S.C.C. File No.: _____

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

B E T W E E N:

ANNAPOLIS GROUP INC.

APPLICANT
(Respondent)

- and -

HALIFAX REGIONAL MUNICIPALITY

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF THE APPLICANT, ANNAPOLIS GROUP INC.
(Pursuant to s.40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 25(1) of the *Rules of the Supreme Court of Canada*)

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

Peter Griffin
Scott Rollwagen
Rebecca Jones
Amy Sherrard
Telephone: (416) 865-2921
FAX: (416) 865-9010
Email: pgriffin@litigate.com
srollwagen@litigate.com
rjones@litigate.com
asherrard@litigate.com
Counsel for the Applicant, Annapolis Group Inc.

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

David R. Elliott/
Corey Villeneuve (Law Clerk)
Tel.: (613) 783-9699
Fax: (613) 783-9690
Email: corey.villeneuve@dentons.com
Ottawa Agent to Counsel for the Applicant, Annapolis Group Inc.

ORIGINAL TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

COPY TO:

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

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

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

Martin C. Ward, Q.C.
Phone: 902-490-4226
Fax: 902-490-4232
Email: wardm@halifax.ca
Counsel for the Respondent,
Applicant, Halifax Regional Municipality

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PART I - OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. The Applicant owns 965 acres of land within the City of Halifax (the "Annapolis Lands"). The Annapolis Lands are adjacent to a provincially designated, 4,366 acre, wilderness area. The Respondent, Halifax Regional Municipality ("HRM"), undertook to create a regional park adjacent to the wilderness area. HRM's proposed regional park includes the Annapolis Lands.

2. HRM, however, did not zone the Annapolis Lands for future public use. Instead, HRM zoned them for future serviced residential development, which permits development once secondary planning approval is granted by HRM. Why did HRM do that?

3. Section 237 of the *Halifax Regional Municipality Charter*[1] requires HRM to acquire lands it zones for future public use within one year. As HRM advised the public:

> "… the reason the privately-owned lands were not zoned 'Regional Park' at the time of adoption of the Regional Plan was because, as mandated by provincial planning legislation, HRM would have been required to purchase the subject lands within a one year timeframe."[2]

4. Since then, HRM has:

(a) Arbitrarily prevented the Applicant's secondary planning application from proceeding; and,

(b) promoted the Annapolis Lands as a park by inviting the public to use them as such and permitting its logo to be placed on trail signs directing the public onto them.

5. On HRM's motion for summary judgment to dismiss the Applicant's claim for *de facto* expropriation, the motions judge dismissed the motion, quite properly recognizing that there were "vast issues of material fact to be determined" at trial, [3] including ample evidence pointing to the

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[1] *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 [the "*Charter*"], Schedule B.
[2] Birch Cove/Susie Lakes Area: Questions and Answers ("Q&A"), Exhibit E, Affidavit of Archie Hattie sworn October 16, 2019 [*Hattie Affidavit*]; Application for Leave to Appeal ("ALA"), Tab 3, pp 121-125.
[3] Reasons for Decision of Justice James L. Chipman dated November 20, 2019 at para 25 [*Reasons of Justice Chipman*]; ALA, Tab 1A, p 15.

possibility of an ulterior motive on the part of HRM.[4] The motions judge recognized that the caselaw offers "creative interpretations on what may constitute a taking",[5] confirming that he was of "the emphatic view that the issue of *de facto* expropriation must be left…for the trial judge.[6]

6. The Court of Appeal allowed the appeal and dismissed the claim for *de facto* expropriation.[7] The Court of Appeal applied the two-step test described in *Canadian Pacific Railway v. Vancouver (City).*[8] It concluded that the unique facts of this case could not show the acquisition of a beneficial interest or the removal of all reasonable uses,[9] and dismissed HRM's motive as irrelevant.[10] The Court of Appeal downplayed and disregarded this Court's observations in *Lorraine (Ville) v. 2646-8926 Québec Inc.*[11] that:

> When property is expropriated outside this legislative framework for an ulterior motive, such as to avoid paying an indemnity, the expropriation is said to be disguised.[12]

7. HRM, instead of regulating the land in the manner required by statute, has blocked any development to indirectly acquire, and therefore expropriate, the land. HRM's actions are not a matter of *bona fide* regulation, but confiscation, which entitles the landowner to compensation.

8. The law of *de facto* expropriation in Canada requires development. As Professor Russell Brown (now Justice Brown) observed in academic articles, the two-step test established by this Court in *CPR*, and particularly the requirement to prove an acquisition of a beneficial interest, collapses the distinction between *de jure* and *de facto* expropriation and has effectively abolished liability for *de facto* expropriation.[13] Through this appeal, this Court will have the

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[4] Reasons of Justice Chipman at para 36; ALA, Tab 1A, p 19.
[5] Reasons of Justice Chipman at para 42; ALA, Tab 1A, p 21.
[6] Reasons of Justice Chipman at para 43; ALA, Tab 1A, p 21.
[7] Reasons for Decision of the Nova Scotia Court of Appeal dated January 7, 2021 [*NSCA Reasons*]; ALA, Tab 1C, pp 25-52.
[8] NSCA Reasons at para 68, citing *Canadian Pacific Railway v Vancouver (City)*, 2006 SCC 5 [*CPR*]; ALA, Tab 1C, p 43.
[9] NSCA Reasons at para 85; ALA, Tab 1C, p 47.
[10] NSCA Reasons at para 82; ALA, Tab 1C, p 47.
[11] *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35 [*Lorraine*].
[12] *Lorraine* at para 2.
[13] Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007), 40 U.B.C. L. Rev. 315 [Brown, "Constructive Taking"]; ALA, Tab 5.

opportunity to address the test in *CPR* and bring the law of *de facto* expropriation in line across Canada.

