

CASELAW UPDATE
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I. CONFLICT OF INTEREST AND THE COMMUNITY OF INTEREST EXCEPTION AT THE COURT OF APPEAL – *REDMOND V. WIEBE*, 2022 BCCA 244

The Court of Appeal’s decision in *Redmond v. Wiebe* was the first occasion for that court to consider the scope of the comparator group “electors of the City generally” in the *Vancouver Charter* community of interest exception – s. 145.6 (1)(a) – or the analogous provision in the *Community Charter* – s. 104 (1)(a). The Court has confirmed that the exception for a pecuniary interest that is held in common with the *electors generally* does not mean *all electors*. The Court has also provided guidance on how courts should go about interpreting the scope of the appropriate comparator group.

The respondent council member Wiebe had a financial interest in a Vancouver restaurant and bar. He failed to disclose his interest and participated in the discussion and vote on a motion to approve a temporary expedited patio permit program (the TEPP Program)” designed to assist restaurants and bars impacted by COVID-19 restrictions. He also proposed an amendment to the original motion that City staff “work directly with business operators”, designed to expedite the implementation of the TEPP program. His restaurant was among the first 14 eateries, bars and breweries granted temporary patio permits in June 2020, at which time there had been 46 applications. His pub received a temporary patio on June 30, 2020. The court summarized the numbers relevant to the discussion of the “interest-in-common” exception as being:

- There were 453,190 registered electors eligible to vote in the 2018 Vancouver municipal election;
- There were 69,230 business licences issued by the City in 2020;
- There were 3,127 restaurant and liquor-primary licences issued in 2019 by the City;
- By September 2, 2020, the City had received 452 TEPP applications;
- By January 2021, the City had issued 334 TEPP permits to businesses.

In dismissing the petition, the Supreme Court judge rejected the petitioners’ argument that the proper comparator group for analyzing the interest-in-common exception was comprised by the 453,190 registered electors in the city, and held that the comparator group to be the holders of restaurant and bar licences issued in 2019. The lower court judge went on to conclude that Councillor Wiebe’s pecuniary interest in the matter was one he held in common with the 3,127 restaurant and liquor licensees and, accordingly, he could rely on the interest-in-common exception in s. 145.6 (1)(a).

The Court of Appeal decision addresses the onus of proof issue which applies to the two-stage analysis required when a court must determine the application of one of the statutory exceptions or the exemptions for good faith errors in judgment. The first stage requires the petitioner to prove that the respondent member had a pecuniary conflict of interest. In this case there was no appeal from the chambers judge's finding that at the first stage Councillor Wiebe had improperly participated in a matter in which he had a direct pecuniary interest. The appeal court confirmed the position from a previous line of authority that at the second stage the onus shifts to the elected official to prove that an exception applies. Councillor Wiebe therefore bore the burden of bringing his actions within the scope of the s. 145.6 (1)(a) exception.

To return to the comparator group question, the appeal court found that the lower court had erred by conflating the fact that the TEPP Program could conceivably apply to all restaurant and bar licensees with the conclusion that they shared a common pecuniary interest in the establishment and promotion of the program. The Court reasoned that a principled application of the test required homogeneity in the group; "that its members share a pecuniary interest similar in kind although not necessarily in degree." The Supreme Court's judge error in principle in defining the comparator group was an error in law, a subject which made appellate court intervention appropriate on the correctness standard.

The appeal court narrowed the scope of the comparator licensee interest-in-common class by reasoning as follows (at para. 75-76):

Sharing a pecuniary interest in kind in respect of a policy like the TEPP requires more than being a member of a group that might benefit from it, ignoring the application requirements. The "sharing a pecuniary interest in kind" analysis in this context must take into account how the policy will work "on the ground" – in reality. Just as a councillor whose pecuniary interest in a matter is too insignificant or too remote is excepted from the conflict-of-interest restrictions, when an elector's purportedly share interest is too insignificant or remote, it ceases being similar in kind. ... And "on the ground" here, the group realistically sharing common ground is much smaller than "all the restaurant and bar licensees in the City of Vancouver."

