

# SUPREME COURT OF CANADA

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# Supreme Court Judgments

## St. John's (City) v. Lynch

Collection: Supreme Court Judgments

Date: 2024-05-10

Neutral citation: 2024 SCC 17

Case number: 40302

Judges: Karakatsanis, Andromache; Côté, Suzanne; Rowe, Malcolm; Martin, Sheilah;  
Kasirer, Nicholas; Jamal, Mahmud; O'Bonsawin, Michelle

On appeal from: Newfoundland and Labrador

Subjects: Expropriation

Notes: [Case in Brief](#)  
[SCC Case Information](#)





**SUPREME COURT OF CANADA**

**CITATION:** St. John's (City) v. Lynch, 2024 SCC 17

**APPEAL HEARD:** November 16, 2023

**JUDGMENT RENDERED:** May 10, 2024

**DOCKET:** 40302

**BETWEEN:**

**City of St. John's**  
Appellant

and

**Wallace Lynch, Willis Lynch, Wilfred Lynch, Reginald Lynch and Colin Lynch**  
Respondents

- and -

**Attorney General of British Columbia, City of Surrey, Canadian Home Builders' Association, Ontario Landowners Association  
and Ecojustice Canada Society**  
Interveners

**CORAM:** Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

**REASONS FOR JUDGMENT:** Martin J. (Karakatsanis, Côté, Rowe, Kasirer, Jamal and O'Bonsawin JJ. concurring)  
(paras. 1 to 67)

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**City of St. John's**

*Appellant*

v.

**Wallace Lynch, Willis Lynch, Wilfred Lynch,  
Reginald Lynch and Colin Lynch**

*Respondents*

and

**Attorney General of British Columbia,  
City of Surrey, Canadian Home Builders' Association,  
Ontario Landowners Association and  
Ecojustice Canada Society**

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**Indexed as: St. John's (City) v. Lynch**

**2024 SCC 17**

File No.: 40302.

2023: November 16; 2024: May 10.

Present: Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR

*Expropriation — Constructive expropriation — Compensation — Value to owner — Expropriation scheme to be ignored in assessing statutory compensation entitlement — Scope of expropriation scheme — Expropriation Act, R.S.N.L. 1990, c. E-19, s. 27(1)(a).*

Several family members own a property in the Broad Cove River watershed. Groundwater within the watershed drains toward the Broad Cove River, which is used by the City of St. John's for the local water supply. While the property was located in unorganized territory and not subject to any planning authority at the time it was conveyed by Crown grant in 1917, amendments to the *City of St. John's Act* in 1959 resulted in the property becoming subject to the City's pollution control and expropriation powers. In 1964, the legislature enacted a prohibition on the construction of buildings in the watershed, with limited exceptions. In 1978, the building prohibition was amended to empower the City to permit construction, subject to the prior recommendation of the City manager. In 1992, a municipal reorganization extended the City's boundaries to formally encompass the property. The property remained subject to the statutory building prohibition in the *City of St. John's Act*, but was now also subject to the City's zoning regulations. Following the boundary expansion, a new municipal plan and development regulations were prepared for the entire City. The *1994 Development Regulations* included a watershed zone that encompassed the property. There are no permitted uses within the watershed zone, but three discretionary uses are contemplated: agriculture, forestry and public utility. In 1996, the City and the provincial government adopted a watershed management plan, based on a report that observed that the *City of St. John's Act* entitled the City to prohibit the erection of buildings within the watershed regions, including the Broad Cove River

watershed, and that recommended it should continue to use those powers to do so.

Since at least the 1990s, the family has tried to obtain permission to develop the property. In 2008, the City refused to transfer the property to an adjacent town, and, in 2011, the City indicated informally that the land must be kept unused in its natural state. Then, in 2013, the City rejected a formal application to develop a residential subdivision on the property, citing its authority under the *City of St. John's Act* and the property's designation as part of the watershed zone pursuant to the *1994 Development Regulations*. Following that refusal, on application by the family, the Court of Appeal declared that the property had been constructively expropriated and that the family had a right to file a claim for compensation with the City as though a notice of expropriation had been served as of February 1, 2013.

When the City applied to the Board of Commissioners of Public Utilities for a determination of the amount of compensation payable, the Board stated a special case for the opinion of the Supreme Court of Newfoundland and Labrador asking whether the compensation should be assessed based on the uses permitted by the existing zoning — agriculture, forestry and public utility uses — or whether the existing zoning should be ignored and the value determined as if residential development were permissible. The application judge concluded that the compensation assessment should take account of the existing zoning. The Court of Appeal allowed the family's appeal and ordered the Board to determine compensation without reference to the existing zoning.

*Held:* The appeal should be allowed and the application judge's order restored.

The family is entitled to fair compensation but not more than fair compensation for the City's constructive expropriation of the property. Given the application judge's finding that the watershed zoning was an independent enactment and not made with a view to expropriation, the market value assessment for the property must take into account the fact that it is limited to discretionary agriculture, forestry, and public utility uses.

A taking of property triggers a presumptive entitlement to compensation absent clear statutory language showing an intention not to compensate. The basic measure of compensation is the same for both formal and constructive expropriation: compensation is based on the property's market value. As land use restrictions, including zoning regulations, impact market value, they are normally taken into account when fixing compensation. The compensation for expropriation can be further affected by other statutory and common law factors. In Newfoundland and Labrador, the *Expropriation Act* prescribes a series of rules applicable to the determination of compensation. One such principle, sometimes referred to as the *Pointe Gourde* principle, has been incorporated into many jurisdictions' expropriation statutes, including s. 27(1)(a) of Newfoundland and Labrador's *Expropriation Act*: changes in value resulting from the expropriation scheme itself are to be ignored in the compensation assessment. An authority cannot downzone or freeze a property's development in anticipation of the need to acquire the property, thereby depreciating the value of the property in order to reduce the compensation payable.

In determining whether a regulation's effect on a property value should be ignored for compensation purposes, the key question is whether the enactment was made with a view to the expropriation or, conversely, was an independent enactment. This is normally a factual determination to be made by the board or other authority tasked with determining compensation, and courts reviewing these determinations must accord deference to first instance decision-makers. The inquiry involves examining the purposes and effects of the enactment. As every land use enactment may impact property values, ignoring their purposes would render each a source of potential liability, impairing the ability of governments to regulate in the public interest. It would also fail to achieve proper economic reinstatement, and it would distort the property's true market value. The purposes of an enactment can be discerned by considering, *inter alia*, debates, deliberations, and statements of policy that give rise to the regulation, the preamble or the terms of the enactment, and the rationale for a municipal by-law that can be found in the municipality's long-term plans and correspondence involving officials.

