IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *Lynch v. St. John's (City)*, 2016 NLCA 35
Date: 20160704
Docket: 201501H0010

BETWEEN:

WILLIS LYNCH — FIRST APPELLANT

AND:

WALLACE LYNCH — SECOND APPELLANT

AND:

COLIN LYNCH — THIRD APPELLANT

AND:

WINFRED LYNCH — FOURTH APPELLANT

AND:

REGINALD LYNCH — FIFTH APPELLANT

AND:

THE CITY OF ST. JOHN'S — RESPONDENT

Coram: Green C.J.N.L., Barry and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, Trial Division Docket No. 201301G3405 (2013 NLTD(G) 2)

Appeal Heard: October 21, 2015
Judgment Rendered: July 4, 2016

Corrected decision: The original judgment was corrected on July 21, 2016. A description is appended.

Reasons for Judgment by Barry J.A.
Concurring Reasons by Green C.J.N.L.
Concurred in by Harrington J.A.

Counsel for the Appellants: Michael J. Crosbie, Q.C.
Counsel for the Respondent: Ian F. Kelly, Q.C.

Barry J.A.:

[1] Water quantity and quality in the City of St. John's depends upon controls exercised by the City under authority granted by the provincial Legislature. To facilitate delivery by the City of wholesome water, the Legislature has prohibited building upon watershed land except in limited circumstances, one of which is where the City Manager recommends this. The legislation does not expressly identify the factors to be considered by the City Manager in deciding whether or not to make the recommendation.

[2] Descendants of David Lynch have been refused permission to proceed with a ten-lot residential development. The refusal was upheld by the Trial Division. The Lynches appeal this decision, saying it effectively amounts to expropriation without compensation of rights they say they acquired pursuant to the 1917 Crown Grant from which their title stems. That Grant included with the land all "appurtenances", and by the *Conveyancing Act*, R.S.N.L. 1990, c. C-34, included water. The Grant was conditional in that David Lynch had five years to clear and cultivate approximately 1.5 acres. This decision assumes that condition was met and that title rests with the Lynches. The City takes no position with respect to ownership, leaving that as a matter between the Lynches and the Crown Lands branch of government. Underlying this appeal is the question of whether the

Legislature intended individual land owners to bear the cost of supplying a service for the public good or whether it intended the general tax payer to bear the cost by having the City pay compensation to affected owners.

[3] The two major sources of water for the City are Windsor Lake and Bay Bulls Big Pond. The Windsor Lake supply has a raw water quality that is considered to be of a very high standard in terms of chemical and bacteriological parameters. This supply has been in operation since 1862. During the first 100 years or so of its operation, no treatment at all was provided. Within the last 50 years or so, only very basic treatment has been provided, consisting of the application of chlorine for disinfection and lime for PH adjustments. This watershed has been vigorously protected in that there has been very little human activity permitted; some sparse rural developments only. The City says this vigorous protection is what has resulted in this watershed remaining, for the most part, in a pristine state.

Background Facts

[4] David Lynch, a cooper, in 1917 obtained 15 acres by Crown Grant to harvest trees for barrel-making and for firewood. He also cleared an area to grow vegetables for personal use and for sale. His son, Chesley Lynch, built a house on the 15 acres in 1930. Around 1945, the house was moved from the land to another location.

[5] At present, approximately 11 acres of the original 15 acres are located in the Broad Cove River ("BCR") Watershed, still in their natural state of trees and shrubs. The other 4 acres are located outside the BCR Watershed and are not part of the Lynch property dealt with in this case. Groundwater located inside the BCR Watershed drains towards the Broad Cove River used by the City for water supply. Groundwater that is located outside the BCR Watershed drains to streams and ponds that are not used by the City for water supply.

[6] The Lynches own 7.36 acres on the east side of Camrose Drive, as tenants in common ("the Lynch property"). Camrose Drive (formerly Miller's Road) became part of the eastern boundary of the Town of Paradise, when the Town was incorporated in 1973, and part of the western boundary of the City of St. John's.

[7] The BCR Watershed extends across Camrose Drive. The City and Paradise executed a Watershed agreement in 1997, which permits limited

development on the west side of Camrose Drive, within Paradise. But since at least 1964, the City has prohibited building on the 7.36 acre Lynch property on the east side of Camrose Drive. There are 106 other privately owned lots in the BCR watershed affected by the building restrictions.

Legislative History

[8] The present *City of St. John's Act*, R.S.N.L. 1990, c. C-17 provides for Council's possession and control of certain water bodies, including the BCR Watershed, as follows:

> **Expropriation**
>
> 101. Where under this Act or another Act the council is empowered to expropriate land with or without buildings or an interest, right, or easement in or over land or buildings, sections 6 to 53 inclusive of the *Expropriation Act*, shall apply to the expropriation by the council and the compensation payable in respect of the expropriation, the word "council" being substituted for the word "minister" where the latter word appears in the *Expropriation Act* and all other necessary changes in wording being made that are necessary to adapt the sections to the purpose of this section.
>
> Water supply
>
> 102. It shall be the duty of the council to convey a sufficient supply of wholesome water to the city from Windsor Lake and other lakes that may be necessary, and to distribute the water through the streets of the city and to erect in places that the council may determine fountains for the supply of water, and to establish hydrants throughout the city that the council thinks necessary.
>
> Control of water bodies
>
> 104. (1) The council shall have possession and control of Windsor Lake, Round Pond, Newfound Pond, George's Pond, Petty Harbour Long Pond, Handy Pond and all lakes and ponds within the catchment area of the Broad Cove River above an elevation of 91.44 metres over mean sea level at the Harbour of St. John's and of the Crown lands within the watershed of those lakes and ponds.
>
> (2) The council is empowered to construct a dam on the Broad Cove River and to impound and store the waters of that river and of the lakes and ponds within the catchment area of that river for the purpose of supplying water to the city or to an area outside the city.
>
> (3) Notwithstanding subsection (1), this section shall not apply to Crown lands within the watershed of George's Pond other than the Crown lands with

buildings on the land used by the council in connection with the supply of water to the city from George's Pond and any rights of way to those lands and buildings.

(4) A person shall not erect a building on land within the catchment area of the Broad Cove River above an elevation of 131.92 metres above mean sea level at the Harbour of St. John's but the council may permit the erection on the land of

(a) a building which is an accessory building to an existing private family dwelling, and for the purpose of this paragraph "accessory building" means a detached building appurtenant to that dwelling and located on the same lot and providing better and more convenient enjoyment of that dwelling;

(b) an extension to an existing private family dwelling where an extension is necessary to provide adequate living quarters for members of the household living in the dwelling, provided that the extensions shall not exceed in cubic content 1/2 the cubic content of the existing private family dwelling;

(c) a building to replace an existing building destroyed by fire or an existing building dilapidated 50% or more; and

(d) a building, or extension to an existing building, subject to the written recommendation of the city manager that a permit be issued for the building or extension.

(Emphasis added.)

Expropriation against pollution

105. The council shall have power, where necessary, for preventing the pollution of the waters of the lakes and ponds, to expropriate private property to the extent from the margin of the lakes and ponds that may be considered necessary; the compensation to be paid to the proprietors of the land shall be determined by arbitration.

(Emphasis added.)

Prohibition in supply area

106. (1) A person shall not

(a) place or permit to escape upon land forming part of the watershed of Windsor Lake, Round Pond, Newfound Pond, George's Pond, or another lake or pond from which the water supply of the city is derived, or

in or into any of those lakes or ponds, a matter or thing of an offensive or deleterious nature, or calculated to impair the quality of the water for use for domestic purposes;

(b) drive or permit to wander a horse or cattle across the ice on lakes or ponds, and a person except an authorized officer of the council shall not row or sail a boat upon the waters of those lakes or ponds; or

(c) cut or remove trees, or shrubs, or other wood upon or from the lands of the council bordering those lakes or ponds, unless that person is an authorized officer of the council or the holder of a written permit from the council for the cutting or removal and a holder of the permit shall not do so otherwise than in accordance with the directions of an officer of the council named in the permit.

