# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Halifax Regional Municipality v. Annapolis Group Inc.*, 2021 NSCA 3

**Date:** 20210107
**Docket:** CA 495116
**Registry:** Halifax

**Between:**

Halifax Regional Municipality

Appellant

v.

Annapolis Group Inc.

Respondent

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**Judge:** The Honourable Justice David P.S. Farrar

**Appeal Heard:** October 1, 2020, in Halifax, Nova Scotia

**Subject:** Summary Judgment. *De facto* Expropriation.

**Summary:** Annapolis owns lands in the Halifax Regional Municipality, a portion of which has been designated for possible future use as a regional park under the Regional Municipal Planning Strategy.

Between 2007 and 2016, Annapolis made various attempts to develop their lands. To be able to do so it needed approval from HRM.

In September 2016, HRM passed a resolution refusing to allow Annapolis to proceed with development of its lands.

Annapolis commenced action against HRM alleging HRM, by its actions, had *de facto* expropriated Annapolis' lands for public use as a park. It argued HRM had deliberately avoided zoning the lands as parkland so it would not have to compensate Annapolis.

HRM applied for summary judgment on evidence to Annapolis' claim of *de facto* expropriation arguing it had no chance of success.

The Motions Judge dismissed HRM's application and awarded costs to Annapolis in the amount of $7,500.00. Annapolis sought leave to appeal and, if leave to appeal was granted, to appeal the decision of the Motions Judge.

**Issues:** (1) Should leave to appeal be granted?
(2) If leave to appeal is granted, did the Motions Judge err in failing to grant summary judgment?

**Result:** Leave to appeal granted, appeal allowed, and summary judgment granted to HRM.

The Motions Judge erred in both the application of the summary judgment rule and his consideration of the law of *de facto* expropriation.

There was no dispute between these parties that *de facto* expropriation required:
1) The acquisition by HRM of a beneficial interest in the property of Annapolis or flowing from it; and
2) The removal of all reasonable uses of the property.

There were not material facts in dispute with respect to these two issues. HRM did not acquire a beneficial interest in the property of Annapolis, nor did it remove all reasonable uses of Annapolis' lands.

Annapolis' claim for *de facto* expropriation had no reasonable chance of success and therefore summary judgment was granted.

**Conclusion:** The appeal is allowed with costs to HRM in the amount of $3,500.00, inclusive of disbursements, payable forthwith. The costs awarded to Annapolis on the summary judgment motion is set aside and costs in the amount of $7,500.00, inclusive of

disbursements, is awarded to HRM on the summary judgment motion, payable forthwith.

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|---|---|
| **Judges:** | Beveridge, Farrar, Derrick, JJ.A. |
| **Appeal Heard:** | October 1, 2020, in Halifax, Nova Scotia |
| **Held:** | Appeal allowed with costs, per reasons for judgment of Farrar, J.A.; Beveridge and Derrick, JJ.A. concurring |
| **Counsel:** | Michelle C. Awad, Q.C. and Martin Ward, Q.C., for the appellant<br>Peter Griffin, Rebecca Jones and Amy Sherrard, for the respondent |

**Reasons for judgment:**

## Introduction

[1] On February 17, 2017, the respondent, Annapolis Group Inc. (Annapolis), filed a Notice of Action and Statement of Claim (amended March 22, 2017) alleging the Halifax Regional Municipality (HRM), by its actions, had *de facto* expropriated lands owned by it (the Annapolis Lands) for public use as a park. It claims HRM delayed and obstructed all of Annapolis' attempts to develop their land and deliberately avoided zoning the lands as parkland so it would not have to compensate Annapolis. These actions, Annapolis says, deprived it of any use of its lands and amounted to a *de facto* expropriation.

[2] The Amended Statement of Claim also alleges unjust enrichment and abuse of, or misfeasance in public office. Those claims are not in issue on this appeal.

[3] By Notice of Motion, HRM applied for summary judgment to dismiss Annapolis' *de facto* expropriation claim.

[4] The motion was heard before Justice James L. Chipman on November 15, 2019. On November 20, 2019, the Motions Judge issued a written decision dismissing the motion and awarded costs to Annapolis in the amount of $7,500.00.

[5] HRM applies for leave to appeal and, if leave to appeal is granted, appeals the decision of the Motions Judge.

[6] For the reasons that follow, I would grant leave to appeal and allow the appeal with costs to HRM in the amount of $3,500.00, inclusive of disbursements. I would also set aside the cost award to Annapolis and award costs to HRM in the amount of $7,500.00, inclusive of disbursements, on the summary judgment motion.

## Background

[7] A Regional Municipal Planning Strategy was passed by HRM Council in 2006. It was a guide for land development in the municipality over a 25-year period. It reserved the Annapolis Lands, along with other lands, for possible future serviced development, including possible use of a portion of the lands for a regional park.