While there must be a connection between the regulation and the expropriation for the effects of the regulation to be excluded,

causation does not drive the inquiry and is of limited assistance in determining the scope of the expropriation scheme. Asking whether there is a causal connection between the imposition of the planned use restriction and the expropriation which subsequently occurs is inconsistent with the jurisprudence, which affirms that zoning regulations properly bear on the compensation for expropriation. It would also risk including as part of the expropriation scheme decisions that neither contemplated nor required a taking, and it would emphasize form over substance as measures closely related to the expropriation that lower the property's value may not be links in the chain that enabled the taking to occur. Conversely, focusing on the act or decision that caused the taking and hence the loss is too narrow. Excluding that act or decision, and nothing further, would permit a state actor to progressively downzone or freeze a property in anticipation of acquiring it in an attempt to reduce the compensation payable. When making the required determination, some relevant factors include whether the land use restriction was enacted as part of a city-wide or province-wide policy, whether it targets specific properties, or whether it was enacted by a different public authority than that which expropriated the property, but a government's knowledge of another level of government's development plans is not conclusive. Neither bad faith nor a "scheme" in any nefarious connotation need be proved.

In the instant case, there is no basis to interfere with the application judge's conclusion that the watershed zoning was part of an independent zoning regulation and not part of the expropriation scheme to be disregarded under s. 27(1)(a) of the *Expropriation Act*. While the enactment of the *1994 Development Regulations* was a link in the chain of events culminating in the expropriation, they were not enacted at the time with a view to the expropriation. To ignore the watershed zoning would compensate the family for something it never would have had absent the expropriation: unencumbered land to develop residential housing.

## Cases Cited

**Applied:** *Pointe Gourde Quarrying and Transport Co. v. Sub-Intendent of Crown Lands*, [1947] A.C. 565; **considered:** *Kramer v. Wascana Centre Authority*, [1967] S.C.R. 237; *Halliday's Estate v. Newfoundland Light & Power Co.* (1980), 29 Nfld. & P.E.I.R. 212; *Re*

*Gibson and City of Toronto* (1913), 11 D.L.R. 529; *Windsor (City) v. Paciorka Leaseholds Ltd.*, 2012 ONCA 431, 111 O.R. (3d) 431, rev'g 2011 ONSC 2876, 106 O.R. (3d) 690; **referred to:** *Lynch v. St. John's (City)*, 2016 NLCA 35; *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36; *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227; *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508; *Irving Oil Co. v. The King*, [1946] S.C.R. 551; *Waters v. Welsh Development Agency*, [2004] UKHL 19, [2004] 2 All E.R. 915; *Diggon-Hibben Ltd. v. The King*, [1949] S.C.R. 712; *Cedars Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569; *Lasade Enterprises Ltd. v. Newfoundland* (1993), 114 Nfld. & P.E.I.R. 19; *Miller v. Province of Newfoundland* (1977), 14 Nfld. & P.E.I.R. 110; *Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633; *The Queen in Right of the Province of British Columbia v. Tener*, [1985] 1 S.C.R. 533; *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98, 177 D.L.R. (4th) 696; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32; *Cunard v. The King* (1910), 43 S.C.R. 88; *Atlantic Shopping Centres Ltd. v. St. John's (City)* (1985), 56 Nfld. & P.E.I.R. 44; *Jewish Community Centre of Edmonton Trust v. The Queen* (1983), 27 L.C.R. 333; *Vision Homes Ltd. v. Nanaimo (City)* (1996), 59 L.C.R. 106; *Clements v. Penticton (City)*, 2005 BCCA 212, 86 L.C.R. 81; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5.

## **Statutes and Regulations Cited**

*1994 Development Regulations* (City of St. John's), s. 10.46.1.

*City of St. John's Act*, R.S.N. 1952, c. 87.

*City of St. John's Act*, R.S.N.L. 1990, c. C-17, s. 104(4).

*City of St. John's (Amendment) Act*, S.N. 1978, c. 45, s. 6(b).

*City of St. John's (Amendment) Act, 1959*, S.N. 1959, No. 57, ss. 4, 5.

*City of St. John's (Amendment) Act, 1964*, S.N. 1964, No. 85, s. 5.

*City of St. John's Boundary Order, 1991*, Nfld. Reg. 236/91.

*Expropriation Act*, R.S.A. 2000, c. E-13, s. 45(e).

*Expropriation Act*, R.S.B.C. 1996, c. 125, s. 33.

*Expropriation Act*, R.S.C. 1985, c. E-21, s. 26(2).

*Expropriation Act*, R.S.N.L. 1990, c. E-19, ss. 19, 26(3), 27.

*Expropriations Act*, R.S.O. 1990, c. E.26, ss. 13, 14.

*Urban and Rural Planning Act*, R.S.N.L. 1990, c. U-7.

*Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8, s. 5.

## Authors Cited

Horsman, Karen, and Gareth Morley. *Government Liability: Law and Practice*. Toronto: Thomson Reuters, 2023 (loose-leaf updated November 2023, release 3).

Todd, Eric C. E. *The Law of Expropriation and Compensation in Canada*, 2nd ed. Scarborough, Ont.: Carswell, 1992.

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Green, White and Butler JJ.A.), [2022 NLCA 29](#), 7 C.A.N.L.R. 540, 85 C.P.C. (8th) 75, 470 D.L.R. (4th) 679, 21 L.C.R. (2d) 91, 27 M.P.L.R. (6th) 175, [2022] N.J. No. 121 (Lexis), 2022 CarswellNfld 167 (WL), setting aside in part a decision of Chaytor J., 2020 NLSC 92, 2 M.P.L.R. (6th) 241, 16 R.P.R. (6th) 221, [2020] N.J. No. 128 (Lexis), 2020 CarswellNfld 156 (WL). Appeal allowed.

*Ian F. Kelly, K.C.*, and *Daniel M. Glover*, for the appellant.

*Michael J. Crosbie, K.C.*, and *Raymond G. Critch*, for the respondents.

*Phong Phan and Tim Quirk*, for the intervener the Attorney General of British Columbia.

*Philip C.M. Huynh and Allan Wu*, for the intervener the City of Surrey.

*Shane Rayman, Conner Harris and Leah Cummings*, for the intervener the Canadian Home Builders' Association.

*Brandon Kain, Jonathan Nehmetallah and Lauren Weaver*, for the intervener the Ontario Landowners Association.

*Randy Christensen and Lindsay Beck*, for the intervener the Ecojustice Canada Society.

The judgment of the Court was delivered by

MARTIN J. —

## I. Overview

[1] How do zoning regulations and other land use restrictions affect the compensation due to owners of expropriated property? That is the question engaged by this appeal.