On a proper analysis, the comparator group of all licensees who can be said to enjoy a common pecuniary interest similar in kind, is that segment of the 3,127 restaurant and bar licensees who were ready and considered themselves able to take advantage of the TEPP Program during its initial limited availability (June to November 2020). The only evidence of the size of that group is the number of such licensees who applied to take advantage of the program. We do not have a precise number covering the entire period but we do have evidence that only 452 applications were received by the City by September 2020. The only inference that can be drawn on the evidence is that over the entire period a

relatively small number of licensees fell within that comparator group. And we do know that of these only 334 applicants received permits.

The Court concluded by noting the onus was on Councillor Wiebe to bring himself within the interest-in-common exception and that he had failed to show that he had an interest shared with a “meaningfully larger group” than the actual number of TEPP Program permits actually issued or applied for. In considering the question of how small the class of those sharing the pecuniary interest might become before the benefit of the exception is lost, the appeal court found that the chambers judge’s reasoning was in error in suggesting that an interest that was not personal to the councillor might be sufficient:

It suggests that one must bring the councillor within a class of one. It is not that it is incorrect to say that the exception is lost if the councillor has a pecuniary interest “separate from the other owners of restaurants and bars distinct to his particular case” But it is wrong to say that the exception is available to everyone except the person who has an individualized, separate and distinct benefit. The exception is not so readily available: the “ineligible group” is not restricted to the single councillor enjoying a singular advantage.

For Councillor Wiebe’s case, the appeal court was satisfied to conclude that he had failed to meet the burden of providing that he shared a pecuniary interest with a significant segment of the public. As to how large that segment of the public must be, the Court observed “that it is not a simple exercise of numbers”. But the class of persons with whom Councillor Wiebe could be said to share a pecuniary interest was too small a segment of the community to bring himself within the community interest-in-common exception.

Further comment beyond observations on the prospective size of the comparator group was provided. The Court noted that even had the class of persons been large enough to support an initial application of the interest-in-common exception, Coun Wiebe had distinguished himself from that class by putting his pecuniary interest in common “with an even smaller group.” Councillor Wiebe was found to be in a class that “would immediately enjoy the benefits of the TEPP Program. Furthermore, Councillor Wiebe knew this to be the case, as witnessed by his celebratory text to his colleagues on the adoption of the program, complete with a “cheers” emoji, which Councillor Wiebe admitted in his affidavit was “not ideal”. From this the Court concluded that it was clear that the councillor was actively pursuing his private interest in the TEPP Program.

As for the ultimate disposition of the case, the appeal court remitted consideration of the remoteness exception and the good-faith excuse to the Supreme Court for determination as the lower court had declined to rule on those issues given the decision to dismiss the petition on the interest-in-common exception.

While the Court of Appeal's decision does not provide a "bright line" demarcation in terms of a numerical threshold for deciding if the interest-in-common exception applies, the Court's reasons provide a principled basis for defining the comparator group in a given case.

II. CONFLICT OF INTEREST – EVIDENCE IS STILL REQUIRED – *GISBORNE V. BRANDER*, 2022 BCSC 1555

The decision of Justice Winteringham in *Gisborne v. Brander* serves as a reminder of the simple, but fundamental proposition that applicants actually need evidence to support their claims that an elected official has breached statutory conflict of interest provisions. The lead applicant was a regional district area director who asserted two distinct allegations of impropriety against another elector area director. The respondent director had signed a petition, in conjunction with several of his neighbours, requesting the regional district introduce a zoning bylaw for a neighbourhood comprised of 17 properties. Once the regional district took up the petition, the director made a declaration that he had a pecuniary conflict and absented himself from the portions of board meetings where the zoning bylaw was considered or voted on.