(2) A person shall not erect a building on land within the watershed of the following lakes or ponds from which the water supply of the city is obtained, Windsor Lake, Round Pond, Newfound Pond or George's Pond but the council may permit the erection on that land of

(a) a building which is an accessory building to an existing private family dwelling and for the purpose of this paragraph "accessory building" means a detached building appurtenant to a dwelling and located on the same lot and providing better and more convenient enjoyment of the dwellings;

(b) an extension to an existing private family dwelling where an extension is necessary to provide adequate living quarters for members of the household living in that dwelling but the extension or the total of all extensions shall not exceed in cubic content 1/2 the cubic content of the existing private family dwelling and the sanitary facilities for use in connection with the extension shall be approved by the city engineer;

(c) a building to replace an existing building destroyed by fire or an existing building dilapidated 50% or more; and

(d) a building, or extension to an existing building, subject to the written recommendation of the city manager that a permit be issued for that building or extension.

(3) A person who contravenes this section shall for the 1st offence be subject to a fine of not less than $25 and not more than $200, and, in default of payment, to imprisonment for a period of not less than 30 days nor more than 6 months, and for a 2nd or subsequent offence to imprisonment for a period of not less than 30 days nor more than 6 months.

(Emphasis added.)

[9] At the time of the Crown Grant to David Lynch in 1917, the *Act* entitled "*Of the St. John's Municipal Council*" provided:

> [78] The Council shall have possession and control of Windsor Lake and the Crown lands adjoining and surrounding said lake to the extent of one half mile from the margin thereof.
>
> [79] For the purposes of preventing the pollution of the waters of Windsor Lake and obstructions to the outflow thereof, and the preservation of the water works, the Council shall have power from time to time to make regulations and by-laws prohibiting the making, depositing or keeping of noxious, deleterious or offensive articles or substances on the land near to or adjoining Windsor Lake, or the carrying on of any business or operations likely to occasion the pollution of the waters, obstruction to the flow of water, or injury to the water works, and to fix penalties for the breach of such rules, regulations and by-laws.
>
> [80] The Council shall have power, if considered necessary for the purposes mentioned in the preceding section, to appropriate private property to such an extent from the margin of said lake as may be deemed necessary, such land to become Crown property, and to be under the control and in the possession of the Council : The compensation (if any) to be paid to the proprietors of such land shall be determined by arbitration, as provided for under section 44 of this Chapter.

(Emphasis added.)

[10] The *St. John's Municipal Act*, 1921, R.S.N. 1921, ss. 97-100, had similar provisions, with s. 97 expressly stating that "it shall be the duty of the Council to cause a sufficient supply of pure and wholesome water to be conveyed to the City". Section 98 granted control of additional lakes beside Windsor Lake and section 99 granted Council the power "if considered necessary, for preventing the pollution of the waters of the said lakes and ponds, to expropriate private property …".

[11] In 1959, the Legislature added the lakes and ponds within the catchment area of the Broad Cove River to the list of lakes and ponds of which Council had possession and control for the purpose of supplying pure and wholesome water to the City. In 1964, an amendment to the *City Act* added section 104(4) to prohibit the erection of buildings within the

catchment area of the BCR above an elevation of 300 feet above sea level, with two exceptions corresponding to the present sections 104(4)(a) and (b).

[12] In the mid-1990's, the City, in cooperation with the Province of Newfoundland, commissioned a Comprehensive Study entitled "A Watershed Management Plan St. John's, Regional Water Supply". That Study (Policy Document) at section 2.2 noted:

> The existing City of St. John's Act entitles the City to prohibit the erection of buildings within the WL [Windsor Lake], BCR [Broad Cove River] and PHLP [Petty Harbor Long Pond] Watersheds both inside and outside of its area of jurisdiction. … Exceptions to the above general prohibition under the present Act can be made by the City Council on a permit basis for an accessory building to an existing private family dwelling, an extension to an existing private family dwelling or to replace an existing building destroyed by fire or an existing building dilapidated by 50% or more. The Act also gives the City Council the power to erect a new building upon the recommendation of the City Manager, however, this power is rarely used. The City of St. John's should continue to use the powers under this 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 bylaw.
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> (Emphasis added.)

[13] That Comprehensive Study (Policy Document) in section 25 also recommended as follows:

> The practice of not allowing further urban development within the protected Watershed in order to protect the water supply is appropriate and should continue. This practice should be extended to non-urban land uses, particularly farming practices. Existing suburban development that has occurred along roadways, as well as, existing farming areas and recreation camp may remain. However, they should not expand and the long term intention is to revert the areas back to natural, pristine conditions as opportunity and funding permit.
>
> (Emphasis added.)

[14] The Policy Document makes clear that this practice by the City of not allowing further development in Watersheds, such as the BCR Watershed, has been adopted to protect the water supply from contamination and pollution caused by urban and non-urban uses of land, which uses would have adverse effects on the water in the Watersheds. The objective in keeping Watershed land in its natural, pristine condition or having the land

revert to this condition is to avoid the City having an impure and polluted water supply for City residents and others who depend upon the City for clean water.

[15] About 1996, the final report from the Comprehensive Study was accepted by the City and the Province as the Watershed Management Plan for the City. The plan and the need to prohibit development in Watersheds in order to protect water supplies from pollution are described in detail in a City publication entitled "Human Activity and Watershed Protection." Attached as Appendix A to these reasons is a summary from the Management Plan of the need for watershed protection and the City's reasons for continuing a practice of stringent development control.

[16] On October 24, 2000, this Court rendered its decision in *City of St. John's v. Butler and Newfoundland*, 2000 NLCA 57 ("the *Butler* decision"). The Court held that no compensation was payable to Butler for refusal of a quarry permit in the BCR catchment area. The court decided that the development restrictions in the *City Act* took precedence over regulations under the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8 ("*URPA 2000*"), and the purchase notice provisions of the *URPA* did not apply. The Court also held that it was up to the Legislature to decide whether the City should continue to have the power to prevent usage of private property without any obligation to compensate. Before this, on May 12, 2000, following argument in *Butler*, the Legislature enacted the *URPA 2000*, which expressly provided, by sections 5 and 96-98, that the purchase notice provisions did not apply when development is prohibited to protect a watershed.

[17] The policy document of the Watershed Management Plan, section 2.5, contained one basic underlying statement of the policy relating to development in the watersheds:

> The practice of not allowing further urban development within the protected watershed in order to protect the water supply is appropriate and should continue. This practice should be extended to non-urban land uses, particularly farming practices. Existing sub-urban development that has occurred along roadways, as well as existing farming areas and recreation camps may remain. However, they should not expand, and the long term intention is to revert these areas back to natural, pristine conditions as opportunity and funding permit.

[18] Since at least the 1990's and following a purchase by the City of land in the BCR Watershed from a Dooley family in 1991, the Lynches have

been trying to obtain permission to develop their property. Around 2008, the Lynches sought to have the property transferred into the Town of Paradise so that the property could be developed pursuant to the Watershed Agreement (made between the Town of Paradise and the City) in the same manner that lands on the west side of Camrose Drive are being allowed to be developed. However, on December 2, 2008 the City refused that boundary change request, noting:

> 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 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 River 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.

[19] The BCR watershed feeds into Little Pond, from which water is pumped on an intermittent basis to supplement the Windsor Lake water supply. Future infrastructure enhancements in the BCR watershed, including construction of one or more dams, will enable more water to be obtained from the BCR watershed. This is one of only two future sources of supply to meet future demands as the population grows.