STATEMENT OF FACTS

(a) Background

9. Annapolis is the owner of approximately 965 acres of land in the Highway 102 West corridor area.[14] Annapolis has held most of these lands since 1956. The zoning history of the Annapolis Lands reflects an intention to reserve them for future municipally serviced development.[15]

10. In June of 2006, HRM adopted its Regional Municipal Planning Strategy. Initial drafts showed the Annapolis Lands would be zoned as Open Space and Natural Resource for a Regional Park.[16] The final draft, however, zoned the Annapolis Lands for future serviced development.[17] At the same time, HRM drew a conceptual Regional Park boundary around most of the Annapolis Lands.[18]

11. The zoning applied to the Annapolis Lands gives Annapolis a right to apply for serviced development through the secondary planning process. HRM is obligated to consider secondary planning requests in good faith and in accordance with express planning criteria.[19]

12. On July 31, 2009, Annapolis applied for secondary planning.[20] In October of 2009, HRM staff recommended that the secondary planning application be deferred because it had a negative financial impact on the municipality and there was no need for further development.[21] Annapolis

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See also: Russell Brown, "Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience" (2009), 1:3 IJLBE 179 [Brown, "Legal Incoherence]; ALA, Tab 6.

[14] Hattie Affidavit at paras 11-13; ALA, Tab 3, pp 70-80.

[15] Hattie Affidavit at paras 16-19; ALA, Tab 3, p 81. Excerpts from Examination for Discovery of K. Denty [*Denty Transcript*], page 82-83, Exhibit A to Hattie Affidavit, ALA, Tab 3, pp 116-117.

[16] Hattie Affidavit at para 27; ALA, Tab 3, p 83.

[17] Hattie Affidavit at para 21, 27; ALA, Tab 3, p 82 and 83.

[18] Hattie Affidavit at paras 37-38; ALA, Tab 3, p 86.

[19] Hattie Affidavit at paras 48-50; ALA, Tab 3, pp 88-89.

[20] Hattie Affidavit at para 52; ALA, Tab 3, p 89.

[21] Hattie Affidavit at paras 54-55; ALA, Tab 3, p 90.

believed HRM's rationale to be a pretext to prevent development and keep the lands for a park. Annapolis retained independent experts who confirmed that HRM Staff's analysis in the October 2009 report was flawed. [22]

13. Thereafter, HRM and Annapolis participated in a facilitation process designed to negotiate development on the Annapolis Lands, as well as the creation of a Regional Park.[23] The late Honourable Justice Heather Robertson acted as Facilitator from November 2014 to June 2016.[24] In the end, HRM and Annapolis could not reach an agreement. Justice Robertson concluded that the Final Development Plan proposed by Annapolis was an appropriate solution. She noted that HRM "cannot delay indefinitely while not permitting the development of the lands".[25] Despite Justice Robertson's recommendations, on September 6, 2016, HRM deferred Annapolis's secondary planning application once again.[26]

(b) Material Facts in Dispute

14. On the motion, it was HRM's onus to demonstrate by evidence that there are no material facts in dispute. In response to that onus, HRM put forward an affidavit for the sole purpose of appending various planning resolutions.[27] Annapolis' evidence included an extensive affidavit comprising 154 paragraphs and 32 exhibits.[28] HRM did not cross-examine Annapolis' affiant.

15. Annapolis's affidavit evidence demonstrated significant material facts in dispute, including:

Material Fact	**Evidence**
HRM treats/uses the Annapolis Lands as a park	• Public statements from HRM stating that it wants to prevent development on the Annapolis Lands to protect and preserve their natural state,[29] and that the Annapolis Lands are already set aside as a public park such that

[22] Hattie Affidavit at paras 56-61; ALA, Tab 3, pp 90-91.
[23] Hattie Affidavit at para 61; ALA, Tab 3, p 91.
[24] Hattie Affidavit at paras 79, 85; ALA, Tab 3, pp 95 and 96.
[25] Hattie Affidavit at paras 100, 107; ALA, Tab 3, pp 99 and 100.
[26] Hattie Affidavit at para 117-122; ALA, Tab 3, pp 102-104.
[27] Reasons of Justice Chipman at para 9; ALA, Tab 1A, pp 8-9.
[28] Reasons of Justice Chipman at para 11; ALA, Tab 1A, p 9.
[29] Reasons of Justice Chipman at para 25; ALA, Tab 1A, p 15. Hattie Affidavit at para 135; ALA, Tab 3, p 107.; "The Coast", page 15-16, Exhibit "U" to Hattie Affidavit; ALA, Tab 3, pp 127-128.