The director did, however, attend 3 public engagement sessions held by the planning department to receive input about the design of the bylaw. The evidence was the director attended as an observer only and did not advocate in favour or against the bylaw. The lead petitioner's evidence was that the respondent had "participated" in the discussion of the proposed bylaw at the engagement sessions, but offered no evidence as to what words the respondent had actually spoken. The petitioners argued that the mere presence of the respondent at the engagement sessions amounted to an endorsement of the bylaw and an attempt to shore up support for the bylaw or, alternatively, had the effect of discouraging residents who attended from voicing opposition. Either way, this was alleged to be a contravention of s. 101 (1)(d) of the *Community Charter* which provides that a member must not "attempt in any way, before, during or after such a meeting, to influence the voting on any question of the matter" [in which the member has a pecuniary interest].

The second ground for disqualification related to the respondent director having moved a resolution that the regional board consider censuring and sanctioning the petitioner Gisborne for his pointed comments questioning the motives of proponents of the same zoning bylaw, which had led to complaints about Director Gisborne's behaviour being in breach of the code of conduct. The allegation was that the respondent Director Brander's support of the censure and sanction process resolution was intended to be a form of "payback" for Director Gisborne's opposition to the zoning bylaw that would apply to the respondent's property. The respondent director's affidavit evidence was that he considered the censure and sanction process to be a separate "matter", relating to Director Brander's conduct towards constituents, and thus distinct from the subject matter of the bylaw itself. As the judge noted at the outset, there was no evidence beyond Director Gisborne's "belief" that the respondent Director Brander was motivated to participate in the censure and sanction process as "payback" intended to punish Director Gisborne for his opposition to the zoning bylaw.

On the first ground, Justice Winteringham concluded that the *Community Charter* did not prohibit Director Brander from attending the public engagement sessions as an observer. There was no evidence that the director did anything other than simply attend the sessions or that he attempted to influence others who attended. The Court was not prepared to draw an inference that the director's attendance would influence others; this would require the court to engage in mere speculation. Neither would the reasonably well-informed elector consider that the director's simple attendance alone was a kind of conduct constituting an attempt to influence.

With respect to the second allegation, the Court was satisfied that the *matter* of the censure and sanction process was a distinct matter from the zoning bylaw in respect of which Director Brander had declared a conflict. There was simply no evidence of a connection between the censure and sanction process and Director Brander's interest in the zoning bylaw. The judge observed that Director Brander was not one of the individuals who had complained to the regional district chair about Director Gisborne's conduct.

Alternatively, the Court found that if the finding that Director Brander had not contravened the attempted influence prohibition in s. 101 was in error, the respondent was entitled to the benefit of the error in judgment made in good faith exemption. Having declared a pecuniary conflict and taken the steps required to leave any meeting and not participate in the discussion or vote on the matter, the Court was satisfied that Director Brander had demonstrated his good faith and that any error, through the "participation" in the engagement sessions, was inadvertent.

III. CONSTITUTIONALLY AMBIGUOUS SIGN BYLAW – INNOVATIVE REMEDY OF ORDER TO AMEND BYLAW – *KAPS V. SURREY*, 2022 BCSC 1191

In 2019 Surrey amended its Sign Bylaw, with a new definition of "political sign" to include a sign that expressed support or disapproval of a particular candidate or political organization or support or opposition of a political municipal, provincial or federal "issue". Neither "political organization" or "issue" were defined terms in the bylaw. The 2021 bylaw amendments deleted the provision requiring removal of political signs within 14 days after an election, replacing it with a prohibition – section 7.1(4) - on placement of political signs on public or private property except for signs relating to federal, provincial, local government or school district elections within the period of the election writ being issued and 14 days after the election. A similar prohibition applied to referenda, plebiscites, local government assent voting or provincial recall or initiative petitions.

The petitioners, who were activists opposed to the decision to replace the RCMP with a Surrey police force, challenged the bylaw as an infringement on their s. 2(b) freedom of expression rights under the *Canadian Charter of Rights and Freedoms*. They contended that the bylaw effectively banned political signs except during the voting events and times specified in the bylaw. Surrey conceded that the bylaw amendments were perhaps “not perfectly drafted”. The City’s position was that the amendments did not prohibit or ban the erection of political signs, instead merely clarifying the dates and types of signs that fell within the permitted political sign exemption from the bylaw’s general requirement to obtain a sign permit. In response to one of the petitioner’s affidavits asserting that he had to remove two “Keep the RCMP in Surrey” signs that had been affixed to his front gate, Surrey claimed that the remaining sign was permitted but that any additional signs would require a permit outside the voting event times specified in the bylaw.

