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2022 FCA 43

9255-2504 Québec Inc. and **142550 Canada Inc.** and **Grand Boisé de La Prairie Inc.** (*Appellants*)

v.

Her Majesty The Queen (*Respondent*)

INDEXED AS: 9255-2504 QUÉBEC INC. V. CANADA

Federal Court of Appeal, Pelletier, de Montigny and Locke JJ.A.—Montréal, September 29, 2021; Ottawa, March 9, 2022.

Crown — Torts — Appeal from Federal Court decision dismissing appellants' action for compensation by respondent on basis that conditions for Crown liability set out in Crown Liability and Proceedings Act (CLPA) had not been met — Federal Court also ruled that theory of disguised expropriation had no application in case such as this where Species at Risk Act (Act) provides for compensation plan — Appellants in real estate development business — Acquired land on South Shore of Montréal to build six-phase residential project, obtained required authorizations from Ville de La Prairie — Completed most of phases of project when on June 17, 2016, Governor in Council made emergency order under Act to protect habitat of Western Chorus Frog, thereby ending appellants' project — Since then, appellants have sought compensation for losses they suffered as result of not being able to complete their project — Act, s. 64(2) requiring Governor in Council make necessary regulations to govern compensation for losses stemming from emergency orders — Governor in Council not making any such regulations — Appellants brought their claim for compensation before Federal Court — Argued that actions of Governor in Council (in failing to make regulation), of Minister (in failing to fulfill her duty to compensate them) constituted fault within meaning of CLPA, which made Crown civilly liable; also alleged that lack of compensation for loss of economic value of their land was, in effect, disguised expropriation entitling them to compensation — Whether Governor in Council was servant of Crown; whether one or more servant(s) of Crown caused appellants damage through their fault(s); alternatively, whether appellants entitled to compensation on account of disguised expropriation of their land —- With respect to Crown's extracontractual civil liability, Governor in Council can only have committed fault within meaning of CLPA, individually or cumulatively, if it is servant of Crown — Definitions of Governor General, Governor in Council in Interpretation Act, s. 35 examined — Governor in Council is not servant of Crown within meaning of CLPA — Thus, Governor in Council's failure to make regulations, even assuming this could constitute fault, did not open door to extracontractual civil liability on part of Crown — While Minister would have to deal with appellants' claim in not-too-distant future, that did not make delay a fault within meaning of CLPA — Thus, Federal Court not erring in determining that Minister did not commit fault within meaning of CLPA — As a result, issue of whether any fault caused damage claimed by appellants not arising — Therefore, appellants' claim based on CLPA

dismissed — As to disguised expropriation, in this case, there was in fact no disguised expropriation because federal government not acquiring anything from appellants — After emergency order was made, appellants remained owners of land — Act providing for possibility of compensation in these circumstances — Was therefore not necessary to rely on common law principle of disguised expropriation nor on Civil Code of Québec, art. 952 or Quebec Charter of human rights and freedoms, s. 6 to do justice to appellants — In conclusion, appellants not meeting conditions with respect to extracontractual civil liability on part of Crown — Furthermore, appellants failed to demonstrate that making of emergency order was akin to disguised expropriation — Appeal dismissed.

Expropriation — Disguised expropriation — Appellants in real estate development business — Acquired land on South Shore of Montréal to build six-phase residential project, obtained required authorizations from Ville de La Prairie — Completed most phases of project when on June 17, 2016, Governor in Council made emergency order under Act to protect habitat of Western Chorus Frog, thereby ending appellant's project — Since then appellants have sought compensation for losses they suffered as result of not being able to complete their project — Species at Risk Act (Act), s. 64(2) requiring Governor in Council make necessary regulations to govern compensation for losses stemming from emergency orders — Governor in Council not making any such regulations — Appellants brought their claim for compensation before Federal Court — Federal Court ruled, inter alia, that theory of disguised expropriation had no application in case such as this where Species at Risk Act provides for compensation plan — Present instance appeal from that decision — Whether appellants entitled to compensation on account of disguised expropriation of their land — In this case, there was in fact no disguised expropriation because federal government not acquiring anything from appellants — After emergency order was made, appellants remained owners of land — Act providing for possibility of compensation in these circumstances — Was therefore not necessary to rely on common law principle of disguised expropriation nor on Civil Code of Québec, art. 952 or Quebec Charter of human rights and freedoms, s. 6 to do justice to appellants — In conclusion, appellants failed to demonstrate that making of emergency order was akin to disguised expropriation.

Environment — Appellants in real estate development business — Acquired land on South Shore of Montréal to build six-phase residential project, obtained required authorizations from Ville de La Prairie — Completed most of phases of project when on June 17, 2016, Governor in Council made emergency order under Act to protect habitat of Western Chorus Frog, thereby ending appellants' project — Since then, appellants have sought compensation for losses they suffered as result of not being able to complete their project — Species at Risk Act (Act), s. 64(2) requiring Governor in Council make necessary regulations to govern compensation for losses stemming from emergency orders — Governor in Council not making any such regulations — Appellants brought their claim for compensation before Federal Court — Argued that actions of Governor in Council (in failing to make regulation), of Minister (in failing to fulfill her duty to compensate them) constituted fault within meaning of Crown Liability and Proceedings Act (CLPA), which made Crown civilly liable; also alleged that lack of compensation for loss of economic value of their land was, in effect, disguised expropriation entitling them to compensation — Federal Court dismissing appellants' action for compensation by respondent on basis that conditions for Crown liability set out in CLPA had not been met — Federal Court also ruled that theory of disguised expropriation had no application in case such as this where Act provides for compensation plan — Present instance appeal from that decision — While Minister would have to deal with appellants' claim in not-too-distant future, that did not make delay to make regulation a fault within meaning of CLPA — Thus, Federal Court not erring in determining that Minister did not commit fault within meaning of CLPA — As to disguised expropriation, in this case, there was in fact no disguised expropriation because federal government not acquiring anything from appellants — After emergency order was made, appellants remained owners of land — Act providing for possibility of compensation in these circumstances.

