



# Expropriation – compensation: ignoring the scheme

## Supreme Court of Canada guidance in *St. John's v. Lynch*

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In expropriation law, an important principle is that increases or decreases in market value attributable to the scheme of an expropriation are ignored in assessing compensation payable for expropriated property. Thus, compensation for land expropriated for the construction and operation of a light rapid transit system will not be increased even though the availability of such a facility might be seen as a positive attribute having upward pressure on market value. Market value will be determined without regard for the presence of the light rapid transit system. Conversely, if land zoned multi-family residential is expropriated to provide some form of public facility, the decrease in market value for land to be used in such a way will be ignored in setting compensation.

This concept, referred to as the *Pointe Gourde* principle,<sup>1</sup> was the focus of the Supreme Court of Canada decision in *St. John's (City) v. Lynch*<sup>2</sup> handed down in May 2024. I wrote about the lower court decisions in *Lynch* in a previous edition of this publication.<sup>3</sup> However, the case bears further discussion now that we have Supreme Court of Canada guidance on this topic.

### Factual background

The subject property in *Lynch* is located in a watershed that feeds a river supplying water to St. John's, Newfoundland ('City'). It was acquired by the Lynch family through a Crown grant in 1917. At the time of the grant, the land was outside municipal boundaries. Over the years following the Crown grant, the City took steps to protect the watershed from pollution. However, until 1992, residential uses were not expressly prohibited.

In 1992, an expansion of the City's boundaries captured the Lynch property and the City's zoning powers applied to the property. Shortly thereafter, as part of a general reorganization of the areas within the City boundaries, a Municipal Plan and

*Development Regulations* implementing the plan were adopted. A watershed zone was created that included the Lynch property. No permitted uses were listed, but three discretionary uses – agriculture, forestry, and public utility – were contemplated.

In 1996, a policy document commissioned by the City recommended that the City continue the *City Act* restriction on erection of new buildings in the watershed and the continuation of a ban on urban development with a long-term intention to revert the area to 'natural, pristine conditions.'

In 2011, the City advised the owners of the Lynch property that no development would be allowed. In 2013, this position was formally reinforced when an application to develop a 10-lot residential subdivision was not approved. The City relied upon the *City Act* and the watershed zoning under the *Development Regulations* in refusing the application.

### Legal background

In earlier proceedings before the Court of Appeal of Newfoundland and Labrador, the owners of the Lynch property proved to the satisfaction of the court that constructive (*de facto*) expropriation had occurred. The court held that the 2011 and 2013 communications from the City to the owners resulted in a) the City acquiring a beneficial interest in property or a beneficial interest flowing from the property, and b) the City's actions removed all reasonable uses of the property. That ruling was not appealed.<sup>4</sup> The next question became the compensation that was due to the owners.

An application for compensation was made to the Board of Commissioners of Public Utilities. The *Pointe Gourde* principle was in play. The Board sought guidance from the Supreme Court of Newfoundland and Labrador on whether compensation was to be based upon existing discretionary uses for agriculture, forestry

and public utility purposes, or whether existing zoning should be ignored and value determined as if residential development was permissible. The answer depended upon whether a) the existing zoning was part of the scheme to protect the water supply, or b) the existing zoning was an enactment independent of the pollution prevention scheme. The owners argued that the existing zoning was part of the scheme, that it should be ignored, and that compensation should be based on residential use. The application judge held that the rezoning for discretionary uses introduced through the *Development Regulations* was independent from the City's pollution prevention scheme for the watershed. Influencing the decision was her conclusion that the *Development Regulations* were part of a comprehensive reorganization and rezoning process and not specific to the Lynch property.

On the owners' appeal to the Newfoundland and Labrador Court of Appeal, the application judge's decision was reversed. The Court of Appeal held that the existing zoning was to be ignored, with the result that the market value was to be determined based on the more lucrative residential use.

The City appealed to the Supreme Court of Canada. That court unanimously held that the Court of Appeal order could not stand and the order of the Newfoundland and Labrador Supreme Court application judge was restored. The land was to be valued based on the existing, more restrictive, less valuable, discretionary uses of agriculture, forestry and public utility.

### Supreme Court of Canada analysis

In cases involving the *Pointe Gourde* principle, the point of the inquiry is to determine if action taken by a public authority is a) part of a process in furtherance of the scheme of expropriation, or b) independent of efforts to further a scheme.<sup>5</sup> In resolving the question, the purposes of an enactment can be gleaned from debates, deliberations and statements of policy leading to the enactment. The rationale for an enactment may also be found in a public authority's long-term plans and correspondence involving officials.<sup>6</sup>

The court provided examples from the case law of independent enactments and enactments in furtherance of a scheme. In one case, the City of Toronto adopted a bylaw that prevented construction on a 17-foot strip of property that was later expropriated for road widening. The court hearing the case held that it was open to the owner of the land to prove that the bylaw freezing development was connected to the scheme for widening the road.<sup>7</sup>

In another case, land initially zoned for residential development was rezoned by local government for public service use. The rezoning occurred after a provincial authority with expropriation power was formed to develop a public facility. The provincial authority expropriated land for its facility. In a split decision, the majority of the court accepted the arbitrator's decision that

the re-zoning was an independent enactment despite the local government's knowledge of the creation of the provincial authority. A factor influencing the majority's opinion was that the rezoning crystallized a city-wide plan that had been designed before the creation of the provincial authority.<sup>8</sup> Presumably, the majority concluded that the expropriated property had not been singled out in the rezoning process.