The Application

[20] The property of the Lynches is located not only in the BCR Watershed. It is also located in a Watershed zone under the City's Municipal Plan and Development Regulations passed pursuant to the *URPA* and its predecessor legislation. The Watershed zone established by the *URPA* and its regulations has no "permitted uses" and only three discretionary uses for the Watershed zone – those relating to agriculture, forestry and public utilities.

[21] Consequently, today, the practice for a person seeking to develop land located in the BCR Watershed and as well in the Watershed zone under the City's Development Regulations is, first, to obtain permission under section 104(4)(d) of the *City Act* and, second, to obtain discretionary permission from the City to use the land for agriculture, forestry or public utility purposes. Alternatively, that person has to ask the City to exercise its discretionary power under the *URPA* to permit a zoning change (for

example, to permit a change from watershed to residential zoning). The *City Act* does not expressly set out the criteria or factors to be considered by the City Manager in making recommendations under s. 104(4)(d) of the *City Act*, nor does it say how the discretionary uses under the *URPA* regulations should interact with the *City Act*.

[22] In 2011, the Lynches retained a solicitor to assist them in determining what level of development the City would allow on the Property. The Lynches asked the City about possible residential development or development for agricultural, forestry or public utility purposes. They enquired about possibly building an "eco-friendly" home, carrying on farming or timber cutting, or saw milling, or installing wind turbines or solar panels. Several meetings were held between some of the Lynches and City officials, during which meetings the Lynches were verbally informed by the officials that the Lynches would not be allowed to develop the Property in any manner.

[23] The City's position was that the land must be kept "unused in its natural state". The Lynches decided in 2012 to force the issue by applying to develop a 10-lot subdivision. This application sought permission to develop pursuant to section 104(4)(d) and requested a re-zoning of the property under the *URPA*. The Lynches say they took this approach after concluding from discussions with City officials that the City was not willing to allow any discretionary uses or to consider any specific environmentally friendly uses. The Lynches also decided, because the City had permitted properties located in the BCR Watershed on the west side of Camrose Drive to be developed as residential housing, to assert use as residential housing as the highest and best use of the Lynch property comparable with existing development in the area.

[24] On February 1, 2013, the City wrote and advised that the appellants' application was rejected "as contrary to the *City of St. John's Act* and the St. John's Development Regulations." The appellants then commenced this action for a declaration that the property has been constructively expropriated.

The Parties' Positions

[25] The Lynches submit that because of the actions of the City in ensuring that the City acquired the benefit of the property as a source of unpolluted water, the property has been rendered totally unusable and valueless and in

effect has been taken from the Lynches. The Lynches say that this constitutes constructive expropriation for which they should be compensated.

[26] The City argues there has been no expropriation as there has been no taking of anything from the Lynches and no acquisition of anything by the City, but merely a lawful regulation of the use of property to protect the public interest, for which no compensation need be paid. Alternatively, the City says if anything has been expropriated, this has been done by the Legislature, not the City.

The Trial Judge's Decision

[27] The trial judge concluded the legislative scheme for protection of the St. John's watershed is largely regulatory in nature. Because he could find no statutory authority which would enable the City to expropriate the property of the appellants on the facts of this case simply by virtue of it being located in the catchment area, he decided the City's regulation of the property could not amount to constructive expropriation. He rejected the appellant's submission that the restrictions on use meant there has been a *de facto* transfer of rights to the City. He noted the jurisprudence does not support the view that regulation of ownership rights might amount to a *de facto* transfer of the owner's interest.

[28] The trial judge found that not all of the aggregate incidents of ownership have been taken from the Lynches but did not identify which incidents remained. He observed that the informal request for residential development was contrary to both the *City Act* and Development Regulations under *URPA*:

> [76] In the intervening period [since the 1917 Grant] the City of St. John's and surrounding area has expanded, and with that expansion there has arisen an increasing need for the wholesome supply of water. Consequent with that need increasing restrictions have been placed on the use to which the property may be put. This use is limited to agriculture, forestry and public utilities, and only then upon the approval of the City Manager. Having regard to the natural state of the land, its location in the sensitive ecosystem of the catchment area and the fact that historically it has seen no appreciable use, it cannot be said that all of the aggregate incidents of ownership by the Applicants have been taken away.
>
> [77] I would observe, as well, that the only formal application brought by the Applicants was for the development of ten residential building lots, a request clearly contrary to both section 104 of the *Act* and the Development Regulations.

> It is true that in an email the Applicants were told that the property was to be kept in its "natural state", but this advice is given in a vacuum without a formal request by the Applicants. Even if this advice prevailed in the face of a formal application, I would not conclude, for the reasons given, that the Applicants have thereby been deprived of all incidents of ownership.

The Issue

[29] The main issue is whether the trial judge erred in concluding that the Lynch property has not been constructively expropriated so as to entitle the Lynches to compensation from the City for the restriction on developing their land.

The Law and Analysis

[30] Since determination of this issue will depend to some extent upon the interpretation of various provisions of the *City Act* and the *Urban and Rural Planning Act*, it will be helpful to consider the appropriate principles of statutory interpretation to be applied.

a. General principles of statutory interpretation

[31] As noted by the majority of this Court in *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, at para. 15, the Supreme Court of Canada has adopted as its "modern rule" of statutory interpretation the statement in Driedger, *The Construction of Statutes* (2nd ed., 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[32] The majority in *Archean*, at paragraph 19, also pointed to s. 16 of our *Interpretation Act*, R.S.N. 1990, c. I-19:

> Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation or provision according to its true meaning.

[33] I agree with the comments of Green J.A. (as he then was) for the majority in Archean, at paragraphs 17-18, where he confirmed that the

"plain meaning rule" is dead. The proper approach to interpretation today is a contextual one, where courts look to all indicators of meaning rather than assuming certain language may be unambiguous so that the text alone governs. However, I disagree with the remarks of Green J.A., at paragraph 21 and 22, where he referred to courts engaging in a "fictionalized search" for a collective "legislative intention". He notes that section 16 of the *Interpretation Act* contains no reference to the notion of "intention of the legislature." I believe the reference in that *Act* to seeking "the attainment of the objects of the *Act*" amounts to the same thing and that the reference in *Archean* to a "fictionalized search" is not supported by the jurisprudence. The Supreme Court of Canada's adoption of the second edition formulation by Driedger, with reference to reading the words of an *Act* "harmoniously with the scheme of the *Act*, and the intention of Parliament," governs. The Supreme Court has not endorsed the formulation of the rule as set out in the third edition of Driedger. See my comments in *Midnight Marine Ltd. v. Lloyd's Underwriters*, 2010 NLCA 64, at paras. 35ff. The rule of law contemplates judges seeking, in good faith, to arrive as close as they can to the expectations of legislators, even though absolute certainty as to legislative intent may not be attainable. As Myres McDougal and Associates stated in 1967, "If the light cannot be dazzling there is no reason for sulking in the dark," McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (Yale University Press, 1967), at p. xviii of their Introduction. With respect, I do not agree with the implication in *Archean*, that courts are being naïve or disingenuous in trying their best to find or approximate legislative intent. This obiter in *Archean* risks detracting from the proper judicial task and risks undermining the democratic principle that the courts must take their direction from the Legislature, unless the *Constitution Act* directs otherwise.

b. The general law of constructive expropriation

[34] The Lynches rely upon what has variously been referred to as a principle of the common law or a rule of statutory interpretation, "the expropriation rule," which involves a presumption that individuals will be compensated for expropriated property unless the Legislature has expressly stated otherwise. Its evolution has been well explained by Lambert J.A. in *British Columbia Medical Association v. British Columbia* (1984), 15 D.L.R. (4th) 568 (C.A.), at paras. 10-19:

> 10 I propose now to consider the scope and character of the expropriation rule.