[2] The starting point for assessing compensation for expropriation is determining the property's market value. It is well established that land use restrictions impact market value and they are normally taken into account when fixing compensation. The

jurisprudence reveals an exception: changes in value resulting from the expropriation scheme itself are to be ignored in the compensation assessment (the “*Pointe Gourde* principle”; see *Pointe Gourde Quarrying and Transport Co. v. Sub-Intendent of Crown Lands*, [1947] A.C. 565 (P.C.)). This principle has been incorporated into many jurisdictions’ expropriation statutes, including s. 27(1)(a) of Newfoundland and Labrador’s *Expropriation Act*, R.S.N.L. 1990, c. E-19, which is at the centre of this case. Determining which enactments form part of the expropriation scheme, and are thus ignored for valuation purposes, is the key factual question that decision makers must grapple with.

[3] In this case, the City of St. John’s (“City”) constructively expropriated the respondents’ property when it refused to permit any development on it. The City deprived the respondents of all reasonable uses of the property and was found to have acquired a beneficial interest in the form of the right to a continuous flow of uncontaminated groundwater downstream to the City’s water facilities. At the time of the expropriation, a zoning regulation limited the property to discretionary agriculture, forestry, and public utility uses — a measure that no doubt diminishes the market value of the property compared to the respondents’ desired residential development use and, therefore, the compensation owed for the expropriation. The application judge concluded that the zoning regulation was an “independent enactment” and not part of the expropriation scheme. This meant that it could operate to influence the market value of the expropriated property and was not to be ignored for the purpose of fixing compensation. The Court of Appeal disagreed, concluding that compensation should be determined without reference to the zoning regulation.

[4] As I see no basis to interfere with the application judge’s conclusion, which is entitled to deference, I would allow the appeal.

## II. Factual Background

### A. *The Lynch Property*

[5] The respondents' grandfather, David Lynch, was issued a Crown grant in 1917 for the purpose of harvesting trees for barrel making and firewood. The respondents today own a 7.36-acre portion of the original Crown grant ("Lynch Property"). A house was constructed on the property in 1930, but was moved to another location around 1945. The Lynch Property has been left in its natural state of trees and shrubs since that time.

[6] The Lynch Property is located on the western side of the Broad Cove River watershed. Groundwater within the watershed drains toward the Broad Cove River, which is used by the City for the local water supply.

[7] While the Lynch Property was located in unorganized territory and not subject to any planning authority or land use restrictions at the time of the Crown grant in 1917, a review of the subsequent legislative activity reveals the long history of development controls in the Broad Cove River watershed. A 1959 amendment to the *City of St. John's Act*, R.S.N. 1952, c. 87, resulted in the Lynch Property becoming subject to the City's pollution control and expropriation powers (S.N. 1959, No. 57, ss. 4 and 5). In 1964, the legislature enacted a prohibition on the construction of buildings in the Broad Cove River watershed, with an exception for accessories to or extensions of existing buildings (S.N. 1964, No. 85, s. 5). In 1978, the building prohibition was amended to empower the City to permit the construction of a building or extension to an existing building "subject to the prior written recommendation of the City Manager that a permit be issued for such building or extension" (S.N. 1978, c. 45, s. 6(b)). A version of this provision remains in effect today (*City of St. John's Act*, R.S.N.L. 1990, c. C-17, s. 104(4)(d)).

[8] A reorganization of the municipalities on the Northeast Avalon Peninsula occurred on January 1, 1992. The City's boundaries were extended to formally encompass the Lynch Property (*City of St. John's Boundary Order, 1991*, Nfld. Reg. 236/91). The Lynch Property remained subject to the statutory building prohibition in the *City of St. John's Act*, but was now also subject to the City's

zoning regulations. Following the boundary expansion, a new municipal plan and development regulations were prepared for the entire city. The *1994 Development Regulations*, enacted pursuant to the *Urban and Rural Planning Act*, R.S.N.L. 1990, c. U-7, included a “Watershed” zone that encompassed the Lynch Property. There are no “permitted uses” within the Watershed zone, but three “discretionary uses” are contemplated: (a) agriculture; (b) forestry; and (c) public utility (*Development Regulations*, s. 10.46.1).

[9] In 1996, the City received a report it had commissioned in collaboration with the provincial government. The report, entitled *A Watershed Management Plan, St. John’s Regional Water Supply*, included a background study and a policy document. The policy document observed that the *City of St. John’s Act* “entitles the City to prohibit the erection of buildings” within the watershed regions, including the Broad Cove River watershed (s. 2.2, reproduced in A.R., vol. IV, at p. 27). It noted that, while City Council had “the power to erect a new building upon the recommendation of the City Manager, . . . this power [was] rarely used” (s. 2.2). It recommended that the City “continue to use the powers under [the *City of St. John’s Act*] to restrict the erection of new buildings within the protected watersheds, recognizing they are complementary to the powers contained in the City’s plan and zoning by-law” (s. 2.2). The policy document went on to say:

The practice of not allowing further urban development within the protected watershed in order to protect the water supply is appropriate and should continue. . . . Existing sub-urban development . . . should not expand and the long term intention is to revert these areas back to natural, pristine conditions as opportunity and funding permit. [s. 2.5]

The *Watershed Management Plan* was adopted by the City and the provincial government in the fall of 1996.

## B. *Development Inquiries*

[10] The respondents tried to obtain permission to develop the Lynch Property since at least the 1990s. The street the Lynch Property is located on marks the municipal boundary between the City of St. John’s and the Town of Paradise, and some limited development

Property is located on marks the municipal boundary between the City of St. John's and the Town of Paradise, and some limited development is permitted across the street from the Lynch Property within the Town of Paradise's jurisdiction. A request by the respondents that the Lynch Property be transferred to the Town of Paradise was denied by the City in December 2008. A report from the City's Director of Engineering stated that staff were not prepared to recommend any boundary changes that would "have the effect of opening up . . . lands that are located in the Watershed for development" (A.R., vol. III, at p. 72). He explained:

There is considerable land within the City's boundaries located in the Watershed which could be developed but the policy of [the] City as set out in Section 104 of the City of St. John's Act strictly prohibits new development. Even serviced development can have a deleterious effect on the watershed because of pesticide and herbicide use and the loss of a natural buffer. The purpose of this is to maintain the excellent raw water quality of the Windsor Lake and Broad Cove Rive[r] Watershed which allows the production of potable water of extremely high quality without risk of having the contaminants found in many municipal water supplies caused by intense urban development. [p. 71]

The respondents were provided with a copy of the Director of Engineering's report in the correspondence from the City denying the boundary adjustment.

[11]               The respondents made inquiries of the City in 2011 concerning the permitted uses of the Lynch Property under the *Development Regulations* and the *City of St. John's Act*. They asked about whether residential development and other activities including tree harvesting, farming, saw milling, and the construction of wind turbines and solar panels would be permitted. The City responded that those activities were not permitted and that the "land must be kept unused in [its] natural state" (A.R., vol. III, at p. 86).

