



SUPREME COURT OF CANADA

CITATION: Annapolis Group Inc.
v. Halifax Regional Municipality,
2022 SCC 36

APPEAL HEARD: February 16,
2022

JUDGMENT RENDERED:
October 21, 2022

DOCKET: 39594

BETWEEN:

Annapolis Group Inc.
Appellant

and

Halifax Regional Municipality
Respondent

- 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

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

JOINT REASONS FOR JUDGMENT: Côté and Brown JJ. (Wagner C.J. and Moldaver and Rowe JJ.
(paras. 1 to 80) concurring)

JOINT DISSENTING Kasirer and Jamal JJ. (Karakatsanis and Martin JJ. concurring)

REASONS:

(paras. 81 to 153)

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Annapolis Group Inc.

Appellant

v.

Halifax Regional Municipality

Respondent

and

**Attorney General of Canada,
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Indexed as: Annapolis Group Inc. v. Halifax Regional Municipality

2022 SCC 36

File No.: 39594.

2022: February 16; 2022: October 21.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Expropriation — State regulation of land use — Constructive taking of private property by public authority — Land owner suing municipality and alleging that municipality’s regulatory measures have deprived it of all reasonable or economic uses of its land, resulting in constructive taking without compensation — Whether acquisition of beneficial interest in property under constructive taking test requires land to actually be taken from owner and acquired by public authority — Whether intention of public authority relevant to analysis of constructive taking claim.

Over time from the 1950s, Annapolis acquired 965 acres of land (the “Lands”) with the intention of eventually securing enhanced development rights and reselling it. In 2006, Halifax adopted a planning strategy to guide land development in the municipality, including the Lands, over a 25-year period. The strategy reserved a portion of the Lands for possible future inclusion in a regional park. It also zoned the Lands as “Urban Settlement”, which denotes an area where urban forms of development may occur and as “Urban Reserve”, which identifies land that could be developed beyond the 25-year horizon. These designations contemplate future service development, but for serviced development to occur on the Lands, Halifax must adopt a resolution authorizing it. Beginning in 2007, Annapolis made several attempts to develop the Lands. Ultimately, by resolution in 2016, Halifax refused to initiate the secondary planning process, and Annapolis sued, alleging a constructive taking, misfeasance in public office, and unjust enrichment. With respect to the constructive taking claim, Annapolis contends that Halifax’s regulatory measures have deprived it

of all reasonable or economic uses of the Lands, resulting in a constructive taking without compensation.

Halifax sought summary dismissal of Annapolis' constructive taking claim. The motion judge dismissed Halifax's motion, finding that Annapolis' constructive taking claim raised vast genuine issues of material fact requiring a trial. On appeal by Halifax, the Court of Appeal held that Annapolis' constructive taking claim did not have a reasonable chance of successfully establishing, as required by *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227 ("*CPR*"), an acquisition by Halifax of a beneficial interest in the Lands or flowing from the Lands — which necessitated that the Lands actually be taken from Annapolis and acquired by Halifax — and the removal of all reasonable uses of the Lands. It was also of the view that Halifax's intended use for the Lands was not relevant to the constructive taking analysis. The Court of Appeal struck the claim.

Held (Karakatsanis, Martin, Kasirer and Jamal JJ. dissenting): The appeal should be allowed and the order of the motion judge restored.

Per Wagner C.J. and Moldaver, **Côté**, **Brown** and Rowe JJ.: The Court of Appeal erred in holding that an "acquisition of a beneficial interest" under the constructive taking test established by the Court in *CPR* requires land to actually be taken from an owner and acquired by the state. A "beneficial interest" is to be broadly understood as an "advantage"; as such, the interest acquired by the state can fall short of an actual acquisition by the state. Further, the Court of Appeal erred in holding that

evidence of the state's intended use of the impugned land is irrelevant to a claim for constructive taking. There are genuine issues of material fact arising from Annapolis' constructive taking claim to be tried. It should therefore be allowed to proceed to trial.

Constructive taking is the preferable term for expropriation through regulation as it more accurately captures the nature of the state action at issue and the effect on the landowner. A "taking" is a forcible acquisition by the Crown of privately owned property for public purposes. It may take the form of a constructive taking (effective appropriation of private property by a public authority exercising its regulatory powers), or a *de jure* taking (formal expropriation), by (in the case of land) taking title. Not every instance of regulating the use of property amounts to a constructive taking. Governments and municipalities holding delegated provincial regulatory authority validly regulate land in the public interest without effecting "takings", properly understood. The line between a valid regulation and a constructive taking is crossed where the effect of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way, or effectively confiscates the property.

The test to show a constructive taking is that stated by *CPR*, properly understood. The test provides that the reviewing court must decide: (1) whether the public authority has acquired a beneficial interest in the property or flowing from it (i.e. an advantage); and (2) whether the state action has removed all reasonable uses of the property. The jurisprudence, upon which the *CPR* test was expressly stated as resting,

supports an understanding of “beneficial interest” as concerned with the effect of a regulatory measure on the landowner, and not with whether a proprietary interest was actually acquired by the government. That same jurisprudence supports the view that “beneficial interest” refers not to actual acquisition of the equity that rests with the beneficial owner of property, connoting rights of use and enjoyment, but to an advantage flowing to the state. To require actual acquisition would collapse the distinction between constructive (*de facto*) and *de jure* takings — a distinction which *CPR* explicitly preserves. If a constructive taking requires an actual taking, then it is no longer constructive. Furthermore, interpreting “beneficial interest” broadly (as meaning a benefit or an advantage accruing to the state) ensures *CPR*’s coherence with previous jurisprudence, which did not understand “benefits” in the strict equitable sense of that term. *CPR* merely sought to affirm, and not alter, the law of constructive takings.

This interpretation is supported by the wording under the first part of the *CPR* test: “a beneficial interest in the property or flowing from it”. An interest flowing from the property affirms that a “beneficial interest” can be more broadly understood as an advantage, and need not be an actual acquisition. Such an interpretation gives effect to the Court’s acknowledgement of a common law right to compensation where the two-part *CPR* test is satisfied. It accords with imperatives of justice and fairness, which underpin the Court’s assessment of expropriation claims, and remedies situations where cases do not neatly fit within the expropriation legislative framework. As the test focusses on effects and advantages, substance and not form is to prevail. A court deciding whether a regulatory measure effects a constructive taking must

undertake a realistic appraisal of matters in the context of the specific case, including but not limited to (a) the nature of the government action, notice to the owner of the restrictions at the time the property was acquired, and whether the government measures restrict the uses of the property in a manner consistent with the owner's reasonable expectations; (b) the nature of the land and its historical or current uses; and (c) the substance of the alleged advantage.

The public authority's intention is not an element of the test for constructive taking at common law. The mischief addressed by the doctrine is one of advantages and effects, not that a public authority acted in bad faith or with an otherwise ulterior motive. However, intention can be relevant to the inquiry. The underlying objective pursued by a public authority may provide supporting evidence for a constructive expropriation claim, but it is neither necessary nor sufficient. The assessment of intent has proved to be helpful in distinguishing between mere regulations in the public interest and takings requiring compensation at common law. What ultimately matters, however, irrespective of matters of intent, is whether the state-imposed restrictions on the property conferred an advantage on the state that effectively amounts to a taking.

In the instant case, the motion judge's legal conclusions that (1) a constructive taking need only have the effect of defeating the landowner's reasonable use of land; and (2) the state's intent may be relevant in assessing whether all reasonable uses of the land has been removed, were legally correct. The Court of

Appeal did not identify any legal error or patent injustice that would justify interfering with the motion judge's decision to dismiss Halifax's summary judgment motion on the basis of the existing triable issues. Two disputed factual issues are particularly material to the *CPR* test. First, it is disputed whether Halifax is promoting the Lands as a public park; this is material because, if proven, it would tend to support Annapolis' claim that Halifax acquired a beneficial interest in the Lands. Preserving a park in its natural state may constitute an advantage accruing to the state, thus satisfying the "acquisition" element of *CPR*. Second, it is disputed whether Halifax, by allegedly treating the Lands as a public park, has eliminated all uses of the Lands except service development, which is conditional upon the approval of Annapolis' secondary planning applications. This is material because, if proven, it may arguably support Annapolis' claim that it has lost all reasonable uses of its property. If Annapolis can prove at trial that Halifax is unlikely to ever grant a secondary planning approval, this is clearly material to its constructive taking claim, as all reasonable uses of the land may be shown to have been eliminated where a permit needed to make reasonable use of the land is refused, such that the state has effectively taken away all rights of ownership.

Per Karakatsanis, Martin, **Kasirer** and **Jamal JJ.** (dissenting): The appeal should be dismissed. There is disagreement with the majority's proposed changes to the *CPR* precedent and with how the majority applies the law in the instant case. Partial summary judgment dismissing Annapolis' *de facto* taking claim was properly granted as that claim has no real chance of success.

First, there is disagreement with the majority's view that the first element of the *CPR* test, which requires "an acquisition of a beneficial interest in the property or flowing from it", should be replaced with the much broader notion of an advantage, whether or not a proprietary interest was actually acquired by the government. Instead, the Court should retain the *CPR* test for a *de facto* taking, which insists that a proprietary interest be acquired. *CPR* and the authorities it cited show there is no *de facto* taking unless there is both acquisition of a beneficial interest in the property or flowing from it and a removal of all reasonable uses of the property. The interest must be proprietary — not merely an advantage — and the acquisition must correspond to the deprivation. The majority has provided no basis for the Court to depart from the acquisition requirement as framed in *CPR*. The majority does not suggest that such a departure from precedent is needed to keep the common law in step with the evolution of society, to clarify a legal principle, or to resolve any inconsistency in the law, which are some of the usual grounds justifying evolution of the common law. To the contrary, courts in common law Canada have applied the *CPR* test without difficulty, and no court has expressed concerns that the test is unworkable or unnecessarily complex. *CPR* is settled law and there is no reason to change it. Furthermore, the majority's reformulation of the acquisition requirement and departure from *CPR* as precedent has significant ramifications. It dramatically expands the potential liability of municipalities engaged in land use regulation in the public interest and throws into question the settled law that a refusal to up-zone (i.e., re-zoning to enlarge the permissible uses of land) is not a *de facto* taking.

Second, there is disagreement with the majority's view that a public authority's intention is a material fact in a claim for a *de facto* taking. This is also an unwarranted departure from *CPR* and the Court's prior jurisprudence. Intention is not an element of the test for a *de facto* or constructive taking; it is equally not a material fact supporting such a claim. Although the public authority's intention may provide narrative background or context or may be relevant to an administrative law claim that its actions were *ultra vires* as having an improper purpose or being in bad faith, it is not relevant to a *de facto* taking claim, which is concerned with the effect of the public authority's actions, not with its intention.

In the instant case, there is no material fact in dispute on either branch of the *CPR* test for a *de facto* taking. Firstly, Halifax has acquired no beneficial interest in the Lands or flowing from them. It has simply refused to up-zone the Lands. Neither Halifax's 2016 municipal resolution refusing to up-zone the Lands nor Halifax's alleged acts of encouraging the public to trespass raises any genuine issue of material fact that Halifax has acquired a beneficial interest in the Lands or flowing from them. The municipal resolution merely preserved the *status quo* by refusing to allow lands that have always been vacant and treed and situated next to a protected wilderness area to be developed into serviced residential communities. Halifax's adoption of a municipal resolution refusing to up-zone the Lands also cannot be a basis for a *de facto* taking claim because the resolution did not result in Halifax acquiring any proprietary interest in the Lands. Moreover, a public authority does not and cannot acquire a proprietary interest by encouraging others to trespass.

Secondly, the uncontradicted evidence is that Annapolis has been deprived of no reasonable uses, let alone all reasonable uses, of the Lands. The zoning and uses of the Lands remain entirely unchanged. The Lands remain vacant and treed, just as they have been since Annapolis acquired them. Annapolis has the same rights with respect to the Lands that it had prior to Halifax's resolution in 2016. Halifax's refusal to up-zone the Lands in 2016 thus did not deprive Annapolis of any reasonable uses of the Lands. It simply disappointed Annapolis' hope of developing them. More importantly, even if Annapolis could somehow show that Halifax will never up-zone the Lands, that could not establish that Annapolis has lost all reasonable uses of the Lands. The Lands have never been used for serviced development, they have always been vacant and treed. The majority's assertion amounts to saying that a refusal to up-zone vacant land can give rise to a *de facto* taking merely if all potential reasonable uses are prohibited. That would upset the settled law reflected in the jurisprudence, and it would eliminate Halifax's statutory and common law protection from liability for refusing to up-zone. Removal of all reasonable uses of the land must be assessed in relation to both its potential uses as well as the nature of the land and the range of reasonable uses to which it has actually been put.

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By Kasirer and Jamal JJ. (dissenting)

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v. Dora Construction Ltd., 2016 NSCA 89, 58 C.L.R. (4th) 1; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Warman v. Law Society of Alberta*, 2015 ABCA 368, 609 A.R. 83; *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46, 612 A.R. 284; *Rudichuk v. Genesis Land Development Corp.*, 2020 ABCA 42, 98 Alta. L.R. (6th) 339; *Wallbridge v. Brunning*, 2018 ONCA 363, 422 D.L.R. (4th) 305.

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The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

CÔTÉ AND BROWN JJ. —

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| I. <u>Overview</u> | |

[1] This appeal calls upon the Court to clarify the circumstances in which state regulation of land use may effect a *de facto* or (as we will refer to it) “constructive” taking of private property.

[2] The appellant, Annapolis Group Inc., contends that the respondent, Halifax Regional Municipality, improperly used its regulatory powers to effectively seize Annapolis’ land for use as a public park without compensation. Halifax says that Annapolis’ claim is a veiled attempt to make taxpayers foot the bill for a decades-long development gamble. It sought summary dismissal of this part of Annapolis’ claim, while permitting other claims (for misfeasance in public office and unjust enrichment) to proceed to trial.

[3] Although unsuccessful at first instance, Halifax persuaded the Nova Scotia Court of Appeal that it should apply this Court’s judgment in *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227 (“*CPR*”), to strike that claim.