11 In my opinion, it is, at least in part, a rule of statutory construction.

12 In *A.G. v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.), Lord Atkinson, at p. 542, put the rule in his own words and followed with a quotation from Lord Justice Bowen. This is what Lord Atkinson said:

The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation. Bowen L.J. in *London and North Western Ry. Co. v. Evans*, [1893] 1 Ch. 16, 28, said: "The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle ... if it sees fit to do so, but, it is not likely that it will be found disregarding it, without plain expression of such a purpose."

In the same case, Lord Parmoor, at p. 579, put the rule this way:

I think that there is no difficulty in applying the ordinary rules of construction, but, if there is room for ambiguity, the principle is established that, in the absence of words clearly indicating such an intention, the property of one subject shall not be taken without compensation for the benefit to others or to the public...

The words of Lord Atkinson were adopted and approved by Ritchie J., for the Supreme Court of Canada, in *Man. Fisheries v. R.*, [1978] 1 S.C.R. 101 at 118, [1978] 6 W.W.R. 496, 88 D.L.R. (3d) 462, *(*sub nom. *Man. Fisheries Ltd. v. Can.)* 23 N.R. 159.

13 Those quotations indicate that the rule is, at least in one aspect, a rule of statutory construction.

14 But it seems that the rule may have another aspect than its aspect as a rule of construction. In *Burmah Oil Co. v. Lord Advocate*, [1965] A.C. 75, [1964] 2 All E.R. 348 (H.L.), there was no statute. General Alexander, G.O.C. Army in Burma, had ordered the destruction of the pursuer's oil works on the outskirts of Rangoon the day before the Japanese army occupied the city. The House of Lords considered the destruction to have been a lawful exercise of the royal prerogative to wage war, but nonetheless decided that the pursuer was entitled to compensation. So, in that case, there was no question of statutory construction involved at all.

15 And in *Belfast Corp. v. O.D. Cars Ltd.*, [1960] A.C. 490, [1960] 1 All E.R. 65 (H.L.), Lord Radcliffe said, at p. 523:

> On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking". *Aspects of this principle are found in the rules of statutory interpretation devised by the courts*, which required the presence of most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. (The italics are Lambert J.A.'s.)

Lord Radcliffe treated the question of statutory construction as being only one aspect of the rule.

> 16 I think the rule may be divided into three parts. The first is that the property of the subject cannot be taken by the Crown without some form of authorization. The second is that the authorization must be clear. If there is any ambiguity about whether the Crown may take the subject's property, the authorization must be construed in favour of the subject. The third is that, even if the authorization clearly permits the taking of the subject's property, there is a presumption, based on justice and fairness, that the Crown will pay compensation to the subject. That presumption can only be rebutted by a clear contrary intention in the authorization.
>
> 17 I have used the word "authorization" in order to indicate the generality of the rule, in all three parts, but in the usual cases the authorization will be contained in some form of legislative enactment. In such cases, the rule, in its second and third parts, could properly be described as a rule of statutory construction. It is an aid in determining the intention of the legislature.
>
> 18 The rule is not a purely mechanical matter of examining the legislation and asking whether there is an express written reference to the fact that the taking is to be without compensation, in words that say "without compensation of any kind", or some equivalent; and that, failing such words, compensation must be paid.
>
> 19 Rather, it is the intention of the legislature that is being sought. The legislature will not be presumed to have countenanced an injustice, unless the contrary intention appears. But the rule does not override the legislative intention. It is not a device by which the courts can enable a claimant to outwit the legislature.

[35] See also *Alberta (Minister of Public Works, Supply & Services) v. Nilsson*, 2002 ABCA 283, where the Court at paragraph 46 applied “the general principle that, in the absence of an expressly contrary statute,

compensation must be paid when the state expropriates a subject's property":

> 45 The principle that the state must pay compensation for expropriated land has been alternately described as a principle of statutory construction and as a common law right. In *Sisters of Charity of Rockingham v. R.*, [1922] 2 A.C. 315 (Canada P.C.), at 322, Lord Parmoor noted:
>
> > Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected," unless he can establish a statutory right.
>
> 46 However, in *Attorney General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (U.K. H.L.), at 542, Lord Atkinson held:
>
> > [t]he recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.
>
> 47 Accordingly, when property is taken by statutory authority, unless the governing statute expressly requires otherwise, compensation is payable. Elsewhere, the principle is described as a "common law right to compensation for interference with a subject's property": *France Fenwick & Co. v. R.* (1926), [1927] 1 K.B. 458 (Eng. K.B.), at 467 ("*Fenwick*"). Whether the principle in question is a common law right or a rule of statutory interpretation is not relevant to our analysis in this appeal. It is sufficient to rely on the general principle that, in the absence of an expressly contrary statute, compensation must be paid when the state expropriates a subject's property.

[36] While I need not decide whether the right to compensation following expropriation is a common law right or a rule of statutory interpretation, I am not ignoring the fact that the drafters of the *Charter of Rights and Freedoms* did not expressly give property rights the equivalent of the protection accorded by section 7 of the *Charter*, and to hold that individuals should be compensated for adverse effects from regulatory legislation falling short of expropriation arguably would be to entrench property rights contrary to the drafters' intentions.

[37] The trial judge in the present case relied upon *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5, para. 30, where the Supreme Court of Canada outlined a two-part test for *de facto*, or constructive expropriation:

> 30 For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property (see *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 696 (N.S. C.A.), at p. 716; *Manitoba Fisheries Ltd. v. R.* (1978), [1979] 1 S.C.R. 101 (S.C.C.); and *British Columbia v. Tener*, [1985] 1 S.C.R. 533 (S.C.C.).

[38] The trial judge also adopted the views of Cromwell J.A. (as he then was), speaking for the majority in *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 696, 178 N.S.R. (2d) 294 (C.A.). There, Cromwell J.A. rejected the argument of *de facto* expropriation, where restrictions had been imposed on the use of environmentally fragile sand dunes and a building permit refused.

[39] In dismissing the appeal, Cromwell J.A., at paragraphs 38-42, compared the law on regulatory taking in the United States and Australia with that of Britain and Canada:

> [38] The scope of claims of *de facto* expropriation is very limited in Canadian law. They are constrained by two governing principles. The first is that valid legislation (primary or subordinate) or action taken lawfully with legislative authority may very significantly restrict an owner's enjoyment of private land. The second is that the Courts may order compensation for such restriction only where authorized to do so by legislation. In other words, the only questions the Court is entitled to consider are whether the regulatory action was lawful and whether the *Expropriation Act* entitles the owner to compensation for the resulting restrictions.
>
> [39] *De facto* expropriation is conceptually difficult given the narrow parameters of the Court's authority which I have just outlined. While *de facto* expropriation is concerned with whether the "rights" of ownership have been taken away, those rights are defined only by reference to lawful uses of land which may, by law, be severely restricted. In short, the bundle of rights associated with ownership carries with it the possibility of stringent land use regulation.
>
> [40] I dwell on this point because there is a rich line of constitutional jurisprudence on regulatory takings in both the United States and Australia which is sometimes referred to in the English and Canadian cases dealing with *de facto* expropriation: see for example *Belfast (City) v. O.D. Cars Ltd.*, [1960] A.C. 490 (U.K. H.L.). The Fifth Amendment to the United States Constitution (which also applies to the States through the Fourteenth Amendment) provides that private property shall not be taken for public use without just compensation. In the Australian Constitution, section 51(xxxi) prohibits the acquisition of property

except upon just terms. While these abundant sources of case law may be of assistance in developing the Canadian law of *de facto* expropriation, it is vital to recognize that the question posed in the constitutional cases is fundamentally different.