This was an appeal from a Federal Court decision dismissing the appellants' action for compensation by the respondent on the basis that the conditions for Crown liability set out in the *Crown Liability and Proceedings Act* (CLPA) had not been met. The Federal Court also ruled that the theory of disguised expropriation had no application in a case such as this where the *Species at Risk*

Act (Act) provides for a compensation plan.

The appellants are in the real estate development business. They acquired land on the South Shore of Montréal to build a six-phase residential project. In order to do so, they obtained the required authorizations from Ville de La Prairie, which included conditions imposed on the city by Quebec's Ministry of the Environment. In addition, they were granted a certificate for their project pursuant to section 22 of the *Environment Quality Act*. Having completed the first four phases, they were about to initiate phases 5 and 6 when, on June 17, 2016, the Governor in Council made an emergency order under the Act to protect the habitat of the Western Chorus Frog, thereby ending the project. Since that time, the appellants have sought compensation for the losses that they suffered as a result of not being able to complete their project. These losses were recorded at some $22,000,000. The respondent was not disputing this amount, although she was disputing her civil liability.

Subsection 64(1) of the Act provides that the Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of an emergency order, while subsection 64(2) of the Act requires the Governor in Council to make the necessary regulations to govern such compensation. The Governor in Council did not make any regulations, leading the Minister to consider that she could not provide any compensation, a position that she took for several years until the Federal Court rendered its decision in *Groupe Maison Candiac Inc. v. Canada (Attorney General)*. Since then, the Minister is of the opinion that she has the jurisdiction to compensate the appellants, despite the absence of regulations, in the event of a claim by them. The appellants pointed out that this is what they had been seeking since the emergency order was made. They brought their claim for compensation before the Federal Court. First, they argued that the actions of the Governor in Council (in failing to make a regulation) and of the Minister (in failing to fulfill her duty to compensate them) constituted a fault within the meaning of the CLPA, which makes the Crown civilly liable; second, they alleged that the lack of compensation for the loss of the economic value of their land was, in effect, a disguised expropriation entitling them to compensation. The Federal Court dismissed the appellants' action and also ruled that the theory of disguised expropriation had no application in a case such as this, where the Act provides for a compensation plan. The reasoning that led the Federal Court to find the Minister liable was that the inaction of the person responsible for exercising regulatory power cannot "serve as a justification for neutralizing the compensation plan established by the Act". The Federal Court concluded that in order to give section 64 of the Act the effect intended by Parliament, the Minister had the right to compensate the appellants despite the absence of a framework to be provided by the Governor in Council through regulations. The Minister's decision not to compensate the appellants was therefore the cause of the losses that they suffered. However, this reasoning dealt only with the cause of these losses and not with the extracontractual civil liability that might be attached to them. In sum, the Federal Court was of the view that an error of law committed in good faith in a context such as the one in this case did not amount to a fault. The Minister's error of law in not compensating the appellants in the absence of regulations could have been subject to a review based on administrative law without giving rise to a remedy based on the extracontractual civil liability of the Crown.

The issues were whether the Governor in Council was a servant of the Crown; whether one or more servant(s) of the Crown caused the appellants damage through their fault(s); and, alternatively, whether the appellants were entitled to compensation on account of the disguised expropriation of their land.

Held, the appeal should be dismissed.

With respect to the Crown's extracontractual civil liability, the Governor in Council can only have committed a fault within the meaning of the CLPA, individually or cumulatively, if it is a servant of the Crown. The definitions of Governor General and Governor in Council in section 35 of the *Interpretation Act* were examined. It could only be concluded from these definitions that the Governor General is at the top of the Government of Canada on behalf of the Queen and that the Governor in Council is merely the Governor General acting in concert with the Queen's Privy

Council, which includes the federal Cabinet. Thus, the Governor in Council is not a servant of the Crown within the meaning of the CLPA. It follows that the failure of the Governor in Council to make regulations, even assuming that this could constitute a fault, did not open the door to extracontractual civil liability on the part of the Crown. This being the case, the appellants' position that it was the actions of the Governor in Council and the Minister, cumulatively, that engaged the Crown's civil liability did not hold water because the actions of the Governor in Council are not likely to engage his or her civil liability.

Since it was not disputed that the Minister was the only servant of the Crown involved, it had to be determined whether her actions constituted faults within the meaning of the CLPA. The appellants' argument that, both before and after the decision in *Groupe Maison Candiac* was rendered, the Minister was wrong in not compensating them was not accepted. The plaintiff has the burden of establishing the existence of a fault that goes beyond the mere invalidity or unlawfulness of anything done or omitted. The appellants attempted to meet this burden by invoking bad faith, relying on the passage of time since the adoption of the CLPA, the making of the emergency order, and the rendering of the decision in *Groupe Maison Candiac* without being paid any compensation. The factors listed by the Federal Court to justify the Minister's non-payment—the error of law as to her jurisdiction, the unusual context of the sparse use of emergency orders, the need to "set the parameters that should guide the examination of claims", and "balancing economic, social or political considerations"—do not justify non-payment forever but they may explain a rational reluctance to move forward on this issue until the right to do so is beyond doubt. One could add to the list of relevant factors the fact that the decision in this case was appealed. It was clear that the Minister would have to deal with the appellants' claim in the not-too-distant future, but that did not make the delay a fault within the meaning of the CLPA. Thus, the Federal Court did not err in determining that the Minister did not commit a fault within the meaning of the CLPA. Given these findings, the issue of whether any fault caused the damage claimed by the appellants did not arise. Therefore, the appellants' claim based on the CLPA was dismissed.