Annapolis asks this Court to restore its claim in respect of the alleged constructive taking and allow it to proceed to trial.

[4] We would allow Annapolis' appeal. The Court of Appeal, in our respectful view, misapplied *CPR* and summary judgment principles. Read in harmony with the jurisprudence upon which it was decided, *CPR* signifies that a constructive taking occurs where: (1) a beneficial interest — understood as an advantage — in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource; and (2) the impugned regulatory measure removes all reasonable uses of the private property at issue. Further, the Court of Appeal erred by holding that Halifax's intention is irrelevant to applying the second part of that analysis. This leaves genuine issues of material fact arising from Annapolis' claim to be tried. Annapolis is entitled to adduce evidence at trial to show that, by holding Annapolis' land out as a public park, Halifax has acquired a beneficial interest therein; and that, because Halifax is unlikely to ever lift zoning restrictions constraining the development of Annapolis' land, Annapolis has lost all reasonable uses of its property. Further, and in support of the latter proposition, Annapolis may adduce evidence of Halifax's intention in not doing so.

II. Factual Background

[5] Over time from the 1950s, Annapolis acquired the subject property, comprising 965 acres of land ("Annapolis Lands" or "Lands"), with the intention of eventually securing enhanced development rights and reselling it.

[6] In 2006, Halifax adopted the Regional Municipal Planning Strategy, a guide for land development in the municipality, including the Annapolis Lands, over a 25-year period. While the Planning Strategy reserved a portion of the Annapolis Lands for possible future inclusion in a regional park, it also zoned the Lands as “Urban Settlement” and “Urban Reserve”. Urban Settlement denotes an area where urban forms of development may occur. Urban Reserve identifies land that could be developed beyond the 25-year horizon. These designations thus contemplate — but do not permit — future residential serviced development. For serviced development to occur on the Annapolis Lands, Halifax must adopt a resolution authorizing a “secondary planning process” and an amendment to the applicable land use by-law. The applicable by-law is the *Halifax Mainland Land Use By-Law*, also adopted in 2006.

[7] In 2014, Halifax adopted a revised version of the Planning Strategy. The Urban Settlement and Urban Reserve designations were maintained, and thus the zoning of the Annapolis Lands did not change, and has not changed since 2006. Nor were the conceptual boundaries for the potential park altered.

[8] Beginning in 2007, Annapolis made several attempts to develop the Lands. Ultimately, by resolution dated September 6, 2016, Halifax refused to initiate the secondary planning process, and Annapolis sued, alleging a constructive taking, misfeasance in public office, and unjust enrichment.

[9] At issue in this appeal is Annapolis’ allegation of a constructive taking. Specifically, Annapolis says that Halifax’s regulatory measures have deprived it of all

reasonable or economic uses of its land, resulting in a constructive taking without compensation, contrary to ss. 65 and 237 of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, and ss. 6 and 24 of the *Expropriation Act*, R.S.N.S. 1989, c. 156. It alleges in particular that Halifax has acquired a beneficial interest in the Lands by exercising dominion over them so as to effectively create a public park at Annapolis' expense. According to Annapolis, members of the public hike, cycle, canoe, camp, and swim on the Lands, are encouraged to do so by Halifax, and Halifax financially supports organizations that also encourage people to use the Lands as a park. Further, signs posted on the Lands allegedly depict the municipality's logo and phone number, and a media article quotes a municipal employee referred to as "the city staffer overseeing the park's creation".

[10] On March 11, 2019, Halifax moved for partial summary judgment of Annapolis' claim, pursuant to r. 13 of the *Nova Scotia Civil Procedure Rules*. In its motion, Halifax sought the dismissal of Annapolis' constructive taking claim and urged the motion judge to find that, as a matter of law, a constructive taking cannot result from Halifax refusing to amend the Planning Strategy and associated land use by-laws. Annapolis resisted the motion, arguing that its claim raises genuine issues of material fact requiring a trial.

III. Judicial History

A. *Supreme Court of Nova Scotia, 2019 NSSC 341, 17 L.C.R. (2d) 1 (Chipman J.)*

[11] The motion judge dismissed Halifax's partial summary judgment motion. He agreed with Annapolis that its constructive taking claim raised "vast" genuine issues of material fact requiring a trial, including:

- (a) whether Halifax had erected signage on the Lands depicting Halifax's logo on various trails;
- (b) whether a Halifax employee had been "overseeing the park's creation";
- (c) whether the Lands would be treated as development lands and not parklands;
- (d) the existence of clauses in the Planning Strategy that mandate consideration of policy concepts without committing Council to adopt the policy, and clauses discussing an urban settlement designation boundary;
- (e) discovery evidence to the effect that Halifax had decided that the Annapolis Lands would be treated as development lands, not parklands; and
- (f) correspondence between counsel, including letters containing Halifax's denial of Annapolis' allegations.

[12] The motion judge also identified a triable issue in affidavit evidence suggesting the possibility of an ulterior motive on Halifax's part — specifically, to reserve part of the Annapolis Lands for a public park. In this regard, he relied on *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577, which involved a claim under Quebec's *Expropriation Act*, CQLR, c. E-24. In *Lorraine*, this Court affirmed that, where property is expropriated outside a legislative framework for an ulterior motive (such as to avoid paying an indemnity), a “disguised” expropriation occurs. In the motion judge's view, disguised expropriation under the law of Quebec may be equated to constructive expropriation as that concept was understood by this Court in *The Queen in Right of the Province of British Columbia v. Tener*, [1985] 1 S.C.R. 533.

[13] In light of the foregoing, the motion judge concluded Annapolis' constructive taking claim should proceed to trial. Expropriation cases, he said, are fact-specific and offer different scenarios in which a constructive taking claim may succeed, and this case is no different. He added that the facts material to the constructive taking claim were “sufficiently interwoven” with Annapolis' two other causes of action, such that “to deny Annapolis' right to pursue this claim would not appreciably shorten pre-trial procedures or the trial” (para. 44). Thus he did not find the proportionality principle, as described in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, to support granting summary judgment.

B. *Nova Scotia Court of Appeal, 2021 NSCA 3, 455 D.L.R. (4th) 349 (Beveridge, Farrar and Derrick J.J.A.)*

[14] The Court of Appeal held that Annapolis' constructive taking claim did not have a reasonable chance of successfully establishing, as *CPR* requires, an acquisition by Halifax of a beneficial interest in the Annapolis Lands or flowing from the Lands, and the removal of all reasonable uses of the Lands. Citing *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98, 177 D.L.R. (4th) 696, it held that limiting the use of land or reducing its value through regulation is insufficient. For Halifax to acquire a "beneficial interest" in the Annapolis Lands, land "must actually be taken" from Annapolis and acquired by Halifax (para. 71). This did not occur. Even had Halifax placed signage on the property to encourage its use by the public, this would, at most, have constituted a trespass by those using the lands. Annapolis has the same rights with respect to the Lands under the Planning Strategy that it has had for years. Nothing has changed. Nor, in the Court of Appeal's view, would adopting a development plan constitute a taking. It simply allows a municipality to set future development goals and to ensure land will be developed (or not) accordingly.

[15] Finally, it said, Halifax's intended use for the Lands is not relevant to the constructive taking analysis. Improper motive is not proof of a constructive taking, and *Lorraine* does not dictate a contrary conclusion.

IV. Issues

[16] The foregoing account presents the issues to be decided:

- (a) Did the Court of Appeal err in holding that an “acquisition of a beneficial interest” under the constructive taking test established by this Court in *CPR* requires land to “actually be taken” from an owner and acquired by the state? If not, should the *CPR* test be revisited?

- (b) Did the Court of Appeal err in holding that evidence of the state’s intended use of the impugned land is irrelevant to a claim for constructive taking?

V. Analysis

A. *Overview of the Law of Takings*

[17] It is useful to begin with a brief overview of the law of takings. Given the facts of this appeal, our focus is on expropriation through regulation — which, again, we refer to as a “constructive taking” in preference to other commonly applied terms such as “*de facto*” or “regulatory taking”, as in our view it more accurately captures the nature of the state action at issue and the effect on the landowner (see e.g., M. Lavoie, “Canadian Common Law and Civil Law Approaches to Constructive Takings: A Comparative Economic Perspective” (2010), 42 *Ottawa L. Rev.* 229).

[18] A “taking” is a “forcible acquisition by the Crown of privately owned property . . . for public purposes” (K. Horsman and G. Morley, eds., *Government*

Liability: Law and Practice (loose-leaf), at § 5:1). It may take the form of a constructive taking (effective appropriation of private property by a public authority exercising its regulatory powers), or a *de jure* taking (formal expropriation), by (in the case of land) taking title.

[19] To be clear, not every instance of regulating the use of property amounts to a constructive taking. Governments and municipalities holding delegated provincial regulatory authority (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 2) validly regulate land in the public interest without effecting “takings”, properly understood (see *Compliance Coal Corporation v. British Columbia (Environmental Assessment Office)*, 2020 BCSC 621, 13 L.C.R. (2d) 215, at para. 91). The line between a valid regulation and a constructive taking is crossed where the *effect* of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way, or effectively confiscates the property (Horsman and Morley, at § 5:2). Put simply, “in order for a Crown measure to effect a constructive taking of property, private rights in the property must be virtually abolished, leaving the plaintiff with ‘no reasonable use’ of the property” (Horsman and Morley, at § 5:13 (emphasis added)).

[20] A series of lower court judgments affirm that, in general, Canadian courts require a “total loss of the plaintiff’s interest in property for the Crown’s action to constitute a taking” (Horsman and Morley, at § 5:13; see also *Lynch v. St. John’s (City)*, 2016 NLCA 35, 400 D.L.R. (4th) 62; *Sun Construction Company Limited v.*

Conception Bay South (Town), 2019 NLSC 102, 87 M.P.L.R. (5th) 256). Courts have, therefore, dismissed claims for compensation where the regulation left the owner *some* reasonable use for the property (*Genevieve Holdings Ltd. v. Kamloops (City)* (1988), 42 M.P.L.R. 171 (B.C. Co. Ct.); *Steer Holdings Ltd. v. Manitoba*, [1992] 2 W.W.R. 558 (Man. Q.B.), aff'd (1992), 99 D.L.R. (4th) 61 (Man. C.A.); *Purchase v. Terrace (City)* (1995), 26 M.P.L.R. (2d) 126 (B.C.S.C.); *Harvard Investments Ltd. v. Winnipeg (City)* (1995), 129 D.L.R. (4th) 557 (Man. C.A.)).

[21] At common law, taking of property by the state must be authorized by law, and triggers a presumptive right to compensation which can be displaced only by clear statutory language showing a contrary intention — that is, an intention *not* to compensate (see P. A. Warchuk, “Rethinking Compensation for Expropriation” (2015), 48 *U.B.C. L. Rev.* 655, at pp. 656 and 678-81). This was recognized in *Attorney-General v. De Keyser’s Royal Hotel*, [1920] A.C. 508 (H.L.), wherein Lord Atkinson stated: “The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation” (p. 542). Explaining the rule’s rationale, His Lordship cited to *London and North Western Railway Co. v. Evans*, [1893] 1 Ch. 16 (C.A.), at p. 28, per Bowen L.J., saying, at p. 542:

The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man’s property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this

ordinary principle . . . if it sees fit to do so, but, it is not likely that it will be found disregarding it, without plain expressions of such a purpose.

Lord Parmoor agreed with Lord Atkinson that this rule was “well-established” and that “justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment”, absent clear words to the contrary (*De Keyser’s Royal Hotel*, at pp. 576 and 579).

[22] It is important to stress that the rule contemplates that governments have the power to immunize themselves from liability to pay compensation for a taking. While, as we explain, we do not “expand” that liability but merely affirm it, the point is that governments may effect takings without paying compensation, so long as the enabling statute clearly expresses that intention. Notably, in *CPR*, the legislation at issue — the *Vancouver Charter*, S.B.C. 1953, c. 55 — immunized the City from compensating landowners for any loss as a result of the restrictions on land development and use (*CPR*, at paras. 12, 19 and 36-37). From the standpoint of government, the exigencies of the rule are modest and easily satisfied.

[23] This Court first applied the rule in *De Keyser’s Royal Hotel* in *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101. Ritchie J., for the Court, cited this passage from Lord Radcliffe’s speech in *Belfast Corporation v. O.D. Cars Ltd.*, [1960] A.C. 490 (H.L. (N.I.)), at p. 523, at p. 110, with approval:

On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to

property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was “taking.” Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. This vigilance to see that the subject’s rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual liberty. It would be a mistake to look on it as representing any conflict between the legislature and the courts. The principle was, generally speaking, common to both.

[24] That the rule in *De Keyser’s Royal Hotel* is one of common law answers Halifax’s submission that interpreting the protection narrowly against uncompensated takings avoids “creat[ing] a common law back door to constitutionalizing rights which were excluded deliberately from the *Charter*” (R.F., at paras. 108-09). It is, of course, true that the framers of our Constitution did not include the protection of property rights in the *Canadian Charter of Rights and Freedoms* (see Warchuk, at pp. 658-59). But the *Charter* is not, and never has been, the sole source of Canadians’ rights against the state; in particular, the common law also affords protections of individual liberty. Nor is the *scope* of common law rights dependent on whether such rights are also entrenched in the *Charter*. While this follows as a matter of logic, s. 26 of the *Charter* itself affirms that “[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.”

[25] This legal backdrop brings us to *CPR*, and its elaboration of the common law rule in the form of a two-part test for showing a constructive taking: “. . . (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property . . .” (para. 30 (emphasis added), citing *Mariner*, at p. 716; *Manitoba Fisheries*; *Tener*). The issues present in this appeal require us to consider the meaning of a “beneficial interest in the property or flowing from it” under the first part of that test. In bringing greater clarity to this aspect of the *CPR* test, we do not change the doctrine of constructive takings, but simply apply it to the facts of the present dispute. As we will explain, the Court in *CPR* did not use “beneficial interest” in the technical sense that it carries in the domain of equity. Rather, a “beneficial interest” is to be more broadly understood as an “advantage” — hence the Court’s coupling of “beneficial interest” with the phrase “or flowing from [the property]”. Clearly, if the interest acquired by the state can be one which *flows from* the property, what must be shown by the property owner can fall short of an *actual* acquisition by the state.

