IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Gosse v. Conception Bay South (Town)*, 2021 NLCA 23
Date: April 20, 2021
Docket Number: 201901H0070

BETWEEN:
RICHARD GOSSE — APPELLANT

AND:
TOWN OF CONCEPTION BAY SOUTH — RESPONDENT

AND

Docket Number: 201901H0071

BETWEEN:
CHRISTOPHER BUTLER — APPELLANT

AND:
TOWN OF CONCEPTION BAY SOUTH — RESPONDENT

Coram: Fry C.J.N.L., White and Goodridge JJ.A

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201801G6047 (2019 NLSC 126)

Appeal Heard: October 20, 2020
Judgment Rendered: April 20, 2021

Reasons for Judgment by: White J.A.
Concurred in by: Fry C.J.N.L. and Goodridge J.A.

Counsel for the Appellant: Daniel W. Bennett
Counsel for the Respondent: Jerome P. Kennedy Q.C.

Authorities Cited:

CASES CONSIDERED: *Butler v. Town of Conception Bay South*, 2017 NLTD(G) 196; *Lynch v. St. John's (City)*, 2016 NLCA 35, 380 Nfld. & P.E.I.R. 13; *Fishery Products International Ltd. v. Rose*, 2018 NLCA 65; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *Bradbury v. Carbonear (Town)*, 2020 NLCA 1; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227; *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227; *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98, 178 N.S.R. (2d) 294.

White J.A.:

[1] At issue in this appeal is whether properties owned by Mr. Butler and Mr. Gosse, the appellants, have been constructively expropriated by the Town of Conception Bay South (the "Town"). Mr. Butler and Mr. Gosse claim that their respective properties have been constructively expropriated after the Town passed a Resolution in accordance with a storm water management plan that prohibited development of their properties.

[2] In the decision under appeal, the applications judge found that the properties of the appellants had not been constructively expropriated. He found that the Resolution did not prohibit all development of the properties and that the appellants still enjoyed some reasonable uses of their properties. In other words, he found that the common law test for constructive expropriation could not be established.

BACKGROUND

[3] In 2014, the Town hired an engineering firm to develop a storm water management plan for the Steadywater Brook drainage basin, or a "catchment area". The firm was asked to identify a floodplain area, or an area to which water would flow and accumulate. The study completed by the engineering firm identified a "100-year" flood line and recommended that a 15-meter buffer zone be established on either side of the flood line within which no development was to occur.

[4] On October 7, 2014, the Town approved the "Steadywater Brook Water Management Plan" and passed Resolution #14-355 (the "Resolution") , which stated:

> Be it resolved that approval be given to restrict all development within the designated 1:100-year flood zone and 15 meter buffer as indicated in the Steadywater Brook Stormwater Management Plan, and update the Municipal Plan as required.

[5] Mr. Butler and Mr. Gosse claimed that their respective properties have been, either wholly or in part, constructively expropriated by the Town. The claims of Mr. Butler and Mr. Gosse were made on a common factual basis and were therefore dealt with together by the applications judge.

[6] Mr. Butler's property is located entirely within the flood zone and is zoned Open Space Conservation ("OSC"), which has certain permitted and discretionary uses. There are two buildings on Mr. Butler's property, a shed and a greenhouse, as well as a vegetable garden.

[7] Only a portion of Mr. Gosse's property falls within the flood zone. This means that only a portion of the property has been zoned OSC, with the balance being zoned as Residential Mixed property. Mr. Gosse maintains a parking lot for commercial vehicles such as buses, trailers and limousines on his property.

[8] Mr. Butler has made several attempts to develop his property – all of which were denied by the Town. On October 8, 2014, Mr. Butler applied to construct a residential dwelling. The Town rejected this request because the proposal was not in accordance with OSC zoning. In September 2015, Mr. Butler applied to have the Town rezone his property from OSC zoning to Residential Medium Density zoning. The Town denied this application on the basis that the property is located within the 100-year floodplain and 15-meter buffer zone, as identified by the Stormwater Management Plan, where no further development is permitted to occur. In April 2016, Mr. Butler submitted another application to build a residential dwelling on his property. The Town again denied the request on the basis of OSC zoning. The rejection letter went on to state that the property is also located within the flood zone and 15-meter buffer, and that it is incumbent on the Town to ensure that development occurs in a safe manner with no potential hazards, such as flooding.