[41] These U.S. and Australian constitutional cases concern constitutional limits on legislative power in relation to private property. As O'Connor, J. said in the United States Supreme Court case of *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (U.S. Mass. 1998), the purpose of the U.S. constitutional provision (referred to as the "takings clause") is to prevent the government from "... forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Canadian courts have no similar broad mandate to review and vary legislative judgments about the appropriate distribution of burdens and benefits flowing from environmental or other land use controls. In Canada, the courts' task is to determine whether the regulation in question entitles the respondents to compensation under the *Expropriation Act*, not to pass judgment on the way the Legislature apportions the burdens flowing from land use regulation.

[42] In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation. It is settled law, for example, that the regulation of land use which has the effect of decreasing the value of the land is not an expropriation. As expressed in Ian MacF Rogers, *Canadian Law of Planning and Zoning* (looseleaf, updated to 1999) at s .5.14, "The law permits the appropriation of prospective development rights for the good of the community but allows the property owner nothing in return." Numerous cases support this proposition including **Belfast Corporation v. O.D. Cars** (supra) and **Hartel Holdings Co. Ltd. v. Calgary**, [1984] 1 S.C.R. 337. Many others are reviewed by Marceau, J. in **Alberta v. Nilsson**, [1999] A.J. No 645 at para 35 ff. I would refer, as well, to the following from E.C.E. Todd, *The Law of Expropriation in Canada*, (2nd, 1992) at pp. 22-23:

> Traditionally the property concept is thought of as a bundle of rights of which one of the most important is that of user. At common law this right was virtually unlimited and subject only to the restraints imposed by the law of public and private nuisance. At a later stage in the evolution of property law the use of land might be limited by the terms of restrictive covenants.
>
> Today the principal restrictions on land use arise from the planning and zoning provisions of public authorities. By the imposition, removal or alteration of land use controls a public authority may dramatically increase, or decrease, the value of land by changing the permitted uses which may be made of it. In such a case, in the absence of express statutory provision to the contrary an owner is not entitled to compensation or any other remedy notwithstanding that subdivision approval or rezoning is refused or

> development is blocked or frozen pursuant to statutory planning powers in order, for example, to facilitate the future acquisition of the land for public purposes. "Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down ... (but) a taker may not, through the device of zoning, depress the value of property as a prelude to compulsory taking of the property for a public purpose.

[40] Cromwell J.A. observed, at paragraph 47, that compensation for *de facto* expropriation has rarely been awarded in Canada:

> [47] In light of this long tradition of vigorous land use regulation, the test that has developed for applying the Expropriation Act to land use restrictions is exacting and, of course, the respondents on appeal as the plaintiffs at trial, had the burden of proving that they met it. In each of the three Canadian cases which have found compensation payable for *de facto* expropriations, the result of the governmental action went beyond drastically limiting use or reducing the value of the owner's property. In **The Queen in Right of British Columbia v. Tener et al.**, [1985] 1 S.C.R. 533, the denial of the permit meant that access to the respondents' mineral rights was completely negated, or as Wilson, J. put it at p. 552, amounted to total denial of that interest. In **Casamiro Resource Corp. v. British Columbia** (1991), 80 D.L.R. (4th) 1 (B.C.C.A.), which closely parallels **Tener**, the private rights had become "meaningless". In **Manitoba Fisheries v. The Queen**, [1979] 1 S.C.R. 101, the legislation absolutely prohibited the claimant from carrying on its business.
>
> [48] In reviewing the *de facto* expropriation cases, R.J. Bauman concluded, and I agree, that to constitute a *de facto* expropriation, there must be a confiscation of "...all reasonable private uses of the lands in question.": R.J. Bauman, *"Exotic Expropriations: Government Action and Compensation"* (1994), 54 The Advocate 561 at 574. While there is no magic formula for determining (or describing) the point at which regulation ends and taking begins, I think that Marceau, J.'s formulation in **Nilsson** is helpful. The question is whether the regulation is of "sufficient severity to remove virtually all of the rights associated with the property holder's interest." (at para 48).

(Emphasis Added)

[41] In the *Butler* decision noted above, this Court found no compensation was payable to Butler for refusal of a quarry permit in the BCR catchment area. Although Butler claimed his property had been effectively expropriated, the Court's analysis revolved primarily around whether Butler was entitled to utilize the purchase notice provisions of the *URPA* to obtain compensation. The Court concluded that the *City Act* took precedence over the *URPA* development regulations in the circumstances. The Court also

held that because the BCR watershed had not vested in the City, the City had no obligation to pay compensation.

[42] The Court in *Butler* provided little analysis of the expropriation rule or of constructive expropriation, and I find the decision of little assistance in the present case. The Court noted that the City was considering two applications – one for a quarry permit under the *Quarry Minerals Act* (which required the City's concurrence before issuing a permit) and the other under the City's Development Regulations. Section 104(4)(d) of the *City Act* determined the matter for the Court because of the prohibition against building and excavation. Because of the omission to consider the significance of the *Manitoba Fisheries* and *Tener* decisions from the Supreme Court of Canada, I do not accept that *Butler* is determinative here.

[43] The Supreme Court of Canada in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, discussed the policy considerations involved in determining whether individual land owners should bear the cost of supplying a service for the public good. The Court held in some circumstances public planning and development restrictions by various levels of government cause such detrimental impacts on private property that it would be unreasonable to conclude that a legislature would intend or the common law require that a property owner should bear without compensation the detrimental or injurious impacts, unless this intention is clear from the language of authorizing legislation.

[44] In *Antrim*, the claim was for compensation for injurious affection, where no land had been taken but highway construction by the Province of Ontario had significantly and permanently interfered with access to the appellant's land. The Supreme Court of Canada, in determining whether the appellant could have sued in private nuisance for damages caused by the construction if it had not been done under statutory authority, a question which arose from the injurious affection provisions of the *Ontario Expropriations Act*, R.S.O. 1990, C.E. 26, held that the issue was whether, in light of all the circumstances, it was unreasonable to expect the claimant to bear the interference without compensation. The Court emphasized that the purpose of the statutory compensation scheme for injurious affection was to ensure that individuals do not have to bear a disproportionate burden of damage flowing from interference with the use and enjoyment of land caused by the construction of a public work. The Court held it was reasonable for the Ontario Municipal Board to conclude that, in the particular circumstances, the appellant should not be expected to endure

permanent interference with the use of land that caused a significant diminution of its market value in order to serve the greater public good.

[45] In summary, on the general law of constructive expropriation, the cases noted above establish that land use regulation has rarely been found to constitute compensable expropriation in Canada. The regulation of land use, even when it has the effect of decreasing the value of land, is not usually found to be a compulsory taking. See the discussion by Cromwell J.A. (as he then was) in *Mariner*.

[46] But, as Cromwell J.A. notes at paragraph 47, there have been two Supreme Court of Canada cases and one at the court of appeal level, which have found compensation payable for *de facto* or constructive expropriation, where the result of the governmental action went beyond drastically limiting use or reducing the value of the owner's property. It is useful to examine these in more detail

[47] In *Manitoba Fisheries Ltd. v. R.*, [1979] 1 S.C.R. 101, legislation granting a Crown corporation a commercial monopoly to export fresh fish was found to have absolutely prohibited the claimant from carrying on its business, deprived the claimant of its goodwill as a going concern, and consequently rendered its physical assets virtually useless. In *British Columbia v. Tener*, [1985] 1 S.C.R. 533, the denial of a park use permit necessary to explore or work mining claims meant that the claimant's mineral rights were completely negated. In *Casamiro Resource Corp. v. British Columbia (Attorney General)* (1991), 80 D.L.R. (4th) 1 (B.C.C.A.), as in *Tener*, the mineral rights in a park had become "meaningless pieces of paper" because of legislation authorizing the Lieutenant Governor in Council to issue an order in council refusing issuance of a resource use permit in a park.