[26] Further, we must also decide the relevance, if any, under the second part of the test of the public authority’s intended use of the land.

B. “Beneficial Interest”

[27] The Court of Appeal, it will be recalled, held that the first part of the test stated in *CPR* — the “acquisition of a beneficial interest in the property or flowing from it” — requires Annapolis to show that Halifax *actually acquired* the Lands. Deciding

whether this is so requires that we give meaning to the expression “beneficial interest”, as it was used in *CPR*. In our view, that meaning is best appreciated by considering the authorities upon which *CPR* relied in stating that condition, and especially this Court’s decisions in *Manitoba Fisheries* and *Tener*. As we will explain, doing so reveals that actual acquisition is not necessary; rather, the obtaining by Halifax of an *advantage* in respect of the Lands suffices.

(1) *Manitoba Fisheries*

[28] Manitoba Fisheries Ltd. was a private commercial fishery. In 1969, Parliament enacted the *Freshwater Fish Marketing Act*, R.S.C. 1970, c. F-13, which granted a federal Crown corporation a commercial monopoly on the export of fish from Manitoba, and delegated power to the corporation to grant licenses to private enterprises like Manitoba Fisheries to continue operating notwithstanding the Act. Manitoba Fisheries did not receive such a license, and eventually the constraints of the Act put Manitoba Fisheries out of business. In such circumstances, the Act required the federal government to transfer funds to the Province of Manitoba, which would then compensate affected businesses, such as Manitoba Fisheries. Manitoba, however, refused to compensate Manitoba Fisheries (pp. 103-5).

[29] Significantly, the monopoly created by the Act conferred an economic advantage upon the state, but not an *actual acquisition* of property. It is true that, relying on *Ulster Transport Authority v. James Brown & Sons, Ltd.*, [1953] N.I. 79 (C.A.), Ritchie J. held that Manitoba Fisheries’ loss of goodwill deprived the company of

property that was acquired by the corporation (p. 110). But this rested on his view that the government had acquired *an advantage* through the acquisition of a statutory monopoly that entitled it to *benefits* that would otherwise have flowed to the company. This interpretation is made plain in Ritchie J.'s conclusion that "[goodwill] is the whole advantage, whatever it may be, of the reputation and connection of the firm", and that the monopoly "completely extinguished" the appellant's goodwill, leaving customers with no choice but to do business with the corporation (p. 107 (emphasis added)). In other words, the monopoly created by the Act restricted competition in the industry, thereby allowing the state to acquire all of the advantage that Manitoba Fisheries had previously enjoyed on the basis of its reputation and connections.

[30] Just as significantly, the Court was also concerned about the *effect* of the taking on the property holder. That effect — the loss of the business — was regarded as a taking or acquiring of Manitoba Fisheries' business by the state (p. 118). A persuasive consideration for Ritchie J. was that, "[u]ntil the creation of the Corporation by the Act, persons wishing to purchase freshwater fish from Manitoba could purchase such fish from [Manitoba Fisheries] or other firms in the industry. After the creation of the Corporation such purchases could be made only from the Corporation or its agents" (p. 109). This led him to conclude: "Once it is accepted that the loss of the goodwill of the appellant's business which was brought about by the Act and by the setting up of the Corporation was a loss of property and that the same goodwill was by statutory compulsion acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown" (p. 110).

[31] That the Court in *Manitoba Fisheries* ascribed significance to the *effects* on the property holder is underscored by Ritchie J.'s reliance on *Ulster Transport Authority*. The relevant passage cited Lord MacDermott's observations in that case:

We are not dealing here with a “mere” prohibition or with a prohibition which is essentially regulatory in character. We are dealing with what I have held to be, according to the intention of the Legislature, a device for diverting a definite part of the business of furniture removers and storers from the respondents and others to the appellants. If that is right, the result must be the same whether section 5(1) of the Act of 1920 sounds in pith and substance or in effect or partly in one and partly in the other. Wherever else a prohibition directed to other ends might lead, the relevant prohibition cannot but constitute a taking if my views as to its effect and underlying intention are correct. [Emphasis added.]

(*Ulster Transport Authority*, at p. 116, as cited in *Manitoba Fisheries*, at p. 111.)

Adopting the reasoning in *Ulster Transport Authority*, Ritchie J. concluded that the impugned regulation “had the effect of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless and that the goodwill so taken away constitutes property of the appellant for the loss of which no compensation whatever has been paid” (p. 118 (emphasis added)).

(2) *Tener*

[32] The Court in *Tener*, as in *Manitoba Fisheries*, also focussed on the *effect* of a regulatory measure and the *advantage* acquired therefrom by the government. The Teners were the registered holders of mineral claims on lands later included in a provincial park. The Province of British Columbia imposed increasingly onerous

conditions governing the exploitation of natural resources in the park, until the Teners were informed that no new exploration or development would be permitted, thus denying them the possibility of exploiting their mineral claims (pp. 536-38 and 552). The central issue on appeal to this Court was whether the Teners were entitled to compensation under the relevant legislation.

[33] In finding for the Teners, Estey J., for the majority, revealed his concern that the regulation had the *effect* of (or, as he put it, “amount[ed] to”) securing an *advantage* by confining all reasonable uses of the property to the Province’s preferred use as a provincial park. As Estey J. explained, while there had been “no regulation *qua* minerals which reduced the value of these minerals or the opportunity of the respondents to remove them”, the “denial of access to these lands occurred under the *Park Act* and amounts to a recovery by the Crown of a part of the right granted to the respondents in 1937” (p. 563 (emphasis added)).

[34] Thus Estey J.’s analysis in *Tener* adhered closely to that in *Manitoba Fisheries*. The Teners retained their mineral rights. In securing the advantage of preserving “qualities perceived as being desirable for public parks” (p. 564) by regulating away the Teners’ ability to exercise those rights, the Province had *effectively* “recover[ed] [. . .] the right granted to the [Teners]” (p. 563).

[35] Wilson J., concurring in the result, focussed on the nature of the Teners’ interest. She described that interest as “in the nature of a profit à prendre comprising both the mineral claims and the surface rights necessary for their enjoyment” (p. 540).

But the Province could not take the actual *profit à prendre*, being a registrable interest under British Columbia's land registry system, without *actually* taking actual title. Hence Wilson J.'s emphasis that the holder of a *profit à prendre* "owns . . . mineral claims and the right to exploit them through the process of severance" (p. 541 (emphasis added; emphasis in original deleted)). So understood, the interest held by the Teners had not been actually acquired, since the Province did not itself obtain a right of exploitation. What the Province *did* acquire by preventing the Teners from exploiting their mineral rights was *an advantage* — specifically, preserving the land as a provincial park in the public interest.

[36] That the Province need not to have been shown to have *actually acquired* a *proprietary interest* for the Teners to establish a constructive taking, and that the focus is instead on *the effect* on the landowner of the advantage gained by the land use regulation, is highlighted by Wilson J.'s reasons:

In my view, this is a case of expropriation under s. 11(c) of the *Park Act* to which the *Highways Act* applies. I reach this conclusion on the basis that the absolute denial of the right to go on the land and sever the minerals so as to make them their own deprives the respondents of their profit à prendre. Their interest is nothing without the right to exploit it. The minerals *in situ* do not belong to them. Severance and the right of severance is of the essence of their interest.

...

While the grant or refusal of a licence or permit may constitute mere regulation in some instances, it cannot be viewed as mere regulation when it has the effect of defeating the respondents' entire interest in the land. Without access the respondents cannot enjoy the mineral claims granted to them in the only way they can be enjoyed, namely by the exploitation of the minerals. [Emphasis added; p. 550.]

[37] We note that Wilson J. expressly rejected the Crown’s submission that “it is not enough to show that what the Crown did prevented the respondents from realizing on their interest or rendered it worthless” (p. 551). Instead, the Teners had to show “that the Crown has appropriated their interest to itself, that the interest which previously belonged to the respondents now belongs to the Crown” (p. 551).

(3) Defining the Nature of a “Beneficial Interest”

[38] In our view, the foregoing jurisprudence — upon which the *CPR* test was expressly stated as resting — supports an understanding of “beneficial interest” as concerned with the *effect* of a regulatory measure on the landowner, and not with whether a proprietary interest was actually acquired by the government. Conversely, that same jurisprudence supports the view that “beneficial interest”, as that term appears in the first part of the test stated in *CPR*, refers *not* to actual acquisition of the equity that rests with the beneficial owner of property connoting rights of use and enjoyment, but to an “advantage” flowing to the state. We say this for two reasons.

[39] First, to require actual acquisition would collapse the distinction between constructive (*de facto*) and *de jure* takings — a distinction which *CPR* explicitly preserves (paras. 30-37). Simply put, if a constructive taking requires an *actual* taking, then it is no longer constructive. It follows that the Court of Appeal’s requirement of an actual acquisition of the Annapolis Lands cannot be necessary to satisfy the *CPR* test for a constructive taking.

[40] Secondly, interpreting “beneficial interest” broadly (as meaning a benefit or advantage accruing to the state) ensures *CPR*’s coherence to *Manitoba Fisheries* and *Tener*, neither of which understood “benefits” in the strict equitable sense of that term. Again, the references to those authorities in *CPR* demonstrate that *CPR* merely sought to affirm, and not to alter, our law of constructive takings. This interpretation is supported by the explicit wording under the first part of the *CPR* test: “. . . a beneficial interest in the property or flowing from it . . .” (para. 30 (emphasis added)). An interest flowing from the property affirms that a “beneficial interest” can be more broadly understood as an advantage, and need not be an actual acquisition.

[41] To be clear, we are not “depart[ing] from precedent” (para. 111), as our colleagues contend. We aim to illuminate *CPR*, not overrule it. Our colleagues say that courts “have applied the *CPR* test without difficulty” (para. 112). With respect, this misses the point. The key question is whether the lower courts have applied the *CPR* test *correctly*. In our respectful view, many of them have not. Indeed, the Court of Appeal itself misapprehended the law in this case, by asserting that *CPR* requires an *actual* expropriation to establish a constructive taking. As we have explained, and as the authorities confirm, *CPR* — properly understood — trains the court’s eye on whether a public authority has derived an advantage, in *effect*, from private property, not on whether it has formally acquired a proprietary interest in the land. To hold otherwise would be to erase the long-standing distinction between *de jure* and *de facto* expropriation from Canadian law.

[42] As a final observation, we acknowledge that, in addition to *Manitoba Fisheries* and *Tener*, the Court in *CPR* also cited to *Mariner*. But this does not affect our analysis. *Mariner* concerned the Province of Nova Scotia’s designation of privately owned land as a beach under a provincial statute that subjected it to stringent conservation regulations. When the Minister refused the respondents’ applications to build homes on the land, they sought a declaration that the Crown had expropriated their lands, entitling them to compensation. Cromwell J.A. (as he then was), writing for the Nova Scotia Court of Appeal, held that the respondents’ loss of economic value did not amount to an advantage acquired by the provincial authority (see generally *Mariner*, at pp. 713-16).

[43] *Mariner* illustrates that regulation alone will not satisfy the test for a constructive taking; there must be something more “beyond drastically limiting use or reducing the value of the owner’s property” (p. 716). When this threshold is crossed — that is, where all reasonable uses have been removed — a regulation may be, “in effect, confiscation” (p. 727 (emphasis added)). To be clear, *Mariner* does not stray from focussing on both the *effect* of the taking and the *advantage* acquired by the government, as required by this Court’s jurisprudence and affirmed in the test set out in *CPR*. Rather, and consistent with both *Manitoba Fisheries* and *Tener*, *Mariner* asked whether the *effect* of the regulation was to remove an interest in land (*Mariner*, at p. 722, referring to *Tener*).

(4) Conclusion on “Beneficial Interest”

[44] In sum, we affirm that the test to show a constructive taking is that stated by *CPR*, properly understood. The reviewing court must decide: (1) whether the public authority has acquired a beneficial interest in the property or flowing from it (i.e. an advantage); and (2) whether the state action has removed all reasonable uses of the property. This gives effect to this Court's acknowledgement of a common law right to compensation where the two-part *CPR* test is satisfied. It accords with imperatives of justice and fairness, which underpin the court's assessment of expropriation claims, and remedies situations where cases do not neatly fit within the expropriation legislative framework and would otherwise "fall between the cracks" (Warchuk, at pp. 686 and 690).

[45] To this, we would add that, because the test focusses on *effects* and *advantages*, substance and not form is to prevail. A court deciding whether a regulatory measure effects a constructive taking must undertake a realistic appraisal of matters in the context of the specific case, including but not limited to:

- (a) The nature of the government action (i.e., whether it targets a specific owner or more generally advances an important public policy objective), notice to the owner of the restrictions at the time the property was acquired, and whether the government measures restrict the uses of the property in a manner consistent with the owner's reasonable expectations;

- (b) The nature of the land and its historical or current uses. Where, for example, the land is undeveloped, the prohibition of all *potential* reasonable uses may amount to a constructive taking. That said, a mere reduction in land value due to land use regulation, on its own, would not suffice; and

- (c) The substance of the alleged advantage. The case law reveals that an advantage may take various forms. For example, permanent or indefinite denial of access to the property or the government's permanent or indefinite occupation of the property would constitute a taking (*Sun Construction*, at para. 15). Likewise, regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test. It could also include confining the uses of private land to public purposes, such as conservation, recreation, or institutional uses such as parks, schools, or municipal buildings.