[9] Mr. Butler then served a Purchase Notice on the Town and the Minister of Municipal Affairs, pursuant to section 96 of the *Urban and Rural Planning Act*, SNL 2000, c. U-8 (the "*URPA*"), which provides for a finding of constructive expropriation where a municipal regulatory development authority renders land "incapable of reasonably beneficial use". The Minister determined that, pursuant to section 98 of the *URPA*, the Purchase Notice provisions under section 96 did not apply in these circumstances because development of Mr. Butler's property

was prohibited for environmental reasons. The Minister also determined that Mr. Butler's property was not incapable of reasonably beneficial use. Mr. Butler sought judicial review of the Minister's decision, but his application was denied. See *Butler v. Town of Conception Bay South*, 2017 NLTD(G) 196 (the "Purchase Notice litigation").

[10] Before addressing the appellants' claims of constructive expropriation, the applications judge first dealt with the Town's claim that Mr. Butler's application amounted to an abuse of process due to Mr. Butler's earlier attempts to seek redress for the Town's denial of his requests to develop his property. The applications judge rejected this argument. He determined that a claim of constructive expropriation had not been advanced or considered in any prior proceeding or application. This was specifically noted by the judge in the Purchase Notice litigation (see para. 17 of the application judge's decision).

[11] In addressing the claims of constructive expropriation, the applications judge concluded that the Resolution restricted development within the flood zone, but did not prohibit all development. In reaching this conclusion, the applications judge acknowledged that, in response to Mr. Butler's requests to rezone his property in 2015, the Town had stated that Mr. Butler's property was located in the 100-year floodplain "where no further development is permitted because of the flooding risk" (at para. 30 of the applications judge's decision). Similarly, the applications judge noted that the Town's response to Mr. Butler's 2016 application for a building permit could also be read as suggesting no development was to occur. Nevertheless, the applications judge referred to both instances as an "unfortunate choice of wording" and did not accept that either statement was evidence that the Resolution prohibited all development of the properties (at para. 32 of the application judge's decision).

[12] Further, the applications judge noted that there was no evidence that either Mr. Butler or Mr. Gosse had applied to develop their respective properties for either a permitted or discretionary use under the OSC zoning. In other words, there was no evidence that any application to develop the properties had been denied solely on the basis of the Resolution.

[13] The applications judge then considered the specific requirements that must be established in order to find that the properties had been constructively expropriated. Referring to this Court's decision in *Lynch v. St. John's (City)*, 2016 NLCA 35, 380 Nfld. & P.E.I.R. 13, the applications judge laid out the following test for constructive expropriation (at para. 36):

> Two elements must be established by the claimant:
>
> (i) The acquisition by the municipal authority of a beneficial interest in the property or flowing from it; and
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> (ii) Removal of all reasonable uses of the property.

[14] The applications judge did not determine whether the Town had acquired a beneficial interest in the properties. In his view, the matter could be disposed of under the second step of the test, which was not established for two reasons. First, the Resolution did not absolutely prohibit development. Rather, the Resolution only restricted development despite the wording the Town had used in prior correspondence with Mr. Butler. Second, he was of the view that Mr. Butler and Mr. Gosse had not established that "virtually all aggregated incidents of ownership" had been taken away. Mr. Butler maintained a shed, garage and vegetable garden on his property, while Mr. Gosse used at least a portion of his property as a parking lot for commercial vehicles. He found that these continued and permitted uses of the properties were a "far cry" from the situation in *Lynch* where constructive expropriation had been found (at para. 45 of the application judge's decision). The judge concluded that, in the case before him, the line between regulation and confiscation had not been crossed.

ISSUES

[15] The appellants first argue that the Town was estopped from arguing that the Resolution did not prohibit development, since this was contrary to both the Town's position and the judge's finding in the Purchase Notice litigation. They also argue that failing to raise this argument until the hearing of the application amounted to an abuse of process.