Justice Kent was persuaded that while the intended effect of the 2021 amendments may have been as described by the City, the language of the amendments had created an ambiguity which supported the petitioner’s position that any political signs on private property were effectively banned except during the voting events and time frames specified by section 7.1(4). Further, while the wording of the bylaw captures voting-event signage, they extended to other signage related to political issues generally, examples being “Keep the RCMP in Surrey”, “Save the Whales”, “Stop Logging Old-growth Forests” and “Get Vaccinated”. Those signs would not be permitted except during the permitted period of the specified voting events. The judge expressed his decision as follows (at para. 66):

I conclude that the 2021 Amendments give rise to an ambiguity in the bylaw that arguably prohibits the posting of political signage on private property except during limited specified periods of time, and that such a restriction would infringe on s. 2(b) of the *Charter* which guarantees the petitioners’ constitutional protection for freedom of among other things, their political expression.

The Court went on to find there was “very little evidence”, let alone any “cogent and persuasive” evidence, that might satisfy the burden to justify any infringement under s. 1 of the *Charter* as a reasonable limit that can be demonstrably justified in a free and democratic society. Justice Kent considered the potential application of doctrines of constitutional interpretation of “reading down” or “reading in”. However, he characterized the case as “unusual” as Surrey said the time limits imposed under s. 7.1(4) of the bylaw were not intended to prevent the petitioners from posting their “Keep the RCMP” signs on their private property while the petitioners refused to accept the City’s assurances respecting the intent of the bylaw. The judge noted neither party was prepared to compromise, “so the Court intends to solve the problem for them.”

The Court's decision on remedy is interesting for its novel approach. The courts have employed the practice of suspending a declaration of invalidity to give the government time to craft new legislation to replace an unconstitutional statute. One such example was in the Supreme Court of Canada case of *Carter v. Canada* where the Court suspended for a 12-month period the declaration of invalidity of the Criminal Code prohibition on physician assisted suicide. Where a declaration of invalidity is suspended the court does not directly order the government to enact new legislation. Rather the looming deadline of the declaration of invalidity acts as the spur to bring in new, constitutionally sound legislation.

As Justice Kent noted in *Kaps*, it is not the Court's role to draft legislation; that is the role of duly elected government. However, rather than grant the declaration of invalidity sought by the petitioners and setting a limited time frame in which the declaration of invalidity of s. 7.1(4) of the bylaw would be suspended, Justice Kent ordered the City and City Council to "forthwith take all steps necessary to amend s. 7.1 of the *Surrey Sign Bylaw* to incorporate clarifications which expressly put into effect the Court's declared interpretation". That interpretation, set out in the preceding paragraphs of his judgment, was that only political signs relating to the electoral events could be limited to the time frame in s. 7.1(4) governing those voting events. All other political signs would be regulated under the provisions requiring a permit except for those signs that did not exceed 32 square feet in size.

It will be interesting to see whether other judges will follow Justice Kent's path and order local governments to amend unconstitutional bylaws in specific terms that would conform with a local government's intention that would have been constitutionally sound.

IV. RECONSIDERATION OF BUSINESS LICENCE DENIAL – RIGHT TO REASONS – *BC/YUKON ASSOCIATION OF DRUG WAR SURVIVORS V. SURREY (CITY)*, 2022 BCSC 855

The extent to which a municipal council is required to provide reasons on a reconsideration of a business licence refusal was the issue in this case. The petitioner applied for a licence to conduct a business of "Non Profit Society, Administration" which would include meeting with members approximately once per week. The petitioner's executive project coordinator described its proposed activities as "facilitating the development of networks and coalitions of drug users and non-users", providing an indoor space for members to rest, congregate and have access to various technological equipment. However, a complaint about the premises being used as a safe injection site prompted an inspection by bylaw officers which found evidence of onsite drug use. The City's licensing manager wrote to the petitioner advising that a business licence would not be issued as it appeared the "proposed business operation includes facilitating the consumption of illicit drugs". Although the petitioner had applied for approval from Fraser Health Authority to operate a safe injection site, it had not been issued an approval.

