IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Lynch v. St. John's (City)*, 2022 NLCA 29
Date: May 11, 2021
Docket Number: 202001H0052

BETWEEN:

WALLACE LYNCH, WILLIS LYNCH, WILFRED LYNCH, REGINALD LYNCH and COLIN LYNCH — APPELLANTS

AND:

CITY OF ST. JOHN'S — FIRST RESPONDENT

AND:

BOARD OF COMMISSIONERS OF PUBLIC UTILITIES — SECOND RESPONDENT

Coram: Green, White and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201801G7703 (2020 NLSC 92)

Appeal Heard: February 10, 2021
Judgment Rendered: May 11, 2022

Reasons for Judgment by: Butler and Green JJ.A.
Concurred in by: White J.A.

Counsel for the Appellants: Michael J. Crosbie Q.C.
Counsel for the First Respondent: Irene S. Muzychka Q.C.
Counsel for the Second Respondent: Peter A. O'Flaherty Q.C.

Authorities Cited:

CASES CITED:
Pointe Gourde Quarrying and Transportation Co. Ltd. v. Sub-Intendent of Crown Lands, (1947) A.C. 565 (JCPC); *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227; *Lasade Enterprises Ltd. v. Newfoundland* (1993), 114 Nfld & PEIR 19 (Nfld. C.A.); *Roberts v. Newfoundland (Minister of Transportation and Works)*, 2005 NLCA 26, 247 Nfld & PEIR 107; *Re Gibson and City of Toronto* (1913), 28 OLR 20 (ON CA), 11 DLR 529; *Kramer et al. v. Wascana Centre Authority*, [1967] SCR 237; *Kramer et al. v. Wascana Centre Authority* (19 May 1965), Docket No. 5255 (Sask. C.A.); *Halliday's Estate v. Nfld. & Light and Power Co. Ltd.* (1980), 29 Nfld & PEIR 212 (Nfld. C.A.); *McKee v. Province of Alberta* (1967), 16 LCR 35; *Atlantic Shopping Centres Ltd. v. St. John's, City of* (1985), 56 Nfld & PEIR 44 (Nfld. C.A.); *Windsor (City) v. Paciorka Leaseholds Limited*, 2012 ONCA 431, 111 OR (3d) 431; *The Corporation of the City of Windsor v. Paciorka Leaseholds Limited*, 2011 ONSC 2876; *West Hill Redevelopment Co. v. Ontario* (1998), 64 LCR 81 (OMB), aff'd (1999), 67 LCR 252 (Ont Div Ct); *Jewish Community Centre of Edmonton Trust v. The Queen* (1983), 27 LCR 333 (Alta LCB); *Waters and Others v. Welsh Development Agency*, 2004 UKHL 19, [2004] 2 All ER 915.

STATUTES CONSIDERED:
Expropriation Act, RSNL 1990, c. E-19, sections 26, 18, 19, 27; *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8; *City of St. John's Act*, RSNL 1990, c. C-17, sections 102, 104(1), 104(4)(d), 101; *The St. John's Municipal Act, 1892*, CSN 2nd Series 1896, c. 42 No. 296, sections 78, 79, 80; *St. John's Municipal Act, 1921*, SN 1921, c. 13, section 6; *City of St. John's (Amendment) Act*, SN 1959, No. 57, sections 4, 5; *City of St. John's (Amendment) Act*, SN 1964, No. 85, section 5; *City of St. John's Act*, SN 1978, c. 45, section 118(4)(d); *Wascana Centre Act, 1962*, (Sask.), c. 46; *Wascana Centre Act*, RSS 1965, c. 401, section 49; *Pippy Park Commission Act*, RSN 1970, c. 290; *Expropriation Act*, R.S.N. 1970, cap. 121, section 27; *Land Compensation Act*, 1961 (UK), c. 33, sections 5, 6.

REGULATIONS CONSIDERED:
St. John's, the City of St. John's, *The 1994 Development Regulations*, Gazetted June 3, 1994 in the Newfoundland Gazette, Vol 69 No 22, 325, section 10.46; *City of St. John's Boundary Order*, 1991 Nfld Reg 236/91.

ARTICLES CONSIDERED:
Raymond D. Schacter, "Compensation for Expropriation in Urban Redevelopment Situations" (1977), 55 Can B. Rev. 656.

OTHER:
St. John's, City of St. John's, *A Watershed Management Plan St. John's Regional Water Supply* (*Background Study*), (April 1996, PN 9410); St. John's, City of St. John's, *A Watershed Management Plan St. John's Regional Water Supply* (*Policy Document*), (April 1996, PN 9410), sections 2.2, 2.5.

Butler and Green JJ.A.:

INTRODUCTION

[1] Most expropriation valuation cases involve a specific exercise of an authority's right to expropriate private property under relevant expropriation legislation.

[2] In contrast, this Court found in 2016 NLCA 35, leave to appeal to SCC refused, [2016] SCCA No. 390, (the "Expropriation Decision"), that the appellants' property had been the subject of a constructive expropriation and it remitted the issue of compensation to be determined by the Board of Commissioners of Public Utilities (the "Board").

[3] The relevant portions of section 26 of the *Expropriation Act*, RSNL 1990, c. E-19 (the "*Act*") provide:

> 26. (1) The board may, in addition to assessing the value of land expropriated, try all questions of law and fact which it is necessary for it to try in order
>
> > (a) to fix the amount of compensation to be paid in respect of the land that was expropriated or detrimentally affected by the expropriation…
>
> (3) The board may at any stage of its proceedings and shall where directed by a judge of the court state in the form of a special case for the opinion of the court a question of law arising in the course of the proceedings.

[4] Relying upon section 26(3) of the *Act*, the Board stated a special case for the opinion of the Supreme Court whose judgment, 2020 NLSC 92 (the "Judgment") is the subject of the herein appeal. The question posed was:

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

(Judgment, at paragraphs 2-3)

[5] The applications judge's answer to this question was that compensation should be assessed based on the existing watershed zoning with discretionary uses of agriculture, forestry and public utility (Judgment, at paragraph 63(2)). In doing so, she rejected the argument of the appellants, based on what has become known as the *Pointe Gourde* principle (based on *Pointe Gourde Quarrying and Transportation Co. Ltd. v. Sub-Intendent of Crown Lands*, (1947) A.C. 565 (JCPC), that the watershed-related designation under the City of St. John's (the "City") formally entitled *Land Use Zoning and Subdivision* Regulations, commonly and herein referred to as the *Development Regulations* (St. John's, the City of St. John's, *The 1994 Development Regulations*, Gazetted June 3, 1994 in the Newfoundland Gazette, Vol 69 No 22, 325) passed under the *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8 should be disregarded for the purpose of valuing the expropriated land.

[6] Her reasoning is summed up in the following paragraph of her judgment:

> [56] Given that the zoning by-law through which the property was zoned watershed was part of an independent zoning regulation, it cannot be considered to be part of the scheme that is to be disregarded for the purpose of the market value assessment. On the other hand, the policy of the City to keep the property unused in its natural state constitutes the pollution prevention scheme giving rise to the expropriation and this scheme must be ignored in the valuation of the property. To paraphrase, Cameron, J.A., in [*Roberts et al. v. Newfoundland and Labrador (Minister of Transportation and Works*), 2005 NLCA 26, 247 Nfld & PEIR 107] the value is to be assessed upon a consideration of the state of affairs which would have existed if there had been no scheme. As such, the property is to be valued without regard to the consequences arising from the City's refusal to allow any development of the property. It was that refusal which left the property with no reasonable use. Therefore, compensation should be on the basis of the zoning at the time of the expropriation (February 1, 2013) - that is watershed zoning which included the discretionary uses of agriculture, forestry and public utility.

[7] On this appeal, the appellants challenge these conclusions. They maintain that the applications judge erred in failing to apply the *Pointe Gourde* principle on the basis that the watershed designation was part of a pollution prevention scheme that encompassed the *City of St. John's Act*, RSNL 1990, c. C-17 (the "*City Act"*) provisions and the *Development Regulations* that were brought into force after the appellants acquired the land in question.

[8] In fact, the appellants go further and submit that the issue relating to the application of the *Pointe Gourde* principle had already been effectively decided in the Expropriation Decision and that the doctrine of issue estoppel applies. They raised this argument in front of the applications judge as well but it was rejected. They now argue that the judge erred in law in so deciding.

LEGISLATIVE AND LANDOWNING BACKGROUND

[9] The factual background of this convoluted and protracted litigation is to a degree summarized in previous decisions of this Court dealing with other aspects of the case (2016 NLCA 35 and 2020 NLCA 31).

[10] For the purposes of this appeal, it is sufficient at this point to highlight some key events in the development of restrictions on the use of the land and how they were regarded, leading up to a letter from the City Manager to the appellants on February 1, 2013 in which he stated that their application for the residential development of their land was being rejected "as contrary to the City of St. John's Act and the St. John's Development Regulations" (Appellants' Appeal Book, Volume 3, Tab 6(I)).