	efforts to develop them are illegitimate[30] • HRM promotes the Annapolis Lands as a park, including promoting hikes on the Annapolis Lands[31] • Signs, with HRM's phone number and logo, that promote trails that cross the Annapolis Lands and advises users to report trail problems to HRM[32]
HRM refused to block secondary planning development and keep the Annapolis Lands as a park	• Expert reports concluding the rationale put forth by HRM in support of its decision to not grant secondary planning was flawed[33] • Contested discovery evidence from an HRM witness confirming that it did not consider the relevant planning criteria when reviewing Annapolis' secondary planning application[34] • Despite stating there is no need for development, HRM permitted serviced development on property all around the Annapolis Lands, such that the only undeveloped property in the area are lands which fall in the centre of the proposed Regional Park, including the Annapolis Lands[35]
HRM zoned the Annapolis Lands inconsistently with its intentions	• A Frequently Asked Questions document where HRM staff admitted that the Annapolis Lands were not zoned as a park because they would have been required to purchase them within a one-year timeframe[36]
HRM obtained benefits	• HRM avoided the financial commitment required to purchase the Annapolis Lands for a park[37] • HRM avoided disruption to its relationship with the Province, which expected HRM to acquire the Annapolis Lands for the Regional Park

[30] Hattie Affidavit at para 151; ALA, Tab 3, p 111.
[31] Hattie Affidavit at para 151; ALA, Tab 3, p 111. Screenshots from HRM's website dated June 10, 2019, Exhibit "CC" to the Hattie Affidavit; ALA, Tab 3, pp 137-141. News Release from HRM dated May 30, 2019, Exhibit "DD" to Hattie Affidavit; ALA, Tab 3, pp 143-145.
[32] Reasons of Justice Chipman at para 25; ALA, Tab 1A, p 15. Hattie Affidavit at para 148-150; ALA, Tab 3, pp 110-111. Photographs of Signage, Exhibit "AA" to Hattie Affidavit; ALA, Tab 3, pp 130-131. Photographs of trail board, Exhibit "BB" to Hattie Affidavit; ALA, Tab 3, pp 133-135.
[33] Hattie Affidavit at paras 56-59; ALA, Tab 3, pp 90-91.
[34] Affidavit of Grace Tsakas sworn October 17, 2019 [*Tsakas Affidavit*] ; ALA, Tab 4, pp 146-147. Exhibit A to Tsakas Affidavit; ALA, Tab 4, pp 149-150. Exhibit C to Tsakas Affidavit at p. 235, q 1-11; ALA, Tab 4, p 154.
[35] Hattie Affidavit at paras 143-145; ALA, Tab 3, p 109.
[36] Q&A, Exhibit "E" to Hattie Affidavit; ALA, Tab 3, pp 122-125.
[37] Hattie Affidavit at para 129; ALA, Tab 3, p 105. Denty Transcript, p. 125, q 7-11, Exhibit "A" to Hattie Affidavit; ALA, Tab 3, p 120.

	(following the province's dedication of an adjacent Wilderness Area)[38] • HRM has obtained the obvious benefit of a *de facto* park[39]
All reasonable uses have been removed	• The only reasonable use of the lands was serviced development[40] • The loss of value of the Annapolis Lands including HRM's efforts to depress the value[41]

16. HRM does not concede these facts, but merely dismisses them as immaterial.

PART II - STATEMENT OF ISSUES

17. Annapolis seeks leave to appeal on these issues of public importance:

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

(b) Must the Court ignore the motive of a government authority in considering whether a "taking" occurs in a *de facto* expropriation case?

PART III - STATEMENT OF ARGUMENT

ISSUE #1: THE TEST FOR *DE FACTO* EXPROPRIATION SHOULD BE REVISITED

18. This case provides a rare opportunity for this Court to clarify the principles underlying the common law claim for *de facto* expropriation, last pronounced by this Court in *Canadian Pacific Railway v Vancouver (City)*.[42]

19. The common law has long presumed that unless expressly provided for by statute, a public authority cannot deprive a subject of property without compensation. As this Court held in *British Columbia (Forests) v. Teal Cedar Products Ltd.*,[43] while the presumption can be rebutted, "courts

[38] Hattie Affidavit at para. 131; ALA, Tab 3, p 106. Denty Transcript, p. 73, q 2-12, p. 121, q 22 to page 122, q 4. Exhibit "A" to Hattie Affidavit; ALA, Tab 3, pp 115, 118 and 119.
[39] Hattie Affidavit at paras 146-151; ALA, Tab 3, pp 110-111.
[40] Hattie Affidavit at para 36; ALA, Tab 3, p 86.
[41] Hattie Affidavit at paras. 124-126; ; ALA, Tab 3, pp 104-105.
[42] *CPR*.
[43] 2013 SCC 51 [*Teal Cedar*].

presume that legislatures intend to provide full compensation for expropriations."[44]

20. Whether it is a principle of law, interpretation, or custom, it is deeply embedded in the common law tradition. As Blackstone observed,

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. […] In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.[45]

21. This principle can yield to the supremacy of the legislature, but the intention to take without compensation must be clearly and unequivocally expressed. It has been observed that this fundamental principle is "one area of takings law [that] appears to be close to settled in Canada."[46]

22. The same commentator, however, has otherwise described the law of "takings" in Canada as an emerging area of law with uncertainties in its application and direction.[47] Among the points that have been described as "somewhat less settled" is the law of *de facto* expropriation, including uncertainty as to the necessary character of regulation required to constitute a taking.[48]

23. In *CPR*, the Court articulated two elements to prove *de facto* expropriation: (1) acquisition of a beneficial interest in the property or flowing from it; and (2) removal of all reasonable uses of the property.[49]

24. *CPR* fundamentally altered, perhaps unintentionally, the law of *de facto* expropriation in Canada by importing a requirement to prove an acquisition of a beneficial interest in the property at issue. The test set out in *CPR* should be revisited because:

(a) Requiring proof of acquisition of a beneficial interest collapses the distinction

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[44] *Teal Cedar* at para 37.
[45] Blackstone, *Commentaries on the Laws of England*, Book 1, Ch. 1, p. 139; ALA, Tab 7, pp 202-203.
[46] Horsman et al., *Government Liability: Law and Practic*e at §4.20.20(3); ALA, Tab 8, 209-212.
[47] Horsman et al., *Government Liability: Law and Practice* at §4.20.20(3); ALA, Tab 8, 209-212.
[48] Horsman et al., *Government Liability: Law and Practice* at §4.20.20(3); ALA, Tab 8, 209-212.
[49] *CPR* at para 30.

between *de jure* and *de facto* expropriation.