C. *Disguised Expropriation in Quebec Civil Law*

[46] The parties and several interveners invoked civil law authorities in this appeal. The conceptual similarities between the common law doctrine of constructive takings and the civil law doctrine of disguised expropriation have been highlighted by some authors (Lavoie, at pp. 241-45; M.-A. LeChasseur, “L'expropriation *de facto* au Canada et la transcendance des solidarités”, in *Service de la qualité de la profession du*

Barreau du Québec, vol. 509, *Développements récents en droit municipal* (2022), 71; Y. Emerich, *Droit commun des biens: perspective transsystémique* (2017), at pp. 225-27 and 235-37). We refer to civil law principles “for the purpose of explanation and illustration”, bearing in mind that Quebec precedents serve as persuasive, rather than binding, authority (*Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 32; see also *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, at para. 58). To be clear, our analysis does not disregard the distinct features of the respective doctrines from either legal tradition (*Callow*, at para. 158, per Brown J., concurring).

[47] The doctrine of disguised expropriation in Quebec civil law is founded upon art. 952 of the *Civil Code of Québec* (“C.C.Q.”): “No owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in return for a just and prior indemnity.” Article 952 establishes a presumption against uncompensated expropriation by the state, as does the common law through the rule in *De Keyser’s Royal Hotel*, as we have explained (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 511-13). In the context of municipal regulations, an owner subject to disguised expropriation may challenge the validity or operability of the bylaw under administrative law principles or, alternatively, claim an indemnity for disguised expropriation under art. 952 (*Lorraine*, at para. 2; S. Pelletier and F. Côté, “Développements récents en matière d’expropriation déguisée: distinction entre les recours en nullité, en dommages pour responsabilité extracontractuelle d’un organisme public et en expropriation déguisée”, in *Service de la qualité de la profession du*

Barreau du Québec, vol. 468, *Développements récents en droit de l'environnement* (2019), 303).

[48] Quebec courts have recognized that art. 952 *C.C.Q.* establishes a no-fault liability scheme for disguised expropriation, in contrast to administrative law challenges to the validity of a bylaw based on the municipality's improper motive (see *Ville de Léry v. Procureure générale du Québec*, 2019 QCCA 1375, at para. 17; *Montréal (Ville) v. Benjamin*, 2004 CanLII 44591 (Que. C.A.), at para. 57; *Ville de La Prairie v. 9255-2504 Québec inc.*, 2020 QCCS 307, 2020 CarswellQue 2737 (WL), at para. 29; *Spénard v. Salaberry-de-Valleyfield (Cité de)*, [1983] C.S. 725). It is now well established in the jurisprudence on disguised expropriation that the criterion applicable to such claims is whether the state action [TRANSLATION] “remov[es] all reasonable uses of the immovable” (*Dupras v. Ville de Mascouche*, 2022 QCCA 350, at para. 27 (CanLII); see also *Wallot v. Québec (Ville)*, 2011 QCCA 1165, 24 Admin. L.R. (5th) 306, at para. 42; *Municipalité de Saint-Colomban v. Boutique de golf Gilles Gareau inc.*, 2019 QCCA 1402, at para. 64; *Meadowbrook Groupe Pacific inc. v. Ville de Montréal*, 2019 QCCA 2037, 2019 CarswellQue 12262 (WL), at para. 29; *Ville de Québec v. Rivard*, 2020 QCCA 146, at para. 64; *Ville de Saint-Rémi v. 9120-4883 Québec inc.*, 2021 QCCA 630, at para. 25 (CanLII)). For this reason, disguised expropriation under art. 952 *C.C.Q.* requires no element analogous to the “acquisition” branch of the *CPR* test. A bylaw that removes all reasonable uses of the property suffices, on its own, to effect a disguised expropriation in Quebec civil law.

[49] There are, however, exceptions that permit us to compare disguised expropriation to constructive takings at common law. The Quebec Court of Appeal's decision in *Benjamin* provides one such example. In that case, the owner's claim based on the decades-old bylaw was prescribed. But the Court of Appeal held that [TRANSLATION] "in the very particular circumstances of this case" (para. 62), the combination of zoning restrictions and the City's use of the land as an extension of its park justified awarding an indemnity for disguised expropriation (paras. 65 and 82).

[50] The criteria applied by the Quebec Court of Appeal in *Benjamin* "pla[y] a functionally similar role" (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 44) to the "deprivation" and "acquisition" requirements of the *CPR* test. Accordingly, and as we discuss below, we regard *Benjamin* and analogous Quebec cases as having persuasive authority in assessing constructive taking claims. These rulings, we emphasize, are useful for illustrative purposes only in applying the *CPR* test. In this case, we need not draw on Quebec authorities to fill a doctrinal gap in the common law or to modify or otherwise develop existing legal rules (*Callow*, at para. 123, per Brown J., concurring, and para. 191, per Côté J., dissenting).

D. *Intention*

[51] The courts below disagreed on whether the intention of a public authority is relevant to the analysis of constructive taking claims. The motion judge, at para. 35, cited this Court's definition of disguised expropriation articulated in *Lorraine*, at para. 2, which included "an ulterior motive", and concluded that this was equally

applicable to finding a constructive taking at common law (para. 36). The Court of Appeal, however, held that “[m]otive is not a material fact in the context of a [constructive] expropriation claim” (para. 82).

[52] Respectfully said, neither position is correct. The public authority’s intention is not an *element* of the test for constructive takings at common law. Again, the mischief addressed by the doctrine is one of advantage and effects, not that a public authority acted in bad faith or with an otherwise ulterior motive. Indeed, this Court held in *CPR* that, even if the City’s purpose were to “enable the inhabitants to use the corridor for walking and cycling,” its bylaw, *in effect*, neither encouraged trespassing nor prevented the historical and current use of the land (para. 33) and therefore could not be said to have deprived the landowner of all reasonable uses.

[53] This does not mean, however, that intention is *irrelevant* to the inquiry. Indeed, the case law we discuss below suggests that the objectives pursued by the state may be *some evidence of* constructive taking. Stated differently, the intention to take constructively, if proven by the claimant, may support a finding that the landowner has lost all reasonable uses of their land (inasmuch as a finding of this effect can be supported by evidence that such an effect was intended). But the absence of evidence of the state’s intention does not preclude a property holder’s claim. It follows that intent may constitute a “material fact” in the context of a constructive taking claim. We stress, however, that the focus of the inquiry must remain on *the effects* of state action.

[54] A brief review of the jurisprudence illustrates the supporting role of intention in assessing constructive taking claims. In *Manitoba Fisheries*, at p. 111, as we have already recalled, Ritchie J. endorsed a passage from *Ulster Transport Authority* highlighting the relevance of intention in constructive taking cases. The key portion of this passage merits repeating: “. . . the relevant prohibition cannot but constitute a taking if my views as to its effect and underlying intention are correct” (emphasis added). Thus the objective pursued by the state was considered (*Ulster Transport Authority*, at pp. 113 and 116; *Manitoba Fisheries*, at pp. 111-13) in distinguishing between a mere regulatory prohibition and the constructive taking of a business through the establishment of a public monopoly.

[55] Likewise, in *Lynch* — which Halifax acknowledges was correctly decided — the Court of Appeal of Newfoundland and Labrador treated the City’s intention in refusing to allow any development on the subject watershed land as germane to whether a constructive taking had occurred. In concluding it had, the court referred to the City’s express intention “to take away the Lynches’ right to appropriate the groundwater on their land” so as to secure the City’s “right to a continuous flow of uncontaminated groundwater downstream to [its] water facilities” (para. 60). Moreover, the City took the view that securing this objective required the prohibition of “all activity on the Lynch property” (para. 62). The City’s intention, as implemented by its officials, thus indicated that the land in issue had been constructively taken.

[56] The Quebec Court of Appeal's decision in *Benjamin* further illustrates how intent may support a finding of a constructive taking. There, a zoning bylaw designated the claimant's property as a "park", and the City [TRANSLATION] "knowingly" used the land in issue as an extension of its own park for 14 years (para. 50). The City — inadvertently at first — installed a fence and lampposts and created a trail on the claimant's land, which was effectively incorporated into an adjacent public park. The City then manifested its intention to achieve that very effect by refusing to remove the fence after receiving a demand letter from the claimant. On appeal, the City offered to remove the fence and lampposts, but only if the claimant accepted to adequately maintain his own land for *public* safety. The Court of Appeal characterized the City's behaviour as an [TRANSLATION] "abuse of right" and underscored its lack of "goodwill" to either formally expropriate the claimant's land or permit reasonable uses thereof (paras. 49, 54 and 59). The plans transparently set out by the City thus indicated that the claimant would continue to be deprived of all reasonable uses of his land indefinitely. In these circumstances, the City's intent buttressed the finding of disguised expropriation arising from the bylaw and the persistent use of the claimant's land.

[57] In short, the underlying objective pursued by a public authority may provide supporting evidence for a constructive taking claim. But it is neither necessary nor sufficient. The case law indicates that the assessment of intent has proved helpful in distinguishing between mere regulations in the public interest and takings requiring compensation at common law. What ultimately matters, however, *irrespective* of matters of intent, is whether the state-imposed restrictions on the property conferred an

advantage on the state that *effectively* amounts to a taking (*Tener*, at pp. 563-65, per Estey J., and pp. 551-52, per Wilson J.; *Manitoba Fisheries*, at p. 118).

E. *Application*

[58] The foregoing explains why, in our respectful view, the Court of Appeal erred by granting Halifax’s application for summary judgment dismissing Annapolis’ constructive taking claim. While the Court of Appeal saw “nothing on the facts . . . that could be remotely considered to be a taking of the Annapolis Lands and a corresponding deprivation of all reasonable uses of the lands” (para. 85), as we have explained, it is well-established in our law that zoning which effectively preserves private land as a public resource may constitute a “beneficial interest” flowing to the state, as contemplated in *CPR*, where it has the effect of removing all reasonable uses of that land. Further, we have already explained why the motion judge did not err by considering Halifax’s alleged intent with respect to the Annapolis Lands in his application of the *CPR* test.

[59] More specifically, we agree with the motion judge’s identification of the material facts to be determined (at paras. 25-26 and 36), arising from:

- September, 2019 correspondence between counsel demonstrating [Halifax]’s denial of the allegations in the amended Statement of Claim at paras. 20, 21, 61, 71 and 79. (exhibits EE and FF)
- Signage erected on Annapolis’ property depicting [Halifax]’s logo on various trails. (exhibits AA, BB and I)

- December 18-23, 2008 The Coast article quoting [Halifax] employee Peter Bigelow “. . . the city staffer overseeing the park’s creation”. (exhibit U, p. 743 especially)
- Ms. Denty’s discovery evidence to the effect that when the 2006 [Planning Strategy] was finalized, the decision was made that Annapolis’ property would be treated as development lands, not parklands. (exhibit A, pp. 54, 55)
- [The Planning Strategy], clause 1.7.1 denoting what [Halifax] Council “shall consider”. “This ter[m] denotes the mandatory consideration of policy concepts but does not commit [Halifax] Council to the eventual adoption of policy in secondary planning strategies”. (exhibit D, p. 175)
- [The Planning Strategy], clause 3.1 and the discussion of “S-2” and S-3” the “Urban Settlement Designation Boundary”. (exhibit D, pp. 195, 196)

...

- Ms. Denty’s discovery evidence as per the transcript and the clarifications in [Halifax] counsel’s October 16, 2019 correspondence (exhibit C at p. 905 and exhibit A at pp. 859-860).

...

. . . Mr. Hattie’s affidavit[, elements of which] “point to the possibility of an ulterior motive” on the part of [Halifax].

[60] The importance of making findings on these points flows from the motion judge’s correct legal conclusions that (1) a constructive taking need only have the *effect* of defeating the landowner’s reasonable use of land; and (2) the state’s intent may be relevant in assessing whether all reasonable uses of land has been removed.

[61] The Court of Appeal did not identify any legal error or “patent injustice” that would justify interfering with the motion judge’s decision to dismiss Halifax’s summary judgment motion on the basis of the foregoing triable issues (*Coady v. Burton Canada Co.*, 2013 NSCA 95, 365 D.L.R. (4th) 172, at para. 19). At most, it can be said

that the Court of Appeal merely disagreed with the motion judge's exercise of discretion. This does not provide a sufficient basis for appellate intervention.

[62] Further, the Court of Appeal erred in its r. 13.04 analysis. In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, 58 C.L.R. (4th) 1, at para. 34, the Nova Scotia Court of Appeal set out a five-part sequential test on a r. 13.04 motion for summary judgment. The first part of the test asks whether the challenged pleading discloses a "genuine issue of material fact", either pure or mixed with a question of law. If yes, it should not be determined by summary judgment.

[63] There was no need for the Court of Appeal to proceed beyond the first *Shannex* step. The motion judge correctly decided that Annapolis' pleadings contain disputed material facts, mixed with questions of law, and the evidence before the motion judge failed to negate the existence of genuine issues of material fact for trial. We therefore see no basis on which to disturb the motion judge's conclusion that Annapolis' pleadings in support of its constructive taking claim disclose "vast issues of material fact to be determined" at trial (para. 25). Indeed, two disputed factual issues are particularly material to the *CPR* test.

(1) Halifax's Alleged Acquisition of a Beneficial Interest in the Annapolis Lands

[64] First, it is disputed whether Halifax is promoting the Annapolis Lands as a public park, for instance by encouraging public use and holding them out as a park, as

Annapolis alleges. This disputed fact is material because, if proven, it would tend to support Annapolis' claim that Halifax acquired a "beneficial interest" in the Lands, as we have explained it. Preserving a park in its natural state may constitute an advantage accruing to the state, thus satisfying the "acquisition" element of *CPR*.

[65] To be clear, we reject the Court of Appeal's formalistic position that a public authority's alleged encouragement and financial support of trespass can never amount to an acquisition of a beneficial interest. Several cases support the proposition that whether a public authority treats private lands as an extension of a public park is a key factor in assessing the acquisition requirement. For instance, in *Benjamin*, the Quebec Court of Appeal found that the City of Montréal's knowing use of private land as a public park — entailing the installation of lampposts, a fence, and signage indicating the location of the "park" that included the subject lands — in conjunction with restrictive zoning, effectively constituted a "disguised expropriation" (paras. 65 and 82).