[11] All of the cases referred to in argument involved formal acts of expropriation taken by the appropriate expropriating authority. Because this case is one of constructive expropriation, no formal notice of expropriation was ever prepared and given to the appellants. The analysis in this case will have to take account of this difference when determining the scope of the expropriation scheme that was at issue.

[12] The land in question has been in the appellants' family ever since David Lynch obtained it as part of a Crown Grant in 1917. At that point the land was outside the boundaries of any municipality or other planning authority and was not subject to any public land use restrictions. The land was located in the Broad Cove River ("BCR") watershed. Groundwater inside the BCR watershed drains toward the Broad Cove River which is now used by the City as a water supply.

[13] At the time of the Crown Grant the City had been given by statute "possession and control" of an area around Windsor Lake – an area outside the municipal boundaries of the City – for the purpose of preventing pollution of the lake which was being used as a water supply. The City was also given power to "appropriate" property upon compensation being paid pursuant to arbitration (*The St. John's Municipal Act, 1892*, CSN 2nd Series 1896, c. 42 No. 296, ss. 78-80). The area where such authority could be exercised did not include the subject lands nor did it include them when a new municipal Act expanding the area of City control was passed in 1921 (*St. John's Municipal Act, 1921*, SN 1921, c. 13, at s. 6).

[14] We agree with the statement in paragraph 12 of the appellants' factum that:

> Land use restrictions in order to use watershed land for pollution prevention and in order to prevent pollution of a watershed, and the ability to expropriate in order to prevent pollution of a watershed, are significant restrictions on the rights of private property owners … to use and develop their land.

[15] In 1959, the lakes and ponds within the BCR catchment area were added by statute to the City's control area (*City of St. John's (Amendment) Act*, SN 1959, No. 57, at ss. 4-5). At that point, the subject property became subject to the City's pollution control and expropriation powers, and use and development became restricted. Building, including residential building was not, however, expressly prohibited.

[16] In 1964, an amendment to the *City Act* added a specific prohibition on erection of buildings above a certain elevation in the control area unless they were accessory to or extensions of existing buildings (*City of St. John's (Amendment) Act*, SN 1964, No. 85, at s. 5).

[17] By a further amendment in 1978 (*City of St. John's Act*, SN 1978, c. 45), the prohibitions on building assumed their present more relaxed form in the *City Act*, by including an exception to the prohibition that provided that the City could permit the erection on land of:

> 118(4) [Subsequently renumbered as 104(4)]…
>
> > (d) a building or extension of an existing building, subject to the written recommendation of the City Manager that a permit be issued for such building or extension.

[18] As noted by the applications judge in this case (Judgment, at paragraph 11(8)) no criteria for the exercise of the City Manager's discretion to recommend issuance of a building permit were stipulated, nor did the *City Act* state how the provisions of the *City Act* should interact with discretionary use provisions under other City planning regulations.

[19] What is clear is that the type or use of any such building was not necessarily limited to any particular category, like agriculture, forestry or public utility use. The 1978 amendment did, however, signal that some building, including possibly carefully regulated residential building, was contemplated, provided it was regarded as compatible with the overall pollution control purpose of the control area. While such development would depend on the City Manager's recommendation, that recommendation could not be made arbitrarily or capriciously but on an individualized basis based on proper planning principles.

[20] In 1992, the City boundaries were expanded to include the appellants' property (*City of St. John's Boundary Order*, 1991 Nfld Reg 236/91). Although continuing to be subject to the restrictions on building and expropriation powers for pollution control purposes under the *City Act*, the land also became subject to the general land use zoning powers of the City.

[21] The City later adopted the *Development Regulations* which designated a "Watershed" zone that encompassed the appellants' property. That zone did not contemplate any permitted uses. The *Development Regulations* did, however, contemplate three possible discretionary uses: (i) agriculture; (ii) forestry; and (iii) public utility (*Development Regulations*, at s. 10.46.1).

[22] In April 1996, the City received a comprehensive study it had commissioned entitled "A Watershed Management Plan, St. John's Regional Water Supply." (St. John's, City of St. John's, *A Watershed Management Plan St. John's Regional Water Supply* (*Background Study*), (April 1996, PN 9410) [Background Study]). The Policy Document emanating from that study observed, at s. 2.2, that:

> The [City] Act … gives the City Council the power to erect a new building upon the recommendation of the City Manager, however, this power is rarely used. <u>The City … 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 by-law.</u> (St. John's, City of St. John's, *A Watershed Management Plan St. John's Regional Water Supply* (*Policy Document*), (April 1996, PN 9410) [Policy Document])

(Emphasis added.)

[23] The Policy Document also recommended that "[t]he practice of not allowing further urban development within the protected watershed in order to protect the water supply is appropriate and should continue" and that "the long term intention is to revert the areas back to natural, pristine conditions as opportunity and funding permit" (Section 2.5. Emphasis added).

[24] The Expropriation Decision cited the final report from the Background Study and the Policy Document that was accepted by the City and the Provincial Department of Municipal Affairs in 1996. The statement of objectives in the Watershed Management Plan included the statement: "Keep the watersheds as pristine as possible." In addition, after referring to the recommendations of the study, quoted above, and the fact that the issue had been "carefully researched", the report, as accepted, asserted: "Past practice of stringent development control has been confirmed as the proper course for the future." (2016 NLCA 35, at Appendix A).

[25] The St. John's Municipal Plan, Gazetted in 1993 and the *Development Regulations* consequent thereon, again identified a "Watershed" zone that encompassed the appellants' land and declared that there were no permitted uses in the zone (the only zone in the City containing no permitted uses) and only three discretionary uses related to agriculture, forestry and public utilities.

[26] The adoption of the policy recommendations in the water management study that the existing "practice" of not allowing urban development within the watershed area in order to protect the water supply from pollution, demonstrates that the Watershed zoning restrictions in the St. John's Municipal Plan and the *Development Regulations* implementing that plan had a direct connection back to the provisions of the *City Act* both in terms of broad objectives and specific regulatory thrust.

[27] In 2011 the appellants inquired of the City as to what sort of residential, agricultural, forestry or public utility uses might be available for their land. They were informed verbally that they would not be allowed to develop the property *in any manner* (2016 NLCA 35, at paragraph 22). This position was formally reinforced when in 2013, in response to an application to develop a ten-lot residential subdivision, the City Manager rejected their application "as being contrary to Sections 104 and 106 of the City of St. John's Act and section 10:46 of the St. John's Development Regulations." The reference to section 10.46 was a reference to the Watershed (W) Zone. It is apparent that it was the combined

effect of the City Act and the Watershed zone under the *Development Regulations*, both of which had the purpose of protecting the BCR watershed from pollution, that led to the City's position. This exercise of discretion by the City to prevent all reasonable uses of the land flowed both from the complementary provisions of the *City Act* and the *Development Regulations*.

[28] It was the expressed decisions in 2011 and 2013 to prevent development in any manner with a view to keeping the land in its natural pristine condition to advance the City's pollution control objectives regarding the BCR Watershed that led this Court to conclude that constructive expropriation of the appellants' land had occurred (2016 NLCA 35, at paragraphs 22, 24, 66-67).

[29] The foregoing events, which are reflected in the record filed by the parties on the application relating to the stated case, are uncontroversial. Where the parties differ, however, is with respect to the implications and inferences to be drawn from them with respect to whether the *Pointe Gourde* principle applies.

ISSUES

[30] The issues raised on this appeal are:

Issue 1: Did the applications judge err in her determination that issue estoppel did not apply to the question posed by the Board to the Court?

Issue 2: Did the applications judge err in her determination of the scope of the expropriation scheme to be ignored for purposes of market value assessment of the appellants' property?

ISSUE 1: DID THE APPLICATIONS JUDGE ERR IN HER DETERMINATION THAT ISSUE ESTOPPEL DID NOT APPLY TO THE QUESTION POSED BY THE BOARD TO THE COURT?

[31] The appellants assert that the Board's question relates to zoning, that the Expropriation Decision determined the issue of zoning and that it cannot be readdressed.

[32] While the Expropriation Decision contained a number of factual determinations, at issue here is whether this Court made a conclusion on zoning or merely determined matters that should *direct* the Board in the exercise of its exclusive authority to assess compensation.

[33] The applications judge summarized the law of *res judicata* and issue estoppel at paragraphs 17 and 18 of her decision:

> [17] There are two species of *res judicata* which are commonly referred to as cause of action estoppel and issue estoppel. The Lynches assert issue estoppel. The Court of Appeal has frequently articulated the test to be met to establish issue estoppel. The issue must have been fundamental to, and decided in, previous litigation between the same parties. This is the case even if the causes of action in the two proceedings were not identical [*Quinlan*, at paragraph 7; *Guardian Insurance Co. of Canada v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62, at paragraph 43; *Canada Post Corp. v. Snook*, 2015 NLCA 49, at paragraph 31].
>
> [18] In *Guardian*, at paragraph 44, Green, C.J., as he then was, cited *Danyluk*, per Binnie, J., in further noting that where issue estoppel is established, the party seeking to re-litigate will, subject to limited exceptions, be barred from challenging the "material facts and the conclusions of law or of mixed fact and law ... that were necessarily (even if not explicitly) determined in the earlier proceedings."