As to disguised expropriation, in this case, there was in fact no disguised expropriation because the federal government did not acquire anything from the appellants. After the emergency order was made, the appellants were left with land that was no longer useful to them for the purposes for which they acquired it, but they remained the owners of the land. The Act provides for the possibility of compensation in these circumstances. It was therefore not necessary to rely on the common law principle of disguised expropriation nor on article 952 of the *Civil Code of Québec* or section 6 of the Quebec *Charter of human rights and freedoms* to do justice to the appellants. Indeed, given the compensation plan put in place by the Act, there was no legal vacuum here that had to be filled by using Quebec law on a suppletive basis. Also, the appellants objected to the idea that a plan that has not been implemented can do them justice. Unfortunately, the plan was not implemented because the appellants failed to take the necessary steps to do so. If the Governor in Council or the Minister failed to comply with the Act, the appellants had the tools at their disposal to require their compliance. They were free to choose among the remedies available to them, but they were wrong to consider that these remedies were equivalent in all respects. An action in extracontractual civil liability involves difficulties that are not present in administrative law. The same is true of the remedy relating to disguised expropriation.

In conclusion, the appellants did not meet the conditions with respect to extracontractual civil liability on the part of the Crown, in particular, the presence of a fault by a servant of the Crown. Furthermore, the appellants failed to demonstrate that the making of the emergency order was akin to a disguised expropriation.

STATUTES AND REGULATIONS CITED

Act respecting threatened or vulnerable species, CQLR, c. E-12.01.

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 39.

Charter of human rights and freedoms, CQLR, c. C-12, s. 6.

Civil Code of Québec, CQLR, c. CCQ-191, art. 952, 1463.

Crown Liability and Proceedings Act, R.S.C., 1985, c. C-50, ss. 3, 35.

Department of Highways Act, R.S.B.C. 1960, c. 103.

Environment Quality Act, CQLR, c. Q-2, s. 22.

Freshwater Fish Marketing Act, R.S.C., 1985, c. F-13.

Interpretation Act, R.S.C. 1985, c. I-21, s. 35.

Park Act, S.B.C. 1965, c. 31.

Species at Risk Act, S.C. 2002, c. 29, ss. 64, 80(4)(c)(ii).

CASES CITED

APPLIED:

Groupe Maison Candiac Inc. v. Canada (Attorney General), 2018 FC 643, [2019] 1 F.C.R. 40, affd 2020 FCA 88, [2020] 3 F.C.R. 645; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *Bernèche c. Canada (Attorney General)*, 2007 QCCS 2945, [2007] J.Q. No. 6368 (QL); *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551.

CONSIDERED:

Centre québécois du droit de l'environnement v. Canada (Environment), 2015 FC 773, 98 Admin. L.R. (5th) 233; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Pacific Shower Doors (1995) Ltd. v. Osler, Hoskin & Harcourt, LLP*, 2011 BCSC 1370; *Manitoba Fisheries Ltd. v. The Queen*, 1978 CanLII 22, [1979] 1 S.C.R. 101; *R. v. Tener*, [1985] 1 S.C.R. 533, 1985 CanLII 76; *Lorraine (Ville) v. 2646-8926 Québec Inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577; *Benjamin c. Montréal, (Ville, Cité de Côte Saint-Luc)*, 2003 CanLII 33374 (Q.C.C.S.).

REFERRED TO:

R. v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205, 1983 CanLII 21; *Welbridge Holdings Ltd. v. Greater Winnipeg*, 1970 CanLII 1, [1971] S.C.R. 957; *Baird v. The Queen* [1984] 2 F.C. 160, 148 D.L.R. (3d) 1, 1983 CanLII 5027 (C.A.); *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 1992 CanLII 41; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983; *Murray c. 9197-5748 Québec inc.*, 2021 QCCA 153; *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508, [1920] UKHL 1 (BAILII).

AUTHORS CITED

Oxford English Dictionary Online, Oxford University Press, "servant"

APPEAL from a Federal Court decision (2020 FC 161, 36 C.E.L.R. (4th) 1) dismissing the appellants' action for compensation by the respondent on the basis that the conditions for Crown liability set out in the *Crown Liability and Proceedings Act* had not been met and that the theory of disguised expropriation had no application in this case. Appeal dismissed.

APPEARANCES

Sylvain Bélair for appellants.

Michelle Kellam and *Jessica Pizzoli* for respondent.

SOLICITORS OF RECORD

De Grandpré Chait LLP, Montréal, for appellants.

Deputy Attorney General of Canada for respondent.

The following is the English version of the reasons for judgment rendered by

PELLETIER J.A.:

I. Introduction

[1] The appellants are in the real estate development business. They acquired land on the South Shore of Montréal to build a six-phase residential project. In order to do so, they obtained the required authorizations from Ville de La Prairie, which included conditions imposed on the city by Quebec's Ministry of the Environment. In addition, they were granted a certificate for their project pursuant to section 22 of the *Environment Quality Act*, C.Q.L.R., c. Q-2. Having completed the first four phases, they were about to initiate phases 5 and 6 when, on June 17, 2016, the Governor in Council made an emergency order under the *Species at Risk Act*, S.C. 2002, c. 29 (the Act) to protect the habitat of the Western Chorus Frog, thereby ending the project. Since that time, the appellants have sought compensation for the losses that they suffered as a result of not being able to complete their project. These losses were recorded at some $22,000,000; the respondent is not disputing this amount, although she is disputing her civil liability.