Section 60(1) of the *Community Charter* provides that, on request, the person or body who makes a decision to refuse a business licence must give written reasons for the refusal. That statutory requirement is supplemented by s. 29 of Surrey's Business Licence Bylaw which provides that where a business licence is refused by Council or the Business Licence Inspector, Council or the Inspector must give reasons for the refusal. On the reconsideration, Council upheld the Inspector's decision to refuse to issue the business licence. Council's decision was recorded in a resolution that indicated the decision to uphold the licence denial followed after consideration of the evidence and submissions of the Licensing Services Manager and the Association, the suitability of the site for its intended use and "the public interest in having safely operated sites situated at suitable locations having regard to the interests of both drug users and other members of the public."

The petitioner argued that Council was obligated to provide clear reasons explaining its denial of the business licence application, particularly in light of the impacts of the ongoing public health crisis relating to the supply of tainted drugs. Council's failure to provide "clear" reasons was alleged to be a breach of procedural fairness. Justice Skolrood acknowledged that Surrey was required by both s. 60 of the *Community Charter* and s. 29 of the Business Licence Bylaw to provide reasons for the denial on the reconsideration but found that "reasons" in the context of municipal council decision-making means something different from the reasons required of other administrative tribunals. The distinction is based on the nature of council's decision-making process where decisions that arise out of a voting process do not lend themselves to producing a single set of reasons.

Justice Skolrood found support for the position that a resolution of council outlining the decision, in conjunction with a record consisting of, for example, staff reports and communications with the affected party, is sufficient to relieve a municipal council from having to provide extensive written reasons "even where some of reasons are mandated." When viewed against the detailed evidence and submissions presented to Council, and the minutes of the reconsideration hearing, Council's decision upholding the licence denial was held to provide "a transparent and intelligible justification." The Court also rejected the Association's argument that it had a legitimate expectation that Council would provide more detailed, "adequate" reasons, noting that Council's decisions were typically made and communicated by way of resolutions similar to the one upholding the licence refusal. No breach of procedural fairness was found and the petition was dismissed.

V. NO TRUST CREATED IN LOCAL IMPROVEMENT LANDS – *AURA VENTURES CORP. V. VANCOUVER (CITY)*, 2022 BCSC 508

In *Aura Ventures* the Court decided that properties acquired by the City of Vancouver for a local improvement were not subject to a trust in favour of the benefitting properties that funded the original acquisition. The decision indicates the likely result of any attempt to assert that properties held by local governments elsewhere in BC under the former local improvement or specified area regimes, or under the successor local area service structure are similarly held in trust. However, the statutory frameworks are different so the result in *Aura Ventures* may not translate exactly to the *Community Charter* local area service context.

The plaintiffs in *Aura Ventures* claimed a beneficial interest in a public parking lot comprised of 15 parcels that had been acquired by the City in 1963 following the approval of a local improvement collective parking project initiated by a group of merchants in the Hastings-Sunrise neighbourhood. The proposed class action was commenced after the City announced its intention to redevelop the parking lot lands for a social housing project. The City was successful in its summary trial application to have the action dismissed on the basis that there was no trust established when the lands were acquired for the local improvement project.

The background relating to the City's history of administering the lands and other collective parking lot lands showed that it had repeatedly rebuffed proposals of prospective developers to acquire the parking lot lands on the basis that the City held the lands in trust for the 59 specially benefitting properties against which the local rate had been assessed. On the other hand, the City had been persuaded to consent to an application being made to the Supreme Court for declarations that a collective parking lot in Kerrisdale, undertaken as a local improvement in the 1960s, could be sold by the City and that those specially benefited owners had no legal or beneficial interest in it. The court application proceeded unopposed and the judge granted the requested relief on the same day the application was heard.