[34] This was a correct statement of the law.

[35] In her application of the law to the facts, the applications judge explained:

> [20] In my view, the finding by the Court of Appeal in terms of the lack of any reasonable use of the property was made in the context of whether the test had been met for constructive expropriation – that was the issue before the Court of Appeal. It did not deal with the basis upon which expropriation compensation should be assessed. Having found that the property was constructively expropriated, the Court of Appeal ordered that the Lynches' compensation claim be determined by the Board in accordance with the provisions of the *Act*.
>
> [21] The question I am being asked to answer – whether compensation should be based upon the property's existing zoning or whether that zoning should be ignored and the value determined as if residential development were permissible, was not determined in the earlier proceeding. That is the question fundamental to the disposition of the case before me. It has not been previously adjudicated. Therefore, the Lynches have not met the test to establish that issue estoppel applies.

[36] In the Expropriation Decision, therefore this Court found that as of February 1, 2013, the appellants' property had been constructively expropriated. As previously stated, it was not asked to, and did not, make a conclusion on the compensation due.

[37] The Expropriation Decision made no reference to the *Pointe Gourde* principle or the effect of its application to the facts. This Court directed only that in the event the parties could not agree on compensation, the appellants could

apply to have it fixed by the Board under sections 18 and 19 of the *Act* (2016 NLCA 35, at paragraph 71).

[38] No error is disclosed in the application judge's conclusion that issue estoppel did not apply to the question posed by the Board.

[39] As will be apparent, however, we conclude that the analysis underpinning the Expropriation Decision, while not binding on the parties under the doctrine of issue estoppel, is nevertheless relevant to the second issue on this appeal. This issue will require consideration of the relationship between the restrictions in the *City Act* and in the *Development Regulations* and how they may have facilitated the achievement of the pollution control objectives of the City.

ISSUE 2: DID THE APPLICATIONS JUDGE ERR IN HER DETERMINATION OF THE SCOPE OF THE EXPROPRIATION SCHEME TO BE IGNORED FOR PURPOSES OF MARKET VALUE ASSESSMENT OF THE APPELLANTS' PROPERTY?

The Parties' Positions

[40] In finding constructive (or *de facto*) expropriation this Court, in the Expropriation Decision, accepted and applied the test stated in *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227, at paragraph 30, which required, in summarized form, proof of:

> (i) an acquisition of a beneficial interest in the property or flowing from it by the expropriating authority and subsequent deprivation of the property owner of the same beneficial interests; and
>
> (ii) removal of all reasonable uses of the property.

[41] On the first element, in the Expropriation Decision, this Court held:

> [59] … 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] …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.

[42] On the second element, this Court addressed whether the 1964 amendment to the *City Act* and the subsequent refusal by the City Manager to exercise discretion (on February 1, 2013), resulted in the deprivation of the reality of proprietorship. In the Expropriation Decision this Court concluded:

> [63] …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.

[43] These passages, suggest that the process that led to the *de facto* expropriation started with the 1964 amendment to the *City Act* and ended with the refusal by the City Manager to exercise discretion to refuse all development on February 1, 2013.

[44] The City argues on this appeal that since the second of the two elements required for a *de facto* expropriation did not occur until 2013, it is the zoning on this date that determines use and value. By February 1, 2013, the property had been rezoned as Watershed as a result of the 1994 *Development Regulations*. The City asserts that these were independent enactments which were not causally connected to the expropriation scheme.

[45] The City submits that it follows from this that valuation for expropriation purposes must be based upon the three discretionary uses permitted by the 1994 *Development Regulations,* namely agriculture, forestry and public utility.

[46] The appellants characterize the scope of the expropriation scheme more broadly. They suggest that every enactment, and every action taken by the City, between 1964 and 2013 affecting the appellants' property and related to the City's overarching concern for pollution control and provision of a safe water supply, are part of the scope of the expropriation scheme to be ignored for valuation purposes. On the basis asserted by the appellants, the 1994

Development Regulations would be ignored and valuation would not be restricted to the three discretionary uses identified in these regulations.

[47] As will become apparent this is the essence of the *Pointe Gourde* principle.

The *Pointe Gourde* Principle

[48] Section 27 of the *Act* provides in pertinent part:

> (1) In fixing the amount of compensation to be paid under this Act the board shall act in accordance with the following rules:
>
> > (a) the compensation shall be an amount based on the fair market value of the land and on existing use value at the time of the beginning of expropriation proceedings and no account shall be taken of the compulsory acquisition of the land, the disturbance of the owner or occupier, or other detrimental effect;
> >
> > …
> >
> > (c) the special suitability or adaptability of the land for a purpose shall not be taken into account where that purpose is one to which the land could be applied only as a result of the authority of an Act or one for which there is not a market apart from the special needs of a particular purchaser or the requirements for which the land is expropriated …;
> >
> > …
> >
> > (g) in all cases an advantage that the owner may derive or be likely to derive directly or indirectly from the contemplated work and operations for which the land is expropriated shall be taken into account in reduction of the amount of compensation; …

[49] The basic requirement in fixing compensation is that value shall be assessed on the basis of "fair market value… and on existing use value" (*Act*, at s. 27(1)(a)). The focus on *use value* requires the assessor to assign value based on the potentialities for future use of the land if it had not been expropriated, i.e. the highest and best use even though it may not be used for that purpose at the time, provided there is a reasonable probability that such use can be achieved in a manner that affects the present value of the property. Purely speculative or unrealistic expectations for future uses are not sufficient (*Lasade Enterprises Ltd. v. Newfoundland* (1993), 114 Nfld & PEIR 19 (Nfld. C.A.), at paragraphs 27-29).

[50] The time at which the determination of potential uses is to be made is the "beginning of expropriation proceedings" (*Act*, at s. 27(1)(a)). It becomes necessary therefore to ascertain the "beginning" of the expropriation process. The "beginning" is not necessarily the time of the delivery of a formal notice of expropriation nor, in the context of a constructive or *de facto* expropriation, the date on which the ultimate event crystallizing the expropriation occurs. As discussed later, the case law requires an assessment of when the development "scheme" leading to expropriation began as a prelude to the actual act of expropriation. The commencement of the scheme is not to be equated with the actual act of expropriation (*Roberts v. Newfoundland (Minister of Transportation and Works),* 2005 NLCA 26, 247 Nfld & PEIR 107, at paragraphs 24-31, 43).

[51] The importance of this determination is that the compensation assessor will be required to disregard acts that are part of the expropriation process that may have the effect of increasing or decreasing the use value of the land taken. This is the essence of the *Pointe Gourde* principle.

[52] It is a judicially-developed concept, which operates as an overlay on (and in some cases has been incorporated in) most expropriation legislative provisions dealing with the manner of calculating compensation.

[53] Properly applied, the principle may cut in favour of either the expropriating authority or the expropriated property owner, depending on the circumstances. If, for example, the proposal for, or effect of, expropriation were to increase property values in anticipation of a proposed new development resulting from the expropriation, the expropriating authority would not have to pay compensation based on those increases in property values. This aspect of the concept is reinforced by ss. 27(1)(c) and (g) of the *Act*. It also reflects the factual circumstances in the *Pointe Gourde* case itself. On the other hand, if the expropriation were for a purpose that has the effect of depressing surrounding property values, the expropriating authority will not be allowed to argue that the level of compensation should be based on the depressed values resulting from the taking. Without applying such a principle (notwithstanding its difficulty of application in some cases), one or the other side will receive a windfall.

[54] A corollary of the principle that favours the expropriated land owner is that where the ultimate expropriation is part of a scheme to take the land for a public purpose, planning and development restrictions imposed as part of the scheme should be disregarded when valuing the taken land. In effect, the land

will be treated as if the restrictive bylaw did not exist. This idea is reflected in the discussion in decisions like *Gibson* and *Halliday* discussed later.

[55] This is the aspect of the principle that is at issue in the current appeal.

[56] As Raymond D. Schacter notes in his article, "Compensation for Expropriation in Urban Redevelopment Situations" (1977), 55 Can B. Rev. 656 at 686, the principle amounts to "common sense justice applied by the courts where there appeared to be a compelling need to prevent abuse of power or inequity, and not applied in other instances where invoking its protective characteristics would drain the public purse or inhibit the proper and beneficial use of municipal or other authority.".

[57] The concept of a scheme of expropriation must not be taken too far, however. If all actions by, say, a municipal expropriating authority using land use bylaws for general planning purposes, were to be regarded as part of the scheme that ultimately leads to an expropriation, it would lead to the absurd result that land use restrictions imposed for general planning purposes would always be disregarded. The result would be valuation based on unrestricted use. The case law clearly rejects this idea. The notion of valuation on the basis of highest and best use cannot completely disregard all such restrictions when valuing land expropriated for some public purpose.