[2] Subsection 64(1) of the Act provides that the Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of an emergency order, while subsection 64(2) of the Act requires the Governor in Council to make the necessary regulations to govern such compensation. The issue is that the Governor in Council did not make any regulations, leading the Minister to consider that she could not provide any compensation. At least, that was the position that she took for several years until the Federal Court rendered its decision in *Groupe Maison Candiac Inc. v. Canada (Attorney General)*, 2018 FC 643, [2019] 1 F.C.R. 40 (*Groupe Maison Candiac*), which was affirmed by this Court in *Groupe Maison Candiac Inc. v. Canada (Attorney General)*, 2020 FCA 88, [2020] 3 F.C.R. 645. Since then, the Minister is of the opinion that she has the jurisdiction to compensate the appellants, despite the absence of regulations, in the event of a claim by them. The appellants point out that this is what they have been seeking since the emergency order was made.

[3] The appellants brought their claim for compensation before the Federal Court. First, they argued that the actions of the Governor in Council (in failing to make a regulation) and of the Minister (in failing to fulfill her duty to compensate them) constituted a fault within the meaning of the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 (the CLPA), which makes the Crown civilly liable; second, they

alleged that the lack of compensation for the loss of the economic value of their land is, in effect, a disguised expropriation entitling them to compensation.

[4] The Federal Court dismissed the appellants' action (2020 FC 161, 36 C.E.L.R. (4th) 1, the Decision) on the basis that the conditions for Crown liability set out in the CLPA had not been met. The Court also ruled that the theory of disguised expropriation had no application in a case such as this, where the Act provides for a compensation plan. The appellants are appealing the Decision.

[5] For the following reasons, I would dismiss the appeal. The appellants have not met the conditions with respect to extracontractual civil liability on the part of the Crown, in particular, the presence of a fault by a servant of the Crown. Furthermore, the appellants failed to demonstrate that the making of the emergency order was akin to a disguised expropriation.

II. Facts

[6] As early as 2013, the appellants—related companies whose directing mind is Mr. Quint—wanted to carry out a residential real estate development project in Ville de La Prairie. This project was to have six phases and was to be completed in 2019 (the Symbiocité Project).

[7] The land on which the Symbiocité Project was to be built was known by all to be the habitat of a population of Western Chorus Frogs (the frog). In 2001, the frog was classified as a "vulnerable wildlife species" pursuant to the *Act respecting threatened or vulnerable species*, C.Q.L.R., c. E-12.01. In 2008, Ville de La Prairie obtained a certificate of authorization from the Government of Quebec pursuant to section 22 of the *Environment Quality Act*. This certificate authorized backfilling of the wetlands where the appellants' project was to be built. In return, it required certain measures to address the environmental impacts of these activities.

[8] In July 2012, the appellants signed a memorandum of understanding with Ville de La Prairie. This memorandum of understanding considered the entirety of the appellants' project, that is, phases 1 to 6. The work covered by the certificate of authorization granted to Ville de La Prairie and some other work of the same nature was contemplated within it and was to be carried out by the appellants. The Federal Court described the nature and extent of this work:

> …. These measures, at the expense of the [appellants],... included expanding the existing conservation park by 5 million square feet, bypassing a stream crossing the Symbiocité Project area and developing four breeding ponds for the Western Chorus Frog....
>
> The certificates of authorization issued in relation to the Symbiocité Project also oblige the [appellants] not to carry out any work during the reproduction period of the Western Chorus Frog, that is, between March and July.

Decision, at paragraphs 45 and 46.

[9] The memorandum of understanding also provided for an exchange of land, such that the appellants were to purchase from the city most of the land on which phases 5 and 6 of their project would be built.

[10] In the months following the negotiation of the memorandum of understanding, an environmental advocacy group initiated the process to seek the making of an emergency order, as provided for in the Act, in relation to the frog habitat on Ville de La Prairie territory. Ultimately, the then federal Minister of the Environment, Leona Aglukkaq, declined to recommend the making of an emergency order to the Governor in Council. This decision was set aside by the Federal Court ([*Centre québécois du droit de l'environnement v. Canada (Environment)*] 2015 FC 773, 98 Admin. L.R. (5th) 233), which referred the matter back to the Minister for reconsideration.

[11] Six months later, in December 2015, the new Minister, Catherine McKenna, announced that she proposed to recommend to the Governor in Council that an emergency order be made. On June 17, 2016, the Governor in Council made an emergency order with conditions, which the Federal Court summarized in paragraph 25 of its Decision as follows:

> The Order gives a precise description of the area to which it applies and states that it is prohibited to
>
> a. remove, compact or plow the soil;
>
> b. remove, prune, damage, destroy or introduce any vegetation, such as a tree, shrub or plant;
>
> c. drain or flood the ground;
>
> d. alter surface water in any manner, including by altering its flow rate, its volume or the direction of its flow;
>
> e. install or construct, or perform any maintenance work on, any infrastructure;
>
> f. operate a motor vehicle, an all-terrain vehicle or a snowmobile anywhere other than on a road or paved path;
>
> g. install or construct any structure or barrier that impedes the circulation, dispersal or migration of the Western Chorus Frog;
>
> h. deposit, discharge, dump or immerse any material or substance, including snow, gravel, sand, soil, construction material, greywater or swimming pool water; and
>
> i. use or apply a *pest control product* as defined in section 2 of the *Pest Control Products Act* or a *fertilizer* as defined in section 2 of the *Fertilizers Act*.

[12] It is not surprising that this order effectively ended the appellants' project, resulting in significant losses. All that remained was the issue of compensation.

[13] The Act provides for compensation to persons who suffer losses as a result of any extraordinary impact of an emergency order. The legislative scheme has two components. The Minister may, in accordance with the regulations provided for under subsection 64(2), compensate persons who suffer losses as a result of the making of an emergency order. Furthermore, the Governor in Council shall make regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of subsection 64(1). Despite this mandatory language, the Governor in Council has not, to date, made the regulation(s) set out in subsection 64(2) of the Act. This inaction has led to the difficulties experienced by the appellants, which gave rise to this appeal.