[12]               The respondents nonetheless formally applied to develop a 10-lot residential subdivision on the Lynch Property. By letter dated February 1, 2013, the City formally rejected the application, citing its authority under the *City of St. John's Act* and the Lynch Property's designation as part of the "Watershed Zone" pursuant to the *Development Regulations*.

C. *The Constructive Expropriation Claim*

[13] Following the City's refusal to permit development, the respondents commenced proceedings, seeking a declaration that the Lynch Property had been constructively expropriated. In a decision that is not the subject of this appeal, the Court of Appeal of Newfoundland and Labrador concluded that the property was constructively expropriated by the City. On behalf of the court, Barry J.A. found that the City "acquired a beneficial interest" in the Lynch Property "consisting of the right to a continuous flow of uncontaminated groundwater downstream to the City's water facilities" (2016 NLCA 35 ("expropriation decision"), at paras. 60-61 (CanLII)). He also found that the respondents' rights to the property flowing from the Crown grant were transformed into merely a right to keep the land "unused in its natural state" (para. 63). In other words, "virtually all of the aggregated incidents of ownership [were] taken away" and the respondents were left with no reasonable uses of the property (para. 63). The court issued the following declaration:

(i) That the real property owned by the Lynches in the Broad Cove River catchment area within the City of St. John's has been constructively expropriated by the City of St. John's pursuant to sections 101 and 105 of the *City [of St. John's] Act*; and

(ii) That the Lynches have a right pursuant to sections 18 and 19 of the *Expropriation Act* to file a claim for compensation with the City as though a notice of expropriation has been served under the *Act* as of February 1, 2013, and, failing agreement within three months of the filing of the formal order, concerning the amount of compensation that is to be paid by the City to the Lynches, they have a right to proceed to a determination of the compensation claim by the Board of Commissioners of Public Utilities. [para. 71]

[14] The parties obtained appraisals for the Lynch Property with an effective date of February 1, 2013. The City's position was that the property should be valued in accordance with the Watershed zoning — that is, based on discretionary agriculture, forestry, and public utility uses. The City's appraiser considered that the "highest and best use under this scenario" would be "agricultural and forestry related uses that would be acceptable to the City, and therefore not deleterious to waters within the zone" (A.R., vol. II, at p. 103). This resulted in an appraised value of \$105,000 for the Lynch Property. Alternatively, under the hypothetical scenario of medium-density residential

development, the City's appraiser valued the property at \$670,000. For their part, the respondents contended that the Lynch Property should be valued as if the Watershed zoning had not been in place and asked their appraiser to assume that residential development would be approved. The respondents' appraiser valued the property at \$875,000 on this basis.

[15] As the parties could not agree on compensation, the City filed an application with the Board of Commissioners of Public Utilities ("Board") for a determination of the amount payable.

### III. Procedural History

#### A. *Board of Commissioners of Public Utilities*

[16] As a preliminary matter, the Board decided to make a reference to the Supreme Court of Newfoundland and Labrador pursuant to s. 26(3) of the *Expropriation Act*. Section 26(3) provides that the Board "may at any stage of its proceedings . . . state in the form of a special case for the opinion of the court a question of law arising in the course of the proceedings". The question posed by the Board was:

Whether the [respondents'] compensation should be assessed based on the uses permitted by the existing zoning, which are agriculture, forestry and public utility uses, or whether the existing zoning should be ignored and the value determined as if residential development were permissible.

(2020 NLSC 92, 2 M.P.L.R. (6th) 241 ("application reasons"), at para. 3)

#### B. *Supreme Court of Newfoundland and Labrador, 2020 NLSC 92, 2 M.P.L.R. (6th) 241 (Chaytor J.)*

[17] The application judge recognized that the question put to her required the consideration and application of the principle from *Pointe Gourde*, which stipulates that any change in the value of the expropriated property that was caused by the expropriation scheme itself is to be ignored in assessing the property’s value for compensation purposes. She questioned whether there was a sufficient factual matrix before the court to determine that issue, but noted that the “parties agreed that the pertinent facts are contained within the Expropriation Decision and that any disagreement between them on matters of fact requires an interpretation by this Court of that decision. Such interpretation, is a question of law” (para. 8).

[18] The application judge considered the Court of Appeal’s expropriation decision and noted its finding that the underlying purpose behind the expropriation was to prevent the pollution of the City’s water supply. Accordingly, the “key question” was whether the pollution prevention scheme that caused the constructive expropriation included the Watershed zoning. The respondents argued it did. In support of their desired valuation of the land as a residential development property, they claimed the Watershed zoning restrictions should be ignored (as part of the expropriation scheme) and not constrain its market value.

[19] Significantly, the application judge noted that the Watershed zoning did not preclude all uses of the property (given the discretionary uses of agriculture, forestry, and public utilities). Similarly, s. 104(4) of the *City of St. John’s Act* allowed for some development in the Broad Cove River watershed upon the recommendation of the City Manager. Had any of the discretionary uses been allowed, the expropriation would not have occurred. In the application judge’s view, the refusal to allow the respondents any uses of the property “was due to the City’s pollution prevention policy to keep the property ‘unused in its natural state’ — not the zoning of the property” (para. 39; see also para. 44).

[20] The application judge noted that the actual act of expropriation of a property is part of a continuing process. She recognized two established but competing principles. First, a municipality cannot use the device of zoning to depress the value of a property as a prelude

to expropriating it for public purposes; in such cases, the effect of the rezoning or freeze on the property's value is to be ignored for assessing compensation. Second, land use regulation is the norm and on its own does not constitute compensable expropriation. Based on this Court's decision in *Kramer v. Wascana Centre Authority*, [1967] S.C.R. 237, zoning regulations that are independent enactments and "not part of a scheme to facilitate the expropriation at reduced compensation" are not to be ignored in assessing compensation (para. 47).

[21] In the application judge's view, the *Development Regulations* were an independent enactment and not part of the City's pollution prevention scheme to keep the property unused in its natural state. In making this determination, she adverted to the 1992 municipal reorganization, which prompted a new city-wide planning process and ultimately led to the *Development Regulations* through which the Lynch Property was zoned "Watershed". The reorganization was a comprehensive zoning process and not specific to the Lynch Property. The application judge noted that the respondents could have been allowed to develop the land in accordance with the Watershed zoning had the City exercised its discretion to permit it. As the *Development Regulations* were an independent enactment, they were not to be ignored in valuing the Lynch Property pursuant to the *Pointe Gourde* principle.

[22] The application judge therefore concluded that the compensation assessment should take account of the zoning regulations in effect on February 1, 2013 (the time that the Court of Appeal found the expropriation occurred). The Lynch Property was not to be valued as a development property, but instead should be valued based on its potential agriculture, forestry, and public utility uses.