[58] It becomes important, therefore, to determine the scope of the expropriation scheme to differentiate it from "independent enactments" that may legitimately affect land use for valuation purposes. To try to address this issue, inquiries have been undertaken in the cases regarding:

- the "state of mind" of the expropriating authorities at the time of imposing land use restrictions (i.e., whether they were then contemplating expropriation);

- whether the land use restriction was regarded as a "step in the expropriation machinery";

- whether there is an "causal connection" between the land use restrictions and the ultimate taking of the land;

- whether the scheme "gives rise" to the expropriation.

[59] If, on the other hand, it can reasonably be said that the land use restrictions exist by virtue of the provision independent of or not causally connected to the expropriation or the purpose for which the land was taken, the valuation will have to be conducted on the basis that the land's value is limited by those restrictions.

[60] The determination of this question is made more complicated in the rare case, such as the current one, where the expropriation does not take place as a result of delivery of a formal notice of expropriation but is deemed to have occurred, as a *de facto* or constructive expropriation resulting from a series of events that ultimately result in the effective removal of all or substantially all of the landowner's proprietary rights in the land. All of those events necessarily are related or connected to the ultimate determination that the land has been constructively expropriated. They can therefore be said to be also necessarily causative of the expropriation. It becomes exceedingly difficult in such circumstances to extract from the events that have occurred any decisions respecting land use restrictions that cannot be said to be a step in the expropriation process.

Jurisprudence Relating to the Pointe Gourde Principle

[61] Previous cases have been decided on unique facts pertaining to the land use restrictions applicable in each case and in different legislative contexts, and for that reason cannot be regarded as determinative in other cases, including the current case. As Schacter notes at 662, "each case appears to be almost unique, and together the cases seem to defy logical analysis." Nevertheless, a reference to several of these prior cases that have been relied on in argument may be useful as examples of how the principle has been applied in practice.

[62] *Re Gibson and City of Toronto* (1913), 28 OLR 20 (ON CA), 11 DLR 529, a case pre-dating the *Pointe Gourde* decision, has, as noted by Schacter (662-663), been cited most often in Canada as the original authority for the obligation of the expropriator to assess the value of the land as if land use restrictions forming part of a development scheme or plan leading to expropriations did not exist. In *Gibson*, the City of Toronto passed a bylaw declaring part of St. Clair Avenue residential and prohibiting any building within 17 feet of the north or south line of the street. The following year, Toronto expropriated the southerly 17 feet of a landowner's lot. Claiming that the process had prevented him from developing the land for commercial purposes, the owner sought compensation on the basis that the arbitrator should have disregarded the bylaw declaring the land to be residential land and should

have valued it as if it were commercial land. The arbitrator held that the existence of the bylaw precluded his being able to disregard the residential designation.

[63] On appeal to the Ontario Court of Appeal, the landowner argued, amongst other things, that the bylaw was "part and parcel of the expropriating machinery" and that its effect in restricting the use of the land should have been disregarded (532). The Court set aside the arbitrator's award and remitted it to him for further consideration in light of the Court's analysis. Maclaren J.A. stated the principle at 532:

> It would indeed be a gross abuse of the powers conferred upon the city corporation, if it should be able to use such powers to depreciate the value of property which it was about to acquire.

[64] Hodgins J.A. elaborated at 536 and 538 respectively:

> … The general scheme was widening St. Clair avenue by expropriating this seventeen-foot strip and payment of the value to the land-owners. In anticipation of this, it is asserted, by-law 5545 was passed to prevent buildings being erected on the seventeen-foot strip meanwhile. If that was its sole purpose, then, I think, it became part of the general scheme and should be so treated. If it is not part of the expropriating machinery as such, it is part of the plan adopted, of which it and the valuation of the lands by arbitration were essential factors. … It is, of course, accepted law that the value of the land to the expropriating body cannot be included in the compensation. But, on the other hand, that authority ought not to be able, by the exercise of its other powers immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and of which it is contemplating expropriation.
>
> …
>
> If the City of Toronto sets up this by-law as a valid exercise of its powers, and its effect as reducing the value of the land to the claimant, I think the latter ought to be allowed to object to its admissibility or its effect as infringing the rule I have quoted, and, if necessary, to prove that it was not really an independent legislative act, if that is important, but had an intimate connection with, and was really part of, the scheme for widening St. Clair avenue. In view of what was stated during the argument, the City of Toronto should, however, have the right to offer evidence to shew, if they can, that Mr. Forman was mistaken in his evidence on this point.

The Court, accordingly, remitted the case to the arbitrator to take further evidence on the point and to make proper findings on whether the bylaw was, in fact, an independent legislative act or part of the expropriation machinery or at least part of the plan adopted to achieve the expropriation result.

[65] In *Kramer et al. v. Wascana Centre Authority*, [1967] SCR 237, Kramer and others owned property in the vicinity of the Saskatchewan provincial legislative buildings which, by bylaw, were zoned to permit single residential buildings and limited local business use. Although a development plan contemplating high density residential, commercial and other development covering the area had been prepared it was not enacted by bylaw and, instead, the Regina City Council adopted a community planning scheme providing for "parks and open public spaces." (*Kramer*, at 241). In 1962, the City of Regina adopted a general plan for the whole city. As well, the provincial legislature later passed the *Wascana Centre Act, 1962*, (Sask.), c. 46, giving the Wascana Centre power to expropriate. Later, the City of Regina passed another bylaw repealing previous limited commercial use zoning and designated the lands in the area for "public service." (*Kramer*, at 241). The Wascana Centre then expropriated Kramer's land (*Kramer*, at 241).

[66] The arbitrator fixed the value of Kramer's land on the basis of "parks and open spaces." (*Kramer*, at 242). On appeal to the Saskatchewan Court of Appeal, it was determined by a majority that valuation was to be determined on the basis of "public service use" according to the bylaw which was in effect at the time of expropriation (*Kramer*, at 242). A majority of the Supreme Court of Canada, on further appeal, upheld the majority decision (*Kramer*, at 239, 248).

[67] The City characterizes *Kramer* as the leading case to guide this Court in answering the question posed in the stated case. In our view, this submission overstates the significance of the case for present purposes. It is important therefore to determine what the decision did, and did not, decide.

[68] All five judges in the Supreme Court were in agreement that the appeal should be dismissed. However, four of the judges expressed their reasons in only two brief paragraphs, in which they stated they reached their decision "upon the basis of the views expressed by Wood[s] and Maguire JJ.A., in the Court below." (*Kramer*, at 239). The decision of the Saskatchewan Court of Appeal is not, however, reported. The registry of this Court obtained a copy of the unreported reasons from the appropriate Saskatchewan authorities (*Kramer et al. v. Wascana Centre Authority* (19 May 1965), Docket No. 5255 (Sask. C.A.)). Three judgments were written. Brownridge J.A. was in dissent. A review of the decisions of the majority (Woods and Maguire JJ.A.) discloses that the basis for their reasoning was that there could not be said to have been any collusion between the provincial government, in enacting the *Wascana Centre Act*, and the City of Regina in its adopting of the applicable zoning by-laws. Maguire J.A. wrote at pages 17, 18, 22 and 22 respectively:

> The argument was to the effect that the Government and the City here acted in concert to a common end, namely, the creation of the Wascana Centre area, with the cooperation of the City consisting of a rezoning of the area, as found in the two bylaws, limiting the permitted uses, to the end that major development of the area would be prevented or restricted thus permitting the Wascana Centre to later acquire the lands at minimum cost. In other words, it was submitted that the bylaw was not an independent enactment for the general good and welfare of the City…
>
> …
>
> … The question is – do the proven facts establish or may an inference be properly drawn that collaboration existed between the Government and the City, relative to the Wascana Centre – the cooperation of the City consisting of zoning the area to meet the wishes of the Government, and the proposed Wascana Centre Authority.
>
> …
>
> … I can find no authority for holding that the provisions of the Bylaw may be disregarded in determining value failing proof of collaboration.
>
> …
>
> It follows that this Community Planning Scheme Bylaw and the attendant zoning bylaws must be held to represent the thinking and intent of Council as of the date of passing, namely, December 5, 1961, … Thus value must be determined on "Public Service" use.

[69] In effect, the reasoning of Maguire J.A. was that the rezoning brought about by the City of Regina's bylaws that limited the land use to parks and public open space/public service use either pre-dated or was at least contemplated by the City (represented "the thinking and intent of Council" (Maguire J.A., at 22)) prior to the enactment of the *Wascana Centre Act* which gave the Centre power to expropriate. Consequently, Maguire J.A. found that the bylaws were independent enactments and could not be considered part of a collusive scheme with the province to down-value the lands for expropriation compensation purposes.

[70] We note at this point that, unlike in the present case, the provincial legislation in *Kramer* did not contain any provisions imposing land use restrictions. It merely conferred a power to expropriate. Further, it was enacted *after* the planning decisions of the City of Regina relating to public uses.