Justice Milman held that he was not bound to follow the decision of the judge who had granted the order that the City was free to dispose of the Kerrisdale parking lot lands as it was not a considered precedent that no trust could be created in local improvement lands. However, Justice Milman concluded that the *Aura* claimants could not succeed in their trust claim. The weight of prior case authority was against an enforceable trust arising out of a statutory scheme. In the case of trusts alleged to have been created by statute, the courts have tended to characterize the government obligation as an unenforceable "political trust". Further, the *Vancouver Charter* local improvement provisions at issue did not create a trust by express words. Being based in statutory provisions, the governing analytical framework fell squarely within the realm of public law, not private law, in which the *Aura Ventures* plaintiffs framed their claim. Finally, in order to succeed the plaintiffs would have to show that any trust created was intended to extend to the parking lot lands in perpetuity, or at least long beyond the originally projected lifetime of the project, which in the case of the parking lot was 25 years.

In the result, the Court held that the City did not hold the parking lot lands in trust, nor did the City owe the claimants a fiduciary duty restricting its use of the lands. As mentioned at the outset, we cannot state with certainty that the result would be the same for any trust claim relating to property acquired for a local improvement or specified area project under pre-*Community Charter* legislation or for a local area service. However, the Court's analysis in *Aura Ventures* suggests that it would be very difficult for a claimant to persuade a court that an enforceable trust in favour could be found to exist.

VI. CONSTRUCTIVE EXPROPRIATION – THE DESTRUCTION OF THE CPR TEST – ANNAPOLIS GROUP INC. V. HALIFAX REGIONAL MUNICIPALITY, 2022 SCC 36

On October 21st of this year the Supreme Court of Canada released its reasons in *Annapolis Group v. Halifax*, the first constructive expropriation to reach the court since its decision in *CPR v. Vancouver (City)*, 2006 SCC 5, where the Court dismissed the railway's claim that Vancouver's development freeze over the Arbutus Corridor lands did not effect a constructive taking. It will take some time before we can say whether the *Halifax* decision is a minor hiccup in the jurisprudence in this area or whether it portends more ominous developments in exposing local, and other, governments to successful claims for restrictive regulatory initiatives. Lest this come across as overly alarmist musing, consider the following from the minority judgment in *Halifax*:

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

Beginning in the 1950s, Annapolis acquired 965 acres of land, intending to secure enhanced development rights and reselling it. In 2006, Halifax adopted a planning strategy to guide land development in the municipality, including Annapolis' lands, over a 25-year period. The strategy reserved a portion of the lands for possible future inclusion in a regional park. It also zoned the lands as "Urban Settlement", being an area where urban forms of development may occur and as "Urban Reserve", which identifies land that could be developed beyond the 25-year horizon. These designations contemplate future service development, but for serviced development to occur on Annapolis' lands, Halifax had to adopt a resolution authorizing it. Annapolis made several attempts to develop its lands, beginning in 2007. However, through a resolution in 2016, Halifax refused to initiate the secondary planning process. Annapolis sued, alleging a constructive taking, misfeasance in public office, and unjust enrichment. Regarding the constructive taking claim, Annapolis contended that Halifax's regulatory measures had deprived it of all reasonable or economic uses of its lands, resulting in a constructive taking without compensation.

The SCC's prior decision in *CPR* set out a two part test to establish a constructive expropriation or taking. A court must decide: "(1) whether the public authority has acquired a beneficial interest in the property or flowing from it (i.e., an advantage); and (2) whether the state action has removed all reasonable uses of the property." How the test has been developed and applied can best be understood by reviewing 4 previous decisions, including *CPR*. In the first decision from 1979, the Supreme Court found in *Manitoba Fisheries Ltd. v. The Queen* that federal legislation granting a fish export monopoly to a Crown corporation effectively put a private fish export company out of business, which amounted to a *de facto* taking of the company's goodwill. The goodwill was property which was rendered valueless because its business had been "obliterated" with the establishment of the federal monopoly. The goodwill was found to have been effectively transferred to the Crown corporation without compensation.