[16] The appellants further argue that the applications judge erred in fact and law in concluding that development of the properties was permitted by the Resolution and that he erred in fact and law in his interpretation and application of the common law test for constructive expropriation.

STANDARD OF REVIEW

[17] The issues raised by the appellants are issues of fact or issues of mixed fact and law. As stated by this Court in *Fishery Products International Ltd. v. Rose*, 2018 NLCA 65, the standard of review to be applied when reviewing questions of fact or mixed fact and law is palpable and overriding error (at para. 25).

[18] The standard of palpable and overriding error is highly deferential (*Fishery Products*, at para. 37). Where the standard of palpable and overriding error applies, an appellate court can intervene only if there is an obvious error in the decision under review that is determinative of the outcome of the case (*Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33).

ANALYSIS

Issue Estoppel/Abuse of Process

[19] The appellants argue that the Town was estopped from arguing at the hearing of the application, that the Resolution did not prohibit all development. They say that this position was contrary to the Town's position in the Purchase Notice litigation and contrary to the finding of the Purchase Notice litigation judge that the Resolution prohibited all development. The appellants further argue that it was an abuse of process for the Town to advance this argument for the first time at the hearing of the application.

[20] Though the appellants argue that the United States doctrine of judicial estoppel (as a branch of the doctrine of abuse of process) should apply to the issue of whether the Resolution prohibited development of the properties, it is not necessary for this Court to consider the doctrine of judicial estoppel in this case. As noted by the Town in its factum, the appellants' argument can be adequately addressed under the doctrines of issue estoppel or abuse of process.

[21] The doctrine of issue estoppel was recently discussed by this Court in *Bradbury v. Carbonear (Town)*, 2020 NLCA 1, at paragraphs 8-9:

> [8] In applying to strike out Ms. Bradbury's statement of claim, the Town relied on the doctrine of issue estoppel, which is discussed in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, in the context of a decision of a disciplinary tribunal and a subsequent civil action. Cromwell and Karakatsanis JJ., for the majority, explained:
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> > […]
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> > [29] … [Issue estoppel] balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion [not to] apply issue estoppel when its application would work an injustice.

> [9] In conducting the analysis in *Penner*, the majority referred to the legal framework set out in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, in which Binnie J., for the Court, concluded:
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> > [25] The preconditions to the operation of issue estoppel were set out by Dickson J. in [*Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.)], at p. 254:
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> > > (1) that the same question has been decided;
> > >
> > > (2) that the judicial decision which is said to create the estoppel was final; and,
> > >
> > > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[22] The doctrine of issue estoppel has no application in this case. The first precondition for issue estoppel – that the same question has already been decided in a previous case – cannot be established. The applications judge was asked to consider a different issue than the judge in the Purchase Notice litigation who was asked to consider a statutory scheme provided for in the *URPA*. This involved an entirely different analysis than determining whether the properties in question have been constructively expropriated. The judge in the Purchase Notice litigation expressly stated that the issue of constructive expropriation was not before him (at para. 38).

[23] Further, it cannot be said that the judge in the Purchase Notice litigation made a finding that the Resolution prohibited all development. The statement relied on by the appellants in advancing their argument was a statement made near the beginning of his decision, in the recitation of the facts of the case (at para. 7).

[24] The appellants further argue that the Town's position that the Resolution did not prohibit development, advanced for the first time at the hearing of the application, amounted to an abuse of process. Counsel for the Town maintains that, during the hearing, he was focused on the main issue to be decided – whether or not the properties were constructively expropriated and that the interpretation of the Resolution was "not a key issue" on the application.

[25] In *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, the Supreme Court of Canada characterized the doctrine of abuse of process as follows:

> 40 The doctrine of abuse of process is characterized by its flexibility. […] In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307 (S.C.C.)), stated at paras. 55-56 that the doctrine of abuse of process
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> > engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [C.A.], at p. 358.
> >
> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process.
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> > [Emphasis added.]
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> 41 As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. […] The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute.