[71] Woods J.A., in his concurring judgment, followed the same approach as Maguire J.A. Although he conceded that there was some evidence from which one could have conjectured that the bylaws and the Wascana Centre plan were

"linked together" (3a), he ultimately concluded that "I have, however, not been able to satisfy myself on the evidence that the learned arbitrator [who had held that there was insufficient evidence that the government and the City acted together in pursuance of a common end] was wrong." (3a).

[72] The focus of both majority judges, therefore, was on the absence of sufficient evidence from which an inference could be drawn that, through collusion, the provincial legislation and the City of Regina's bylaws were linked together or part of one scheme. Their perceptions of the evidence drove their conclusions. It was these conclusions that were affirmed by the majority in the Supreme Court. This can be gleaned from the comment of Abbott J., writing for the majority as follows, at 239:

> The learned arbitrator found that the Community Planning Scheme adopted by by-law 3506, passed by the City Council of Regina on December 5, 1961, represented the state of mind of the city authorities at that time. That Planning Scheme was crystallized in the zoning by-law 3618 adopted on December 28, 1962, of which public notice had been given some months before, and which affected the whole City of Regina. The arbitrator held on the evidence that this by-law was an independent zoning enactment, part of an overall city plan and not part of the expropriation proceedings–although passed of course with knowledge of the Wascana Centre Scheme. He held therefore that the bylaw 3618, in limiting the use of the land expropriated to "public service use", was a determining factor in assessing the amount of compensation. These findings were confirmed by the majority of the Court of Appeal. The Appellants failed to satisfy me that they are wrong…

[73] In the Saskatchewan Court of Appeal, the dissenting view was written by Brownridge J.A. Contrary to the majority and the arbitrator, he concluded that the bylaws were "inextricably linked" with the Wascana Centre scheme and resulting Act (at p. 8). He concluded that there was "strong evidence" to support the inference that the rezoning was done to benefit the Wascana Centre Scheme and resulting Act "because the scheme existed long before the Authority was created by legislation" (at p. 6). Because the bylaws were part of the machinery of expropriation, he considered that they should therefore be disregarded when considering compensation.

[74] In the Supreme Court, Spence J., dissenting, agreed with Brownridge J.A. Citing *Gibson*, he asserted "one must keep in mind that in order to be found to be part of the expropriating machinery one does not need to determine that the limiting by-laws were in any sense the result of a fraudulent conspiracy to deprive the owner of an award to which he was entitled" (243). He noted that both of the City bylaws had been approved by the Minister of Municipal Affairs

after the *Wascana Centre Act* had been enacted, granting the powers of expropriation. On those facts, he concluded at 246-247:

> I am of the opinion that in view of the circumstances to which I have referred above, one can only come to the conclusion that the enactment of by-laws 3506 and 3618 was simply a step, in so far as these lands are concerned, in the setting up of the Wascana Centre and the acquisition by the Wascana Centre Authority of the lands in question. Counsel for the respondent points out that the two by-laws deal not only with the lands in question but with all lands within the City of Regina and that, therefore, there can be no implication that the enactment of the by-laws was part of a "scheme." To that submission, there are two answers: Firstly, as I have pointed out, no "scheme" in any nefarious connotation need be proved, and secondly, whatever the impact and purpose of the by-laws were as to other lands, the impact and purpose as to the lands in question were very plainly to prevent such a development as had been envisaged by the appellants and instead included them in the limiting, although commendable, design of the Wascana Centre Authority.
>
> I am therefore of the opinion that it is the duty of the tribunal fixing the award to consider the situation without regard for the enactment of the limiting use in these two by-laws….

[75] It can be seen from the foregoing that the differing conclusions of the majority and the minority in both the Supreme Court of Canada and the Saskatchewan Court of Appeal relating to whether the *Wascana Centre Act* and the City of Regina bylaws were part of one scheme resulted from their differing perceptions regarding the connection, or lack of connection, between the City of Regina bylaws and the expropriation legislation in the *Wascana Centre Act.*

[76] For the majorities, the fact that the bylaws were passed or conceived (though not approved by the Minister of Municipal Affairs) *before* the *enactment* of the *Wascana Centre Act* led to the conclusion that the bylaws were "independent enactments" in the absence of proof of collusion.

[77] For the minorities, however, the emphasis was on the fact that the Wascana Centre proposal existed *in concept* long before its formal enactment and final approval of the bylaws by the Minister occurred *after* the *Act.* The bylaws were therefore adopted under the conceptual shadow of the Centre proposal and were, in effect, facilitative of it. That provided the linkage that, for the minority, made it all part of one scheme.

[78] Regardless of one's own view as to which of these differing inferences from the circumstances was correct, the *Kramer* decisions underscore that it is the specific factual context that is all-important. It is very difficult to extrapolate from one fact-specific case to another. Certainly, in the instant appeal, there are

significant differences in the factual and legal context when compared to those in *Kramer*. These include: the timing of the enactment and amendments to the *City Act* in relation to the adoption of the *Development Regulations*; the overarching pollution control objective that permeated both the *City Act* provisions and the Watershed zoning restrictions in the *Development Regulations*; the fact that the Watershed zone in the *Development Regulations* related primarily to the area within the City encompassed by the watershed protection provisions in the *City Act*; and the lack of resemblance between the expropriation provisions at issue in *Kramer* (s. 49 of the *Wascana Centre Act*, RSS 1965, c. 401) and in this province's *Act* (s. 27).

[79] Furthermore, it is worth noting that both the majority decision and the dissent in *Kramer* (at both the Court of Appeal and at the Supreme Court) effectively achieved the same result on valuation. *Kramer* is therefore not an example of a case where ignoring (or considering) the effects of a development scheme would have enormous consequences on value. The results did not have to be viewed with the same degree of caution that is warranted when a gross disparity is present (*Waters and others v. Welsh Development Agency*, 2004 UKHL 19, [2004] 2 All ER 915, at para. 63).

[80] Accordingly, the actual decision in *Kramer*, and the analysis undertaken therein, can be of little assistance in application to the factual circumstances of the current case. It can, however, be relied on as recognizing the general proposition that where an authority's expropriation decision is merely "a step in the expropriation process" that reflects the authority's "state of mind" reflected in zoning restrictions, those restrictions should be disregarded when valuing the effects of the expropriation for compensation purposes. The expropriation will be regarded as an extension or exercise of the authority's previously-stated intentions.

[81] *Halliday's Estate v. Nfld. & Light and Power Co. Ltd.* (1980), 29 Nfld & PEIR 212 (Nfld. C.A.), was an appeal from a public utility board's order for compensation, specifically for a transmission line easement over 4.135 acres of Halliday land. On review, this Court held that where land is under development control, such that a park is the only use to which the land may be put in the future, and a public utility expropriates an easement over that land, the value of the land is to be determined on the basis of market value to the owner as if the land was not under such development control.

[82] Without reference to *Pointe Gourde*, this Court considered whether the restrictions placed on the use of the land by the *Pippy Park Commission Act*,

RSN 1970, c. 290, and regulations thereunder should have been excluded from consideration on valuation and that, instead, compensation should have been determined having regard to the full potential of the land unrestricted by the *Pippy Park Commission Act*. Morgan J.A. did, however, refer to *Gibson* and *Kramer*. He adopted the following statement from the minority judgment of Spence J. in *Kramer* as stating the applicable principle:

> [16] … The creation of [the concept of a large natural park] and its execution, however, should not result in depriving an owner of the valuation of his lands expropriated for the purpose of carrying out the concept, based on the potential development of these lands prior to the creation of the scheme.

[83] On the facts in *Halliday*, the "freeze" on the lands was found to be tantamount to an expropriation because of the declared intent to control development thereon. The power company could not take advantage of any devaluation of the Halliday property associated with this freeze in the calculation of value of the land over which it would run its transmission line.

[84] Citing with approval *McKee v. Province of Alberta* (1967), 16 LCR 35, at 38-39 this Court, in *Halliday*, endorsed the principle that:

> [17] …when land has been given an artificial depreciation and value by a public authority which intends to take it over, that then, and in such event, no court, in fixing compensation, is bound immutably to that artificially decreased value, brought about by the authority which, in fact, is now doing the expropriation. If such were the case it would mean that, in law, the public authority which can move, as was done in this case, to freeze property for a purpose, could, in effect, at that moment, expropriate the property for its own use but not pay the owner for it until some future time when it sees fit to actually expropriate; and to do so, on the basis of the depressed value, the factual act of expropriation through the freezing had given the property.

[85] As a result, this Court concluded on the facts that the value of the rights expropriated should have been determined with respect to the full potential of the lands as a whole.

[86] The City asserted that *Kramer* was "applied and affirmed" by this Court in *Atlantic Shopping Centres Ltd. v. St. John's, City of* (1985), 56 Nfld & PEIR 44 (Nfld. C.A.) (First Respondent's Factum, paragraph 50). This is incorrect; the decision makes no reference to *Kramer*.