(b) It unduly restricts property owners' rights and sets Canada back on the global stage.

(c) It requires alignment with this Court's recent dictum in *Lorraine*.

(A) CPR Collapses the Distinction between *De Jure* and *De Facto* Expropriation

25. *CPR* concerned a strip of land owned by the Canadian Pacific Railway ("CPR"), known as the Arbutus Corridor. In 1886, the provincial Crown granted the corridor to CPR for the construction of a railway. From 1902 to 1999, CPR used the lands for rail operations.[50]

26. As early as 1986, the City identified that it wanted to preserve the corridor for transportation purposes. In 1999, CPR began the process of formally discontinuing rail operations on the corridor. CPR wished to redevelop the land for residential and commercial purposes. The City passed an official development plan by-law ("By-Law") designating the corridor as a public thoroughfare for transportation and greenways.[51] This limited CPR to uneconomic uses of its land.[52] Applicable legislation stated that the By-Law was not an expropriation.[53]

27. The primary argument before this Court in *CPR* was whether the By-law was *ultra vires.* However, this Court also dismissed the alternative argument that CPR was entitled to compensation because the By-Law amounted to a *de facto* expropriation. In brief reasons, this Court held that *de facto* expropriation had not been made out and noted that "even if the facts of this case could be seen to support an inference of *de facto* taking at common law, that inference has been conclusively negated by s. 569 if the *Vancouver Charter*".[54]

28. As noted by Professor Brown (now Justice Brown), the brief reasoning on the *de facto* expropriation test in *CPR* has "thrown into confusion the state of the law in Canada".[55] The reasoning in *CPR* should be reconsidered because it:

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[50] *CPR* at para 1-2.
[51] *CPR* at para 4.
[52] *CPR* at para 8.
[53] *CPR* at para 19.
[54] *CPR* at paras 30-37.
[55] Brown, Constructive Takings at 321; ALA, Tab 5, p 162.

(a) cites *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*[56] for the proposition that 'acquisition' is part of the test. *Mariner* is an unsteady foundation on which to build *de facto* expropriation case law.

(b) did not consider other cases, including appellate decisions, where acquisition was not required.

(c) did not sufficiently distinguish between *de jure* and *de facto* expropriation.

(i) Reliance on Mariner

29. As Professor Brown (now Justice Brown) has observed, of the three cases cited by this Court in support of the *CPR* test, only *Mariner* expressly discusses a requirement of acquisition.[57] The reasoning in *Mariner* regarding 'acquisition' should be confined to its facts three reasons.

30. First, Cromwell JA's pronouncement that both "the extinguishment of virtually all incidents of ownership and an acquisition of land by the expropriating authority must be proved"[58] was made in a case where the claimants were seeking a declaration that land was expropriated under the Nova Scotia *Expropriation Act*. They therefore had to "bring themselves within the definition of expropriation *under the statute conferring compensation*"[59], which Cromwell JA highlighted as follows:

> […] Section 3(1) of the **Expropriation Act** defines expropriate as "... the taking of land without consent of the owner by an expropriating authority in the exercise of its statutory powers...". There is no issue here that the owners did not consent or that the designation was lawful. The question is whether "land" was "taken" "by" an expropriating authority. [emphasis added][60]

31. As noted by Cromwell JA, it was "common ground on [the] appeal that for there to be an expropriation, land must be taken from the respondents and acquired by the Province."[61] By adopting *Mariner*'s treatment of the issues before it into a fundamentally different case, *CPR*

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[56] 1999 NSCA 98 [*Mariner*].
[57] Brown, "Constructive Takings" at 326; ALA, Tab 5, p 167.
[58] *Mariner* at para 50.
[59] *Mariner* at para 50 [emphasis added].
[60] *Mariner* at para 10.
[61] *Mariner* at para 11.

introduced into *de facto* expropriation law a requirement tantamount to proof of an actual taking.

32. Cromwell JA noted there were other arguments open to the claimants that were not argued. Although not mentioned by Cromwell JA, the description sounds in *de facto* expropriation:

> [12] […] Similarly, there is no challenge on this appeal to either the conferral or the exercise of the discretion to refuse the respondents' applications to build residences. **It may be arguable that the Beaches Act was not intended to confer discretion to designate lands where its exercise has the effect of imposing the sweeping and stringent limitations on the enjoyment of virtually the whole of a private owner's lands which have resulted from the designation in this case**. [emphasis added][62]

33. Second, it is unclear whether Cromwell JA intended to require an actual acquisition. In criticizing the trial judge in *Casamiro*, Cromwell JA stated that the judge failed to appreciate that in *Manitoba Fisheries* there was "in effect" an acquisition of the plaintiff's goodwill.[63] Cromwell JA then articulated the first branch of the test as requiring the "acquisition of a beneficial interest" without acknowledging the inherent difference between "actually" and "in effect" acquiring.