[48] Ritchie J. for the Court in *Manitoba Fisheries*, because there was no express language in the legislation providing for the payment of compensation, applied the rule of construction set out by Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508, at p. 542:

> The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.

[49] Ritchie J. referred to Lord Radcliffe's rationale for the rule, set out in *Belfast Corporation v. O.D. Cars Ltd.*, [1960] A.C. 490 (H.L.), at p. 523.

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

[50] Ritchie J. also found support for presuming a right to compensation in *Ulster Transport Authority v. James Brown and Sons Ltd.*, [1953] N.I. 79, where Lord MacDermott, at page 116, concluded the case involved more than a prohibition that was essentially regulatory in character but instead amounted to a taking of the prohibited business.

[51] Ritchie J. was able to distinguish *France Fenwick and Company Ltd. v. The King*, [1927] 1 K.B. 458, where the Court held that no compensation was recoverable merely because a negative prohibition regarding the unloading of a ship interfered with the enjoyment of property. Ritchie J. noted the obliteration of Manitoba Fisheries' entire business and found that the statute there in question had the effect of depriving the company of its good will as a going concern and consequently rendered its physical assets virtually useless. There being nothing in the legislation providing for the taking of property without compensation, Ritchie J. held the taking of the good will was unauthorized, having regard to the recognized rule that "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation", in the words of Lord Atkinson in *Attorney General v. De Keyser's Royal Hotel*.

[52] In the *Nilsson* case, at paragraph 45, discussed above, the Alberta Court of Appeal noted that the principle that the state must pay compensation for expropriated land, unless a statute expressly says

differently, has been alternatively described as a principle of statutory construction and as a common law right. The Court also, at paragraph 49, considered "at what point does an interference with the freedom of a property owner and a reduction in the incidents of property ownership equate with a taking of property warranting compensation." While finding that in the case before them the obligations and restrictions did not interfere with property rights to a degree sufficient to amount to *de facto* expropriation, the Court, at paragraph 62, held open the possibility "that in an exceptional case the nature or extent of restrictions imposed on land use might be so significant that a *de facto* taking of the property has occurred."

[53] In *Mariner*, Cromwell J.A., at paragraph 80, concluded that regulation becomes, in effect, confiscation when, as noted in *Nilsson*, restrictions on the use become so stringent and all-encompassing that they have the effect of depriving the owner of his or her interest in the land, although leaving paper title undisturbed. He went on to state, at paragraph 83, that judging by the only three Canadian cases to which the Court had been referred, where governmental regulatory action had been held to be a *de facto* expropriation, *Manitoba Fisheries*, *Tener* and *Casamiro Resource Corp.*, "*de facto* expropriations are very rare in Canada and they require proof of virtual extinction of an identifiable interest in land or of an interest in other property, such as the goodwill in *Manitoba Fisheries*.

c. Was there a taking of the Lynch property?

(i) Was there an acquisition by the City?

[54] The City's submission is that no expropriation has occurred because there has been only lawful land use regulation and no acquisition or taking of land as required by the common law to establish a *de facto* expropriation requiring compensation.

[55] The Lynches say that the City's denial of their application for residential development, combined with an email confirmation by the City's Manager for Development that the property must be kept in its "natural state", means that the City has acquired a continuous flow of uncontaminated ground water from the Lynch property, and the Lynches have been denied all reasonable uses of the property. This, they say, meets the requirements for a *de facto* taking requiring compensation at common law, as set out in *Canadian Pacific Railway Co. v. Vancouver (City)*, *supra*, and the cases therein cited.

[56] To properly appreciate whether anything has been taken from the Lynches and acquired by the City, we have to consider the nature of groundwater. At common law, groundwater was described as "water percolating through underground strata, which has no certain course and no defined limit, but oozes through the soil in every direction in which the rain penetrates." See, *Chasemore v. Richards*, 1843-60, All E.R. 77, at 81-82 (H.L. 1859) and Roman & Ferris, *Regulation of Groundwater Contamination in Canada* (1989), 65 Chicago-Kent Law Review 519. Underground streams flowing in a definite channel also fall within the classification of groundwater because of the difficulty in proving their existence. See, Anger & Honsberger, *Law of Real Property* (3rd ed., loose-leaf to December 2014), vol. 2, s. 19:70.

[57] The common law distinguishes between rights applying to groundwater and riparian rights applying to watercourses "in which water flows in a fairly regular manner in channels between banks that are more or less defined": Warren J. in *Hoyt v. Loew*, 2008 NSSC 29, at para. 44. Riparian rights entitle the owners of lands abutting a watercourse to a right of access to water and the right to prevent flooding. See *Hoyt*, at paragraphs 39 and 40. Downstream owners are entitled to receive the natural flow of the stream, and upstream owners are not entitled to unreasonably interfere with the downstream owners' rights. Also, riparian owners are entitled to have water reach their lands substantially undiminished in quality.

[58] Riparian rights do not apply, however, to water which flows through undefined and unknown channels and groundwater; "water falling from the heavens to the surface of the earth, so long as it does not flow in a defined watercourse, [is] property of the owner of the soil where it falls:" *Hoyt*, at paragraph 51. A landowner is not entitled to the continuous flow of groundwater: *Hoyt*, paragraph 52. Groundwater may be appropriated by the owner of the land without incurring liability to the landowners to whose land the water would have flowed: *Bradford v. Pickles*, [1895] AC 587; *Hoyt*, paragraph 53; and Anger & Honsberger, at section 19:60:20.

[59] The Lynch property is part of that granted to David Lynch in 1917, which states that all "appurtenances" associated with the land (with the exception of certain rights to mines and minerals) were conveyed. Section 3 of the *Conveyancing Act* provides that "a conveyance of land shall be considered to include with the land all … waters … appertaining or reputed to appertain to the land." So, groundwater is part of the bundle of rights granted to the predecessors in title of the Lynches in 1917. Until 1964, the

City, as a lower level landowner, had no property right at common law for the natural drainage or continuous flow of groundwater from the Lynches higher level lands. But by the 1964 amendment to the *City Act* and the requirement under section 104(4)(d) for the City Manager's recommendation before building, the Legislature and the City took away the Lynches' common law right to appropriate the upstream groundwater. The City's Watershed Management Plan has made it clear that the building controls have been imposed with the purpose of maintaining a continuous flow of groundwater to the City's lower level land, water and facilities in the BCR Watershed. The City was thereby acquiring the tangible benefit of that continuous flow of groundwater by taking away the Lynches' beneficial interest in the groundwater. The Legislature and the City thereby ensured that the City acquired a continuing water-filtration-type benefit.

[60] For the purposes of this decision, I need not decide whether the City acquired a negative easement (a right over the land of another) or a *profit à prendre* (a right to take something from the land of another) or merely something in the nature of a restrictive covenant. For the distinctions, see Jonathan Gaunt, *Gale on Easements* (19th ed., 2012), at p. 324. It is sufficient to conclude, as I do, that the Legislature and the City purported to take away the Lynches' right to appropriate the groundwater on their land and to give the City 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.

[61] Having found that the City acquired a beneficial interest in the Lynch property, we must consider the second requirement of the Supreme Court's test in *Canadian Pacific Railway v. Vancouver* for a *de facto* or constructive expropriation, namely, whether all reasonable uses of the property have been removed.

(ii) Were all reasonable uses of the property removed?