[87] The decision in *Atlantic Shopping Centres* was also a review of an award of the Public Utilities Board for the value of land expropriated for road widening purposes. On the standard of review that applied, this Court acknowledged that

reviewing courts should not interfere with such an award unless the Board proceeded "upon some wrong principle of law or has misdirected itself on the evidence with the result that the award is clearly inadequate or excessive" (paragraph 12).

[88] Citing *Halliday* (which it later distinguished) at paragraph 22, this Court agreed that under section 27 of the *Expropriation Act*, R.S.N. 1970, cap. 121, in effect at that time, fair market value of a property must be taken as meaning that value which "…rather than be ejected, a prudent man would pay for his property … having regard to the potentialities for its eventual development at its highest and best use" (*Atlantic Shopping* Centres, at paragraph 16).

[89] Subsections 27(1)(a) and (b) of the *Expropriation Act*, in effect when *Atlantic Shopping Centres* was decided, stated:

> (1) In fixing the amount of compensation to be paid under this Act a board shall, subject to subsection (2), act in accordance with the following rules:
>
> (a) the compensation shall be an amount based on the fair market value of the land and on existing use value at the time of the commencement of expropriation proceedings and no account shall be taken of the compulsory acquisition of the land, the disturbance of the owner or occupier, or any other injurious affection;
>
> (b) the fair market value of the land shall, subject to this Act, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise but the board is entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the owner of the land;
>
> …

[90] The wording of section 27 remains largely unchanged in the current version of the *Act*; the provisions of the legislation that determined the results in *Atlantic Shopping Centres* and the Expropriation Decision are substantially the same.

[91] On the facts in *Atlantic Shopping Centres*, this Court found no error in the Board's conclusion that the three parcels of land were appropriately valued on the basis of their actual utilization under the existing zoning uses at the time of the commencement of expropriation proceedings. However, the Court drew a valuable distinction between zoning enactments which are tantamount to expropriation (the effect of the "freeze" in *Halliday*) and those that restrict and regulate development like all other land under the municipality's jurisdiction

(the zoning in place for the land expropriated for road widening in *Atlantic Shopping Centres*).

[92] In *Windsor (City) v. Paciorka Leaseholds Limited*, 2012 ONCA 431, 111 OR (3d) 431, a case relied on by the City, lands were subject to various government actions between 1983 and 2002 designed to preserve natural habitat and endangered species. There had been reports, designations, and plans developed during that time, including a 1996 provincial government policy statement ("PPS"). The land in issue was expropriated in 2004. The landowner argued that the whole process commencing in 1983 led to the expropriation. The City argued that the expropriation scheme did not begin until 2002 when it resolved to create a nature park and that the previous studies and reports including the PPS were part of an independent process and not to be regarded as part of the expropriation scheme.

[93] Compensation was initially assessed on the basis that the whole process that began in 1983 led to the expropriation and determined market value on that basis. The decision was upheld by the Divisional Court but was reversed on appeal.

[94] The Ontario Court of Appeal concluded that although the assessment board was entitled to find that the expropriation scheme embraced some government activities beginning in 1983 and culminating in the actual expropriation in 2004, not every governmental activity, especially the PPS, was necessarily part of the scheme (*Paciorka*, at paragraphs 9-10). It was unreasonable for the board to fail to take account of the possible negative effects on the market value of the land resulting from the PPS because it was not part of the scheme to be ignored under the *Pointe Gourde* principle but was instead a land use province-wide policy instrument adopted by another public authority having no causal connection between the imposition of land use restrictions and the subsequent expropriation (*Paciorka*, at paragraphs 26-27).

[95] In reaching these conclusions, the Court was dealing with a situation where the assessment board did not expressly address the impact of the PPS in its reasoning (*Paciorka*, at paragraph 14). The Court was therefore left to speculate whether the board failed to address the impact at all, or conclude that the impact of the PPS was immaterial to valuation because it was part of the expropriation scheme, or because it had no effect on the value of the lands. Given the importance of the PPS as a planning document, it was necessary that it be considered. The Court addressed various possible unexpressed lines of analysis that the board may have undertaken and concluded none of them would

have justified disregarding the impact of the PPS on valuation (*Paciorka*, at paragraphs 24-30). Consequently, it concluded that the decision of the board was unreasonable and had to be set aside (*Paciorka*, at paragraph 31).

[96] The factual circumstances in *Paciorka* and the current case are very different. The PPS involved the implementation of a recent government policy that was designed to enunciate a province-wide environmental policy (*Paciorka*, at paragraph 6). It did not necessarily contemplate the expropriation of the lands in question for purposes of a public park: "It was passed independently of, and without any connection to, the specific development for which the land was expropriated" (paragraph 27). Furthermore, in concluding that it was unlikely that the board would have concluded, without expressing its opinion, that the PPS was part of the expropriation scheme, the Court noted counsel for the landowner "*conceded* that the PPS, part of a province-wide legislative scheme, was not part of the expropriation scheme" [emphasis added] (*Paciorka*, at paragraph 26). Thus, the very issue that engages this Court (the scope of the expropriation scheme) was a matter of concession by counsel in *Paciorka*.

[97] The Court did go on, however, and discussed the issue of whether in its opinion the PPS was part of the expropriation scheme and concluded that there was no support for that conclusion in the evidence. It adopted the reasoning of the dissenting judge in the Divisional Court (*The Corporation of the City of Windsor v. Paciorka Leaseholds Limited*, 2011 ONSC 2876) as to the test to be applied to determine whether a particular governmental action could be said to be part of an expropriation scheme. The Divisional Court dissenting judge referred to *West Hill Redevelopment Co. v. Ontario* (1998), 64 LCR 81 (OMB), aff'd (1999), 67 LCR 252 (Ont Div Ct) relative to the question of "*whether a "land use" instrument passed by one public authority should be taken into account in fixing market value in an expropriation affected by a different public authority*." [emphasis added] (paragraph 130). In addressing that issue, *West Hill*, at 76, had itself adopted principles from another case, *Jewish Community Centre of Edmonton Trust v. The Queen* (1983), 27 LCR 333 (Alta LCB), at 360-361:

> …the underlying principle … is that there must be a causal connection between the imposition of land use restriction and the expropriation which subsequently occurs. That is to say if the "land use by-law, land use classification or analogous enactment" is made for the purpose and "with a view to the development under which the land is expropriated" then … it must be ignored in the valuation process.

[98] The difficulty faced by the Court in *Paciorka* was the fact that the impact of the PPS, in terms of whether it was part of the expropriation scheme, was affected by the fact that it had been adopted by the province as part of a general province-wide environmental policy and this was not the authority that ultimately effected the expropriation. To connect the two entities, the test adopted was whether there was a "causal connection" between the two or whether the PPS was made "with a view" to the development under which the land was expropriated. That was not the situation in the current case. The *Development Regulations,* which purported to limit building to agriculture, forestry and public utility, were adopted by the City which was the same entity which was deemed to have constructively expropriated the appellants' land.

[99] The Court in *Paciorka* applied the approach in *West Hill* and concluded:

> [27] … Given the fact that the PPS was not passed with a view to the development for which the land was expropriated, it cannot be considered to be part of the "scheme" that should be disregarded for the purpose of the market value assessment. Thus, even without the scheme, the Expropriated Lands, which do contain natural heritage features, would have been subject to the PPS. The Board was required to deal with what effect this would have had on the development potential of the lands in question.

[100] In the end, therefore, the Court set aside the original decision and remitted the case for a new hearing where the issue could be explicitly addressed. The most the case can be said to have decided, therefore, was that *on the evidence then before the Court,* there was no support for the proposition that the PPS was part of the expropriation scheme. On rehearing, of course, different evidence might have suggested otherwise.

[101] Counsel for the Board directed our attention to the House of Lords decision in *Waters*. In that case the issue was the basis on which compensation should be assessed for the compulsory acquisition of low-lying farm land as a result of the construction of an artillery bombardment range ("barrage") across the mouth of Cardiff Bay.

[102] *Waters* contains a comprehensive review of the *Pointe Gourde* principle and its co-existence with sections 5-6 of the *Land Compensation Act*, 1961 (UK), c. 33 [*Land Compensation Act*]. The underlying principle of sections 5-6 of the *Land Compensation Act* (as well as section 27 of our *Act*) is that restrictions on or enhancements affecting development of land resulting from the purpose or purposes for which the land was expropriated as part of a scheme are

to be ignored whilst determining proper compensation – regardless of whether the effect of the development was an increase or decrease of value.