[14] As soon as the Minister announced her intention to recommend to the Governor in Council that an emergency order be made, that is, in December 2015, the appellants were informed that "although compensation was possible under the Act, the question was premature at this stage since the adoption of such an order remained hypothetical. Mr. Quint was also informed that, for the moment, there were no regulations allowing compensation to be paid": Decision, at paragraph 75. The Minister maintained this position until the Federal Court rendered its decision in *Groupe Maison Candiac* in 2018, a case brought by another real estate developer.

[15] That case involved an application to cancel the emergency order on the grounds that subparagraph 80(4)(c)(ii) of the Act—which authorizes the making of an emergency order—is *ultra vires* Parliament. In the alternative, Groupe Maison Candiac argued that the fact that they were not compensated constituted a disguised expropriation of their land. Groupe Maison Candiac's application was dismissed, but along the way, the Court ruled on the effect of the lack of regulations. At paragraph 207 of *Groupe Maison Candiac*, the Federal Court wrote:

> It is well established that an administrative decision maker cannot invoke the absence of a regulation to not act when this inaction is equivalent to stripping a law or countering its application. We want to avoid creating a legal vacuum, thereby giving rise to an abuse of power by conferring to the regulatory authority [TRANSLATION] "a dimension that allows the Administration to indefinitely strip the legislature's express will" (Patrice Garant*, Droit Administratif,* 7th Ed., Montreal, Yvon Blais, 2017 (*Garant*), at pages 215–216). The principles only apply to the exercise of regulatory power, be it facultative or imperative, like in this case (*Garant*, at page 215). They are particularly useful in the absence of a regulation, if it was interpreted as having prevented the application of the legislation, or depriving the offender of a benefit conferred by it (*Irving Oil Ltd. et al. v. Provincial Secretary of New Brunswick*, [1980] 1 S.C.R. 787, at page 795).

[16] On appeal of the Federal Court decision, Groupe Maison Candiac argued that the absence of the regulations provided for in subsection 64(2) of the Act created a legal vacuum that justified the use of provincial law on a suppletive basis. This argument was rejected by this Court at paragraph 74 of its reasons:

> I find this argument to be without basis, and the Federal Court correctly rejected it. As the Supreme Court stated in *Irving Oil Ltd. et al. v. Provincial Secretary of New Brunswick*, [1980] 1 S.C.R. 787, at page 795, (1980), 29 N.B.R. (2d) 529, [1980] S.C.J. No. 23 (QL), a regulatory authority cannot nullify the application of a law and deprive the litigants of a benefit or remedy to which they would be entitled by refraining from adopting the regulation which conditions its existence. According to this logic, the Minister could not cling to the fact that no regulation was adopted pursuant to subsection 64(2) of the Act in order to deny a claim for compensation.

[17] As a result of these decisions, the Minister stated that she had changed her mind and that she was prepared to consider compensating the appellants, provided that a claim be presented to her. The appellants replied that they had made numerous claims for compensation and had not yet received any compensation.

III. The decision under appeal

[18] The Federal Court began its analysis with an overview of the law and the case law on the extracontractual civil liability of the Crown. The CLPA provides that the Crown's liability is only vicarious, that is, it is based on the personal liability that servants of the Crown would have for damage resulting from their faults. Relying on *Hinse v.*

Canada (Attorney General), 2015 SCC 35, [2015] 2 S.C.R. 621 (*Hinse*), the Federal Court expressed the view that it is now established that a minister is considered to be a servant within the meaning of the CLPA, but that the status of the Governor in Council has not been definitively decided.

[19] However, not all acts attributed to the Crown engage extracontractual civil liability since the Crown enjoys relative immunity as regards its "policy" decisions. These decisions are those that are "based on considerations of public interest, such as economic, social or political factors": Decision, at paragraph 144. The exercise of legislative power, even delegated or subordinate power, enjoys this immunity (legislative immunity). However, Crown immunity is not absolute; irrational or bad faith decisions are not protected in any way.

[20] Bad faith is not limited to intent to harm others; it also includes decisions that are so markedly inconsistent with the legislative context that a court cannot reasonably conclude that they were performed in good faith: *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304 (*Sibeca*).

[21] Furthermore, the fact that a servant of the Crown fails to fulfill a legal obligation does not necessarily lead to a finding of fault within the meaning of the law of the CLPA. Even if a discretionary decision of a decision maker has been declared invalid or unlawful, that in itself does not create a cause of action in extracontractual civil liability (in Quebec) or in tort liability (in provinces where the common law applies). That is, a decision, even if it is determined to be invalid, is not by that very fact a fault.

[22] Moreover, as in private law, "the alleged damage must have been the logical, direct and immediate consequence of the fault (*Hinse* at para 132)": Decision, at paragraph 149.

[23] Following this overview of the law, the Federal Court considered the issue of the civil liability of the Governor in Council and the Minister. The Court examined the issue of the civil liability of the Governor in Council from four perspectives, the fourth of which is not relevant to this case. These perspectives are (1) immunity in relation to the power to legislate, (2) the absence of bad faith, and (3) the absence of a causal link. The Court then considered the Minister's civil liability.

[24] The Federal Court began this part of its analysis by recalling the principle of immunity. Legislative immunity applies equally to decisions not to legislate and to decisions to legislate. The same is true of the decision to make or not to make a regulation. In stating this principle, the Federal Court relied on what Justice Wagner [as he then was] wrote in *Bernèche c. Canada (Attorney General)*, 2007 QCCS 2945, at paragraph 108:

> [TRANSLATION]
>
> The State cannot engage civil liability for having adopted laws or regulations, whether or not they are declared *ultra vires*. Similarly, the failure to adopt certain rules cannot automatically give rise to a finding of civil liability on the part of the State.