34. Third, even if Cromwell JA intended to require actual acquisition, it is not clear that this interpretation fairly represents the decision of the Court. Hallett JA wrote concurring reasons in *Mariner* suggesting that the result turned on the plaintiffs' failure to prove that the *Beaches Act* interfered with the claimants' lands to the required extent. Hallett JA observed that "If an owner of shore front property that is designated as a beach under the *Beaches Act* is refused permission to construct a type of dwelling that would be reasonable considering the nature of the land, then such refusal may well found a claim that the land has, in effect, been expropriated."[64] Yet, the Province acquired nothing in making a designation under the *Beaches Act* at issue in *Mariner,* which suggests that Hallett JA did not conceive that there had to be an acquisition of an interest in property. Glube CJNS agreed with both sets of reasons, making it difficult to extract any clear test from the Court's decision in *Mariner*.

35. *Mariner*, therefore, is an unsteady foundation on which to base the legal test for *de facto*

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[62] *Mariner* at para 12.
[63] *Mariner* at para 98.
[64] *Mariner* at para 118.

expropriation. Continued reliance on *Mariner* risks further collapsing the distinction between *de facto* and *de jure* expropriation, leaving no room for *de facto* expropriation as a separate concept.

(ii) Other Cases where acquisition not required

36. In *CPR*, this Court did not consider other cases which did not require acquisition to establish *de facto* expropriation. Woven throughout the history of *de facto* expropriation case law is an implicit acknowledgement that "actual taking" or "acquisition" is not a required part of the test. By definition, "*de facto*" taking involves something short of acquisition, whether actual possession or an actual gain.[65]

37. In early English jurisprudence, Courts found a right to compensation where property was destroyed for a public purpose, without the public authority acquiring anything. In *Burmah Oil Co Ltd v Lord Advocate*, for example, compensation was ordered for the government's deliberate destruction of the claimant's oil facilities in wartime to prevent their use to an advancing enemy.[66]

38. In Canada, this Court has historically recognized that widely divergent forms of government actions, without acquisition, can amount to a "taking". Although this Court in *CPR* referred to its decisions in both *Tener* and *Manitoba Fisheries* in support of the "acquisition" element of the test, neither case enunciated this as being a necessary part of test. At most, those decisions adverted to a corresponding advantage flowing to a public body because of an alleged taking. In neither case did the public body acquire any interest in the actual property said to have been expropriated.

39. In *Manitoba Fisheries*, this Court found that the granting of a statutory monopoly to a Crown corporation destroyed the plaintiff's business and was a taking for which the Crown was obligated to compensate. The bulk of the Court's reasoning focused not on what the Crown gained, but on what the plaintiff lost. Ritchie J. observed that the creation of the statutory monopoly "had the effect of depriving the appellant of its goodwill as a going concern and consequently rendering

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[65] Brown, "Constructive Takings" at 321, 333; ALA, Tab 5, pp 162 and 174.
[66] *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 147 [*Burmah Oil*].

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."[67]

40. In *R v Tener*, this Court held that a systematic refusal to grant permits to work mineral claims in a provincial park was a taking for which compensation was owed. The Court held that denial of the permits, along with a corresponding benefit in enhancing the value of the public park, amounted to a taking for which compensation had to be paid. Estey J. observed that the systematic denial of permits "took value from the respondents and added value to the park."[68] Notably, the government did not acquire what was alleged to have been taken (i.e. the mineral claims).

41. Other cases have concluded that *de facto* taking could be satisfied by government conduct that was "equivalent" to expropriation without there necessarily having been an actual taking.[69] For example, in *Casamiro Resource Corp v British Columbia (Attorney General)*, the British Columbia Court of Appeal held that an expropriation occurred after an order in council prohibited the issuance of permits required to exercise certain mineral claims which turned them into "meaningless pieces of paper." [70]

42. The leading decisions pre-*CPR* focused on what the plaintiff lost. While 'benefits' obtained by the government may have informed that analysis, they were not the lynchpin in a *de facto* takings case. The test in *CPR* fundamentally changed the state of the law on this point.

(iii) The difference between de jure and de facto expropriation

43. The test in CPR creates a logical inconsistency in takings law because it fails to appreciate the distinction between *de jure* and *de facto* expropriation. The test requires proof of the "acquisition of a beneficial interest" in the property or flowing from it. As "acquisition of a

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[67] *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101 at p. 118
[68] *R. v. Tener*, [1985] 1 SCR 533, at para. 60.
[69] Brown, "Constructive Takings" at p 321-323, citing *Rock Resources Inc. v British Columbia*, 2003 BCCA 324, leave to appeal to SCC refused, [2003] SCCA No. 375 and *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283, leave to appeal to SCC refused, [2003] SCCA No. 35; ALA, Tab 5, pp 162-164. See also: *Bingo City Games Inc. v British Columbia Lottery Corp.*, 2005 BCSC 25 at para 185.
[70] *Casamiro Resource Corp. v. British Columbia (Attorney General)* (1991), 80 DLR (4th) 1 (BCCA) [*Casamiro*] at para 34.

beneficial interest" was not defined, confusion and inconsistency in its application have resulted.