[8] In the 2006 Planning Strategy, there are two designations that are relevant to the Annapolis Lands: the Urban Settlement designation and the Urban Reserve

designation. The Urban Settlement designation defines those areas where urban forms of development may occur throughout the 25 years after 2006.

[9] The Urban Reserve designation identifies land that could be developed beyond the 25-year horizon. Attached as Appendix 1 is a map depicting those portions of the Annapolis Lands designated as Urban Settlement and Urban Reserve. The map also shows the conceptual park boundary.

[10] For serviced development to occur, HRM Regional Council must pass a resolution authorizing a secondary planning process and an amendment to the applicable land use by-law.

[11] The secondary planning process is the vehicle by which the part of the Annapolis Lands within the Urban Settlement designation could be moved forward to serviced development.

[12] At the same time as it adopted the 2006 Planning Strategy, HRM also adopted the Halifax Mainland Land Use By-law.

[13] The Land Use By-law included zoning for the Urban Settlement and Urban Reserve designations that applied to the Annapolis Lands.

[14] The zoning of the Annapolis Lands has not changed since the adoption of the Land Use By-law in 2006.

[15] In October 2014, HRM adopted the 2014 Regional Municipal Planning Strategy. The Urban Settlement and Urban Reserve designations from the 2006 Planning Strategy were maintained under the 2014 Planning Strategy.

[16] Also unchanged was the conceptual boundary for the proposed regional park.

[17] In summary, from 2006 to present, the Urban Settlement and Urban Reserve designations for the Annapolis Lands, the Land Use By-law and the conceptual boundaries for the proposed park remain the same.

[18] In 2007, Annapolis requested HRM initiate the secondary planning process with respect to its lands. This led to a series of events, over a number of years, which culminated in HRM's refusal to initiate the secondary planning process by resolution dated September 6, 2016.

[19] Annapolis commenced this action against HRM on February 17, 2017.

[20] Paragraph 109 of the Amended Statement of Claim alleges:

> HRM Council's September 6, 2016 resolutions have the following results: (a) the Annapolis Lands are taken as a park without compensation to Annapolis and without HRM being subject to the statutory one year constraint in subsection 237(2) of the *Charter*; and (b) despite being zoned "Urban Settlement", the Annapolis Lands cannot be developed.

[21] At the Summary Judgment Motion and before this Court, Annapolis argued that HRM was exercising dominion over its lands. By this it says that members of the public are hiking, cycling, canoeing, camping, and swimming on the Annapolis Lands and are encouraged to do so by HRM.

[22] It says its position is buttressed by the fact HRM financially supports organizations that encourage people to use Annapolis' property.

[23] This, Annapolis says, coupled with the resolution, amounts to a *de facto* expropriation of its lands, effectively preventing it from developing them.

[24] As noted earlier, HRM sought summary judgment dismissing Annapolis' claim for *de facto* expropriation. The motion was dismissed on the basis that the *de facto* expropriation claim raised genuine issues of material fact requiring a trial.

[25] HRM filed a Notice of Application for Leave to Appeal and Notice of Appeal on December 27, 2019.

**Issues**

[26] The appellant lists four issues in its Notice of Application for Leave to Appeal and Notice of Appeal as follows:

1. Should leave to appeal be granted?
2. Did the judge err in law when he held that there were genuine issues of fact that were material to Annapolis' claim of *de facto* expropriation?
3. Did the judge err in law in finding that the law of *de facto* expropriation is unclear?
4. If there are no genuine issues of material fact with respect to *de facto* expropriation, is HRM otherwise entitled to partial summary judgment?

[27] I would restate the issues as follows:

1. Should leave to appeal be granted?
2. Did the Motions Judge err in failing to grant summary judgment?

**Standard of Review**

*1. Should leave to appeal be granted?*

[28] Whether the appellant should be granted leave to appeal is a new issue before this Court and there is no standard of review. (*Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, ¶ 18)

[29] In *Burton Canada Company v. Coady*, 2013 NSCA 95, Justice Saunders for the majority set out the test for leave to appeal:

> 18… The well-known test on a leave application is whether the appellant has raised an arguable issue, that is, an issue that could result in the appeal being allowed. [Citations omitted]

*2. Did the motion judge err in failing to grant summary judgment?*

[30] The standard of review applicable to an appeal of decisions in summary judgment motions was also addressed in *Burton*. This Court will not intervene "unless wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result." (¶ 19)

**Analysis**

*1. Should leave to appeal be granted?*

[31] As will be apparent, the test for leave is satisfied in this case. I would grant leave to appeal.

*2. Did the Motions Judge err in failing to grant summary judgment?*

[32] HRM moved for summary judgment on evidence under Rule 13.04. For ease of reference, I will set it out in its entirety. It provides:

> 13.04 Summary judgment on evidence in an action
>
> (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> > (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> >
> > (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> > (a) determine a question of law, if there is no genuine issue of material fact for trial;
> >
> > (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[33] In *Shannex Inc. v. Dora Construction Ltd*., 2016 NSCA 89, Justice Fichaud set out the five sequential questions to be asked when considering Rule 13.04:

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> • First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.