[25] The Federal Court turned to the parliamentary debates to identify the context in which the Act was adopted. This context included the desire, expressed in those

debates, to develop regulations on the basis of experience with providing compensation in an ex-gratia way.

[26] In considering the allegation of bad faith, the Federal Court took note of the fact that Cabinet deliberations are confidential pursuant to section 39 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5; therefore, there was no evidence in the record to shed light on the reasons for which the Governor in Council did not make the regulation set out in subsection 64(2) of the Act. However, there was nothing to suggest that the Governor in Council was motivated by an intention to harm the appellants. Moreover, the specific context—in particular, the fact that this was the first time that this legislation had been applied to private land and the fact that there was only one other example of an emergency order being made—did not allow the Court to conclude that the delay in acting was so inconsistent with the legislative context that a finding of bad faith was required: Decision, at paragraph 194.

[27] According to the Federal Court, the direct and immediate cause of the damage suffered by the appellants was not the decision of the Governor in Council not to make a regulation "given the role and responsibilities of the Minister in the implementation of said plan": Decision, at paragraph 193.

[28] The reasoning that led the Court to find the Minister liable is the same as that set out by the Federal Court in *Groupe Maison Candiac*, namely, that the inaction of the person responsible for exercising regulatory power cannot "serve as a justification for neutralizing the compensation plan established by the Act": Decision, at paragraph 155. The Federal Court concluded that in order to give section 64 the effect intended by Parliament, the Minister had the right to compensate the appellants despite the absence of a framework to be provided by the Governor in Council through regulations. To conclude otherwise would give the Governor in Council the power to "neutralize" the Act by failing to adopt the regulations set out in the Act.

[29] The Minister's decision not to compensate the appellants was therefore the cause of the losses that they suffered: Decision, at paragraph 156. However, it was important to emphasize that this reasoning dealt only with the cause of these losses and not with the extracontractual civil liability that might be attached to them.

[30] On this point, the Federal Court relied on the case law according to which an act or decision that proves to be ill-founded does not in itself engage civil liability: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (*TeleZone*), at paragraphs 25 and 29; see also *R. v. Saskatchewan Wheat Pool*, 1983 CanLII 21, [1983] 1 S.C.R. 205 (*Saskatchewan Wheat Pool*); *Welbridge Holdings Ltd. v. Greater Winnipeg*, 1970 CanLII 1, [1971] S.C.R. 957, at page 969.

[31] To the extent that the Minister erred in law in acting as she did before the decision in *Groupe Maison Candiac* was rendered, this would not in itself be sufficient to engage extracontractual civil liability in the absence of bad faith. However, there was no evidence of bad faith.

[32] With respect to the lack of compensation since the Federal Court's decision in *Groupe Maison Candiac*, the Federal Court was of the view, given the particular context, that in compensating the appellants, the Minister would have to define the formal and substantive parameters that the Act reserved for the Governor in Council.

The Federal Court considered that the Minister, if she acted in this way, would not be a mere public servant, but would be granted immunity since she would be “in the antechamber... of the policy decision, being called in to decide whether she, on her own, could assume this responsibility, which is moreover protected by Crown immunity”: Decision, at paragraph 201.

[33] In sum, the Federal Court was of the view that an error of law committed in good faith in a context such as the one in this case did not amount to a fault. The Minister’s error of law in not compensating the appellants in the absence of regulations could have been subject to a review based on administrative law without giving rise to a remedy based on the extracontractual civil liability of the Crown.

[34] The Federal Court summarized its findings on extracontractual civil liability in paragraphs 193 to 194 of the Decision:

> In sum, I find that the defendant’s extracontractual civil liability is not engaged because the Governor in Council has still not adopted the regulations implementing the compensation plan established by section 64 of the Act. Indeed, even assuming that this defect results from faulty conduct, the damage alleged by the plaintiffs was not the direct, logical and immediate cause, given the role and responsibilities of the Minister in the implementation of said plan.
>
> In the alternative, I find that the absence of regulations, when considered in light of all the evidence, and in particular the parliamentary debates preceding the adoption of the Act and the context in which section 80 was implemented, does not disclose any evidence of bad faith, whether direct or indirect, in the conduct of the Governor in Council. In other words, while this conduct can theoretically give rise to recourse and remedies under public law, it is not such as to justify compensation under the CLPA.

[35] Before the Federal Court, the respondent argued that the losses suffered by the appellants were not compensable because they resulted from the business risk that the appellants had assumed in carrying out their project despite their knowledge of the existence and status of the frog. The Federal Court did not consider this issue given its finding on the issue of Crown civil liability: Decision, at paragraph 215. This argument can be summarily dismissed. The risk that gave rise to the damage claimed by the appellants was not the making of the emergency order, but rather the risk that order would be made without the possibility of compensation on the advice of the Minister. This risk was hardly conceivable since it is so inconsistent with Canadian notions of “fair dealing.”

[36] As it did with civil liability, the Federal Court began its analysis of disguised expropriation with an overview of the relevant legal principles. The appellants had based their allegation of disguised expropriation on the fact that, since the emergency order was made, they had been unable to use their land for the purposes for which it was purchased from Ville de La Prairie or for any other economic purpose, without being paid or even offered any form of compensation for their losses.

[37] The Federal Court noted the presumption from the common law that no one may be dispossessed of their property without compensation unless the legislature has, in clear and unequivocal terms, decided otherwise: Decision, at paragraph 217. Similarly, section 6 of the *Charter of human rights and freedoms*, CQLR, c. C-12 (the Quebec Charter) guarantees every person a right to the peaceful enjoyment and free disposition of his or her property. Moreover, article 952 of the *Civil Code of Québec*, CQLR,

c. CCQ-1991 (CCQ) provides that it is sufficient to demonstrate that a measure taken by a public authority entails the suppression of the reasonable uses of the property in order to establish the disguised expropriation: Decision, at paragraphs 216–219.