[103] Lord Nicholls explained:

> [55] The co-existence of the s 6 code and the *Pointe Gourde* principle means that the problems associated with identifying the ambit of the 'scheme' for the purposes of the *Pointe Gourde* principle remain live problems. Undoubtedly the present state of the law gives rise to serious valuation difficulties. It is unreal to require land to be valued on the basis of what would have been the position if a major development which took place years ago had not been carried out. …
>
> …
>
> [56] There is an even more fundamental problem. This goes to the very fairness of the *Pointe Gourde* principle as currently applied. The wider the scheme, the greater the potential for inequality between those outside the area of acquisition, whose land values rise by virtue of the scheme, and landowners whose properties are acquired at a value which disregards the scheme. Conversely, the narrower the scheme, the greater the potential for an authority being called upon to pay compensation inflated by its own investment in improved infrastructure or other regeneration activities. Holding the balance between these conflicting interests is pre-eminently a subject for decision by Parliament. But, as matters stand, there are indications that in some cases the application of the *Pointe Gourde* principle has become too wide-ranging.
>
> [57] The Law Commission, in its report already mentioned (see [39], above), recommended enactment of a new compensation code which would include provision for a 'statutory project'. This would replace the *Pointe Gourde* principle, s 6 of the 1961 Act and much else beside. In several respects this 'statutory project' provision is not compatible with s 6. Whilst s 6 remains on the statute book, therefore, the Law Commission's statutory project' recommendation does not lend itself to adoption by the courts as a model for the future in place of the existing *Pointe Gourde* principle. For present purposes what is important is that, after consulting widely, the Law Commission recognised the need to restrict the area of schemes.
>
> [58] I turn, then, to the question of how the extent of a scheme should be identified in today's conditions. A scheme essentially consists of a project to carry out certain works for a particular purpose or purposes. If the compulsory acquisition of the subject land is an integral part of such a scheme, the *Pointe Gourde* principle will apply accordingly. Both elements of a project, the proposed works and the purpose for which they are being carried out, are material when deciding which works should be regarded as a single scheme when applying the *Pointe Gourde* principle to the subject land.
>
> [59] The extent of a scheme is often said to be a question of fact. Certainly, identifying the background events leading up to a compulsory purchase order may give rise to purely factual issues of a conventional character. But selecting from these

> background facts those of key importance for determining the ambit of the scheme is not a process of fact-finding as ordinarily understood.
>
> (Emphasis added.)

[104] Admittedly having no "magical detailed formula providing a ready answer in every case", Lord Nicholls stated some principles to assist:

> [63] …
>
> (1) The *Pointe Gourde* principle should not be pressed too far. The principle is soundly based but it should be applied in a manner which achieves a fair and reasonable result. …
>
> (2) A result is not fair and reasonable where it requires a valuation exercise which is unreal or virtually impossible.
>
> (3) A valuation result should be viewed with caution when it would lead to a gross disparity between the amount of compensation payable and the market values of comparable adjoining properties which are not being acquired.
>
> (4) When applied as a supplement to the s 6 code, which will usually be the position, the *Pointe Gourde* principle should be applied by analogy with the provisions of the statutory code. Thus in the class 1 type of case the area of the scheme should be interpreted narrowly, for instance, so as to embrace the property acquired under the compulsory purchase order and property which would probably have been so acquired had it not been bought by agreement. In other cases, such as case 2, Parliament had spread the 'disregard' net more widely. Then it may be appropriate to give the scheme a wider scope.
>
> (5) Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority. But this formulation should not to be regarded as conclusive.
>
> (6) When in doubt a scheme should be identified in narrower rather than broader terms.

[105] The facts in *Waters* were akin to those in *Pointe Gourde*. Unlike in the instant case, both dealt with claims in which it was alleged that the land use zoning increased the value of the expropriated land.

[106] In *Pointe Gourde*, although a quarry had admittedly been created prior to the acquisition, that value was increased by the fact that a Base was being established in the vicinity for which a large quantity of stone in a readily accessible situation was required. In other words, the value was enhanced by

the scheme of the party acquiring the land, and that is not a factor for which additional compensation may properly be awarded.

[107] In *Waters*, it was fair and reasonable to regard the acquisition of the claimant's land (after it had been identified as part of the intended site) as an integral part of the barrage project but the potential of the land as a result of the barrage scheme, including any key value it might have, was to be disregarded in valuation. In other words, any unrealized potential of the land, due to the barrage scheme, was to be disregarded.

[108] By contrast, in the current case, it is argued that the land use zoning, if applied, decreased the value of the land.

General Principles Extracted from the Jurisprudence

[109] From the jurisprudence that has been reviewed, the following generalized principles can be extracted:

1. The amount of compensation to be paid is required to be "an amount based on the fair market value of the land and on existing use value at the time of the commencement of expropriation proceedings" (the *Act*, at s. 27(1)(a); and *Atlantic Shopping Centres*, at paragraph 16).

2. Any change in the value of the property caused by the scheme for which the expropriating authority's compulsory taking powers were exercised is to be ignored in the computation of the property's value for expropriation assessment purposes (the "*Pointe Gourde* Principle").

3. The *Pointe Gourde* principle should not be pressed too far; it should be applied in a manner which achieves a fair and reasonable result (*Waters*, at paragraph 63(1)).

4. Specifically, an expropriating authority cannot downzone a property in anticipation of the need to acquire the property, thereby depreciating the value of the property to reduce the compensation payable. In such cases, the bylaw downzoning the property will be ignored (*Halliday*, at paragraph 17*)*.

5. If however, the zoning bylaw is of general application, not linked to the expropriation (in the sense of furthering the ends of the

expropriation), it is not to be ignored in the valuation process (*Atlantic Shopping Centres*, at paragraphs 19-20).

6. The critical issue in determining whether a bylaw or enactment should be excluded in determining market value is whether the provisions were passed "with a view to the development for which the land was expropriated" or whether there is a causal connection between the imposition of the planned use restriction and the expropriation which subsequently occurs (*Paciorka*, at paragraph 27).

7. While the scope of the intended works and their purpose would normally appear from the formal resolutions or documents of the acquiring authority, that formulation is not to be regarded as conclusive.

8. When in doubt, a scheme should be identified in narrower rather than broader terms (*Waters*, at paragraph 63).

Did the Applications Judge Properly Apply the Pointe Gourde Principle?

[110] Proper application of the *Pointe Gourde* principle requires a close focus on the circumstances surrounding the development of the applicable land use restrictions that were relevant to the property expropriated, with a view to determining their interrelationship, and possible causal connection, with the expropriation itself. All relevant circumstances should be considered so as to determine, to use the words of the majority in *Kramer*, the "state of mind" of the authorities at the time of adoption of the land use restrictions and what inferences can be drawn therefrom as to causal connection with the expropriation.

[111] As will become apparent, we have concluded that the applications judge erred in her approach and we identify three matters in this regard.

(i) Interconnections Between the *Development Regulations*, Watershed Policy and the *City Act*.

[112] The *Development Regulations* and the *City Act*, in relation to watershed issues, had one central focus and intent – prevention of pollution of the City's water supply. Section 102 of the *City Act* placed a statutory duty on the City "to convey a sufficient supply of wholesome water to the city from Windsor Lake and other lakes that may be necessary…". How that was to be achieved was left

to the City. The City was, however, given "possession and control" of certain areas including the BCR watershed and, while enunciating a policy of restricted building, consigned decisions concerning the nature and extent of building within the relevant areas to the City (*City Act*, at ss. 104(1), 104(4)(d)). The possibility of expropriation by the City to achieve the objectives of preservation of water quality was not excluded by the general wording of the expropriation provision of the *City Act* (s. 101).

[113] When the appellants' land was brought within the municipal boundaries of the City in 1992, it also became subject, when ultimately adopted, to the City's *Development Regulations*, specifically the Watershed zoning designation, which only recognized the three discretionary uses of agriculture, forestry and public utility. The "state of mind" of the City in adopting the regulations was to further the objective of water pollution control mandated by the *City Act*. It is clear from the earlier studies undertaken by the City in relation to the management of the watershed that the policy that was developed was to use the powers under the *City Act* in a manner that was "complementary" to the powers contained in the City's municipal plan and zoning bylaw, the ultimate intention being to "revert the areas back to natural, pristine conditions…" (Policy Document, at s. 2.5). As subsequently determined by this Court in the Expropriation Decision, achieving reversion of the lands to "natural, pristine conditions" effectively meant refusal of all development and use, which amounted to *de facto* expropriation. Expropriation was therefore the logical result of the zoning policy that was adopted and the manner in which it was applied. It is not hard, therefore, to infer a causal connection between the adoption and application of the watershed zoning regulations and the expropriation.

[114] Accordingly, because the *City Act*, and especially the manner in which it was applied, and the *Development Regulations* were all intended to achieve the same objective, they flowed one into the other. The *Development Regulations* clearly had to take account of and come within the umbrella of the statutory mandate imposed by the *City Act*.

[115] We therefore agree with the submission in the appellants' factum that "it cannot be stated that the 1994 *St. John's Municipal Plan* and the 1994 *St. John's Development Regulations* were independent of, and not causally connected or linked to, the City's watershed pollution control scheme stated in the *City Act*" (paragraph 33). In concluding that the *Development Regulations* were an "independent enactment", the application judge failed to take account of these interconnections and, in not doing so, erred (paragraph 53).