In a case where a development freeze was placed on land in an area designated as a future park, the fact there was no immediate intent to expropriate did not take away from the objective to control development on the land so it would be available for park use. The regulatory enactment was held to be made with a view to expropriation.<sup>9</sup> In such a case, the depressing effect on market value of the development freeze would not be taken into account in setting compensation.

A restrictive enactment on property that was subsequently expropriated for a road project was held not to have been with a view to expropriation because the enactment applied to all land in the city.<sup>10</sup>

A city's expropriation of land for the purpose of creating a nature park followed on the heels of a province-wide policy imposing development restrictions on environmentally sensitive lands including the expropriated land. The court in that case held that the province-wide policy could not be ignored in addressing compensation because it was not directed at the subject lands.<sup>11</sup>

The inquiry in the case law examples provided in *Lynch* was whether the actions of the public authority could be said to have been made with a view to expropriation. If so, then those actions should be considered part of the expropriation scheme and their effects are to be excluded from the compensation assessment.<sup>12</sup>

A land use restriction enacted as part of a local government-wide or province-wide initiative not targeting specific properties may suggest an independent enactment and is not to be excluded in the compensation assessment. An enactment brought forth by a different public authority may also indicate an independent enactment. One government's knowledge of another government's development plans is not conclusive that an enactment was made with an intent to expropriate. Was the enactment made for the purpose of expropriating or was it for regulating? In the end, each case will depend on its facts.<sup>13</sup>

In *Lynch*, the key question was whether the *Development Regulations* were enacted by the City with a view to the pollution prevention scheme, i.e., to never allow development on the Lynch Property. On her view of the evidence, the application judge regarded the discretionary uses under the *Development Regulations* as independent from the scheme to protect the watershed. Reasonable people considering the same evidence could come to a different conclusion. In restoring the Supreme Court of Newfoundland and Labrador application judge's decision, Justice Martin for the Supreme Court of Canada wrote "... there will be reasonable

disagreements about the characterization of particular enactments, given that this factual determination does not admit of bright-line rules. In the circumstances, I see no basis to interfere with the application judge's assessment. It is entitled to deference."<sup>14</sup>

### Closing

As with so many other things in the law, the result in *Lynch* and the cases cited therein demonstrate that the scheme of expropriation is highly dependent upon the facts in each case, that there can be more than one reasonable interpretation of the facts and that this will lead to a high degree of uncertainty in how courts will rule.

### Endnotes

- <sup>1</sup> *Pointe Gourde Quarrying & Transport Co. v. Sub-Intendent of Crown Lands*, (1947) A.C. 565 (H.L.); see for example *Expropriation Act*, RSNL 1990, c E-19, s 27; *The Expropriation Act*, CCSM c E190, s 27(2); *Expropriations Act*, RSO 1990, c E.26, s 14(4)(b); *Expropriation Act*, RSBC 1996, c 125, s 33; *Expropriation Act*, RSA 2000, c E-13 s 45; *Expropriation Act*, RSNB 1973, c E-14, s 39(4); *Expropriation Act*, RSNS 1989, c 156, s 33
- <sup>2</sup> *St. John's (City) v. Lynch*, 2024 SCC 17
- <sup>3</sup> Canadian Property Valuation, 2023 – Volume 63 – Book 3 – *Compensation in Constructive (De Facto) Expropriation – Ignoring the Scheme*

- <sup>4</sup> 2016 NLCA 35; *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 (*Annapolis*), paras. 18-19
- <sup>5</sup> *Lynch*, para. 46
- <sup>6</sup> *Lynch*, para. 48
- <sup>7</sup> *Lynch*, para. 42; *Re Gibson and City of Toronto* (1913), 11 D.L.R. 529 (Ont. S.C. (App. Div.))
- <sup>8</sup> *Lynch*, para. 43; *Kramer v. Wescana Centre Authority*, [1967] S.C.R. 237
- <sup>9</sup> *Lynch*, para. 44; *Halliday's Estate v. Newfoundland Light & Power Co.* (1980), 29 Nfld. & P.E.I.R. 212
- <sup>10</sup> *Lynch*, para. 44; *Atlantic Shopping Centres Ltd. v. St. John's (City)*, (1985), 56 Nfld. & P.E.I.R. 44 (Nfld. C.A.)
- <sup>11</sup> *Lynch*, para. 45; *Windsor (City) v. Paciorka Leaseholds Ltd.*, 2021 ONCA 431
- <sup>12</sup> *Lynch*, para. 54
- <sup>13</sup> *Lynch*, paras. 56, 57
- <sup>14</sup> *Lynch*, para. 65

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