C. *Court of Appeal of Newfoundland and Labrador, 2022 NLCA 29, 470 D.L.R. (4th) 679 (Green, Butler and White JJ.A.)*

[23] The Court of Appeal allowed an appeal from the application judge's decision on the basis for calculating compensation and ordered that the respondents' compensation "should be determined without reference to the existing watershed zoning in the *Development Regulations*" (para. 139).

[24] After reviewing the relevant jurisprudence and extracting general principles from it, the Court of Appeal identified three errors in the application judge’s reasoning. First, she failed to take account of the interconnections between the *City of St. John’s Act*, the *Development Regulations*, and the City’s policy of prohibiting development in the Watershed. The Court of Appeal reasoned that:

The “state of mind” of the City in adopting the regulations was to further the objective of water pollution control mandated by the City [of St. John’s] Act. It is clear from the earlier studies undertaken by the City in relation to the management of the watershed that the policy that was developed was to use the powers under the *City [of St. John’s] Act* in a manner that was “complementary” to the powers contained in the City’s municipal plan and zoning bylaw, the ultimate intention being to “revert the areas back to natural, pristine conditions. . .” (Policy Document, at s. 2.5). As subsequently determined by this Court in the Expropriation Decision, achieving reversion of the lands to “natural, pristine conditions” effectively meant refusal of all development and use, which amounted to *de facto* expropriation. Expropriation was therefore the logical result of the zoning policy that was adopted and the manner in which it was applied. It is not hard, therefore, to infer a causal connection between the adoption and application of the watershed zoning regulations and the expropriation. [Emphasis added; para. 113.]

Second, the application judge did not refer to or rely on affidavit evidence from City officials confirming that the *Development Regulations* and the *City of St. John’s Act* were interconnected in terms of purpose, focus and application. Third, the application judge did not recognize that the Court of Appeal, in the expropriation decision, “regarded the expropriation process as beginning in 1964 and culminating with the February 1, 2013 refusal by the City Manager to exercise his discretion to permit any development, with the effect that all reasonable uses of the property were taken away”, and implied that the *Development Regulations* “were part of this broad scheme of watershed pollution protection” (paras. 118-19).

#### IV. Issue on Appeal

[25] This appeal requires the Court to consider how compensation for constructive expropriation should be assessed. While there are substantial similarities between different federal and provincial expropriation statutes, it is the compensation framework set out in

Newfoundland and Labrador’s *Expropriation Act* that must be applied in this case.

[26] Specifically, the Court must determine whether the *Development Regulations* form part of the “compulsory acquisition of the land”, which is to be ignored in assessing the respondents’ compensation entitlement pursuant to s. 27(1)(a) of the *Expropriation Act*.

## V. Analysis

### A. *Compensation for Expropriation*

[27] A “taking” — defined as the “forcible acquisition by the Crown of privately owned property . . . for public purposes” — can occur in two ways (K. Horsman and G. Morley, *Government Liability: Law and Practice* (loose-leaf), at § 5:1). Formal expropriation (a *de jure* taking) occurs where a public authority acquires legal title (typically through the authority’s invocation of a statutory expropriation framework) (*Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, at paras. 18 and 104). Constructive expropriation (a *de facto* taking), on the other hand, involves the appropriation of private property by a public authority exercising its regulatory powers (*Annapolis*, at para. 18). In this case, the Lynch Property was constructively expropriated as the City had acquired a beneficial interest in it and all reasonable uses of the property had been removed. I note that the expropriation decision, which is not under appeal, applied the test from *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227, but the conclusion with respect to the Lynch Property is consistent with this Court’s more recent articulation of the test for constructive expropriation set out in *Annapolis*.

[28] A taking of property triggers a presumptive entitlement to compensation absent clear statutory language showing an intention not to compensate (*Annapolis*, at para. 21; *Attorney-General v. De Keyser’s Royal Hotel*, [1920] A.C. 508 (H.L.), at p. 542).

[29] The basic measure of compensation is the same for both formal and constructive expropriation: compensation is based on the property's market value. Market value is codified as the starting point in several federal and provincial expropriation statutes, including the applicable Newfoundland and Labrador statute (*Expropriation Act*, s. 27(1)(a); other examples include *Expropriation Act*, R.S.C. 1985, c. E-21, s. 26(2); *Expropriations Act*, R.S.O. 1990, c. E.26, ss. 13 and 14).

[30] Compensation based on market value naturally flows from the objective of economic reinstatement. Displaced property owners should be put back in the same economic position that they were in prior to the expropriation: no better and no worse (see E. C. E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992), at pp. 109-10; *Irving Oil Co. v. The King*, [1946] S.C.R. 551, at p. 556; *Halliday's Estate v. Newfoundland Light & Power Co.* (1980), 29 Nfld. & P.E.I.R. 212 (Nfld. C.A.), at paras. 21-22). Furthering economic reinstatement accounts for the rights and legitimate expectations of property owners while ensuring that governments can act in the public interest without paying a premium for doing so. As Lord Nicholls of Birkenhead explained in *Waters v. Welsh Development Agency*, [2004] UKHL 19, [2004] 2 All E.R. 915, at para. 1, powers of expropriation are essential to a modern democratic society, but the "obligation to pay full and fair compensation" goes "[h]and in hand".

[31] In *Diggon-Hibben Ltd. v. The King*, [1949] S.C.R. 712, at p. 715, Rand J. identified the key question for assessing compensation as being what the property owner at the moment of expropriation would "pay for the property rather than be ejected from it". The relevant market value is the "value to the owner" and not the property's value in the eyes of the taker (the public authority) (*Cedars Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569 (P.C.), at p. 576; *Irving Oil*, at p. 555; Todd, at pp. 109-12).

[32] In the land expropriation context, market value may reflect a higher and better use of the land than its current state — in other words, recognizing the land's development potential (see, e.g., *Lasade Enterprises Ltd. v. Newfoundland* (1993), 114 Nfld. & P.E.I.R. 19 (Nfld. C.A.), at para. 26; *Miller v. Province of Newfoundland* (1977), 14 Nfld. & P.E.I.R. 110 (Nfld. C.A.), at paras. 22-27; Todd, at pp. 134-

35). But the jurisprudence leaves no doubt that zoning regulations and other land use restrictions properly bear on a property's market value (and thus compensation for expropriation). In *Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633, at para. 47, Gonthier J. explained:

Legal restrictions on land use . . . may affect the market value of freehold property. In *Revenue Properties [Co. v. Victoria University]* (1993), 101 D.L.R. (4th) 172 (Ont. Div. Ct.), at p. 182, the court held that “[a]ll applicable statutes and laws relating to use such as zoning by-laws must be considered” when assessing land value. . . . To determine land value, whether as vacant or as improved, the appraiser . . . considers the highest and best use that is “legally permissible, physically possible, financially feasible, and maximally productive”.

Compensation is not to be based on speculative or unrealistic expectations about higher-value uses to which a property could be put (*Lasade*, at para. 27).