44. From a legal perspective, 'beneficial interest' is a term of art. It refers to "the equity that rests with the beneficial owner of property" and it "confers upon its holder all associated rights of use and enjoyment in the land".[71] However, the essential point of a regulatory taking is that it "takes" by regulation, not by acquisition. It inherently contemplates that no gain, or at least no gain of an equitable *in rem* quality, need be conferred on the public authority.[72] If a government is said to have acquired a beneficial interest in the property, in the ordinary legal sense of the term, what then differentiates a *de facto* expropriation from a *de jure* expropriation?

45. As noted by Professor Brown (now Justice Brown), the Court's resulting analysis in *CPR* has effectively abolished liability for *de facto* expropriation.[73] The absence of a tangible benefit accruing to the public authority does not preclude characterization of the regulation in question as a taking. The acquired benefit is, in fact, irrelevant and instead, the loss of the plaintiff's right and enjoyment of the land is what matters.[74]

(b) *CPR* unduly restricts property rights in Canada

46. In a survey of 13 Western nations, one author found that Canada ranked last in offering compensation for takings.[75] In analyzing compensation amongst nations for major takings (which was defined to include *de facto* expropriation), the author noted that the Canadian practice of requiring proof of an acquisition of a beneficial interest in the property and removal of all reasonable uses stands in contrast to most other countries surveyed.[76]

47. The deficiency of the current state of takings law in Canada is further highlighted not only by comparison to other countries, but in reference to Canada's own foreign policies. As canvassed by Professor Brown (now Justice Brown) in previous academic articles, it appears that Canada's

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[71] Brown, "Legal Incoherence" at 188; ALA, Tab 6, pp 193-194.
[72] Brown, "Legal Incoherence" at 191; ALA, Tab 6, pp 196-197.
[73] Brown, "Constructive Takings" at 316; ALA, Tab 5, p 157.
[74] Brown, "Legal Incoherence" at 189; ALA, Tab 6, pp 194-195.
[75] Mark Milke, "Stealth Confiscation: How governments regulate, freeze, and devalue private property – without compensation" (2012) The Fraser Institute at ix [Milke, "Stealth Confiscation"]; ALA, Tab 11, p 272.
[76] Milke, "Stealth Confiscation" at 35; ALA, Tab 11, p 275.

foreign policy has prescribed greater expropriation protection to foreign investors than Canadian residents.[77]

48. The common law is an important tool for defining property rights in Canada, including the development of extra-constitutional restrictions on a state's power to expropriate.[78] It is thus important for this Court to reconsider its test in *CPR*, to further develop the common law and bring Canada's property rights more in line with other Western countries.

(c) Aligning *CPR* with *Lorraine*

49. In *Lorraine,* released by this Court in 2018, private land that was intended to be developed was re-zoned as a conservation area. The landowner discovered this when he visited the land and saw that the Town had installed infrastructure for hiking and cross-country skiing on the lands. The landowner commenced an action challenging the zoning by-law as a nullity and alternatively, seeking compensation for disguised expropriation.[79]

50. As noted by Chief Justice Wagner, the proceedings were split so that the action in nullity would proceed first and the claim for compensation for disguised expropriation would be determined later.[80] The only question before this Court was whether the action in nullity was commenced within a reasonable period of time.[81] This Court concluded that the action was out of time, but noted that the claim for compensation relating to disguised expropriation could proceed.

51. In discussing the interplay between zoning decisions and disguised expropriation, this Court provided useful guidance on the principle of *de facto* expropriation. First, this Court described expropriation generally as "the power of a public authority to deprive a property owner of the enjoyment of the attributes of his or her right of ownership."[82]

52. In the context of regulation, such as enacting a by-law, the Court held that where a

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[77] Brown, "Legal Incoherence" at 182-186; ALA, Tab 6, pp 187-192. Brown, "Constructive Taking" at 334-341; ALA, Tab 5, pp 175-182.
[78] Brown, "Legal Incoherence" at 180; ALA, Tab 6, pp 185-186.
[79] *Lorraine* at paras 7-9.
[80] *Lorraine* at para 16.
[81] *Lorraine* at para 22.
[82] *Lorraine* at para. 1

government limits the enjoyment of the attributes of the right of ownership of property to such a degree that they are *de facto* taken from the person entitled to enjoy them, the government acts inconsistently with its planning powers and has engaged in an abuse of power.[83] A landowner faced with this situation has two choices: 1) it may seek to have the by-law declared null or inoperable, which must be done within a reasonable period of time,[84] or 2) it may pursue a claim for compensation arising from the disguised expropriation.[85]

53. The principles in *Lorraine* are not limited to administrative law remedies like quashing a by-law: they were recently applied in *Dupras c. Ville de Mascouche*,[86] a pure disguised expropriation case. In *Dupras*, Ms. Dupras owned property zoned for residential use. It was vacant land, used by the local population for recreational outdoor activities. In the early 2000's, the City created a municipal park adjacent to the private lands. The City then rezoned the private land to 'conservation'. The City refused to acquire the land, so the landowner brought an action for compensation for a disguised expropriation. In concluding that the City had expropriated the land, the Court relied on this Court's test in *Lorraine*, noting that a disguised expropriation can occur in many forms, including restricting use of the property through a zoning by-law.[87]

54. The difference between the articulations of the principles in *Lorraine* and *CPR* is striking. This Court's description of *de facto* expropriation in *Lorraine* more accurately describes the law as it existed before *CPR*. While *Lorraine* is a civil law decision, this Court does not say that its concept of disguised expropriation is unique to civil law systems. Like the civil law, under common law, when a landowner claims that regulation has resulted in an expropriation, it has two remedies: an administrative law remedy or a claim for *de facto* expropriation.