[62] The City's Municipal Plan and Development Regulations passed under *URPA* do not provide for any permitted uses in an area zoned "watershed" and only allow three possible discretionary uses: (i) agriculture, (ii) forestry, and (iii) public utility. In providing for a discretion in the City Manager to allow building on BCR Watershed land, the *City Act* unfortunately does not set out the factors or criteria to be considered in exercising the discretion. Despite the noted discretionary uses of agriculture, forestry and public utilities, it is clear that the City takes the

position that the City Manager is entitled to refuse all applications for building on the land in order to keep the land "unused in its natural state," with its groundwater uncontaminated. Despite enquiries from the Lynches about possible farming activity, tree harvesting, saw milling and wind turbine or solar panel installations, City officials would not, or could not, identify any uses at all to which the Lynches might be entitled to put the land. Even though some agricultural, forestry or public utility uses conceivably could, with proper conditions, be compatible with maintaining a sufficiently pristine flow of groundwater, City officials take the position that the best watershed management plan is to prohibit all activity on the Lynch property.

[63] The trial judge, at paragraph 67 of his decision, found that "given the nature of the property and its historical use," the Lynches have not been deprived of all reasonable uses of the property. At paragraph 76, the trial judge held:

> Having regard to the natural state of the land, its location in the sensitive ecosystem of the catchment area and the fact that historically it has seen no appreciable use, it cannot be said that all of the aggregate incidents of ownership by the Applicants have been taken away.

But the trial judge did not identify a single use which might be possible. With respect, I believe the trial judge erred in failing to ask, as discussed in *Mariner*, at paragraph 48, whether the *City Act* and the exercise of the City Manager's discretion resulted in "deprivation of the reality of proprietorship." The trial judge erred in failing to ask, in other words, whether virtually all of the aggregated incidents of ownership have been taken away. Having the property rights flowing from a Crown grant, with virtually unrestricted rights to build and to appropriate and use groundwater, transformed to merely a right to keep the land "unused in its natural state," results in virtually all of the aggregated incidents of ownership being taken away. All of the reasonable uses of the property were taken away and a compulsory taking, a *de facto* or constructive expropriation, resulted.

iii. Authority to Compensate for an Expropriation

[64] The City has argued, and the trial judge agreed, that there cannot have been a constructive expropriation because no authority to compensate has been granted by the Legislature to the City in these circumstances. With respect, this approach turns the law regarding constructive expropriation on

its head. Instead of the liberty of the individual being protected by applying a presumption that, where there has been a compulsory taking, the Legislature intends compensation to be paid except where it expressly states to the contrary, the approach taken by the trial judge in the present case would require the individual to forego compensation, unless the individual can point to a statutory provision authorizing expropriation with compensation. This shifts the burden from the executive to the individual who has had property rights taken away.

[65] The correct approach in these cases is to first ask whether on the facts there has been an acquisition by the authority in question of a beneficial interest and a removal of all reasonable uses of the property, so as to constitute a *de facto* compulsory taking. If such acquisition and removal is found, the question then becomes whether there is a statutory provision which, reasonably interpreted, expressly authorizes the taking without compensation. If no such legislative provision is put forth, the Court must order that compensation be paid by the adoption of an expropriation procedure, *mutatis mutandis*.

[66] In the present case, once the Court concludes that there has been a constructive expropriation, the provisions of sections 101 and 105 of the *City Act* may be applied to allow for compensation. In section 105, the reference to the council having power to expropriate private property "where necessary, for preventing the pollution of the waters" becomes applicable when a Court finds a compulsory taking has occurred. A *de facto* expropriation may be treated as a trigger for the expropriation process, without unduly straining the language of the statute. Compensation must then be paid as determined by arbitration if no agreement is reached on the amount. In the present case, the fact that a compulsory taking occurred establishes that the Council believed it was necessary. The evidence establishes that the restrictions on building and other activity on the Lynch property were imposed to prevent pollution of the waters of Little Pond, from which water is pumped on an intermittent basis to supplement the Windsor Lake water supply.

[67] The trial judge in the present case concluded, at paragraph 60:

> 60 The property of the Applicants is presently in its natural state and there is nothing in the facts before me upon which the Respondent could justify the use of its expropriation powers under section 105. To the contrary, the Respondent has thus far performed its statutory duty of ensuring a wholesome supply of water

> through the regulatory measures adopted in section 104. Therefore, on the facts before me the Applicants' claim of constructive expropriation cannot be grounded in this provision.

With respect, the trial judge has erred by failing to recognize that once the Court determines, as it should, that the regulatory measures adopted in section 104 amount to *de facto* or constructive expropriation, the conclusion must follow that the City has decided the constructive expropriation is necessary for pollution control. The unchallenged affidavit evidence from the City makes a case that a buffer zone, where no residential building is permitted, is the best management approach for ensuring pure and wholesome water as mandated by the *City Act*. This is an assertion by the City that the restrictions on the Lynch property are necessary for preventing pollution. Compensation then becomes available through the provisions of sections 101 and 105. Section 105 may be relied upon by the Lynches as a statutory basis for seeking compensation, with section 101 *mutatis mutandis* setting out the process to be followed.

iv. Should the City or the Legislature compensate?

[68] The Legislature enacted the *City Act* and approved the City's Municipal Plan and Development Regulations, but the authority to expropriate is given to City Council by section 105. It is the exercise of discretion by the City Manager under section 104(4)(d) of the *City Act* which led to the refusal to approve development. This was for the benefit of the City. In these circumstances, it is the City which should pay the compensation.

[69] Since argument in this matter, this Court has filed its decision in *George v. Her Majesty in Right of Newfoundland and Labrador*, 2016 NLCA 24. In *George*, as in the present case, this Court had to consider, in a nuisance claim, whether a statutory authority should be liable to individuals for injury resulting from decisions taken for the public good. The test applied by the Supreme Court of Canada in *Antrim* was applied and this Court asked whether fairness between the individual and the state demanded that the burden imposed be borne by the public generally and not by the claimants alone. The conclusion was that, in the circumstances of *George*, it would not be unfair to have the individual claimants bear the burden rather than the public generally. The circumstances of the present case are more like *Antrim* and support the conclusion that, as in *Antrim*, it would be unfair and unreasonable to conclude that the Lynches should be expected to bear,

without compensation, the disproportionate burden of damage which flows from interference with the use and enjoyment of land caused by watershed management decisions.

Summary and Disposition

[70] In summary, the trial judge erred in concluding that the Lynch property has not been constructively expropriated so as to entitle the Lynches to compensation from the City pursuant to subsections 101 and 105 of the *City Act* for the prohibition on developing their land.

[71] I would allow the appeal with costs in accordance with column 5 in both the Trial Division and the Court of Appeal.

A declaration shall issue:

> (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 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.

_____

L. D. Barry J.A.

Green C.J.N.L. Concurring in the Result:

[72] I concur in the result and in the reasoning of my colleague, Barry J.A., save and except for his comments in paragraphs 31 through 33 of his reasons insofar as they disagree with or purport to modify the description of the approach to interpretation of provincial statutes in this jurisdiction as enunciated by the majority of this Court in *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124.

[73] The point of disagreement by my colleague with some of the language in *Archean* appears to be the absence of a specific reference to the phrase "intention of Parliament" in *Archean's* description of the basic approach to interpretation, as it appears in the second edition of Driedger, *The Construction of Statutes* (2d ed., 1983), a source which has been referred to in Supreme Court of Canada jurisprudence dealing with construction of federal statutes and statutes in other provinces.