The analysis of this question follows *Burton*'s first step.

A "material fact" is one that would affect the result. A dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]

*Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

• Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

• Third Question: If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: "Does the challenged pleading have a real chance of success?"

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

• Fourth Question: If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): Should the judge exercise the "discretion" to finally determine the issue of law?

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge

> exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.
>
> This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.
>
> A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[34] The Motions Judge correctly set out the law with respect to summary judgment motions; however, in my respectful view, he erred in both the application of Rule 13.04 and in his consideration of the law of *de facto* expropriation.

*The test in Shannex*

[35] First question: Is there a genuine issue of material fact?

[36] To decide whether an allegation of fact is material, a court must consider whether the allegation is essential to establish a pleaded cause of action. The first step in the analysis, therefore, is to identify the essential elements of that cause of action. The second step is to consider whether the allegations of fact in support of those elements are the subject of a genuine dispute.

[37] There does not appear to be any dispute between the parties about what must be established for a *de facto* expropriation to occur. Annapolis must prove two things:

i) Acquisition by HRM of a beneficial interest in the Annapolis Lands or flowing from the lands; and

ii) The removal by HRM of all of Annapolis' reasonable uses of the Annapolis Lands (Appellant's Factum, ¶ 59, Respondent's Factum, ¶ 61).

[38] The Motions Judge also recognized the two elements of *de facto* expropriation in his decision:

> [31] Further, as outlined in *Mariner* and by the Supreme Court of Canada in *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, to have a chance at success the claimant (Annapolis) must be able to establish that a regulatory action by a statutory authority (HRM) leads to:
>
> 1. The acquisition by the authority of a beneficial interest in the property or flowing from it; and
>
> 2. The removal of all reasonable uses of the property

[39] It follows that the material facts for Annapolis' *de facto* expropriation claim are facts that relate to whether HRM acquired a beneficial interest in, or flowing from the Annapolis Lands, and whether Annapolis lost all reasonable uses of the Lands.

[40] Although there is no dispute about what constitutes the elements of *de facto* expropriation, it is useful to review its origins in the case law to understand when it arises or, perhaps more importantly, when it does not.

[41] The doctrine originated as a rule of statutory construction. In *Attorney General v. De Keyser's Royal Hotel Limited*, [1920] A.C. 508, the War Office purported to act under the Defence of Realm Regulations and took possession of a hotel for the purpose of housing the headquarters personnel of the Royal Flying Corps. It did not compensate the owners for the possession.

[42] There was no express provision in the regulations or any statute which required compensation to be paid to the owners of the hotel.

[43] Lord Atkins stated at p. 542:

> 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.

[44] The House of Lords went on to uphold the decision of the Court of Appeal which ordered compensation be paid to the owners.

[45] *De Keyser's Royal Hotel* was applied in *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101. Manitoba Fisheries purchased fish from Manitoban fishers/suppliers, processed the fish in Manitoba and sold it to customers in Canada and the United States.

[46] In 1969, a federal Crown Corporation, created pursuant to the *Freshwater Fish Marketing Act*, was granted a monopoly in respect of the export of fish from Manitoba. As Manitoba Fisheries was not issued a licence that would have exempted it from the monopoly provisions of the *Act*, it ceased to carry on business. It brought an action for a declaration that it was entitled to compensation for the loss of its business. The Supreme Court of Canada held the company was entitled to that declaration.

[47] Ritchie, J., who delivered the judgment of the Court, referred to *DeKeyser's Royal Hotel* and held:

> There is no express language in the Act providing for the payment of compensation by the federal Crown but the appellant relies upon the long-established rule which is succinctly stated by Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel Ltd.* [[1920] A.C. 508.], at p. 542 where he said:
>
> > 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.
>
> The rule of construction is more amply stated in *Maxwell on Interpretation of Statutes*, 11th ed., pp. 275 to 277 in language which was approved by Wilson J.A. in the British Columbia Court of Appeal in *B.C. Power Corp. Ltd. v. Attorney-General of British Columbia et al.*, at p. 44, which is set out at length in the judgment of Mr. Justice Collier at [1977] 2 F.C. p. 462, where reference is also made to the approach adopted by Lord Radcliffe in *Belfast Corporation v. O.D. Cars Ltd.*, at p. 523 (H.L.(N.L.)). In considering whether a particular piece of legislation contemplates taking without compensation, Lord Radcliffe there said:
>
> > <u>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</u>. 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. …

(pp. 109-110) [emphasis added]

[48] Justice Ritchie concluded the *Freshwater Fish Marketing Act* had the effect of taking Manitoba Fisheries' property for the Corporation and rendered its assets virtually useless:

> It will be seen that in my opinion the *Freshwater Fish Marketing Act* and the Corporation created thereunder 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. There is nothing in the Act providing for the taking of such property by the Government without compensation and as I find that there was such a taking, it follows, in my view, that it was unauthorized having regard to the recognized rule 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" *per* Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel, supra*. (p. 118) [emphasis added]

[49] *Manitoba Fisheries* was followed in *R. v. Tener*, [1985] 1 S.C.R. 533. Tener and others were the owners of mineral claims originally granted by the Crown in 1937. Under various statutory provisions, the owners had the right to all minerals in the claims, the right to the use and possession of the surface for the purpose of extracting the minerals, and a right of way to the area of the claims.

