener Attorney General of Nova Scotia does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

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



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[22] *Alberta v Nilsson*, 1999 ABQB 440, paras. 40-41.
[23] *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283.

PART VII – TABLE OF AUTHORITIES AND LEGISLATION

Case Law:	**Para. Ref:**
Alberta (Minister of Infrastructure) v Nilsson, 2002 ABCA 283	3, 4, 18
Alberta (Public Works, Supply & Services) v Nilsson, 1999 ABQB 440	3
Canadian Pacific Railway Co. v. Vancouver (City), 2006 SCC 5 (CanLII), [2006] 1 SCR 227	1
Halifax Regional Municipality v Annapolis Group Inc, 2021 NSCA 3	7
Mariner Real Estate v Nova Scotia (AG), 1999 NSCA 98	3
Regina Auto Court v City of Regina (1958), CanLII 165 (SK QB)	14
Secondary Sources:	
Stanley M. Makuch, *Canadian Municipal and Planning Law*, (Carswell, Toronto: 1993)	13, 16, 17, 18
Statutes, Regulations, Legislation:	
Halifax Regional Municipality Charter, SNS 2008, c 39	14, 15