[33] That zoning enactments affect the amount of compensation due to an owner is particularly appropriate in the context of constructive expropriation, where it has been repeatedly affirmed that restrictions on land use, on their own, do not constitute a taking. “Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down” (*The Queen in Right of the Province of British Columbia v. Tener*, [1985] 1 S.C.R. 533, at p. 557). More is required for regulation to constitute expropriation than “drastically limiting use or reducing the value of the owner’s property” (*Annapolis*, at para. 43, quoting *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98, 177 D.L.R. (4th) 696, at p. 716; see also *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8, s. 5). Constructive expropriation only occurs when a beneficial interest accrues to the state and the regulatory measure removes all reasonable uses of the property (*Annapolis*, at para. 4).

[34] Beyond the starting point of a property’s market value, the compensation for expropriation can be further affected by other statutory and common law factors. For example, this Court’s decision in *Toronto Area Transit Operating Authority v. Doll Holdings Ltd*

statutory and common law factors. For example, this Court's decision in *Toronto Area Transit Operating Authority v. Den Holdings Ltd.*, [1997] 1 S.C.R. 32, considered the extent to which a property owner was entitled to recover disturbance damages as part of their compensation under s. 13(2)(b) of Ontario's *Expropriations Act*. Newfoundland and Labrador's statute prescribes a series of rules applicable to the determination of compensation (s. 27). It is not necessary to examine all of these factors in these reasons. Only one is in issue on this appeal: the direction in s. 27(1)(a) that no account shall be taken of changes in value resulting from the expropriation scheme itself (the "compulsory acquisition of the land"). This is sometimes referred to as the *Pointe Gourde* principle.

B. *The Pointe Gourde Principle*

[35] The key principle from *Pointe Gourde* was articulated by Lord MacDermott: ". . . compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition" (p. 572).

[36] The factual circumstances of *Pointe Gourde* demonstrate how this principle directly stems from considering the property's value to the owner, not the taker. The case involved the expropriation of land used as a quarry for the purpose of constructing a naval base in Trinidad. There was no dispute that compensation was to reflect the "value of the quarry as a going concern" (Todd, at p. 159). However, the quarry's "value was increased by the fact that a base was being established in the vicinity for which a large quantity of stone in a readily accessible situation was required" (*Pointe Gourde*, at p. 572). The quarry owners sought a higher valuation based on claims they would have been even more profitable because their stone would be used to build the base. The Judicial Committee of the Privy Council held that the increase in value was not compensable as it was entirely due to the scheme underlying the expropriation. The special need for the stone only arose because a naval base was to be constructed, prompting the need for the expropriation in the first place. While the public authority benefitted from the large quantity of stone that was readily accessible (i.e., it was valuable to the taker), it presented no additional value to the owners in the absence of the naval base project and expropriation.

[37] The principle that changes in value resulting from the expropriation scheme are to be ignored in assessing compensation was not created in *Pointe Gourde*, however. Several early 20th century decisions recognized the principle (see, e.g., *Cunard v. The King* (1910), 43 S.C.R. 88, at pp. 99-100, per Duff J., dissenting; *Re Gibson and City of Toronto* (1913), 11 D.L.R. 529 (Ont. S.C. (App. Div.)), at pp. 536-37). Those authorities recognize that compensation is to be assessed without reference to *decreases* in value caused by the expropriation scheme as well (*Cunard*, at p. 100; *Gibson*, at p. 537). In effect, the principle “seeks to remove extrinsic influences associated with the taking” (I.F., Canadian Home Builders’ Association, at para. 4). Ignoring both increases and decreases in market value caused by the expropriation scheme results in neither an economic burden nor a windfall for the owner. As the intervener the Attorney General of British Columbia points out, applying the *Pointe Gourde* principle facilitates economic reinstatement, allowing the owner to purchase an equivalent replacement property (I.F., at para. 23).

[38] Expropriation statutes have incorporated the *Pointe Gourde* principle, though the terminology employed varies between them. For example, s. 27(1)(a) of Newfoundland and Labrador’s *Expropriation Act* provides that “no account shall be taken of the compulsory acquisition of the land” in fixing compensation. In Ontario, “any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation” is excluded from consideration (*Expropriations Act*, s. 14(4)(b)). Section 33 of British Columbia’s expropriation statute lists several elements of the expropriation “scheme” that are to be ignored in assessing compensation, including “the anticipated or actual purpose for which the expropriating authority intends to use the land”, increases or decreases in value resulting from the expropriation and related development (or the prospect of either), and the enactment of zoning regulations “made with a view to the development in respect of which the expropriation is made” (*Expropriation Act*, R.S.B.C. 1996, c. 125). Although they share some principles, the specific terms of the relevant jurisdiction’s statutory provisions must ground any compensation analysis.

### C. *The Scope of the Scheme to be Ignored*

[39] Applying the *Pointe Gourde* principle requires that changes in value resulting from the expropriation scheme be ignored in assessing compensation. The key question is, therefore: What is the scope of the expropriation scheme?

[40] There are different dimensions to that question. Temporally, the inquiry exposes a tension in expropriation law. On the one hand, property is expropriated by the state at a defined moment in time. In the constructive expropriation context, this happens when a beneficial interest accrues to the state and all reasonable uses of the property are removed (*Annapolis*, at para. 4). On the other hand, this Court has recognized that expropriation is a process:

The courts have long determined that the actual act of expropriation of any property is part of a continuing process. In [*City of Montreal v. McAnulty Realty Co.*, [1923] S.C.R. 273], at p. 283, Duff J. noted that the term “expropriation” is not used in the restrictive sense of signifying merely the transfer of title but in the sense of the process of taking the property for the purpose for which it is required. [Emphasis in original.]

(*Dell Holdings*, at para. 37)

#### (1) Compensation Jurisprudence

[41] Both the City and the respondents cite several authorities on this appeal demonstrating that regulatory enactments made with a view to the expropriation are considered to be part of the expropriation scheme and are thus ignored in calculating compensation. Conversely, changes in value caused by enactments determined to be “independent” of the expropriation are taken into account. The parties frame their arguments around this dichotomy (see, e.g., A.F., at paras. 37, 48, 89-90, 95-96, 101, 105, 107-8 and 120; R.F., at paras. 45 and 87). It is instructive to review some of these authorities.

[42] In *Gibson*, the City of Toronto adopted a by-law preventing the construction of any building on a 17-foot strip of property fronting onto St. Clair Avenue. The property was later expropriated for the purpose of widening the road. Writing for the majority, Hodgins J.A. reasoned that an “authority ought not to be able, by the exercise of its other powers immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and of which it is contemplating expropriation” (p. 536). It was open to the property owner to prove that the by-law freezing development “was not really an independent legislative act . . . but had an intimate connection with, and was really part of, the scheme for widening St. Clair avenue” (p. 538). *Gibson* illustrates that the enactment of a by-law freezing or limiting development in contemplation of future expropriation cannot be used as a mechanism to reduce the compensation the state authority will have to pay the property owner.