[50] In 1939 the Province of British Columbia created a park, Wells Gray Park, which included the lands subject to the mineral claims. Between 1965 and 1973, various statutes provided that permits or authorizations from government were required before the exploration for, or the production of, minerals could be undertaken in Wells Gray Park. Despite requests from the claim owners for the required permits between 1974 and 1977, none were issued. In 1978, Tener and the other owners were notified that the Province would not authorize new exploration or development work in the Park. The Supreme Court held that the owners were entitled to compensation for the loss of the right to develop the mineral claims.

[51] Justice Estey identified the two questions to be answered as follows:

> Two questions at once arise:
>
> (a) What right did the respondents lose and what interest did the government acquire; and,
>
> (b) If such compulsory taking has occurred, when did it take place? (page 556)

[52] Justice Estey concluded that the actions of the Crown amounted to an acquisition from which compensation must flow:

> … 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. This acquisition by the Crown constitutes a taking from which compensation must flow. Such a conclusion is consistent with this Court's judgment in *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101. (page 563)

[53] The leading case in Nova Scotia is *Nova Scotia (Attorney General) v. Mariner Real Estate Limited*, 1999 NSCA 98. In that case the respondents, including Mariner, owned lands at Kingsburg Beach. These lands were designated as a beach under the *Beaches Act* and as such, became subject to a number of restrictions on the uses of and activities on them. Mariner applied for approval to build single family dwellings on the lands. The Minister refused to grant the necessary approval.

[54] Mariner then sued the Province claiming that the lands had been the subject of *de facto* expropriation. This Court, allowing an appeal from the decision of the trial judge, held that Mariner's action should be dismissed.

[55] The principal judgment was written by Cromwell, J.A. (Hallett J.A. concurred with separate reasons) who did a detailed analysis of *de facto* expropriation. He began by noting that the scope of such claims was limited in Canadian law due to the constraints imposed by two governing principles:

> 38. The scope of claims of *de facto* expropriation is very limited in Canadian law. They are constrained by two governing principles. The first is that valid legislation (primary or subordinate) or action taken lawfully with legislative authority may very significantly restrict an owner's enjoyment of private land. The second is that the Courts may order compensation for such restriction only where authorized to do so by legislation. In other words, the only questions the Court is entitled to consider are whether the regulatory action was lawful and whether the *Expropriation Act* entitles the owner to compensation for the resulting restrictions.

[56] Adopting a statement from Rogers, *Canadian Law of Planning and Zoning*, Cromwell, J.A., accepted that the law permits the appropriation of prospective development rights for the good of the community but allows the property owner nothing in return:

> 42 In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation. It is settled law, for example, that the regulation of land use which

> has the effect of decreasing the value of the land is not an expropriation. As expressed in Ian MacF Rogers, *Canadian Law of Planning and Zoning* (looseleaf, updated to 1999) at s. 5.14, "The law permits the appropriation of prospective development rights for the good of the community but allows the property owner nothing in return." Numerous cases support this proposition including *Belfast Corporation v. O.D. Cars (supra)* and *Hartel Holdings Co. Ltd. v. Calgary*, [1984] 1 S.C.R. 337. Many others are reviewed by Marceau, J. in *Alberta v. Nilsson*, [1999] A.J. No 645 at para 35 ff. I would refer, as well, to the following from E.C.E. Todd, *The Law of Expropriation in Canada*, (2nd, 1992) at pp. 22-23:
>
> > Traditionally the property concept is thought of as a bundle of rights of which one of the most important is that of user. At common law this right was virtually unlimited and subject only to the restraints imposed by the law of public and private nuisance. At a later stage in the evolution of property law the use of land might be limited by the terms of restrictive covenants.
> >
> > Today the principal restrictions on land use arise from the planning and zoning provisions of public authorities. 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. "Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down ... (but) a taker may not, through the device of zoning, depress the value of property as a prelude to compulsory taking of the property for a public purpose.: ..... [emphasis in original]

[57] The Court held this long tradition of rigorous land use regulation meant that the test for applying the *Expropriation Act* to land use restrictions is exacting. Referring to the three cases where *de facto* expropriation was found, Cromwell, J.A. said those cases went beyond limiting the use or reducing the value of the owners' property but, rather, rendered the owners' rights meaningless:

> 47. In each of the three Canadian cases which have found compensation payable for *de facto* expropriations, the result of the governmental action went beyond drastically limiting use or reducing the value of the owner's property. In *The Queen in Right of British Columbia v. Tener*…the denial of the permit meant that access to the respondents' mineral rights was completely negated, or as Wilson, J. put it at p. 552, amounted to total denial of that interest. In *Casamiro Resources Corp. v. British Columbia* which closely parallels *Tener*, the private rights had become

> "meaningless". In *Manitoba Fisheries v. The Queen*…the legislation absolutely prohibited the claimant from carrying on its business. [emphasis added]

[58] In order to constitute a *de facto* expropriation, the Court said there must be "a confiscation of 'all reasonable private uses of the lands in question'" (emphasis in original). The question is "whether the regulation is of 'significant severity to remove all of the rights associated with the property holder's interest'" (¶ 48, emphasis added).

[59] Cromwell, J.A., then considered whether the loss of economic value of lands is equivalent to the loss of land within the meaning of the *Expropriation Act*. He concluded it was not:

> 79. I conclude, therefore, that the learned trial judge erred in holding that the loss of virtually all economic value of the respondents' land, was the loss of an interest in land within the meaning of the *Expropriation Act*.

[60] Mariner also failed the second part of the test: the need to establish that there was an "acquisition of land by the expropriating authority for there to be an expropriation within the meaning of the *Act*" (¶ 91). Mariner argued that *Tener* stood for the proposition that, "where regulation enhances the value of public land, the regulation constitutes the acquisition of land". Cromwell, J.A. disagreed. He observed:

> 94. When the judgments in *Tener* are read in their entirety and in light of the facts of the case, there is no support for the proposition on which the respondents rely. It is clear in the judgments of both Estey, J. and Wilson, J. in *Tener* that what was, in effect, acquired in that case was the reversion of the mineral interests which had been granted by the Crown.

[61] Moreover, Mariner's reliance on the comments of Estey, J. in *Tener* that the Province's refusal of the required permit enhanced the value of the park was misplaced:

> 95. I do not think, with respect, that his statements to the effect that the re-acquisition enhanced the value of the park takes away from his holding that the Crown re-acquired in fact, though not in law, the mineral rights which constituted land under the applicable definition. I am supported in this view by Wilson, J.'s unequivocal statements to similar effect with regard to the respondents' *profit à prendre*.

[62] There "must be…an acquisition of an interest in land and…enhanced value is not as such an interest" (*Mariner*, ¶ 99).

[63] Mariner's reliance on *Manitoba Fisheries* was also held to be misplaced because the Supreme Court recognized that the plaintiff's deprivation was accompanied by an acquisition by the government. Cromwell, J.A. held:

> 96. The crucial element in that case was that the same legislative scheme that deprived the company of its goodwill also conferred a monopoly to conduct the same business on the new corporation. The Court not only held that there had been a deprivation but also, in effect, a transfer of the goodwill to the new corporation.

[64] Cromwell, J.A. concluded that the freezing of development or strict regulation, in itself, will not confer an interest in land on the Province:

> 105. [T]he freezing of development and strict regulation of the designated lands did not, of itself, confer any interest in land on the Province or any other instrumentality of government. I am reinforced in this opinion by many cases dealing with zoning and other forms of land use regulation. Estey, J., in *Tener*, notes that ordinarily compensation does not follow zoning either up or down. The Supreme Court of Canada in *Dell Holdings*…accepted the general proposition that, under our law, owners caught up in the zoning or planning process, but not expropriated, must simply accept the loss (provided, of course, that the regulatory actions are otherwise lawful). Development freezes have consistently been held not to give rise to rights of compensation…One of the bases of these decisions is that the restriction of development generally does not result in the acquisition of an interest in land by the regulating authority.
>
> 106. There was no evidence that the economic value of the Crown's land was enhanced. Even if its value could be considered to be enhanced in some other sense, such enhancement, in my view, is not an acquisition of land for the purposes of the *Expropriation Act*.

[65] In his concurring judgment, Hallett J.A. affirmed that in order to have a *de facto* expropriation, all reasonable private uses of the land must be removed, and an acquisition of the private uses by the same statutory authority:

> 113 To prove a *de facto* expropriation, an owner of an interest in land as defined in the *Expropriation Act*, R.S.N.S. 1989, c. 56 must conclusively prove that there has been, in effect, a confiscation of all reasonable private uses of the interest in the land in question and an acquisition of the same by the statutory authority. That is what occurred in *The Queen in Right of British Columbia v. Tener et al.*, [1985] 1 S.C.R. 533.

[66] Finally, I refer to *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, a case with many similarities to this one. CPR owned land in Vancouver known as the Arbutus Corridor. When CPR discontinued using the corridor for rail traffic it made proposals to develop the corridor for residential and commercial purposes. It also offered to sell the corridor "at whatever price was determined by agreement or expropriation" (¶ 3). Nothing came of these efforts.