[38] However, it is established that Parliament—that is, the federal legislature—can derogate from Quebec civil law in exercising its legislative authority, just as it is open to the Quebec legislature to restrict or set aside the principle established in article 952 of the CCQ, as long as it does so in express terms: Decision, at paragraph 223.

[39] For its part, the Federal Court was of the view that since Parliament, through section 64 of the Act, had expressly provided a mechanism for compensation for losses suffered as a result of the making of an emergency order, the concept of disguised expropriation did not apply: Decision, at paragraphs 233 and 237.

[40] For these reasons, the Federal Court dismissed the appellants' action.

IV. Issues

[41] What is surprising about this case is that it is presented as an extracontractual civil liability case rather than an administrative law issue. The Act provides for the possibility to compensate those who have suffered losses as a result of the making of an emergency order, which has not yet occurred in this case. The courts apply administrative law principles on a daily basis to issues of non-compliance with the legislation and the exercise of discretion (or lack thereof) that violates the framework of its enabling statute.

[42] The appellants have chosen to proceed by way of action under the CLPA, which brings its own set of problems. In Quebec, the extracontractual civil liability of the federal government is engaged by the damage caused by the fault of a servant of the Crown. It follows that the appellants, in order to succeed, must show that one or more servant(s) of the Crown caused them damage through their fault(s). However, not every damaging act of a Crown representative necessarily constitutes a fault of a servant of the Crown that engages his or her extracontractual civil liability, even if it is possible to remedy this act based on administrative law.

[43] Since there is no dispute that the Minister is a servant of the Crown, the only remaining issue is whether the Governor in Council is also a servant of the Crown; the Federal Court did not address this issue. The appellants argue that the Federal Court erred when it failed to consider the possibility that the servants in question were the Governor in Council in conjunction with the Minister. This is an issue that will have to be examined.

[44] With respect to the second criterion, that of fault, two issues must be considered. First, it must be asked what behaviour is alleged against the servant of the Crown. Second, it must be determined whether that behaviour is a fault and whether the actor is exempt from extracontractual civil liability by virtue of some privilege or immunity. A decision or a lack of a decision cannot be a fault within the meaning of the CLPA if it is sheltered from all legal condemnation.

[45] The third criterion is the cause of the damage suffered. The Federal Court exonerated the Governor in Council and held that the cause of the damage was the

Minister's failure to compensate the appellants as provided for in the Act. It remains to be seen whether this finding is erroneous.

[46] In the alternative, the appellants argue that the fact that they were not compensated when the making of the emergency order deprived them of the benefit of their land constituted a disguised expropriation. This issue will be examined if the action in extracontractual civil liability is unsuccessful.

V. Analysis

[47] Since this Court is hearing an appeal from a Federal Court judgment rendered after a trial, the standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law, except for extricable questions of law, for which the standard of correctness is also applicable.

A. *The extracontractual civil liability of the Crown*

(1) Is the Governor in Council a servant of the Crown?

[48] At paragraph 141 of its Decision, the Federal Court noted that there has not yet been a judicial pronouncement to the effect that the Governor in Council is a servant of the Crown, but that some have taken the view that this is not the case. The Federal Court cited a decision of the Supreme Court of British Columbia to that effect, *Pacific Shower Doors (1995) Ltd. v. Osler, Hoskin & Harcourt, LLP*, 2011 BCSC 1370, in which it is simply stated at paragraph 64 that the Governor in Council is not "a servant of the Crown".

[49] The Federal Court did not dwell on the issue of the status of the Governor in Council because it was of the view that, in any event, the Governor in Council enjoyed relative immunity for economic, social or political decisions: Decision, at paragraphs 141 and 144.

[50] The appellants, for their part, challenged the finding regarding the relative immunity of the Governor in Council (see, in particular, paragraphs 46–47), but without addressing the issue of the status of the Governor in Council. Moreover, the appellants argued that [TRANSLATION] "the actions of the Governor in Council and the Minister, taken individually and cumulatively, constitute a fault and an abuse of power entailing the civil liability of the respondent": memorandum of the appellants, at paragraph 42.

[51] It seems clear to me that the Governor in Council can only have committed a fault within the meaning of the CLPA, individually or cumulatively, if it is a servant of the Crown, which is an issue that the appellants have avoided. However, the answer to this question is not self-evident. The fact that the appellants have not addressed this issue does not prevent me from doing so, since it arises before the issue of immunity even presents itself.

[52] The appellants argued that, by failing to fulfill the duty to make regulations, the Governor in Council [TRANSLATION] "has acted out of synch with [the Act]" and has "neutralized the power granted to the Minister to compensate the appellants": memorandum of the appellants, at paragraph 39. In so doing, the appellants have

intermingled the principles of administrative law and extracontractual civil liability. In administrative law, the fact that the holder of a power failed to comply with the law justifies the intervention of the courts, whereas in Crown civil liability, the courts can intervene only if the holder of the power is a servant of the Crown. As I have just mentioned, this element is absent from the arguments put forward by the appellants.