The Supreme Court's 1985 decision in *Tener v. BC* involved mining claims within a provincial park. The Province refused to grant park use permits with the result that the claims could not be exploited through extraction. The Crown's actions deprived the owners of their ability to access and extract the minerals, which was a "right" and "property interest" previously granted to the owner by the Crown. By denying access to the claims, the Crown had effectively recovered part of the owner's property rights. Any legal interest in the claim had been lost and rendered virtually useless.

In 1999 the Nova Scotia Court of Appeal in *Mariner Real Estate v. Nova Scotia* rejected a constructive expropriation by the owner of a beachfront property who had been refused permission to build single-family dwellings. The Court stressed that there must be a proprietary nature to the acquisition to make out a constructive expropriation. Both *Manitoba Fisheries* and *Tener* had required the acquisition to correspond with the deprivation. By contrast, in *Mariner*, there was no *de facto* taking: "the loss of economic value resulting from land use regulation is not a taking of land". For the Court, Cromwell J.A. noted that "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."

Finally, in *CPR*, the City's development freeze had not resulted in the City acquiring any beneficial interest in CPR's lands; the freeze was "simply an assurance that the land will be used or developed in accordance with [the City's] vision, without even precluding the historical or current use of the land". The City had not removed all reasonable uses of CPR's property as it was not precluded from using the land to operate a railway, the only historical use. Accordingly, CPR had not suffered a deprivation and the City had not acquired a beneficial interest.

With that legal background Halifax applied for summary judgment on Annapolis' constructive taking claim. The summary judgment application judge rejected Halifax's bid to have the claim dismissed, finding that there were "vast material issues of fact" that required the case proceed to trial. Amongst the various pieces of evidence said to justify sending the case to trial was the

presence of Halifax's logo on trail signage erected on Annapolis' property, a newspaper article quoting a Halifax employee who was charged with "overseeing" the creation of a park on Annapolis' lands and discovery evidence from a Halifax planner that a decision had been made in 2006 that Annapolis' lands would be treated as development lands, not parkland.

While the majority in the Supreme Court of Canada thought that Annapolis should have the opportunity to explore these matters further at trial, the minority at the Court were adamant that none of the facts were "material facts" that could support a *de facto* taking claim. In particular, evidence of an ulterior motive on the part of the municipality was irrelevant, in the minority's view, to a *de facto* taking claim. The minority pointed out that intention has never been an element of the test for a *de facto* taking claim, which is concerned with the effect of a public authority's actions, not with its intention. The majority's position on the relevance of intention to a constructive expropriation claim is problematic. On the one hand, the majority concedes that intention is not an *element* of the test for constructive takings at common law. But that did not mean that intention is *irrelevant* to the Court's inquiry. The majority reasoned that "the absence of the state's intention does not preclude a property holder's claim. It follows that intent may constitute a "material fact" in the context of a constructive taking claim." The practical result will be that full discovery and exploration of an alleged constructive taker's intention will be the norm, whereas previous attempts to probe intention through document and oral discovery could be rebuffed as irrelevant to the prosecution of a constructive taking claim. Pre-trial procedures and trials will be lengthier.

The most troubling aspect of the majority judgment is that while it claims to be affirming the *CPR* test on the "acquisition" leg of the two-part test, it is opening the door to claims that would have previously ended in failure. In the majority view, the phrase from *CPR* that there must be "an acquisition of a beneficial interest in the property or flowing from it" must be understood more broadly as an "advantage". This is said to follow from the *CPR* Court's coupling of "beneficial interest" with the phrase "or flowing from it". Thus the interest acquired by the state can be one which *flows* from the property, and can fall short of an *actual* acquisition by the state. For the minority there was no reason to depart from or modify the *CPR* test; there must be an acquisition of a proprietary interest – not merely an "advantage" – and the acquisition must correspond to the deprivation.

We will leave the last word to the minority in describing why, in its view, there were no material facts that justified the case going to trial:

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

The municipal resolution merely preserved the *status quo* by refusing to allow lands which have always been vacant and treed and situated next to a protected wilderness area to be developed into serviced residential communities. It is of no

moment that the 2006 Regional Municipal Planning Strategy, as a statement of policy, stated that a possible future use of the Annapolis Lands included serviced residential development.

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

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