[43] *Kramer* concerned lands in Regina that had been initially zoned for residential development. City Council then enacted a by-law that repealed the previous zoning and limited the subject lands to “public service use”. Eight months previously, the Wascana Centre Authority — a provincial entity — was created and given the power to expropriate lands by *The Wascana Centre Act, 1962*, S.S. 1962, c. 46. The Wascana Centre Authority expropriated the appellants’ property for a public interest development project. This Court divided on whether the city’s zoning by-law limiting development to “public service use” should be ignored in assessing the appellants’ compensation. For the majority, Abbott J. endorsed the arbitrator’s conclusion that the zoning by-law was an “independent zoning enactment” even though it was “passed . . . with knowledge of the Wascana Centre Scheme” (p. 239). He noted that the zoning by-law crystallized “an overall city plan” that had been designed over a year prior to its enactment. Compensation was therefore to be assessed in light of the property’s limited “public service use”. Spence J., writing separately, was troubled by the timing of the zoning by-law’s enactment. In his view, the by-law “was simply a step . . . in the setting up of the Wascana Centre” and the “purpose as to the lands in question [was] very plainly to prevent [the residential] development . . . envisaged by the appellants” (pp. 246-47). In sum, both opinions centered, but disagreed, on whether the public service use zoning by-law was an independent enactment or was made with a view to the expropriation.

[44] Two Newfoundland decisions contrasted by the application judge and the Court of Appeal below offer a helpful comparison. In *Halliday*, a development freeze was placed on land situated within the area designated for the future C. A. Pippy Park on the outskirts of St. John's. The court held that, "while there was no immediate intent to expropriate the lands in question" when the development freeze was implemented, "there was a declared intent to control development thereon to the end that the lands would be available for the use and purpose of the [C. A. Pippy Park] Commission, as the park was gradually developed" (para. 15). I agree with the City's argument that *Halliday* supports the proposition that "an authority cannot downzone or 'freeze' a property's development in anticipation of the need to acquire the property, thereby depreciating the value of the property in order to reduce the compensation payable" (A.F., at para. 106). The regulatory enactment in that case was made with a view to expropriation. On the other hand, the court in *Atlantic Shopping Centres Ltd. v. St. John's (City)* (1985), 56 Nfld. & P.E.I.R. 44 (Nfld. C.A.), determined that there was no evidence to suggest that a restrictive enactment "was done in anticipation of" the particular road expansion project for which the land was expropriated (para. 20). Of significance was the fact that the restriction in issue was the same as that which applied to all other lands in the city. Distinguishing *Halliday*, the court concluded that the impugned regulation was an independent enactment and was not to be ignored in assessing compensation.

[45] Lastly, in *Windsor (City) v. Paciorka Leaseholds Ltd.*, 2012 ONCA 431, 111 O.R. (3d) 431, at para. 27, the Court of Appeal for Ontario endorsed the view of Sachs J., dissenting, in the court below (2011 ONSC 2876, 106 O.R. (3d) 690 (Div. Ct.)). At para. 130, she had relied on *Jewish Community Centre of Edmonton Trust v. The Queen* (1983), 27 L.C.R. 333 (Alta. L.C.B.), at p. 360, which said that an enactment is ignored in assessing compensation if it is made "for the purpose and 'with a view to the development under which the land is expropriated'". In *Paciorka*, the City of Windsor expropriated land for the purpose of creating a nature park. A Provincial Policy Statement enacted under Ontario's *Planning Act*, R.S.O. 1990, c. P.13, applied to environmentally sensitive lands across the province, including the subject lands, and imposed development restrictions. The Court of Appeal adopted the dissenting judge's conclusion that the Provincial Policy Statement could not be ignored as it "applies across the province and was not directed at the Expropriated Lands", and was "passed independently of, and without any connection to, the specific development for which the land was expropriated" (para. 27 (emphasis

deleted)).

(2) Determining the Scope of the Expropriation Scheme

[46] The weight of the jurisprudence on this subject affirms that, in determining whether a regulation's effect on a property value should be ignored for compensation purposes (the application of the *Pointe Gourde* principle), the key question is whether the enactment was made with a view to the expropriation or, conversely, was an independent enactment. This jurisprudential trend is reinforced by several expropriation statutes that expressly state that, in determining market value, no account may be taken of enactments "made with a view" to the development underlying the expropriation (see *Expropriation Act* (B.C.), s. 33(g); *Expropriation Act*, R.S.A. 2000, c. E-13, s. 45(e)), or have been interpreted in that manner (see *Expropriations Act* (Ont.), s. 14(4)(b); *Paciorka*, at paras. 22 and 27).

[47] As the application judge recognized, this is normally a factual determination to be made by the board or other authority tasked with determining compensation (para. 8; see also *Vision Homes Ltd. v. Nanaimo (City)* (1996), 59 L.C.R. 106 (B.C.C.A.), at para. 20; *Clements v. Penticton (City)*, 2005 BCCA 212, 86 L.C.R. 81, at para. 12). Courts reviewing these determinations must accord deference to first instance decision-makers. On an appeal, compensation determinations are generally reviewable only for palpable and overriding error, absent an extricable error of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36).

(a) *The Inquiry Involves Examining the Purposes and Effects of the Enactment*

[48] Determining whether an enactment was made with a view to expropriation involves examining its purposes and effects (see, e.g., *Waters*, at para. 58; *Gibson*, at p. 536; *Kramer*, at pp. 239 and 246-47; *Halliday*, at para. 15; *Atlantic Shopping Centres*, at paras. 18-20; *Paciorka*, at para. 27). The focus on purpose is appropriate given governments' need to regulate in the public interest. As the intervener the

City of Surrey explains:

. . . government liability for regulations that reduce property value would be unworkable unless an element of intentionality was required . . . . As every land use regulation may impact property values, a focus on effects would render each land use regulation a source of potential liability, impairing the ability of governments to regulate in the public interest.

(I.F., at para. 8)

The purposes of an enactment can be discerned by considering, *inter alia*, the debates, deliberations, and statements of policy that gave rise to it (see *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 29; see also *Waters*, at para. 63; *Vision Homes*, at para. 19). As explained in *Catalyst Paper Corp.*, at paras. 29-33, the rationale for a municipal by-law can be found in the municipality’s long-term plans and correspondence involving officials. The preamble and terms of the enactment itself can also be of assistance (see *Paciorka*, at para. 27).