[74] I note, however, that my colleague acknowledges that the notion of the "intention of the legislature" effectively "amounts to the same thing" as the mandate in s. 16 of the *Interpretation Act*, RSN 1990, c. I-19 to interpret legislation in a manner that "best ensures the attainment of the objects of the Act." I agree – as does *Archean* - that the courts must attempt to determine the objects or purpose of the Act as part of the interpretive exercise. Accordingly, a separate search for the intention of the legislature is otiose.

[75] The real question becomes how does one discern the object and purpose – and hence the legal effect – of the legislative act set in motion by the legislature? The answer is by reference to all relevant sources of meaning, including the words used, the statutory context, the court's knowledge of the state of the pre-existing law, social context, the perceived mischief that caused the government (or private member) to act by introducing the bill into the legislature and the legislative history. There is no separate stand-alone search for actual intentions of legislators, either collectively or individually. In that sense, the search for intention is fictionalized. Rather, the phrase "intention of the legislature" is a convenient turn of phrase that compendiously encapsulates the result of an interpretive exercise ("our [i.e. the Court's] characterization" of the legislative intent: per Wagner and Gascon JJ. in *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at paragraph 32) that involves consultation of all relevant sources of meaning. It is the inference that is drawn from all these

sources that may, as a convenient fiction, be referred to as the intention of the legislature. In other words, the intention of the legislature is not a separate component of the search for meaning, but rather a description of what results from that search, properly conducted.

[76] That is all that *Archean's* discussion of a fictionalized legislative intention conveys. As such this "disagreement" between my colleague and me is a sterile one.

[77] Much could be said in response to what my colleague has written, particularly in the latter portion of paragraph 33 where my colleague asserts that *Archean* risks undermining the democratic principle that the courts must take their direction from the legislature. However, in view of the fact that his comments are unnecessary for the decision he reaches, it is enough to say that *Archean* does no such thing. Rather than undermining the supremacy of the legislature, the approach described in *Archean*, with its reference to objects and purposes, as well as all other indicators of meaning, is directed to giving effect, as fully and faithfully as possible, to the meaning associated with the legislative act and counters the potential for substitution of judicial for legislative will.

[78] It is in any event also worth noting that a majority of a five judge panel of this Court in *R. v. Pardy*, 2014 NLCA 37, 357 Nfld. & P.E.I.R. 49 (with the minority not expressly dealing with the point) recently affirmed the *Archean* approach (and in particular, the paragraphs to which my colleague takes exception) as being the proper one with respect to the process of interpretation of statutes in this province.

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J. D. Green C.J.N.L.

Harrington J.A. Concurring in the Result:

[79] I agree with my colleague Barry J.A. and the Chief Justice that the appeal should be allowed and I also agree with the separate comments of the Chief Justice.

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M. F. Harrington J.A.

APPENDIX A

The Need for Watershed Protection

The objective of watershed management is to preserve the quantity and quality of water available.

- Once the quantity of exiting supplies becomes inadequate, new sources are increasingly more expensive to develop and bring on-line.
- If quality is allowed to degrade, the cost to provide adequate treatment rises considerably. Water treatment is not a substitute for watershed management.
- Adequate control and protection reduces the risk of hidden conditions or catastrophic events which could endanger public health.

All of the human activities addressed by watershed management plans have potential for negative impact on water quality. Some can be mitigated, but some must be more strictly controlled, even to the point of eliminating them.

The most dangerous activities are those which cause a direct threat to human health from bacteriological pollution. Sources of such threats include:

- Human waste from residential development, recreation camps, tourism attractions, etc.
- Manure from livestock farming and farmland application.

Other activities may present a risk of chemical pollution which can affect health directly or promote secondary detrimental effects on water quality. Such risks include:

- Pesticides and fertilizers from farms and residential developments.
- Gas and oil spills from vehicles and equipment associated with almost every type of use.
- Ice and dust control chemicals from roads.

Even activities that might not appear too serious can have hidden risks with far-reaching effects on the ecology of a watershed and the quality of its supply.

- Any major disruption of vegetation cover can:
    - Alter drainage patterns
    - Allow erosion
    - Reduce percolation and natural filtration
    - Promote siltation of water bodies

- Such conditions occur as a result of:
    - Clearing for roads, houses, quarries, farms and pastures
    - Damage from off-road equipment

Control of these risks and effects is not a simple matter of banning the associated activities. A management plan must weigh the negative impacts on water quality against the advantages of a proposal from other viewpoints. Some activities may be permitted, with adequate controls, if the overall benefits outweigh the risks and costs. Such benefits are usually based on social or economic benefits to society as a whole or to particular proponents or stakeholders.

In our local experience, issues with respect to development have arisen in the following areas:

- Approval for residential development is continuously being sought by private property owners and neighbouring municipalities.
- Tourism and recreational interests, both government and private, want to make use of watersheds for these purposes.
- Increased access to natural resources, including forests, farmlands and minerals are sought by the relative government agencies and commercial interests.
- Use of water for hydro-electric generation conflicts with its use for municipal supply.

St. John's Watershed Management Policy

In 1995, St. John's and the Province joined in commissioning the preparation of a Watershed Management Plan for the water supplies serving the region.

- The result, issued early in 1996, was a Background Study and a Policy Document.
- The later was basically a compilation of recommended policies and practices to be applied.
- It was formally adopted by both the City of St. John's and the Department of Municipal and Provincial Affairs.

The objectives of the Plan were defined as follows:

- Keep the watersheds as pristine as possible.
- Protect the watersheds from any contamination that might threaten the water supply.
- Allow the City and its surrounding communities to grow in a logical and responsible fashion, recognizing the mutual dependence of having an adequate water supply source.

- Resolve watershed conflicts.
- Eliminate, minimize or defer the need to construct or upgrade water treatment plants.
- Provide an equitable sharing of costs and benefits.

The overall intent of these objectives is obvious:

- That safeguarding the quantity and quality of water is of primary importance.
- That due consideration be given to other factors where there can be some degree of accommodation without unnecessarily comprising the primary objective. These factors include:
    - The costs, both economic and social, to the community as a whole.
    - The particular interests of separate sections of society including land owners, commercial enterprises, government agencies and other interest groups.

The Policy Document produced under this mandate contained one basic underlying statement of the policy relating to development, as follows:

> "The practice of not allowing further urban development within the protected watershed in order to protect the water supply is appropriate and should continue. This practice should be extended to non-urban land uses, particularly farming practices. Existing sub-urban development that has occurred along roadways, as well as existing farming areas and recreation camps may remain. However, they should not expand, and the long term intention is to revert these areas back to natural, pristine conditions as opportunity and funding permit."

In arriving at this conclusion, many management alternatives were considered, covering such broad issues as allowing widespread urban development, constructing highways and water filtration plants, watershed preservation, etc. These alternatives were assessed for appropriateness against the goals and objectives. In so doing, it was seen that the City's traditional approach of watershed preservation goes a long way to meet the goals and objectives, but that additional watershed management practices can better meet the objectives.

Therefore, in addition to the general policy statement, there were also recommendations for practices such as the following:

- Establishment of a Water Efficiency Program to promote responsible operation, maintenance and consumption practices.
- Amendment of the City of St. John's Act and review of other legislative and regulatory documents to address certain shortfalls and inconsistencies in jurisdiction and authority with respect to overall watershed management.
- Developmetnt of programs for improvement and protection of natural and physical conditions.
- Preparation of a forestry management plan which is specific to each watershed as a unit, and makes adequate provision for water quality preservation.
- Implementation of a series of Best Management Practices for any permitted or tolerated development. There are specific recommendations aimed at minimizing the risks and effects of each type of land use.

In effect, the City's formal watershed management policies have been carefully researched. Past practice of stringent development control has been confirmed as the proper course for the future.

Correction Notice:

Correction made on July 21, 2016:

1. In paragraph [71] the declaration was replaced with the following:

   A declaration shall issue:

   (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 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.