55. *Lorraine* serves as persuasive authority in the present case. As noted by this Court, a comparison between common law and civil law principles is a particularly useful and familiar exercise for the Court.[88] The concept of disguised expropriation has evolved much more quickly

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[83] *Lorraine* at para 27.
[84] *Lorraine* at para 28.
[85] *Lorraine* at para 2, 46.
[86] 2020 QCCS 2538 [*Dupras*].
[87] *Dupras* at paras 104-108.
[88] *CM Callow v Zollinger*, 2020 SCC 45 at para 60.

and liberally in the Province of Quebec.[89] With this appeal, this Court can revisit the test in *CPR* and align it the jurisprudence in the Province of Quebec and its recent dictum in *Lorraine*.

CONCLUSION ON ISSUE #1

56. The Applicant alleges, based on a solid evidentiary foundation, that HRM improperly exercised its planning powers to preserve privately owned land for a municipal public park, and to avoid a statutory requirement to pay for it. HRM ensured the Annapolis Lands could not be developed, and then encouraged the public to use the Annapolis Lands as a park. By these actions, the Annapolis Lands became useless to the Applicant.

57. All the material facts (outlined in paragraphs 14-16 above) were supported by a full evidentiary record on the motion. All of them are disputed between the parties.[90] By granting HRM's motion for summary judgment, the Court of Appeal concluded that none of these facts matter: it says they are immaterial to a *de facto* expropriation claim and consequently, could not move the outcome needle at all. As one commentator has observed,

> At some point, admittedly hard to locate, excessive regulation must be seen as equivalent to confiscation. If property is a bundle of rights, then state action that removes the ability to exercise those rights leaves merely the twine of the bundle (bare title) and little else.[91]

58. The Court of Appeal's treatment of the material facts in dispute assumes that the law of *de facto* expropriation is so certain and fixed that there does not need to be any further inquiry into whether a taking has occurred. Yet, the decision tolerates a result that violates the core values protected by takings law: the Applicant has been left with only the "twine of the bundle" of its property rights. If this is the implication of the test established in *CPR*, the resulting paradox requires the attention of this Court.

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[89] Malcolm Lavoie, "Canadian Common Law and Civil Law Approaches to Constructive Takings: A Comparative Economic Perspective", 42 Ottawa L. Rev. 229 at 231-234; ALA, Tab 12, pp 277-279.

[90] HRM has denied these facts in its pleading. It led no evidence on the motion to demonstrate that these material facts are not in dispute. Instead, it argued that, while the facts were disputed, they were *immaterial*.

[91] Brown, "Constructive Takings" at 322, citing Bruce Ziff, "'Taking' Liberties: Protections for Private Property in Canada", in Elizabeth Cooke, ed., *Modern Studies in Property Law*, vol 3 (Oxford: Hart Publishing, 2005) at p 347; ALA, Tab 5, p 163.

Issue #2: A Public Authority's Motive is Material to a Claim of *De Facto* Expropriation

59. Even if the test in *CPR* were to remain as it was articulated in that case, this case still raises an issue of public importance because of the Court of Appeal's finding that, in applying this "fact dependent"[92] test, motive is *immaterial* to determining whether a taking has occurred.

60. This means that even if the Applicant's allegations are true—specifically that the impugned actions of HRM were undertaken for the express purpose of acquiring the benefit of a public park without paying for it—they are immaterial to the question of whether a taking has occurred that carries with it a requirement to compensate the Applicants.

61. This Court in *Lorraine* described motive as material to whether an expropriation has occurred:

> When property is expropriated outside this legislative framework for an ulterior motive, such as to avoid paying an indemnity, the expropriation is said to be disguised.[93]

62. The Court of Appeal disregarded the reference to motive in *Lorraine*, holding that "the law of *de facto* expropriation is clear and settled that the motive of the expropriating authority is not a factor in the analysis."[94] It dismissed the dictum in *Lorraine* by stating that this Court's "statement that property expropriated outside of the legislative framework for an ulterior motive is "disguised" does not mean that the two branches of the legal test for *de facto* expropriation do not need to be met."[95] As noted above, in *Lorraine* this Court does not refer to a legal test for *de facto* expropriation having two branches.

63. This Court's description of *de facto* expropriation in *Lorraine* more accurately describes the law. It accounts for cases like *Burmah Oil*, cited above, where the government's motivation for destroying oil facilities was a highly material fact in concluding that a taking occurred.[96] The confiscatory nature of a public authority's act can be informed by its motivation (i.e. the reason the act was undertaken). The claimant's facilities were destroyed in *Burmah Oil* to achieve a public

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[92] NSCA Reasons at para. 85; ALA, Tab 1C, p 47.
[93] *Lorraine* at para. 2
[94] NSCA Reasons at para 75; ALA, Tab 1C, p 45.
[95] NSCA Reasons at para 80; ALA, Tab 1C, p 47.
[96] *Burmah* at 147.

benefit. Similarly, in the present case, it is alleged that the constructive taking was also done to achieve a public benefit.

64. The Court of Appeal nevertheless disregarded this Court's *dictum* about motive in *Lorraine*, relying on Cromwell JA's reasons in *Mariner* to hold that the law is clear and settled that motive of a public body—however improper and colourable it may be—is immaterial to assessing whether a "taking" has occurred.[97] The passage cited by the Court of Appeal as authority for this conclusion provides no support for this statement: Cromwell JA merely distinguished between administrative law challenges of planning decisions and claims for expropriation.[98] *Mariner* was not about motive, there being no evidence in that case of any intention to acquire the benefit of the claimant's lands. Cromwell JA did not suggest that a public body's intention to acquire a claimant's property is irrelevant to assessing whether a taking has occurred.