[67] The City wanted to preserve the corridor for transportation purposes and had indicated this in planning documents as early as 1986. Despite the vigour with which CPR pressed its case, the City made it clear that it would not buy the land. In 2000, the City adopted a by-law and official development plan that designated the corridor as a public thoroughfare for transportation and greenways providing nature trails and cycling paths. Development contrary to the plan was prohibited. The effect of the by-law was to freeze the redevelopment potential of the corridor and to confine CPR to uneconomic uses of the land (¶ 8). The Supreme Court of Canada held that the City was entitled to refuse to compensate CPR (¶ 9).

[68] CPR's claim for compensation was discussed in terms of *de facto* expropriation and McLachlin, C.J., citing *Mariner*, *Manitoba Fisheries* and *Tener*, set out the requirements for a successful claim:

> 30. 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. [emphasis added]

[69] Dealing with CPR's argument that by passing the development plan the City acquired a *de facto* park, the Chief Justice stated:

> Yet, as Southin J.A. acknowledged, those who now casually use the corridor are trespassers. The City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a "tak[ing]". [¶ 33, emphasis added]

[70] CPR was also held to have failed to satisfy the second element of the test that all reasonable uses of the property were removed:

> 34. Second, the by-law does not remove all reasonable uses of the property. This requirement 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": see *Mariner Real Estate*, at p. 717. The by-law does not prevent CPR from using its land to operate a railway, the only use to

> which the land has ever been put during the history of the City. Nor, contrary to CPR's contention, does the by-law prevent maintenance of the railway track. Section 559's definition of "development" is modified by the words "unless the context otherwise requires". Finally, the by-law does not preclude CPR from leasing the land for use in conformity with the by-law and from developing public/private partnerships. The by-law acknowledges the special nature of the land as the only such intact corridor existing in Vancouver, and expands upon the only use the land has known in recent history.

[71] The authorities have clearly identified what qualifies as a *de facto* expropriation and what does not:

i) The acquisition must be one that confers a beneficial interest on the authority alleged to have expropriated the land. Land must actually be taken from an owner and acquired by the authority;

ii) All reasonable uses to which the property could be put must be removed. The burden of proving all reasonable uses have been removed is on the land owner;

iii) The freezing of development and restrictive land use regulation, in and of itself, does not amount to *de facto* expropriation;

iv) The decrease in the value of land does not amount to *de facto* expropriation; and

v) The passing of a development plan does not constitute a taking, it simply allows a municipality to set a vision and course for future development and ensures the land will be used or developed in accordance with its vision.

[72] I will now return to where I started this analysis and address what material facts may be in dispute with respect to whether HRM acquired a beneficial interest in or flowing from the Annapolis Lands and whether Annapolis lost all reasonable uses of that land.

[73] The Motions Judge's reason for refusing to grant summary judgment appear to be twofold:

i) Motive is an element of the *de facto* expropriation test; and

ii) What constitutes a taking may be subject to a creative interpretation.

[74] I take these points from two paragraphs of his decision:

> 36. In argument Annapolis' counsel equated "disguised" expropriation to *de facto* or constructive expropriation. In the context of the within motion I am certainly prepared to entertain this interpretation. I would add that there is ample evidence in Mr. Hattie's affidavit to point to the possibility of an ulterior motive on the part of HRM.
>
> …
>
> 42. Having carefully reviewed the expropriation cases, it is fair to say that they offer at times creative interpretations on what may constitute a taking. Without question they are fact specific and offer different scenarios in terms of when a *de facto* expropriation claim may succeed.

[75] I deal first with the suggestion by the Motions Judge that motive may play a role in the law of *de facto* expropriation (a point which the respondent argues). With respect, the law of *de facto* expropriation is clear and settled that the motive of the expropriating authority is not a factor in the analysis. Improper motive does not create an alternative way of proving the claim and cannot compensate for the failure to establish the two required elements of *de facto* expropriation.

[76] This was made clear by Cromwell, J.A. in *Mariner* where he specifically referred to *ultra vires* actions taken for an improper purpose which do not give rise to a claim for *de facto* expropriation:

> 50 Claims of *de facto* expropriation may be contrasted with administrative law challenges to the legality or appropriateness of planning decisions. For example, zoning by-laws may be attacked as *ultra vires* if they are enacted for a confiscatory or other improper purpose if such purpose is not one authorized by the relevant grant of zoning power: see e.g. *Re Columbia Estates and District of Burnaby* (1974), 49 D.L.R. (3d) 123 (B.C.S.C.). The issue in such cases is not whether the by-law effects an expropriation within the meaning of expropriation legislation but whether its true purpose is a lawful purpose. Similarly, where an administrative tribunal is empowered to approve or disapprove municipal planning decisions, drastic impact on land use or value may be used as a relevant consideration: see e.g. *Re Township of Nepean Restricted Area By-law 73 -76* (1978), 9 O.M.B.R. 36 (O.M.B.) at 55. In neither sort of case is the land owner claiming compensation under expropriation legislation, but rather, is attacking the legality or soundness of a land use regulation decision with respect to which the severity of the restriction falling short of extinguishment of virtually all rights of ownership may be relevant. Where, as in this case, however, such a claim for compensation is made, the claimants must bring themselves within the definition of expropriation under the statute conferring compensation. As noted, the test is exacting. Both the

> extinguishment of virtually all incidents of ownership and an acquisition of land by the expropriating authority must be proved.