[26] In addressing the test for constructive expropriation, the Town's position was that all reasonable uses of the properties had not been removed. While it is technically true that the interpretation of the Resolution was "not a key issue" on the application, the impact of the Resolution was relevant to the determination of the key issue of constructive expropriation. The effect of the Resolution was connected to the applications judge's later finding that constructive expropriation could not be established in this case because the properties had not been deprived of all reasonable uses.

[27] There was no abuse of process in the Town advancing its argument at the hearing of the application that the Resolution did not prohibit development. There was nothing manifestly unfair in the Town's advancement of this argument, nor did its assertion of this position at the hearing bring the administration of justice into disrepute. The Town's position on this point was consistent with its overriding assertion that no constructive expropriation occurred.

[28] Further, as discussed above, the issue in the application before the applications judge involved an entirely different issue than the Purchase Notice

litigation. That is, neither the Town's submissions in the Purchase Notice litigation, nor any statement made by the judge in that litigation had any bearing on the applications judge's findings in the instant case. Indeed, it was Mr. Butler who successfully argued before the applications judge that the application was not an abuse of process and was merely an exercise of his rights to pursue compensation for constructive expropriation.

[29] It was therefore open to the applications judge to conclude, as he did, that the Resolution did not prohibit development. Regardless of how counsel specifically articulated their positions at the hearing, the effect of the Resolution was a live issue on the application and there was nothing manifestly unfair about the applications judge's consideration of this issue. No manifest unfairness occurs when different judges in different proceedings involving different legal considerations reach different findings. Such a scenario does not bring the administration of justice into disrepute.

Constructive Expropriation

[30] In *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227, the Supreme Court of Canada set out a two-step test for *de facto*, or constructive, expropriation (at para. 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 [citations omitted].

[31] In *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98, 178 N.S.R. (2d) 294, Cromwell J.A., for the Court, determined that constructive expropriation occurs only when the restrictions placed upon the property are so stringent and all-encompassing that they have the effect of depriving the owner of his or her interest in the land while leaving the paper title undisturbed (at para. 80). Cromwell J.A. went on to state that constructive expropriations are very rare in Canada and require proof of the virtual extinction of an identifiable interest in the property (at para. 83).

[32] As noted by this Court in *Lynch*, land use regulation has rarely been found to constitute compensable expropriation in Canada, even where that regulation has the effect of decreasing the value of the land (at para. 45). Yet, there may be instances where the governmental action extends beyond drastically limiting the use or reducing the value of the owner's property (at para. 46). Applying the test from *Canadian Pacific Railway*, as well as the principles from *Mariner Real Estate* and other cases, this Court found that *Lynch* was one of those cases in

which the regulation of the property constituted compensable expropriation. In that case, "virtually all aggregated incidents of ownership" had been taken from the owners of the property (*Lynch*, at para. 63).

[33] The appellants argue that the applications judge made errors of fact and mixed fact and law in his analysis at the second step of the test for constructive expropriation. First, the appellants argue that the applications judge erred in fact in finding that the Resolution did not prohibit all development. Second, the appellants argue that the applications judge erred in mixed fact and law in finding that reasonable uses of the properties exist.

[34] As noted above, the applications judge did not determine whether the Town had acquired a beneficial interest in the properties. In his view, it was unnecessary to make a finding on this issue since the second step of the test could not be established. The appellants do not argue that there were any errors in this general approach, nor do they suggest that a different approach to the first step of the test would have led to a different result or analysis at the second step of the test.

[35] With respect to the applications judge's finding that the Resolution did not prohibit all development, this is a factual finding of the judge that requires deference. The appellants argue that the applications judge committed a palpable and overriding error in finding that the properties were not prohibited from development when there was evidence to suggest otherwise. They point to correspondence from the Town that stated no development was to occur in the floodplain, as well as to the evidence of the Town's Director of Planning and Development, Mr. Corrie Davis, in support of their argument that the Resolution did prohibit development.

[36] The correspondence from the Town was dealt with by the applications judge, who characterized the wording as "unfortunate" and he made his finding notwithstanding the unfortunate wording. The appellants have not identified any error in his treatment of this evidence.