[66] Similarly, in *Dupras v. Ville de Mascouche*, 2020 QCCS 2538, the Quebec Superior Court held that the City had effectively expropriated the claimant's lands by subjecting them to "conservation" zoning and treating them as if they were part of a public park. Notably, the City had (1) marked off trails, (2) added signage with park maps covering the subject land, (3) encouraged the public to use the lands on the park, and (4) taken out insurance to cover public recreational activities on the land (see paras. 137-40). The Quebec Court of Appeal affirmed the Superior Court's reasoning

and dismissed the respondent city's cross-appeal on the finding of disguised expropriation (2022 QCCA 350, at paras. 27-40).

[67] A similar claim in *Steer Holdings* failed, but for reasons which distinguish it from the allegations here. In *Steer Holdings*, the Manitoba Court of Appeal held that no benefit was acquired where there was “no suggestion that people will be encouraged in any way to move from the nature park to the subject property” (p. 67). Moreover, the land was not adjacent to the provincial park. The Court of Appeal thus rejected the argument that the Province of Manitoba had effectively enlarged its park system.

[68] As we have explained, and as the cases confirm, the doctrine of constructive takings looks to the *effects* of state action; it does not require a formal acquisition of a proprietary interest by the state. The absence of such a proprietary interest does not preclude the argument that, *in effect*, Halifax has functionally treated the Annapolis Lands as if they were a park for the benefit of the public. If proven, this fact would support Annapolis' claim that Halifax acquired a beneficial interest in its property. It is, therefore, plainly material.

(2) Halifax's Alleged Removal of All Reasonable Uses of the Annapolis Lands

[69] Second, it is disputed whether Halifax, by allegedly treating the Annapolis Lands as a public park, has eliminated all uses of the Lands except serviced development, which is conditional upon the approval of Annapolis' secondary planning applications.

[70] This disputed fact is material because, if proven, it may arguably support Annapolis' claim that it has lost all reasonable uses of its property. This would leave Annapolis to shoulder the burden of holding the Lands as a public park indefinitely, while Halifax enjoys the advantage of having the Lands reserved for its own purposes without having to pay compensation. It is notable that the Court of Appeal, after observing that "Annapolis' reasonable uses of its lands have not changed", failed to identify a single reasonable possible use of the property (para. 92; see *Lynch*, at para. 63).

[71] Further, the Court of Appeal's reasoning — to which our colleagues subscribe — cuts against one of the core lessons from *Mariner*, being to look to "the actual application of the regulatory scheme as opposed simply to its potential for interference with the owner's activities" (p. 718 (emphasis added)). In concluding that there had been no taking in the present case, the Court of Appeal leaned heavily on the fact that the zoning rules had not changed, such that Annapolis' land use rights remained the same after the release of the 2006 Planning Strategy. But the Court of Appeal neglected to consider Halifax's *application* of the regulatory scheme as alleged by Annapolis. Indeed, *Manitoba Fisheries*, *Tener*, and *Mariner* all stand for the proposition that a regulation does not *per se* eliminate all reasonable uses of property where it provides a mechanism for permits, exemptions, or licenses to allow activities that are otherwise prohibited. In such cases, it is not the regulation alone that effects a constructive taking, but the *application* of that regulation to the land, including the manner in which the public authority *refuses* to grant the permit, exemption, or license

(see *Manitoba Fisheries*, at p. 103 (taking of the goodwill resulting from the refusal by the Crown corporation to grant a license or exemption for the export of fish); *Tener*, at pp. 564-65 (Crown’s notice denying a permit to conduct development work found to be an “expropriation” of the mineral rights)). In sum, “[w]hen . . . the claim is that the impact of a regulatory scheme has, in effect, taken away all rights of ownership, it is not the existence of the regulatory authority that is significant, but its actual application to the lands” (*Mariner*, at p. 729 (emphasis in original)). Therefore, the Court of Appeal erred in focussing solely on the “longstanding zoning *status quo* for the Lands” (R.F., at para. 18) since the passing of the *Halifax Mainland Land Use By-Law* in 2006.

[72] According to Annapolis, Halifax has repeatedly refused to initiate the secondary planning process which could lead to the re-zoning of the Annapolis Lands. If Annapolis can prove at trial that Halifax is unlikely to *ever* grant secondary planning approval, this is clearly material to its constructive taking claim. In our view, all reasonable uses of land may be shown to have been eliminated where a permit needed to make reasonable use of the land is refused, such that the state has effectively taken away all rights of ownership.

[73] We note our colleagues’ characterization of Halifax’s alleged conduct as a mere “refusal to up-zone” which did not affect the reasonable uses of the Annapolis Lands. Our colleagues say that Halifax’s alleged conduct “simply disappointed” Annapolis’ hopes of cashing in on a speculative investment (para. 145). For several reasons, we respectfully reject this view.

[74] First, Annapolis did not acquire the Lands as a “speculative bet” (para. 145). Annapolis acquired most of the Lands in 1956, slowly adding to its holdings over time. Crucially, Halifax did not regulate land use in the relevant area prior to 1982. In other words, nothing prevented Annapolis from developing the Lands when they were first acquired. The conduct alleged is therefore not a mere “refusal to up-zone”, as our colleagues say (para. 115). Annapolis originally had the right to use the Lands at its discretion. It now alleges that Halifax eliminated this right and thereby secured a public advantage without compensation.

[75] Secondly, and again with respect, our colleagues incorrectly characterize our position as an assertion that a “refusal to up-zone vacant land” is tantamount to a constructive taking (para. 151). A refusal to up-zone, standing alone, will not generally remove *all* reasonable uses of vacant land. As we have explained, Halifax’s alleged conduct in this case is more than a mere refusal to up-zone. Annapolis claims that Halifax has effectively transformed its Lands into a public park. We emphasize, however, that Halifax may defeat Annapolis’ constructive taking claim by showing a *single* reasonable use of the property.

[76] In this regard, it is telling that our colleagues do not identify *any* reasonable use of the Annapolis Lands. The mere (theoretical) possibility for Annapolis to lease the lands is not indicative of any reasonable use of the property — as our colleagues implicitly recognize in discussing *Benjamin*. As they acknowledge, the City in *Benjamin* “render[ed] any use of the land practically impossible” (para. 139), despite

the absence of any restrictions on leasing. In any event, it is not realistic to assert that Annapolis may lease lands which, according to its allegations, are already used as a public park by Halifax.

[77] Moreover, in most cases, a public authority will not benefit from a refusal to up-zone vacant land. As such, even if all reasonable uses of land are eliminated by a zoning refusal, the first element of the *CPR* test for a constructive taking would not ordinarily be met. Accordingly, we cannot agree with our colleagues that our approach “dramatically expands the potential liability of municipalities engaged in land use regulation” (para. 115). To the contrary, our approach is firmly rooted in the common law and does not encroach on the general rule that a refusal to up-zone does not itself effect a constructive taking.

[78] Lastly, we reiterate that provincial legislatures remain free, as they always have been, to “alter the common law” in respect of constructive takings (*CPR*, at para. 37, referring to the immunity conferred by s. 569 of the *Vancouver Charter*) — by, in this case, immunizing Halifax by statute from the obligation to pay compensation for taking private property in the public interest.

[79] In light of the foregoing, the Court of Appeal erred in striking Annapolis’ claim related to the alleged constructive taking. There are genuine issues of material fact to be tried.

VI. Disposition

[80] We would allow the appeal, set aside the Court of Appeal’s partial summary judgment order, and restore the motion judge’s order dismissing Halifax’s motion for partial summary judgment, with costs throughout. Annapolis’ claim against Halifax, in its entirety, may proceed to trial.

The reasons of Karakatsanis, Martin, Kasirer and Jamal JJ. were delivered by

KASIRER AND JAMAL JJ. —

I. Overview

[81] We have had the advantage of reading the reasons of our colleagues Côté and Brown JJ. With respect for their views, we conclude that the appeal should be dismissed.

[82] This Court summarized the test for a *de facto* (or constructive) taking at common law in its unanimous decision in *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227 (“*CPR*”), at para. 30, per McLachlin C.J.:

For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property (see *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 696 (N.S.C.A.), at p. 716; *Manitoba Fisheries*

Ltd. v. The Queen, [1979] 1 S.C.R. 101; and *The Queen in Right of British Columbia v. Tener*, [1985] 1 S.C.R. 533).

[83] Annapolis Group Inc. has asked this Court to depart from this precedent. It urges the Court to allow its appeal from the order of the Nova Scotia Court of Appeal granting partial summary judgment dismissing its claim against Halifax Regional Municipality for a *de facto* taking of its lands. Annapolis invited — and needs — this Court to depart from *CPR* for its claim to proceed to trial.

[84] Our colleagues Côté and Brown JJ. have accepted Annapolis' invitation and propose to change the *CPR* precedent in two respects. We respectfully disagree with the changes they propose and how they apply the law in this case.

[85] First, we disagree with our colleagues' view that the first element of the *CPR* test — which requires “an acquisition of a beneficial interest in the property or flowing from it” — should be replaced with the much broader notion of an “advantage”, whether or not “a proprietary interest was actually acquired by the government” (see paras. 4, 25, 27, 38, 40 and 44-45). Our colleagues' reformulation involves an unwarranted departure from *CPR* and significantly expands the potential liability of public authorities when regulating land use in the public interest. In our view, this Court should retain the *CPR* test for a *de facto* taking, which insists that a proprietary interest be acquired. Courts across common law Canada have applied this test without difficulty.

[86] Second, we disagree with our colleagues' view that a public authority's "intention" is a material fact in a claim for a *de facto* taking (para. 53). This is also an unwarranted departure from *CPR* and this Court's prior jurisprudence. The material facts for a *de facto* taking claim concern the *effects* of the public authority's regulatory activity, not its *intention*.

[87] Here, Annapolis' *de facto* taking claim arises from Halifax's refusal to "up-zone" (in French: "*procéder à un rezonage pour usage plus intensif*") land — to re-zone to enlarge the permissible uses of land, in this case so that Annapolis may commercially develop the land for housing — in connection with about 1,000 acres of vacant and treed land owned by Annapolis ("Annapolis Lands"). Annapolis' proposed use for commercial development is impermissible and has been impermissible for many years. Annapolis now alleges that a Halifax municipal council resolution in 2016 refusing to up-zone the land to permit development — a regular occurrence in municipalities across Canada — and Halifax's alleged acts of trespass in encouraging the public to hike, canoe, and swim on the lands, give rise to claims for *de facto* taking, abuse of public office, and unjust enrichment.

[88] The claims for abuse of public office and unjust enrichment are proceeding to trial, and, if the court finds Halifax liable, it may award a remedy. If Annapolis succeeds, it will be compensated for the harm occasioned by this conduct. But these matters are distinct from the question of whether Annapolis has alleged facts that would substantiate a claim for *de facto* taking under the applicable common law rules. The

only issue on this appeal is whether the claim for *de facto* taking should also proceed to trial.

[89] The Nova Scotia Supreme Court declined to grant partial summary judgment on the *de facto* taking claim because the law could change through “creative interpretations on what may constitute a taking” and because a public authority’s intention may be relevant to a *de facto* taking claim (2019 NSSC 341, 17 L.C.R. (2d) 1, paras. 42 and 36). The Nova Scotia Court of Appeal allowed the appeal and granted partial summary judgment (2021 NSCA 3, 455 D.L.R. (4th) 349). It ruled that the evidence on the motion, seen in light of *CPR* and prior jurisprudence, establish no material fact in dispute either that Halifax has acquired a proprietary interest or that Annapolis has lost all reasonable uses of its lands. The Court of Appeal also ruled that intention is not a material fact for a *de facto* taking claim.

[90] In our view, this appeal should be dismissed. There is no material fact in dispute on either branch of the *CPR* test for a *de facto* taking. First, Halifax has acquired no beneficial interest in the Annapolis Lands or flowing from them. It has simply refused to up-zone the lands. Second, the uncontradicted evidence is that Annapolis has been deprived of *no* reasonable uses — let alone *all* reasonable uses — of its lands. The zoning and uses of the Annapolis Lands remain entirely unchanged. The lands remain vacant and treed, just as they have been since Annapolis acquired them. Importantly, the Court of Appeal rightly recalled that pursuant to the judgment of this Court in *CPR*, a public authority’s improper motive is not a factor in the analysis and

cannot make up for a failure to establish the two settled requirements for a claim of *de facto* taking. Accordingly, partial summary judgment was properly granted dismissing the *de facto* taking claim as the claim has no real chance of success in law.

[91] Annapolis' core claim is that Halifax's refusal to up-zone its land to permit residential development, along with the fact that Halifax acted deliberately to secure the advantage of using the Annapolis Lands as a public park, constitutes a *de facto* taking. However, a refusal to up-zone, in the circumstances of this case, cannot establish a *de facto* taking unless this Court departs from the common law requirements that Halifax has acquired a beneficial interest involving the property and that Halifax has removed all reasonable uses of the property. We decline to alter the settled law to allow Annapolis to proceed with its claim. We are respectfully of the view that by acceding to Annapolis' plea to set aside this Court's decision in *CPR* as a governing precedent, our colleagues' opinion risks radically changing the complexion of municipal planning law by providing, in like up-zoning contexts, a windfall to developers who speculate at municipal taxpayers' expense.

II. Background

[92] We take no issue with our colleagues' summary of the factual background and the decisions below, but we wish to highlight the precise conduct of Halifax that Annapolis alleges constitutes a *de facto* taking: (1) refusing to up-zone the Annapolis Lands and to zone the lands as a park, and (2) encouraging the public to trespass.

[93] Between the 1950s and 2014, Annapolis, a real estate development company, acquired the Annapolis Lands, consisting of about 1,000 acres of vacant and treed land. Annapolis hoped to develop the lands into residential communities and to sell the development for a profit. The Annapolis Lands — which are still vacant and treed — are next to the Blue Mountain-Birch Cove Lakes Wilderness Area, a large wilderness area protected under the *Wilderness Areas Protection Act*, S.N.S. 1998, c. 27.