[49] In the constructive expropriation context, it is not until all reasonable uses of the property have been removed that a *de facto* taking occurs (*Annapolis*, at para. 19). In assessing compensation once constructive expropriation is found to have occurred, distinguishing enactments on the basis of both their purposes and effects ensures the property owner receives “fair compensation but not more than fair compensation” (*Waters*, at para. 61). Ignoring enactments’ purposes and singularly considering effects would present two equally undesirable possibilities. If the *Pointe Gourde* principle only excluded the regulation that had the effect of removing all reasonable uses of the property (mirroring the requirement from *Annapolis* for a taking to occur), governments would be permitted to downzone properties or freeze development in anticipation of expropriation to reduce the compensation payable. This idea has been rejected (see, e.g., *Tener*, at p. 557; *Gibson*, at p. 536). If, instead, all prior enactments affecting the property’s value — regardless of whether they removed all reasonable uses of the property or were made with a view to expropriation — were excluded from the compensation assessment, compensation would amount to a windfall. This approach would be inconsistent with settled law: “ . . . regulation alone will not satisfy the test for a constructive taking . . . ”

a windfall. This approach would be inconsistent with settled law: . . . regulation alone will not satisfy the test for a constructive taking . . . and “compensation does not follow zoning either up or down” (*Annapolis*, at para. 43; *Tener*, at p. 557). Neither of these possibilities would achieve proper economic reinstatement, and both would distort the property’s true market value.

(b) *Causation Does Not Drive the Inquiry*

[50] The Court of Appeal characterized the *Pointe Gourde* principle as follows: “Any change in the value of the property caused by the scheme for which the expropriating authority’s compulsory taking powers were exercised is to be ignored in the computation of the property’s value for expropriation assessment purposes . . .” (para. 109 (emphasis added)). In this case, there is no dispute that the Watershed zoning in the *Development Regulations* diminishes the market value of the Lynch Property, as is clear from the parties’ competing appraisals. But is it part of the scheme? In reversing the application judge’s decision, the Court of Appeal also relied on causation in determining that the Watershed zoning was part of the expropriation scheme and therefore to be ignored for valuation purposes. In my view, causation is of limited assistance in determining the *scope* of the expropriation scheme.

[51] After reviewing the jurisprudence on the *Pointe Gourde* principle, the Court of Appeal noted that the critical issue in determining whether a particular enactment should be excluded in assessing market value is “whether there is a causal connection between the imposition of the planned use restriction and the expropriation which subsequently occurs” (para. 109, citing *Paciorka*, at para. 27). Later in its reasons, the Court of Appeal concluded that there was a causal connection between the adoption of the Watershed zoning regulations and the expropriation of the Lynch Property (para. 113). It also noted that the application judge had failed to take account of these interconnections (para. 115). Similarly, the respondents argue that a “broad and expansive approach to causation” should be taken, emphasizing that “[w]ithout all the prior links [including the Watershed zoning] the City’s 2013 decision would have been without lawful foundation” (R.F., at paras. 90 and 96). The respondents encourage an examination of “the whole of the chain, each link of which plays a key and unavoidable part in leading to the constructive expropriation” (para. 92).

and unavoidable part in leading to the constructive expropriation (para. 82).

[52] I do not agree that this broad conception of causation should drive the inquiry. It is inconsistent with the jurisprudence highlighted above, which affirms that zoning regulations properly bear on the compensation for expropriation. Adopting this approach would risk including as part of the expropriation scheme “decisions that neither contemplated nor required a taking” (I.F., Attorney General of British Columbia, at para. 43). Moreover, such an approach would emphasize form over substance. It will sometimes be the case that measures closely related to the expropriation that lower the property’s value are not links in the chain that enabled the taking to occur. For example, in *Gibson*, the City of Toronto had enacted a by-law implementing a freeze on any construction of buildings in anticipation of the future expropriation of the property, which occurred later under a different statutory authority. Hodgins J.A. reasoned that the by-law imposing the freeze could have been part of the expropriation scheme (and therefore its effects excluded from the compensation assessment) — notwithstanding that the decision to expropriate was not taken pursuant to that by-law (pp. 536 and 538). Put simply, the analysis does not turn on whether the regulatory enactment was a link in the chain of events leading to the expropriation (i.e., that “but for” the enactment there would have been no expropriation).

[53] The City’s causation proposal is, conversely, too narrow. The City submits that a simple question should have been asked by the courts below: “What was the act or decision by the City which caused the taking and hence the loss to the [respondents]?” (A.F., at para. 61). It notes that there would have been no taking and no loss had the City permitted development for agriculture, forestry, and public utility purposes, and that it was the City’s decision to refuse permission for any development on the Lynch Property that resulted in the constructive expropriation (paras. 61-62). I agree with the City’s submission that it is not enough for a regulatory enactment to be a “related connection” to the constructive expropriation to be ignored in assessing compensation (A.F., at para. 64 (emphasis deleted)). However, while, under the *Annapolis* criteria, a taking crystallizes at a particular moment in time, expropriation is nonetheless a process (*Dell Holdings*, at para. 37). Merely excluding the act or decision of the state actor that constituted the taking, and nothing further, would permit a state actor to progressively downzone or freeze a property in anticipation of acquiring it in an attempt to reduce the compensation payable. I note that the

progressively downzone or freeze a property in anticipation of acquiring it in an attempt to reduce the compensation payable. I note that the City itself accepts that the prohibition on such a manoeuvre is a “corollary” to the *Pointe Gourde* principle (A.F., at para. 71).

[54] While there must be a connection between the regulation and the expropriation for its effects to be excluded, a focus on causation masks the true inquiry. As I have explained, giving effect to the *Pointe Gourde* principle requires consideration of whether an enactment was made with a view to the expropriation. If it was connected in this manner, it should be considered part of the expropriation scheme and its effects excluded from the compensation assessment.

(c) *Guidance for Conducting the Assessment*

[55] It is not necessary for these reasons to set out an exhaustive list of factors that will bear on whether an enactment was made with a view to expropriation, but the jurisprudence I summarize above offers some guidance for those tasked with making this factual determination. If a land use restriction is enacted as part of a city-wide or province-wide policy, or does not target specific properties, that may indicate that the restriction is an independent enactment and is not to be excluded under the *Pointe Gourde* principle (see *Kramer*, at p. 239; *Atlantic Shopping Centres*, at para. 20; *Paciorka*, at para. 27). It may also be relevant that the impugned regulation was enacted by a different public authority than that which expropriated the property (see *Paciorka*, at paras. 16 and 26). Further, a government’s knowledge of another level of government’s development plans is not conclusive of an enactment having been made with a view to expropriation (see *Kramer*, at p. 239).

[56] Bad faith is not a prerequisite to a finding that an enactment was made with a view to expropriation. No “‘scheme’ in any nefarious connotation need be proved” (*Kramer*, at pp. 246-47, per Spence J.). Plainly, by-laws that control development in anticipation of

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