[37] The appellants argue that the evidence of Mr. Davis supported a finding that the Resolution prohibited all development. Mr. Davis acknowledged that, generally speaking, Mr. Butler would not be permitted to build on his property. However, as noted by the applications judge at paragraph 29 of his decision, Mr. Davis deposed:

> In practice, a restriction on development within the 1:100-year flood zone and 15m buffer does not mean that any and all development would be prohibited.

[38] The applications judge's finding respecting the effect of the Resolution is therefore consistent with the evidence of Mr. Davis.

[39] The applications judge also pointed to the wording of the Resolution itself in finding that it did not prohibit development. The Resolution adopted by the Town uses the word "restrict" and not "prohibit". Applying a plain language interpretation to the Resolution, the appellants have not shown that the applications judge's treatment of the Resolution is incorrect.

[40] The applications judge was also correct to note the absence of any evidence that an application by the appellants to develop their properties for either a permitted or discretionary use was denied based solely on the Resolution. The correspondence from the Town indicates that the location of the properties within the flood zone was an important consideration in refusing the proposed development, having regard to the Resolution, but that this was not the sole basis for denying the applications. The development proposed was first and foremost contrary to OSC zoning and it cannot be said, based on the evidence, that the Resolution establishes an outright prohibition of any and all development.

[41] The appellants have not established that the applications judge erred in his assessment of the Resolution. He weighed the evidence before him and made a finding that was supported by that evidence; namely, the wording of the Resolution itself, the evidence of Mr. Davis, and the absence of any evidence that the Town had refused past requests to develop the properties based solely on the Resolution.

[42] The applications judge's other main finding at the second stage of the test was that the appellants did not establish that "virtually all aggregated incidents of ownership" had been taken away. The evidence established that Mr. Butler maintained a shed, garage and garden on his property and that Mr. Gosse maintained a parking lot for commercial vehicles. There was no evidence that the appellants would not be permitted to continue with such uses of their properties.

[43] Having found that the Resolution did not prohibit all development, and because there was evidence before him that the appellants maintained some use of their properties, the applications judge found that the second step of the test for constructive expropriation could not be met.

[44] The Supreme Court of Canada, when setting out the second step of the test for constructive expropriation in *Canadian Pacific Railway*, employed the words "removal of *all* reasonable uses of the property [emphasis added]" (at para. 30). By finding that this standard was met where "virtually all aggregated incidents of ownership have been taken away", this Court confirmed the high threshold to be met at the second stage of the test (*Lynch*, at para. 63). As noted in *Lynch*, findings of constructive expropriation are very rare in Canada (at para. 53).

[45] The applications judge was correct in finding that the case before him was a "far cry" from the standard set out by this Court in *Lynch*. In that case, this Court determined that the trial judge had not identified a "single use" of the property that might be possible (*Lynch*, at para. 63). In this case, not only did the applications judge identify continued uses, the appellants acknowledged that they maintain some uses of their properties.

[46] While the use of the appellants' properties has been limited or restricted, this does not meet the standard required by the common law test. When comparing the facts of this case to other cases in which constructive expropriation has been made out – a rare finding in Canada – the restrictions placed upon the properties by the Town do not rise to the level of confiscation required to justify a finding of constructive expropriation.

SUMMARY AND DISPOSITION

[47] The appellants have not demonstrated that the Town was estopped from advancing the argument that the Resolution did not prohibit development, nor was it an abuse of process for the Town to do so. It was open for the applications judge to determine, as he did, that the Resolution did not prohibit all development of the properties. He was not bound by the Purchase Notice litigation, which did not involve a claim of constructive expropriation.

[48] Further, the applications judge did not err in finding that the properties had not been constructively expropriated. He applied the correct legal test and made appropriate comparisons between the facts of this case and the facts of cases wherein constructive expropriation had been found. He made no errors in finding that the limits on the use of the properties in this case did not rise to the level of constructive expropriation.

[49] I would dismiss the appeal.

C. W. White J.A.

I Concur: _____
D. E. Fry C.J.N.L.

I Concur: _____
W. H. Goodridge J.A.