[94] In 2006, Halifax adopted a “Regional Municipal Planning Strategy” as a policy statement to guide land development in the municipality. This policy, essentially a vision statement of long-term property development in the municipality, was adopted under the *Municipal Government Act*, S.N.S. 1998, c. 18, and the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 (“*Halifax Charter*”). Both statutes require Halifax to put in place a municipal planning strategy containing “statements of policy” to “guide the development and management of the municipality”, including “the future use, management and development of lands within the municipality” (*Municipal Government Act*, ss. 212 to 214; *Halifax Charter*, ss. 227 to 229). Both statutes also expressly provide that “[t]he adoption of a municipal planning strategy does not commit the council to undertake any of the projects suggested in it” (*Municipal Government Act*, s. 217(2); *Halifax Charter*, s. 232(2) (emphasis added to both statutes)).

[95] Under Halifax’s 2006 Regional Municipal Planning Strategy, about a third of the Annapolis Lands are designated “Urban Settlement”, which means they could be developed for serviced residential communities within 25 years. The remaining two-thirds of the Annapolis Lands are designated “Urban Reserve”, which means they could be developed after 25 years. Serviced development on the Annapolis Lands cannot occur, however, unless Halifax adopts a municipal resolution authorizing a “secondary planning process” and amends its zoning by-law to allow residential development.

[96] Starting in 2007, Annapolis urged Halifax to take these legislative measures to permit Annapolis to build residential communities on the lands. Halifax has consistently refused to do so, preferring to maintain the *status quo*. In 2016, Halifax adopted a municipal resolution stating that it would not authorize a secondary planning process on the Annapolis Lands “at this time”.

[97] The 2016 municipal resolution refusing to up-zone the lands to permit development led to this litigation. In 2017, Annapolis sued Halifax for over \$120 million for the alleged *de facto* taking of its lands and for abuse of public office and unjust enrichment.

[98] Only the *de facto* taking claim is in issue on this appeal. Annapolis alleges that Halifax refused to up-zone the lands because it intends to use them for a park and that Halifax has encouraged the public to trespass on the lands to hike, canoe, and swim. Annapolis also claims that Halifax has refused to zone the lands as a park because it

would otherwise have a statutory obligation to buy the lands within a year (see *Municipal Government Act*, s. 222; *Halifax Charter*, s. 237). Annapolis’ key allegations of *de facto* taking are set out in its amended statement of claim, dated March 22, 2017, at paras. 111-12:

[Halifax] has *de facto* expropriated the Annapolis Lands for public use as a park. [Halifax] has delayed and obstructed all of Annapolis’ attempts to develop the Annapolis Lands, and likewise, has deliberately avoided expressly zoning the Annapolis Lands to avoid its compensation obligation. In doing so, it has obtained the use of the Annapolis Lands as a public park, and has deprived Annapolis of any use of the Annapolis Lands.

Indeed, [Halifax] encourages members of the public to use the Annapolis Lands as a park. In addition to a variety of other outdoor activities, members of the public hike, cycle, canoe, camp, and swim on the Annapolis Lands as if [Halifax] held the Annapolis Lands as a park.

(A.R., vol. I, at p. 146)

[99] As we will explain, none of these pleaded acts, alone or in combination, amount to a *de facto* taking.

III. Law

A. *This Court Should Not Depart From the CPR Test for De Facto Taking*

(1) Introduction

[100] Our colleagues state that the test for a *de facto* taking is set out in this Court’s decision in *CPR*, when “properly understood” (para. 44). Respectfully, our

colleagues then depart from *CPR* by inappropriately extending *CPR*'s acquisition requirement — that the public authority's regulatory actions result in the “acquisition of a beneficial interest in the property or flowing from it” — to encompass any “advantage” accruing to the public authority, whether or not what is acquired is proprietary and whether or not what is acquired corresponds to what is removed. Our colleagues depart from precedent and change the common law even though courts across common law Canada have applied *CPR* without difficulty and no court has expressed concern that the law is uncertain or unclear.

[101] Our colleagues derive this understanding of the acquisition requirement by parsing *CPR* and the authorities cited by McLachlin C.J., even though she referred to “a beneficial interest in the property or flowing from it” rather than a mere “advantage”. By stretching the acquisition requirement, our colleagues go some way towards endorsing Annapolis' request that this Court should “revisit the *CPR* test due to the confusion caused by the concept of ‘acquisition of a beneficial interest in property or flowing from it’” (A.F. in response to interveners, at para. 27). Annapolis urged this Court to abandon *CPR*'s acquisition requirement because it was “a new element”, “a departure from historical jurisprudence”, and “not a required part of the test” (A.F., at paras. 36, 45 and 52). According to Annapolis, “a taking does not require an acquisition” (A.F., at para. 59; see also para. 66).

[102] Annapolis cited, among other authorities, the views of several commentators in support of its position that “this Court's analysis in *CPR*, if taken

literally, effectively abolishes liability for *de facto* taking” (A.F., at para. 9; see also paras. 35 and 52). Annapolis asserted that *CPR* should be “confined to its facts” (A.F., at para. 36) and pointed to similar commentary suggesting that this Court was mistaken in including the acquisition of a beneficial interest as part of the test (A.F., at paras. 89-92). Annapolis further criticized *CPR* by submitting that *de facto* taking can be satisfied by government conduct without there necessarily having been an acquisition of anything (A.F., at para. 62).

[103] We respectfully disagree with our colleagues’ proposed departure from the acquisition requirement as framed in *CPR*. By subverting the acquisition requirement, our colleagues effectively accede to the request of the intervener the Canadian Constitution Foundation that this Court “revisit” the *CPR* test by focusing on “the effect of the government measure on the rights of the owner, not what was acquired by the government”, so that the acquisition requirement in *CPR* becomes “largely superfluous” (I.F., at paras. 6 and 9).

[104] As we explain below, under *CPR* and the cases it cited, there is a *de facto* taking only if there is both an acquisition and a corresponding deprivation of a proprietary interest removing all reasonable uses of the property. We also disagree with our colleagues’ claim, at para. 38, that the “beneficial interest” language of the acquisition requirement is concerned with the effect of a regulatory measure on the landowner and not with whether a proprietary interest was acquired by the public authority. While a *de facto* taking claim is concerned with the effect of a regulatory

measure on the landowner, that concern is reflected in the removal requirement. The removal requirement is distinct from the acquisition requirement, which focuses on whether the public authority acquired a proprietary interest. Moreover, contrary to Annapolis' position, *CPR* maintains the distinction between *de jure* and *de facto* takings: a *de jure* taking involves the acquisition of legal title (such as when a public authority invokes the statutory expropriation framework), while a *de facto* taking involves the acquisition of a proprietary interest without legal title.

(2) *A De Facto Taking Requires the Acquisition of and a Corresponding Deprivation of a Proprietary Interest*

[105] *CPR* and the cases it cited — *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101, *The Queen in Right of the Province of British Columbia v. Tener*, [1985] 1 S.C.R. 533, and *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98, 177 D.L.R. (4th) 696 — illustrate how the test for a *de facto* taking should be applied. In two of these cases, the *de facto* taking claim was accepted (*Manitoba Fisheries* and *Tener*); in the other two cases, the claim was rejected (*Mariner* and *CPR*). We will briefly discuss each case.

(a) *Manitoba Fisheries*

[106] In *Manitoba Fisheries*, this Court held that federal legislation granting a fish export monopoly to a Crown corporation, which resulted in putting a private fish export company out of business, amounted to a *de facto* taking of the company's

goodwill. The Court found that the company's goodwill was "property" (pp. 110 and 118). The legislation involved a *de facto* (but not a *de jure*) taking because it had "the effect" of depriving the company of its goodwill and transferring it to the Crown corporation (p. 118). The legislation resulted in the company losing all reasonable uses of its goodwill and caused the "obliteration" of its "entire business" (p. 115). The Court also emphasized the correspondence between the acquisition and the deprivation: the company's lost goodwill was "the same goodwill" that was "by statutory compulsion acquired by the federal authority"; the company was thus "deprived of property which was acquired by the Crown" (p. 110).

(b) *Tener*

[107] In *Tener*, this Court held that the Crown in right of British Columbia engaged in a *de facto* taking by refusing to grant park use permits to the owners of registered mineral claims within a provincial park. The effect of refusing the permits was that the mineral rights could not be exploited through extraction. Estey J., for the majority, determined that the Crown's actions deprived the owners of their ability to access and extract the minerals, a "right" and "property interest" the Crown had granted to them by giving them title to the mineral claims (pp. 553-54 and 556-57). The Crown had effectively recovered part of the property right by denying access (p. 563). The owners thus retained legal title to a property interest (the registered mineral claims), but that interest was rendered virtually useless. A *de facto* (but not a *de jure*) taking was made out. The mineral extraction right, though legally retained, was effectively

lost by the owners of the registered claims and effectively recovered by the Crown. The deprivation thus corresponded to the acquisition.

(c) *Mariner*

[108] In *Mariner*, the Nova Scotia Court of Appeal held that the province did not engage in a *de facto* taking of a claimant's property on a provincial beach by refusing to allow the claimant to build single-family dwellings on the property. Cromwell J.A. (as he then was) affirmed that a *de facto* taking requires "an *acquisition* as well as a *deprivation*" (p. 732 (emphasis in original)). He stressed the proprietary nature of what must be acquired (pp. 730 and 732). Cromwell J.A. also highlighted that both *Tener* and *Manitoba Fisheries* required the acquisition to correspond to the deprivation: in *Tener*, "the Crown re-acquired in fact, though not in law, the mineral rights" (p. 731 (emphasis added)), while in *Manitoba Fisheries*, "[t]he crucial point . . . is that the asset which was, in effect, lost by [the private company] was the asset gained, in effect, by the new federal corporation" (p. 731 (emphasis added)). In *Mariner*, by contrast, there was no *de facto* taking. Cromwell J.A. held that the "the loss of economic value resulting from land use regulation is not a taking of land" (p. 700). The province had acquired nothing because of the regulatory designation of the property as a beach, and the claimant had not lost virtually all rights of ownership (p. 700). As Cromwell J.A. observed, "[i]n this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation" (p. 713). He decided that, "what is, in form, regulation will

be held to be expropriation only when virtually all of the aggregated incidents of ownership have been taken away” (p. 717).

(d) *CPR*

[109] Finally, in *CPR*, this Court held that the City of Vancouver did not engage in a *de facto* taking of CPR’s land (a railway corridor) by enacting a by-law refusing to allow CPR to develop the land for residential and commercial uses. McLachlin C.J. determined that the City’s development freeze did not result in it acquiring any beneficial interest in CPR’s land; the freeze was simply an “assurance that the land will be used or developed in accordance with [the City’s] vision, without even precluding the historical or current use of the land” (para. 33). This was “not the sort of benefit” that could be construed as a taking (para. 33). Nor had the City removed all reasonable uses of CPR’s property, because CPR was not precluded from using the land to operate a railway — the only historical use — or from leasing the land or otherwise developing it as permitted by law (para. 34). Thus, CPR suffered no deprivation and the City enjoyed no acquisition. The claim for *de facto* taking failed.

(e) *Conclusion*

[110] *CPR* and the authorities it cited show there is no *de facto* taking unless there is both the acquisition of a beneficial interest in the property or flowing from it and a removal of all reasonable uses of the property. The interest must be proprietary — not merely an “advantage” — and the acquisition must correspond to

the deprivation. These requirements are confirmed by K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at § 5:1, which our colleagues rely on (at paras. 18-20): a “taking” is “the forcible acquisition by the Crown of privately owned property . . . for public purposes” (emphasis added). The authors also recognize that “[i]n takings law, only those rights that are proprietary and vested . . . are compensable” (§ 5:8) and that “Canadian law recognizes that governments have the ability to greatly restrict the potential uses of property without triggering a right to compensation” (§ 5:13).

(3) There Is No Basis to Change the Common Law

[111] We believe our colleagues have provided no basis for this Court to depart from the acquisition requirement as framed in *CPR*. They do not suggest that such a departure from precedent is needed to keep the common law in step with the evolution of society, to clarify a legal principle, or to resolve any inconsistency in the law, which are some of the usual grounds justifying evolution of the common law (see *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842, at para. 42; *R. v. Salituro*, [1991] 3 S.C.R. 654, at pp. 668-69 and 679).

[112] To the contrary, courts in common law Canada have applied the *CPR* test without difficulty. No court has expressed any concern that the test is unworkable or unnecessarily complex (see British Columbia: *FortisBC Energy Inc. v. Surrey (City)*, 2013 BCSC 2382, 112 L.C.R. 89, at paras. 411 and 418-19; *Compliance Coal Corporation v. British Columbia (Environmental Assessment Office)*, 2020 BCSC 621,

13 L.C.R. (2d) 215, at paras. 92-101; Alberta: *Genesis Land Development Corp. v. Alberta*, 2009 ABQB 221, 471 A.R. 1, at paras. 127-29 and 141-42, aff'd 2010 ABCA 148, 477 A.R. 390; *Kalmring v. Alberta*, 2020 ABQB 81, 11 Alta. L.R. (7th) 177, at paras. 68 and 79-82; *Altius Royalty Corporation v. Alberta*, 2021 ABQB 3, 23 Alta. L.R. (7th) 105, at paras. 27 and 44-47, aff'd 2022 ABQB 255; Ontario: *Club Pro Adult Entertainment Inc. v. Ontario* (2006), 27 B.L.R. (4th) 227 (S.C.J.) (“*Club Pro (S.C.J.)*”), at paras. 77-78 and 82, rev'd in part on other grounds 2008 ONCA 158, 42 B.L.R. (4th) 47; *Railink Canada Ltd. v. Ontario* (2007), 95 L.C.R. 17 (S.C.J.), at para. 19; Nova Scotia: *Taylor v. Dairy Farmers of Nova Scotia*, 2010 NSSC 436, 298 N.S.R. (2d) 116, at paras. 74 and 82-85, aff'd 2012 NSCA 1, 311 N.S.R. (2d) 300; Newfoundland and Labrador: *Lynch v. St. John's (City)*, 2016 NLCA 35, 400 D.L.R. (4th) 62, at paras. 54-63; *Sun Construction Company Limited v. Conception Bay South (Town)*, 2019 NLSC 102, 87 M.P.L.R. (5th) 256, at paras. 13 and 15; *Gosse v. Conception Bay South (Town)*, 2021 NLCA 23, 16 L.C.R. (2d) 123, at paras. 30 and 46; *KMK Properties Inc. v. St. John's (City)*, 2021 NLSC 122, 19 M.P.L.R. (6th) 150, at paras. 18, 40 and 47-50; Federal Court: *Dennis v. Canada*, 2013 FC 1197, 114 L.C.R. 1, at paras. 21-24, aff'd 2014 FCA 232; *Calwell Fishing Ltd. v. Canada*, 2016 FC 312, at paras. 173 and 249-52 (CanLII); *Anglehart v. Canada*, 2016 FC 1159, [2017] 2 F.C.R. 74, at paras. 160-61, aff'd 2018 FCA 115, [2019] 1 F.C.R. 504; Yukon Territory: *Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources)*, 2021 YKSC 3, 16 L.C.R. (2d) 1, at paras. 285 and 309, rev'd in part on other grounds 2021 YKCA 6, 79 C.C.L.T. (4th) 179). Our colleagues do not suggest that lower courts have

applied the *CPR* test with difficulty but simply assert, without more, that “many” of these courts across Canada have applied the test incorrectly (para. 41).