65. There is no authority in this country establishing the irrelevance of evidence tending to establish that a public authority was trying to acquire a claimant's property without compensation when it enacted an impugned measure. It is wrong to say that as a matter of law it is not relevant to ask *why* a public authority is exercising a regulatory power that is said to amount to a taking. One author has described legislative intent—far from being irrelevant—as being the "critical" factor distinguishing between *bona fide* regulatory actions "and those that are designed to effect a taking without compensation."[99]

66. In *Manitoba Fisheries*, the Court cited a decision of the Court of Appeal in the Northern Ireland case of *Ulster Transport Authority v. James Brown & Sons, Ltd*.,[100] where the legislature's intention was material to assessing whether a taking had occurred. That case, like *Manitoba Fisheries*, concerned a prohibition on the claimant's carrying on business in a field occupied by a public monopoly. In that case, a material factor that turned regulation into taking was the legislature's object in enacting the impugned prohibition:

> Why should they be punished by being deprived of that business?

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[97] NSCA Reasons at paras 75-76; ALA, Tab 1C, pp 45-46.
[98] *Mariner* at para 50.
[99] Katharina A. Byrne, "Regulatory Expropriation and State Intent" *The Canadian Yearbook of International Law 2000* 89 at 118; ALA, Tab 9, p 215.
[100] [1953] N.I. 79 [*Ulster Transport Authority*]; ALA, Tab 10.

> Were they incompetent or negligent? Was their service unsatisfactory? Were their charges exorbitant? No such allegations were made[…]The only inference that can be drawn from these considerations is that ***the prohibition was devised and enacted for the purpose of enabling the appellants to capture that portion of the rival business which the respondents were prohibited from carrying on***. [emphasis added][101]

67. *Ulster Transport Authority* stands for the common-sense proposition that if a claimant contends that a regulation affecting the claimant's property amounts to a taking, it is relevant to ask what the authority is trying to accomplish by enacting the impugned regulation. There was no suggestion in *Manitoba Fisheries* that the Court disagreed with the focus on intention in *Ulster Transport Authority*. Indeed, after quoting two paragraphs from *Ulster Transport Authority* stressing the intention of the legislature, the Court held that *Ulster Transport Authority* "strongly supports" the claim for compensation in *Manitoba Fisheries*.

68. The impropriety of a public body's motive, *as such*, may be irrelevant to a takings case[102] but only if the impropriety has nothing to do with the principal question of what the public authority was trying to accomplish by enacting an impugned measure (a question that the Court in *Ulster Transport Authority* asked and answered without any suggestion that there was any issue of relevance in doing so). But irrelevance of impropriety in some cases does not imply irrelevance of motive in all cases. In this case, for example, the HRM's motive would have been entirely proper had it achieved its objective in the manner contemplated by the statute, compensating the applicant as it should have under section 237 of the *Halifax Regional Municipality Charter*. It cannot be that HRM's misuse of its regulatory power to achieve this objective indirectly is immaterial to a *de facto* expropriation claim.

CONCLUSION ON ISSUE #2

69. The Applicant alleges that HRM deliberately exercised is powers to prevent development

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[101] *Ulster Transport Authority* at pp. 120-121; ALA, Tab 10, pp 258-259.

[102] Indeed, in *Ulster Transport Authority*, the Court gleaned sufficient indicia of the purpose of the legislation from its overall context that it saw no reason to "speculate" on the motives of the legislature, noting that "Whatever in fact those motives may have been, the intention of the Legislature, as gleaned from its terms, must guide the court in this instance." (p. 114); ALA, Tab 10, p 252.

on the Applicant's lands to acquire a park for the public without paying for it. The Court of Appeal's decision means not only that such actions cannot amount to expropriation, but also that under the law of *de facto* expropriation, the surreptitiousness of the taking precludes the Court from hearing evidence about it.

70. Such a principle requires the attention of this Court because it cannot be reconciled with *Lorraine*. By summarily rejecting *Lorraine*'s acknowledgment of the relevance of motive in a *de facto* expropriation case, the decision below will deprive property owners of protections available to them when they most need them—namely, where a public authority intends to take their property without compensation, but wishes to do so in a way that avoids accounting to anyone for its value.

71. Takings law gives effect to a basic social contract. As this Court observed, albeit in the context of a claim for injurious affection, the purpose of a compensatory rule for public actions is "to ensure that individual members of the public do not have to bear a disproportionate share of the cost of procuring the public benefit."[103] The Court of Appeal's decision assumes that the law of *de facto* expropriation is certain and fixed, yet tolerates a result that violates the core values protected by takings law. The resulting paradox requires the attention of this Court.

PART IV - SUBMISSION ON COSTS

72. Annapolis respectfully requests its costs.

PART V - ORDER REQUESTED

73. Annapolis respectfully requests that leave to appeal be granted, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 8th DAY OF MARCH, 2021.

Counsel for the Applicant
Lenczner Slaght Royce Smith Griffin LLP

[103] *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at para 38.

PART VI – TABLE OF AUTHORITIES AND STATUTORY PROVISIONS (hyperlinked)

Cases Authorities	**Referred to in Memorandum of Argument at Para(s):**
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