[77] The Alberta Court of Appeal came to a similar conclusion in *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283 (leave to appeal refused [2003] S.C.C.A. No. 35). In that case, the plaintiff land owner claimed tort damages for abuse of public authority and also alleged that the Crown's wrongful actions amounted to expropriation. The Alberta Court of Appeal rejected that contention, holding:

> 67. The principle proposed is inconsistent with the principles on which the right to compensation for expropriation and *de facto* expropriation are based. That there has been a taking of the property, or what amounts to a taking, is the fundamental basis of an expropriation, without which the right to compensation does not arise. There cannot be compensation for expropriation when no taking has occurred. If the state has acted wrongfully and a property owner has suffered damages as a result, he or she may seek to recover through a claim in tort. However, absent a taking, a wrongful act alone does not, merely because of its wrongful nature, amount to expropriation.

[78] The civil case of *Lorraine (Ville) v. 2646 – 8926 Québec inc.*, 2018 SCC 35, referred to by the Motions Judge does not dictate a contrary conclusion. In that case, the plaintiff claimed a series of remedies including a declaration that the by-laws were a nullity and the Municipality's action was a disguised expropriation. Only the timeliness of the action came before the Supreme Court. However, in dismissing the claim, the Court noted that the disguised expropriation claim could continue.

[79] The Motions Judge here referred to the following excerpt from the opening two paragraphs of the Supreme Court of Canada's decision:

> 35 As for *de facto* or constructive expropriation, the concept is addressed by the Supreme Court of Canada in Chief Justice Wagner's opening paras. in *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35:
>
> > 1 The concept of expropriation concerns the power of a public authority to deprive a property owner of the enjoyment of the attributes of his or her right of ownership. Because of the importance attached to private property in liberal democracies, the exercise of the power to expropriate is strictly regulated to ensure that property is expropriated for a legitimate public purpose and in return for a just indemnity. In Quebec, the *Expropriation Act*, CQLR, c. E-24, limits the exercise of this power and lays down the procedure to be followed in this regard.

> 2 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. Where a municipal government improperly exercises its power to regulate the uses permitted within its territory in order to expropriate property without paying an indemnity, two remedies are therefore available to aggrieved owners. They can seek to have the by-law that resulted in the expropriation declared either to be null or to be inoperable in respect of them. If this option is no longer open to them, they can claim an indemnity based on the value of the property that has been wrongly taken from them.
>
> [emphasis in original]

[80] The 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.

[81] This was recently affirmed in *Ville de Québec v. Rivard*, 2020 QCCA 146. After referencing *Lorraine*, the Court stated:

> 63. It has been long recognized that in order to be deemed disguised expropriation, legislation must be to such a degree restrictive that it makes impossible the exercise of the right of ownership, and be tantamount to a confiscation, insofar as the zoning is deployed to expropriate without compensation.

[82] With respect, *Lorraine (Ville)* does not expand the well-settled criteria for establishing *de facto* expropriation. Motive is not a material fact in the context of a *de facto* expropriation claim.

[83] If HRM has acted in an inappropriate manner, or for any other improper purpose, Annapolis is still able to proceed with its cause of action for abuse of, or misfeasance in, public office against HRM. As Cromwell, J.A. said in *Mariner*, those types of claims are to be contrasted with *de facto* expropriation (para. 50).

[84] The second aspect of the Motions Judge's decision is that there may be "creative interpretations on what may constitute a taking" (para. 42).

[85] Although cases are fact dependant, there is nothing on the facts that have been presented to the Motions Judge that could be remotely considered to be a taking of the Annapolis Lands and a corresponding deprivation of all reasonable uses of the lands.

[86] The best that can be said on the evidence is Annapolis cannot make the use of the lands they wish to, but it is clear that does not result in a taking.