[113] We also note that at least one court has declined to abandon *CPR*’s acquisition requirement as proposed by Annapolis here (*Altius Royalty Corporation v. Her Majesty the Queen in Right of Alberta*, 2022 ABQB 255, at para. 76 (CanLII)), while another has rejected the suggestion that *CPR* is inconsistent with *Tener* and *Manitoba Fisheries* and has affirmed that the “the law is very settled on this issue” (*Club Pro (S.C.J.)*, at para. 78, per Spies J.).

[114] This confirms, in our view, that *CPR* is settled law and that there is no reason to change it.

(4) Departing From *CPR* Will Expose Municipalities Across Canada to Significant Financial Liability in Regulating Land Use

[115] Our colleagues’ reformulation of the acquisition requirement and departure from *CPR* as precedent has significant ramifications. It dramatically expands the potential liability of municipalities engaged in land use regulation in the public interest and throws into question the settled law that a refusal to up-zone is not a *de facto* taking.

[116] For example, in *Tener*, at pp. 557 and 564, Estey J. affirmed that “[o]rdinarily, in this country, . . . compensation does not follow zoning either up or

down. . . . The imposition of zoning regulation and the regulation of activities on lands . . . add nothing to the value of public property.”

[117] Similarly, in *Mariner*, at pp. 713 and 734, Cromwell J.A. stated that “[i]t is settled law . . . that the regulation of land use which has the effect of decreasing the value of the land is not an expropriation. . . . [O]rdinarily compensation does not follow zoning either up or down. . . . Development freezes have consistently been held not to give rise to rights of compensation”.

[118] This settled law, which our colleagues propose now to set aside, was helpfully summarized by E. C. E. Todd in *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992), at pp. 22-23:

By the imposition, removal or alteration of land use controls a public authority may dramatically increase, or decrease, the value of land by changing the permitted uses which may be made of it. In such a case, in the absence of express statutory provision to the contrary an owner is not entitled to compensation or any other remedy notwithstanding that subdivision approval or rezoning is refused or development is blocked or frozen pursuant to statutory planning powers in order, for example, to facilitate the future acquisition of the land for public purposes. [Footnotes omitted.]

See also S. E. Hamill, “Common Law Property Theory and Jurisprudence in Canada” (2015), 40 *Queen’s L.J.* 679, at p. 703 (“So long as the owner can continue to use their property as they always have, they cannot be considered to have suffered a legally recognizable loss”); S. M. Makuch, N. Craik and S. B. Leisk, *Canadian Municipal and Planning Law* (2nd ed. 2004), at p. 212 (“the courts would be well advised to remain

true to 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”).

B. *Intention Is Not a Material Fact for a Claim of De Facto Taking*

[119] We are also of the respectful view that our colleagues further depart from precedent when they say that “intent may constitute a ‘material fact’ in the context of a constructive expropriation claim” (para. 53). This statement contradicts their affirmation that “[t]he public authority’s intention is not an *element* of the test for constructive takings at common law” (para. 52 (emphasis in original)) and that “the underlying objective pursued by a public authority . . . is neither necessary nor sufficient” (para. 57). In our view, intention is not an element of the test for a *de facto* or constructive taking; it is equally not a material fact supporting such a claim.

[120] Our colleagues seek to reconcile their inconsistent positions by saying that “the intention to take constructively, if proven by the claimant, may support a finding that the landowner has lost all reasonable uses of their land” (para. 53). Again, we disagree. Although the public authority’s intention may provide narrative background or context or may be relevant to an administrative law claim that its actions were *ultra vires* as having an improper purpose or being in bad faith (see *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 28; *Mariner*, at pp. 717-18; *CPR*, at paras. 10-37), it is not relevant to a *de facto* taking claim, which is concerned with the effect of the public authority’s actions, not with its intention.

[121] On our reading, none of the three authorities cited by our colleagues support their position that intention is a material fact for a *de facto* taking claim. Our colleagues first rely, at para. 54, on *Ulster Transport Authority v. James Brown & Sons, Ltd.*, [1953] N.I. 79 (C.A.) (cited in *Manitoba Fisheries*), at pp. 113 and 116. But the issue in *Ulster* was whether legislation purporting to limit the business of furniture removers, properly interpreted, was *ultra vires* for effectively taking property without compensation, contrary to a statutory prohibition of such taking. The discussion of intention in *Ulster* concerned legislative intention, as objectively expressed, rather than the subjective intention or motive of the public authority responsible for the taking. MacDermott L.C.J. referred to “deliberate and intentional” drafting but asked what the “intention [of the legislation] was” and invoked the principle that “Parliament must be presumed to intend the necessary effect of its enactments” (p. 112). He added, at p. 114: “Whatever in fact [the Legislature’s] motives may have been, the intention of the Legislature, as gleaned from its terms, is what must guide the court”

[122] Second, our colleagues, at para. 55, rely on *Lynch*, at paras. 60 and 62, which considered whether the City of St. John’s refusal to permit development amounted to expropriation of the claimants’ property. The effect of the City’s action was to take away the claimants’ right to appropriate the groundwater from their property and to give the City a beneficial interest in the property, consisting of the right to a continuous flow of uncontaminated groundwater. The claimants’ property rights flowing from a Crown grant were thereby reduced. But neither the cited paragraphs nor the decision as a whole suggest that intention is a material fact for a *de facto* taking

claim. The case concerned the effect of the City’s actions that “purported” to remove the claimants’ right to appropriate groundwater on their land (para. 60).

[123] Finally, our colleagues, at para. 56, rely on *Montréal (Ville) v. Benjamin*, 2004 CanLII 44591 (Que. C.A.), which considered whether a zoning by-law and the City of Montréal’s actions in fencing off the owner’s land to include it within a public park amounted to “disguised expropriation” under Quebec civil law. Our colleagues write that the City “manifested its intention” by refusing to remove various structures on the claimant’s land and its “intent buttressed the finding of disguised expropriation”. But our colleagues’ reference to the “manifested” intention shows that the proper focus is on the effect, or intention as expressed, rather than intention itself. And any intention that “buttressed” a finding of disguised expropriation only confirmed such a prior finding; it did not help establish that finding. In our respectful view, *Benjamin* does not support the relevance of intention to a *de facto* taking claim.

[124] The mention of [TRANSLATION] “abuse of right” in *Benjamin* does not suggest otherwise. A “disguised expropriation” is in itself an abuse of power, because a municipal government that uses its regulatory power to deprive an owner of the enjoyment of their property acts in a manner inconsistent with the municipality’s delegated authority (*Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577, at para. 27). This is how the expression “abuse of right”, mentioned in *Benjamin*, was used by the Court of Appeal of Quebec in *Lorraine* (2016 QCCA 1803, at para. 13) and has been subsequently interpreted (see *Pillenière, Simoneau v. Ville de*

Saint-Bruno-de-Montarville, 2021 QCCS 4031, 19 M.P.L.R. (6th) 275, at para. 112).

This analysis focuses on the effect of municipal action and does not suggest that intent or motive is required for a distinct cause of action seeking compensation for disguised expropriation.

[125] To the contrary, Quebec courts have expressly held that the public authority's intention is irrelevant under the Quebec civil law of disguised expropriation. Disguised expropriation is based on art. 952 of the *Civil Code of Québec*, whose focus is the *effect* of the public authority's actions. This was recently confirmed by the unanimous judgment of the Quebec Court of Appeal in *Dupras v. Ville de Mascouche*, 2022 QCCA 350, at para. 29 (CanLII):

[TRANSLATION] Moreover, the municipality's good or bad faith — the wrongfulness of its conduct — is not relevant to the analysis; it is “the actual effect of the by-law” that matters. This is why, when the Supreme Court used the concept of abuse to characterize disguised expropriation, it referred to abuse of the power to regulate in order to proceed, *de facto*, with an expropriation of property without paying the indemnity required in particular by article 952 of the *Civil Code of Québec*. The validity of the by-law restricting land use therefore does not preclude the existence of disguised expropriation. [Emphasis added; footnotes omitted.]

[126] We also agree with the Nova Scotia Court of Appeal that this Court's decision in *Lorraine*, at para. 2, does not support the motion judge's view, at paras. 35-36, that Halifax's alleged “ulterior motive” is relevant to the *de facto* taking claim. The Quebec Court of Appeal correctly explained the import of *Lorraine* in *Dupras* in the passage quoted above: “. . . when the Supreme Court used the concept of abuse to characterize disguised expropriation, it referred to abuse of the power to

regulate in order to proceed, *de facto*, with an expropriation of property without paying the indemnity required in particular by article 952 of the *Civil Code of Québec*". We accordingly disagree with the view of the motion judge and Annapolis that *Lorraine* supports the relevance of motive to a disguised expropriation claim — a view that even our colleagues refrain from endorsing.

[127] That said, we do not quarrel with our colleagues' general remarks, at paras. 47-48, on the Quebec law of disguised expropriation. We note, however, that while our colleagues describe disguised expropriation under art. 952 of the *Civil Code of Québec* as a "no-fault liability scheme", what the Quebec authorities mean by this is that fault, in the sense of bad faith, improper purpose, or improper motive, is not required. Nevertheless, the test for disguised expropriation remains extremely onerous: there must be an absolute negation of the exercise of the right of ownership, rendering its use impossible or equivalent to an actual confiscation of the property. As the Quebec Court of Appeal explained when referencing absence of fault in *Ville de Léry v. Procureure générale du Québec*, 2019 QCCA 1375, at para. 17:

[TRANSLATION] However, absence of fault in the development of government objectives does not mean that there is no legal relationship between the appellant and the respondent, if what it alleges is shown. In *Wallot v. Québec (Ville)* [2011 QCCA 1165, at paras. 45-47], this Court stated that for a by-law to be regarded as effecting disguised expropriation, it must amount to an absolute negation of the exercise of the right of ownership, i.e. render its use impossible, or be tantamount to an actual confiscation of the immovable. In such a case, the by-law that permits no uses by the owner on its land is not a zoning by-law but an expropriation. The question of the municipality's good or bad faith, or of its "fault", then becomes entirely secondary, if not irrelevant. [Emphasis added; footnote omitted.]

See also *Wallot v. Québec (Ville)*, 2011 QCCA 1165, 24 Admin. L.R. (5th) 306, at paras. 41-54; *Municipalité de Saint-Colomban v. Boutique de golf Gilles Gareau inc.*, 2019 QCCA 1402, at paras. 64-65; *Meadowbrook Groupe Pacific inc. v. Ville de Montréal*, 2019 QCCA 2037, 2019 CarswellQue 12262 (WL), at para. 29; *Ressources Strateco inc. v. Procureure générale du Québec*, 2020 QCCA 18, 32 C.E.L.R. (4th) 231, at paras. 113-14; *Ville de Québec v. Rivard*, 2020 QCCA 146, at paras. 64-65; *Ville de Saint-Rémi v. 9120-4883 Québec inc.*, 2021 QCCA 630, at paras. 25-26 (CanLII); *Dupras*, at paras. 27-29.

[128] Accordingly, the Quebec law of disguised expropriation does not support the relevance of motive or intention under the common law of *de facto* taking.

[129] We therefore agree with the conclusion of the Nova Scotia Court of Appeal, at para. 75, that the law of *de facto* taking is “clear and settled”: a public authority’s motive or intention is not a material fact for such a claim and “cannot compensate for the failure to establish the two required elements of *de facto* expropriation”.

[130] We will now apply *CPR* to the partial summary judgment motion at issue in this case.

IV. Application

A. *Introduction*

[131] In our view, the Nova Scotia Court of Appeal did not err in granting partial summary judgment. There is no genuine issue of material fact requiring a trial on either branch of the *de facto* taking test, *both* of which Annapolis must meet to succeed. We disagree with our colleagues' conclusion, at para. 63, that there are "vast issues of material fact to be determined", and also with their view, at para. 61, that the Court of Appeal "merely disagreed with the motion judge's exercise of discretion". Under the law enunciated in *CPR*, Annapolis' *de facto* taking claim has no real chance of success and should be dismissed.

B. *The Summary Judgment Test in Nova Scotia*

[132] Summary judgment is available when there is no genuine issue for trial (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 34). The test for summary judgment on evidence in an action under r. 13.04 of the *Nova Scotia Civil Procedure Rules* was addressed by the Nova Scotia Court of Appeal in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, 58 C.L.R. (4th) 1, at para. 34. The Nova Scotia Court of Appeal held that r. 13.04 asks five sequential questions, only the first three of which are relevant here:

- First, does the pleading disclose a genuine issue of material fact — that is, one that would affect the result (either a pure question of fact or a question of mixed fact and law)? If the answer is "yes", the issue should not be determined on summary

judgment. If the answer is “no”, the court proceeds to the second question.