(ii) Evidence on the Record of the Stated Case

[116] The record on the stated case which contained affidavit evidence from City officials also confirms that the applicable provisions were interconnected in terms of purpose, focus and application. For example, Gareth Griffiths, Manager of Real Estate Services of the City, in describing the operation of the *Development Regulations* and the *City Act*, deposed that: "The *combined effect* of the City's Development Regulations and the provisions of the *City Act* would permit only agriculture, forestry and public utility uses, as discretionary uses in the Zone…" (Appeal Book, Volume 3, page 197, at paragraph 9. Emphasis added). Of course, the *City Act* did not limit uses to those three categories. The only way that limit could be achieved was for the City Manager to exercise his discretion under s. 104(4)(d) of the *City Act*, to impose such limits. Powers exercisable under one source (the *City Act*) were therefore being employed to achieve objectives under another (the *Development Regulations*). In other words, the two sources of authority worked in tandem to achieve one "combined effect." Further, Paul Mackey, Deputy City Manager, Public Works, deposed that: "The City has always had a strong policy of enforcing the prohibitions and restrictions on development in the protected watersheds in accordance with the provisions of the *City Act*" (Appeal Book, Volume 3, page 232, paragraph 17). This use of the powers in the *City Act* to achieve the objectives of the City's *Development Regulations* demonstrates that the City itself regarded the provisions as interconnected.

[117] The applications judge did not refer to, or apparently rely on this very relevant information. Because of its relevance and the failure of the judge to refer to it, we must conclude that she erred in not taking it into consideration.

(iii) Key Determinations in, and Implications of, the Expropriation Decision

[118] Finally, the analysis underpinning the Expropriation Decision, particularly paragraphs 59, 62 and 63, strongly suggests that, far from regarding the expropriatory act as one single event occurring in 2013, the Court regarded the expropriation process as beginning in 1964 and culminating with the February 1, 2013 refusal by the City Manager to exercise his discretion to permit any development, with the effect that all reasonable uses of the property were taken away.

[119] Further, the implication from the Expropriation Decision is that the City's *Municipal Plan* and *Development Regulations* were part of this broad scheme of

watershed pollution protection. This implication can be drawn because, despite discretionary uses, it is clear that the City took the position that the watershed protection policy – whether operating under the *City Act* or the *Development Regulations* – was "to prohibit all activity on the [appellants'] property". Given the record before us, we see no reason to dissent from that position in the current case.

Answer to the Question Posed

[120] We conclude, therefore, that the applications judge erred in deciding that the *Development Regulations* were an "independent enactment" not causally connected to the expropriation. It was the purported interpretation and application of the *Development Regulations*, buttressed by the powers in the *City Act*, which resulted in the conclusion in the Expropriation Decision that *de facto* expropriation had occurred. Put another way, to achieve the ultimate objective of the Watershed zone in the *Development Regulations* – to return the lands in the Watershed to their pristine natural condition – all development had to be prohibited. That is a position that has been held to amount to *de facto* expropriation. Accordingly, because the *Development Regulations* were causally connected to the expropriation or were made with a view to achieving effective expropriation under the *Pointe Gourde* principle, they must be ignored when assessing compensation.

[121] The conclusions reached by this Court in the Expropriation Decision are equivalent to a finding that the regulatory authority, long before the City's refusal in 2013 of any development, effectively froze any use of the appellants' property. As stated in *Halliday*, when a zoning enactment has this effect, it is tantamount to expropriation and valuation must be based on available uses prior thereto. No reason has been advanced on this appeal to restrict this principle to cases involving use of formal notices of expropriation. It is equally applicable to constructive expropriation, but with modifications to recognize that, in constructive expropriation cases, the process of "expropriation" often cannot be defined as one single act, but has to be regarded as a process going on for some time. The cumulative effect of land use restrictions which, over time, effectively take all proprietary rights to property away, may often be considered to constitute the expropriation.

[122] The point at which regulation ends and taking begins in this case was in 1964 because the amendment to the *City Act* in that year coupled with the exercise of the City Manager's discretion in 2013 in pursuance of a long standing policy of watershed protection by refusing development and keeping

the area in its pristine state, resulted in "deprivation of the reality of proprietorship" (Expropriation Decision, at paragraphs 39-40, 63). The *Development Regulations* were an integral part of the expropriation process. They were not independent of that process but in fact enabled it.

[123] The scope of the City's intention to keep the land in its pristine state is reflected in the record on this stated case. There can be no doubt that the *Development Regulations* were part of this scheme and were a step in the (*de facto*) expropriation process. Given the City's "state of mind" with respect to watershed protection, the regulations cannot be considered independent. Accordingly, the restrictions limiting uses to agriculture, forestry and public utility as imposed in the *Development Regulations* must be ignored for compensation purposes.

[124] The applications judge's conclusion that "compensation should be based on the existing watershed zoning with discretionary uses of agriculture, forestry and public utility" (Judgment, paragraph 63(2)) should therefore be set aside.

[125] The question posed for the application judge's opinion, at paragraph 3 of the Judgment, was as follows:

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

[126] We would answer the question posed as follows:

> Compensation should be determined without reference to the existing watershed zoning in the *Development Regulations*. Compensation should not be based only on the discretionary uses of agriculture, forestry and public utility.

[127] We do not consider it appropriate to answer the remaining part of the question, namely, whether value should be determined as if residential development were permissible. Although the question posed was expressed in an "either-or" manner, ignoring the application of the Watershed zoning under the *Development Regulations* does not necessarily lead to the conclusion that residential development should inevitably be part of the equation; it only means that the basis of compensation should not be limited by agricultural, forestry and public utility uses. It is theoretically possible that additional uses, but not residential ones, would be included.

[128] Whether that is so would depend on interpretation of the *City Act* provisions relating to building restrictions, determination of the appropriate date when the land became subject to those restrictions and their effect at that time, the likelihood, given the existing legislation, that a particular type of development was a realistic and possible use, (*Lasade*) as well as other possible matters. These matters were not addressed by the applications judge, nor were they addressed by the parties before this Court.

[129] Given our observations about the scope of use of the stated case in the present context, it follows that the Board should determine what other uses beyond agriculture, forestry and public utility should be taken into account as part of the process of fixing compensation under section 19(1) of the *Act*.

AN *OBITER* COMMENT

[130] This matter came before the applications judge by way of stated case pursuant to section 26(3) of the *Act.* The question to be posed by the stated case is limited to "a question of law" arising in the course of the proceeding.

[131] The record prepared for the purpose of the stated case was extensive and contained much evidentiary material, including affidavits, reports and maps. There was no agreed statement of facts.

[132] The applications judge quite rightly, in our view, questioned the parties as to "whether there is a sufficient factual matrix before the Court to determine the issue as there was no agreed statement of facts presented." She pointed out that the scope of the scheme to be ignored under the *Pointe Gourde* principle normally involved a factual determination (paragraph 8).

[133] The parties nevertheless insisted that the matter proceed, submitting that all pertinent facts were contained within the reasons for judgment in the Expropriation Decision. As a result, the matter did proceed.

[134] There can be no doubt that for the applications judge to answer the question posed to her, it was necessary for her to reach some conclusions as to, amongst other things, the scope of the expropriation scheme. As matters developed, there were no conflicts in the evidence that she had to resolve. What she ultimately was faced with was the drawing of inferences from that uncontradicted evidence as to what the scope of the scheme was.

[135] We also were initially concerned that, in the absence of an agreed statement of facts, what was being asked of this Court might be too extensive

and might require this Court to stray outside of the scope of section 26(3) of the *Act*. However, we decided that, given the desire of the parties to proceed and history of this protracted litigation, little would be gained at this stage by declaring that the applications judge should have refused to consider the stated case in the manner in which it was presented. We were ultimately satisfied that it would be appropriate to proceed because, as matters transpired, the applications judge did not have to make any factual findings based on conflicting evidence but was only being asked to draw inferences from the uncontested evidence that had been submitted. We approached the matter by considering whether the applications judge made any errors in the manner in which she drew her inferences. As is evident, we concluded that she had made errors in this regard.

[136] That said, we would nevertheless caution that whenever a stated case is submitted to the court in the future, care should be taken to ensure that the issue presented can truly be said to be a true question of law to be decided on an agreed statement of facts.

CONCLUSION

[137] We would dismiss the appeal against the finding of the applications judge that issue estoppel did not apply.

[138] We would allow the appeal and set aside paragraph 2 of the Order of the applications judge, dated June 30, 2020 and filed July 20, 2020, insofar as it states the court's opinion to be that: "compensation should be based on the existing watershed zoning with discretionary uses of agriculture, forestry and public utility."

[139] The answer to the question posed on the stated case is:

> Compensation should be determined without reference to the existing watershed zoning in the *Development Regulations*. Compensation should not be based only on the discretionary uses of agriculture, forestry and public utility.

[140] We would remit all further issues and questions to the Board for determination as part of the compensation process.

[141] The appellants, having been substantially successful, should be entitled to their costs on this appeal, determined in accordance with the principles discussed in this Court's previous decision in 2020 NLCA 31. Costs in the court

below may, on application, be decided by that court taking into account this decision.

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J.D. Green J.A.

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G. D. Butler J.A.

I concur:_____

C.W. White J.A.