[87] The Motions Judge set out what he considered to be material facts to be determined. He held:

> [25] In response to this, Annapolis says they wanted to put their best foot forward in marshalling as much relevant evidence as possible. In my view, they have responded appropriately. Indeed, on the basis of the evidence there can be no question that there are vast issues of material fact to be determined. In this regard, Mr. Hattie's affidavit discloses a number of genuine issues of material fact in dispute, inclusive of:
>
> • September, 2019 correspondence between counsel demonstrating HRM'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 HRM's logo on various trails. (exhibits AA, BB and 1)
>
> • December 18-23, 2008 The Coast article quoting HRM 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 RMPS was finalized, the decision was made that Annapolis' property would be treated as development lands, not parklands. (exhibit A, pp. 54, 55)
>
> • RMPS, clause 1.7.1 denoting what HRM Council "shall consider". "This terms denotes the mandatory consideration of policy concepts but does not commit HRM Council to the eventual adoption of policy in secondary planning strategies". (exhibit D, p. 175)
>
> • RMPS, clause 3.1 and the discussion of "S-2" and S-3" the "Urban Settlement Designation Boundary". (exhibit D, pp. 195, 196)

[88] With respect, none of the facts listed relate to the two elements which must be established in a *de facto* expropriation claim, nor does the Motions Judge explain how these facts are "material".

[89] Even if HRM has placed signage on the property to encourage people to use it, and financially supported parties that are using the lands, that does not amount to a taking. At best, it may be a trespass by those using the land. However, HRM has acquired nothing and Annapolis has lost nothing.

[90] Annapolis says the proverbial "straw that broke the camel's back" was Council's resolution on September 6, 2016. The resolution was a discretionary

decision by Council not to initiate secondary planning. It was a decision within their authority. And although it restricted the ability of Annapolis to develop its lands, the law is abundantly clear that is not sufficient to constitute *de facto* expropriation.

[91] There are simply no facts in dispute that would relate to the *de facto* expropriation claim. 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.

[92] There has been no acquisition of any interest in the Annapolis Lands by HRM and, similarly, Annapolis' reasonable uses of its lands have not changed. Although HRM has published conceptual boundaries for a park, which it hopes to establish in the future, the lands and the reasonable uses to which Annapolis can put them remain exactly as they have been for many years.

[93] Nothing that HRM did in either 2006 or 2016 has prevented Annapolis from continuing with the only uses to which the lands have ever been put. The permitted uses of the lands from 2006 remain, as does their longstanding identification as a possible future serviced area.

[94] In *Hartel Holdings Co. Ltd. v. City of Calgary*, [1984] 1 S.C.R. 337, the appellant made an argument similar to the one advanced here by Annapolis; namely, that by adopting a plan for a proposed park whose boundaries encompassed the appellant's land, the City was bound to acquire that land. This argument was rejected by Wilson, J.:

> In my view, however, this is not that kind of case. The City has not changed the zoning of the appellant's land. It has simply refused to rezone it in his favour or buy him out at a fair price. There is nothing inherently wrong with a development freeze.
>
> …
>
> Moreover, this Court's decision in *Vancouver (City of) v. Simpson*, 1 [1977] S.C.R. 71, indicates that planned public acquisition of land for a park can be a legitimate reason for refusing to grant a building permit or, by extension, for a refusal of an application for rezoning. Exceptions are always made for situations involving bad faith but I think it is stretching the concept of bad faith beyond the breaking point to attempt to apply it in this case. (pp. 355-356)

[95] Here, as in *Hartel Holdings*, HRM has not changed the zoning of the Annapolis Lands. They remain zoned as Urban Settlement and Urban Reserve. HRM has simply refused Annapolis' request to initiate the secondary planning processes.

[96] Annapolis has not demonstrated a genuine issue of fact which is material to the law of *de facto* expropriation.

*Should Summary Judgment be Granted?*

[97] If there are no genuine issues of material fact, is HRM entitled to summary judgment? In my view, the answer to that question is "yes" based on a consideration of the other sequential questions posed by Fichaud, J.A. in *Shannex*.

[98] The second question from *Shannex* is as follows:

> If the answer to #1 is No*...[i.e. there is no genuine issue of material fact]*…then: Does the challenged pleading require the determination of a question of law, either pure or mixed with a question of fact?

[99] The respondents concede that Annapolis' Amended Statement of Claim raises a question of law with respect to the scope of the law of *de facto* expropriation and its application to the facts of this case. The answer to the second question is "yes".

[100] The third question posed by *Shannex* is:

> If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment… Governing that discretion is the principle in *Burton's* second test: "Does the challenged pleading have a real chance of success?"

[101] I have already discussed the application of the legal principles of *de facto* expropriation in considering whether there is a genuine issue of material fact. I need not repeat the analysis here. The evidence relied on by Annapolis does not answer the central two questions which a court must determine–namely, whether there has been a removal of all of Annapolis' rights in relation to the Annapolis Lands, and whether HRM acquired a beneficial interest in these lands. Where there is but one outcome based on the law and uncontested facts, summary judgment should follow.

[102] Annapolis' claim for *de facto* expropriation does not have a reasonable chance of success and summary judgment should issue.

**Conclusion**

[103] I would grant leave to appeal, allow the appeal with costs to HRM on the appeal of $3,500.00, inclusive of disbursements, payable forthwith. I would reverse

the Motions Judge's cost award to Annapolis and award costs to HRM of $7,500.00, inclusive of disbursements, on the motion below, payable forthwith.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Derrick, J.A.