- Second, does the pleading require the determination of a question of law (either a pure question of law or a question of mixed fact and law)? If the answers to the first and second questions are both “no”, summary judgment must issue. If the answers to the first and second questions are “no” and “yes”, respectively, leaving only an issue of law, then the court proceeds to the third question.
- Third, the court may grant or deny summary judgment in the exercise of its discretion. The court must ask whether the pleading has a real chance of success. If the answer is “no”, summary judgment must issue. If the answer is “yes”, the court considers whether to exercise its discretion to finally determine the issue of law.

[133] When the motion judge applies an incorrect legal principle or errs with regard to a purely legal question, the decision should be reviewed on a correctness standard (*Hryniak*, at para. 84).

[134] In our view, Halifax’s motion for partial summary judgment succeeds under r. 13.04 based on the third question in *Shannex*. We accept that there should be flexibility in allowing novel claims to either be determined on summary judgment or

proceed to trial (see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 21; *Warman v. Law Society of Alberta*, 2015 ABCA 368, 609 A.R. 83, at para. 6; *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46, 612 A.R. 284, at para. 35; *Rudichuk v. Genesis Land Development Corp.*, 2020 ABCA 42, 98 Alta. L.R. (6th) 339, at para. 35; *Wallbridge v. Brunning*, 2018 ONCA 363, 422 D.L.R. (4th) 305, at para. 26). In this case, however, Annapolis' *de facto* taking claim has no real chance of success.

- (1) There Is No Genuine Issue of Material Fact That Halifax Has Acquired a Beneficial Interest in the Annapolis Lands or Flowing From Them, Either in Refusing to Up-Zone the Lands or by Allegedly Encouraging Trespass

[135] Neither Halifax's 2016 municipal resolution refusing to up-zone the Annapolis Lands nor Halifax's alleged acts of encouraging the public to trespass raises any genuine issue of material fact that Halifax has acquired a beneficial interest in the lands or flowing from them.

[136] The municipal resolution merely preserved the *status quo* by refusing to allow lands which have always been vacant and treed and situated next to a protected wilderness area to be developed into serviced residential communities. It is of no moment that the 2006 Regional Municipal Planning Strategy, as a statement of policy, stated that a possible future use of the Annapolis Lands included serviced residential development. Both the *Municipal Government Act* and the *Halifax Charter* confirm that "[t]he adoption of a municipal planning strategy does not commit the council to

undertake any of the projects suggested in it” (*Municipal Government Act*, s. 217(2); *Halifax Charter*, s. 232(2)).

[137] Halifax’s adoption of a municipal resolution refusing to up-zone the lands also cannot be a basis for a *de facto* taking claim because the resolution did not result in Halifax acquiring any proprietary interest in the lands. As this Court held in *CPR*, at para. 33, a mere assurance that land will be used or developed in accordance with a municipality’s vision, without precluding historical or current uses of the land, is “not the sort of benefit” that can meet the acquisition requirement. This is why the common law has consistently held that a refusal to up-zone is not actionable as a *de facto* taking. Our colleagues claim, at para. 64, that “[p]reserving a park in its natural state may constitute an advantage accruing to the state”, but this flouts *CPR*’s insistence that the public authority must have acquired a proprietary interest. A mere “advantage” does not suffice. Respectfully, our colleagues’ expansive approach to what constitutes a *de facto* taking departs from precedent and would result in *CPR* being decided differently.

[138] We also respectfully disagree with our colleagues’ suggestion, at para. 65, that Halifax’s alleged encouragement of trespass changes this conclusion. For example, at the hearing of the appeal, Annapolis insisted that Halifax has distributed promotional material encouraging people to hike at Fox Lake, which is within the Annapolis Lands. Annapolis claimed that this was an example of Halifax’s “use [of] the Annapolis Lands as a Regional Park” (outline of argument, at para. 5, in condensed book, at p. 2). We disagree. A public authority does not and cannot acquire a proprietary interest by

encouraging others to trespass. If these allegations were made out at trial, Halifax might well expose itself to liability on some other basis. But this allegation cannot ground a claim for a *de facto* taking.

[139] Annapolis' position illustrates how incompatible the notion of an "advantage" proposed by our colleagues is with any proprietary interest. The only cases they rely on, at paras. 65-66, are the Quebec disguised expropriation cases of *Benjamin* and *Dupras*, but such reliance is misplaced. As *Dupras*, at para. 34, makes plain, and as our colleagues recognize, at para. 48, the acquisition requirement has no direct corollary under Quebec civil law (see M. A. LeChasseur, "L'expropriation *de facto* au Canada et la transcendance des solidarités", in *Service de la qualité de la profession du Barreau du Québec*, vol. 509, *Développements récents en droit municipal* (2022), 71, at p. 172). *Benjamin* is also a markedly different case. In *Benjamin*, the City had passed zoning by-laws allowing only public uses of the owner's land. It also took physical possession of the owner's land by erecting a fence to transform the land into a park. There was both physical dispossession and the prior use of legislative power to render any use of the land practically impossible (*Benjamin*, at paras. 9, 11, 14 and 65; see also *Rivard*, at para. 66). This conduct is a far cry from the refusal to up-zone encountered in this appeal. The focus of *Benjamin* was on the change of regulation that took away the rights of the landowner, which is not the case here. Therefore, the findings of disguised expropriation in *Benjamin* and *Dupras* do not directly illuminate what can or cannot meet the acquisition requirement at common law.

[140] None of the allegedly “vast issues of material fact” listed by our colleagues, at para. 59, and the motion judge, at paras. 25-26 and 36, has any bearing on the *de facto* taking claim. To the extent that these facts help make Halifax liable for abuse of public office or unjust enrichment, an appropriate remedy can be awarded for those claims at trial. It bears noting that, as the Court of Appeal observed, at para. 83, if Halifax has acted for an improper purpose, Annapolis may succeed in its cause of action for abuse of public office. The Court of Appeal rightly relied on *Mariner*, at pp. 717-18, where Cromwell J.A. explained that administrative law claims for unlawful actions are distinct from compensatory claims for *de facto* taking. But these facts are not material facts in support of the *de facto* taking claim:

- Correspondence between counsel in which Halifax denies allegations in the amended statement of claim are not “material facts” in support of a *de facto* taking claim.
- Signage on Annapolis’ property depicting Halifax’s logo on various trails does not have the effect of Halifax acquiring any proprietary interest.
- A newspaper article quoting a Halifax employee does not support the claim that Halifax has acquired a proprietary interest in the Annapolis Lands. What a newspaper says, or quotes a Halifax employee as saying, does not affect this issue.

- Discovery evidence on whether the Annapolis Lands were to be treated as development lands, not parklands, under the 2006 Regional Municipal Planning Strategy is not a material fact in dispute. The Strategy speaks for itself. As a matter of law, it “does not commit the council to undertake any of the projects suggested in it” (*Municipal Government Act*, s. 217(2); *Halifax Charter*, s. 232(2)). The same applies to the next two bullets that our colleagues cite, relating to the Planning Strategy, clauses 1.7.1 and 3.1.
- Discovery evidence relating to the 2016 municipal council resolution, and later clarifications from counsel, has no bearing on whether Halifax acquired a proprietary interest in the Annapolis Lands. The pleaded allegation of *de facto* taking relies on the resolution itself, which, as already noted, merely preserved the *status quo*.
- Evidence of an alleged ulterior motive of Halifax is irrelevant to the *de facto* taking claim, as already explained above.

[141] There are thus no disputed material facts as to whether Halifax acquired a proprietary interest in the Annapolis Lands. No such interest was acquired. Halifax merely refused to up-zone the lands. Because these are not material facts, we

respectfully disagree with the motion judge, at para. 44, that the *de facto* taking claim may properly go to trial along with the balance of the matters in dispute.

(2) There Is No Genuine Issue of Material Fact That Halifax Has Deprived Annapolis of All Reasonable Uses of the Annapolis Lands

[142] Even if Annapolis could establish that Halifax has acquired a beneficial interest in the Annapolis Lands or flowing from them, it cannot meet the second requirement of the test for a *de facto* taking: there is no genuine issue of material fact that Halifax has deprived Annapolis of all reasonable uses of its lands. This in itself is fatal to Annapolis' appeal given that the two requirements in *CPR* are cumulative.

[143] This second element of the *CPR* test must be assessed “not only in relation to the land’s potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put” (*CPR*, at para. 34, quoting *Mariner*, at p. 717). When “a regulatory regime is imposed on land, its *actual application* in the specific case must be examined, not the potential, but as yet unexploited, range of possible regulation” (*Mariner*, at p. 718 (underlining added)). Confinement to uneconomic uses is insufficient (*CPR*, at paras. 8 and 27-31). Loss of virtually all economic value is also insufficient (*Mariner*, at pp. 714 and 719-27).

[144] In *CPR*, for example, this Court held that the City of Vancouver’s by-law did not remove all reasonable uses of the property because it did not prevent the

landowner from using its land to operate a railway, the only use to which the land had ever been put during the history of the City (para. 34).

[145] The situation here is indistinguishable. As the Nova Scotia Court of Appeal noted, at para. 14, “[t]he zoning of the Annapolis Lands has not changed since the adoption of the Land Use By-law in 2006.” The court added: “Annapolis has the same rights with respect to its lands that it had prior to Council’s resolution on September 6, 2016. Nothing has changed” (para. 91). The lands were vacant and treed when Annapolis acquired them, and they remain vacant and treed. Halifax’s refusal to up-zone the lands in 2016 did not deprive Annapolis of any reasonable uses of its lands. It simply disappointed Annapolis’ hope of developing them. Annapolis speculated that, one day, it would have that right. The company made a bet and lost. There is no principled basis for saying that Halifax and its taxpayers now have to guarantee that speculative bet. We therefore agree with the submission of Halifax’s counsel, that “[Annapolis] bought barren land with no rights to do anything more than that. The municipality is not the guarantor of their land speculation” (transcript, at p. 79).

[146] Contrary to our colleagues’ suggestion at para. 72, Halifax has not taken Annapolis’ “right” to develop the lands. Annapolis claims that it had an unfettered right to develop the lands before they were first zoned in 1982. Yet Annapolis grounds its *de facto* taking claim in the proceedings before us in Halifax’s refusal to up-zone *in 2016* — which, as already noted, did not affect the zoning of the lands or Annapolis’ rights. Indeed, our colleagues acknowledge that *the zoning has not changed since 2006*

(para. 7). The potential permissible uses of the lands before 1982 are thus irrelevant to Annapolis' claim.

[147] We therefore agree with the Nova Scotia Court of Appeal, at para. 92: “. . . the lands and the reasonable uses to which Annapolis can put them remain exactly as they have been for many years”. This responds to our colleagues' criticism that the Court of Appeal “failed to identify a single reasonable possible use of the property” (para. 70; see also para. 74). The lands remain vacant and treed and are zoned exactly as before. Further, as counsel for Halifax conceded during oral argument, subject to the current zoning Annapolis can lease the lands (transcript, at p. 72), just as CPR could in *CPR* (*CPR*, at para. 34). We note, too, that confinement of the land to uneconomic uses does not in itself establish a *de facto* taking (see *CPR*, at paras. 8 and 34; *Horsman and Morley*, at § 5:13).

[148] In our respectful view, there is no basis in the record for our colleagues to assert that “it is disputed whether Halifax, by allegedly treating the Annapolis Lands as a public park, has eliminated all uses of the Lands except serviced development, which is conditional upon the approval of Annapolis' secondary planning applications” (para. 69 (emphasis added)). Halifax did not eliminate or remove any reasonable use of the property. It simply refused to up-zone the lands to allow for residential development.

[149] Our colleagues nevertheless claim, at para. 76, that “it is telling that [Kasirer and Jamal JJ.] do not identify *any* reasonable use of the Annapolis Lands”

(emphasis in original). Respectfully, this illustrates how our colleagues have changed the law. First, our colleagues evaluate the reasonable uses of the lands from the perspective of a commercial property developer, even though our law has never required that the “use” be confined to those of one class of landowner. Second, the removal requirement insists not merely that there be no reasonable uses, but also that they have been *removed by the public authority*. The issue is whether there has been a *de facto* taking *by the public authority*. Annapolis cannot show that Halifax removed any reasonable uses. Nor, in any event, is there any legal impediment to Annapolis leasing the lands.

[150] Our colleagues respond to the zoning and uses of the Annapolis Lands having not changed with the suggestion that this ignores “Halifax’s *application* of the regulatory scheme as alleged by Annapolis” (para. 71 (emphasis in original)). Our colleagues assert that “[i]f Annapolis can prove at trial that Halifax is unlikely to *ever* grant secondary planning approval, this is clearly material to its constructive taking claim” (para. 72 (emphasis in original)). We respectfully disagree. As a matter of proof, we do not see how Annapolis can prove a negative, particularly one involving a future fact.

[151] More importantly, even if Annapolis could somehow show that Halifax will never up-zone the lands, that could not establish that Annapolis has lost all reasonable uses of those lands. The lands have never been used for serviced development — they have always been vacant and treed. Our colleagues’ assertion

amounts to saying that a refusal to up-zone vacant land can give rise to a *de facto* taking merely if all “*potential* reasonable uses” are prohibited (para. 45 (emphasis in original)). That would upset the settled law reflected in *Manitoba Fisheries*, *Tener*, *Mariner*, and *CPR*, and it would eliminate Halifax’s statutory and common law protection from liability for refusing to up-zone. In *CPR*, this Court specifically noted that removal of all reasonable uses of the land must be assessed in relation to both its potential uses as well as the “nature of the land and the range of reasonable uses to which it has actually been put” (para. 34, quoting *Mariner*, at p. 717). That statement applies equally in this case.

C. *Conclusion*

[152] We conclude that there is no genuine issue of material fact that Halifax has acquired a beneficial interest in the Annapolis Lands or flowing from them or that Halifax has deprived Annapolis of all reasonable uses of its lands. In view of the settled law, the pleading of a *de facto* taking has no real chance of success. Like the Nova Scotia Court of Appeal, we would grant partial summary judgment dismissing the claim for *de facto* taking.

V. Disposition

[153] We would dismiss the appeal with costs throughout.

Appeal allowed with costs throughout, KARAKATSANIS, MARTIN, KASIRER and JAMAL JJ. dissenting.

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