[53] For her part, the respondent bases her argument on the definitions of Governor General and Governor in Council in section 35 of the *Interpretation Act*, R.S.C., 1985, c. I-21:

> ***Governor, Governor General*** or ***Governor of Canada*** means the Governor General of Canada or other chief executive officer or administrator carrying on the Government of Canada on behalf and in the name of the Sovereign, by whatever title that officer is designated;
>
> ***Governor General in Council*** or ***Governor in Council*** means the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada;

[54] Section 3 of the CLPA, which is the basis of the appellants' claims, reads as follows in relation to Quebec:

> **3** The Crown is liable for the damages for which, if it were a person, it would be liable
>
> **(a)** in the Province of Quebec, in respect of
>
> **(i)** the damage caused by the fault of a servant of the Crown, or
>
> **(ii)** the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner;

[55] It follows from this text that the extracontractual civil liability of the Crown is vicarious in the sense that the Crown is liable solely for the faults of its servants: *Hinse*, at paragraph 58, *Baird v. The Queen* [1984] 2 F.C. 160, 148 D.L.R. (3d) 1, 1983 CanLII 5027 (C.A.).

[56] The definition of "servant" (revised 2021) in the *Oxford English Dictionary Online* is as follows: "A person who is engaged… to perform specified tasks or functions… ; a person who is in the service of another". This definition sets out the ordinary meaning of the word. The context and purpose of the legislation, which are well set out in the Federal Court's Decision, confirm that this is the meaning intended by Parliament [at paragraph 139]:

> ... the Crown, at common law, was in principle sheltered from any extracontractual civil liability since it was considered that, being the source and fountain of justice, it could not act contrary to law. Over time, however, it had become technically possible to take legal action against the Crown in a case of extracontractual civil liability, but this could only happen if the alleged fault was attributable to one of its employees and if it gave its consent to filing the proceedings. [Citations omitted.]

[57] The control factor is one element, if not the primary element, in assigning liability for the fault of others: see *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 1992 CanLII 41; *671122 Ontario Ltd. v. Sagaz Industries Canada*

Inc., 2001 SCC 59, [2001] 2 S.C.R. 983; *Civil Code of Québec*, article 1463; *Murray c. 9197-5748 Québec inc.*, 2021 QCCA 153, at paragraph 35.

[58] In reviewing the two definitions from the *Interpretation Act* above, one can only conclude that the Governor General is at the top of the Government of Canada on behalf of the Queen and that the Governor in Council is merely the Governor General acting in concert with the Queen's Privy Council, which includes the federal Cabinet. This means that the Governor in Council is at the top of the federal administration and is not subject to any control that would make the Governor in Council a servant of the Crown.

[59] What about the fact that the Act imposes a duty on the Governor in Council to make regulations? Does the obligation imposed on the Governor in Council by Parliament demonstrate that the Governor in Council is subject to the control of Parliament and is therefore a servant of the Crown? Under the principles of administrative law, the courts require the Governor in Council to do what the Act imposes on him or her, but this does not make the Governor in Council a servant of Parliament or of the courts. The fact that the Governor might be accountable to Parliament should not be likened to the degree of direction and control implied by the word "servant" as used in the CLPA. The former is a question of political and electoral accountability, while the latter is a question of operational control.

[60] I find that the Governor in Council is not a servant of the Crown within the meaning of the CLPA. It follows that the failure of the Governor in Council to make regulations, even assuming that this could constitute a fault, does not open the door to extracontractual civil liability on the part of the Crown. This being the case, the appellants' position that it is the actions of the Governor in Council and the Minister, cumulatively, that engage the Crown's civil liability does not hold water because the actions of the Governor in Council are not likely to engage his or her civil liability.

[61] Since it is not disputed that the Minister is the only servant of the Crown involved, the next issue that must be reviewed is whether her actions constitute faults within the meaning of the CLPA.

(2) The Minister's fault

[62] The appellants argue that, both before and after the decision in *Groupe Maison Candiac* was rendered, the Minister was wrong in not compensating them. It should be recalled that in *Groupe Maison Candiac*, the Federal Court determined that the Minister could not rely on the lack of regulations to legitimize her refusal to exercise the discretion conferred on her pursuant to subsection 64(1) of the Act; to find otherwise, according to the Federal Court, would allow the holder of the regulatory power to neutralize the legislation by failing to exercise the power conferred under the Act.

[63] The Federal Court noted that harm resulting from an act or omission does not necessarily lay the basis for a private cause of action:

> ... insofar as the Minister, according to *Groupe Maison Candiac*, erred in law by taking the position that the absence of regulations deprived her of the power to exercise her discretion under subsection 64(1) of the Act. In my opinion, only proof of bad faith can engage the liability of the federal Crown in connection with this error. However, this proof has not been made.

Decision, at paragraph 200. See also paragraph 202.

[64] With respect to the Minister's inaction since *Groupe Maison Candiac* was rendered, the Federal Court rejected the appellants' argument that the Minister had failed to implement a judicial decree and therefore could not rely on the protection afforded by the principles of Crown immunity. Rather, the Federal Court was of the view that the judgment in *Groupe Maison Candiac* did not impose anything on the Minister. There was no conclusion in its disposition creating any obligation whatsoever on the Minister: Decision, at paragraphs 210–211. This conclusion is unassailable.

[65] The appellants challenge the finding that the position taken by the Minister did not engage the liability of the Crown because:

[TRANSLATION]

a. the Minister never decided not to pay compensation to the appellants;

b. the Minister always considered that the lack of regulations precluded her from paying compensation; and

c. in doing so, the Minister never exercised her jurisdiction pursuant to subsection 64(1) [of the Act], contrary to the intent clearly evidenced by Parliament in enacting the [Act].

Memorandum of the appellants, at paragraph 51

[66] Moreover, the appellants do not agree that, since the decision in *Groupe Maison Candiac* was rendered, the Minister can consider a claim for compensation. In addition, they emphasize that the Minister has not done anything whatsoever to implement *Groupe Maison Candiac*: memorandum of the appellants, at paragraphs 52–53.

[67] Furthermore, the appellants do not accept that they must make a claim for compensation now, after all the steps that they have taken to assert their rights, including making oral submissions to the Minister's office, presenting a formal notice, and suing. This being the case, it appears that the appellants have indeed made a claim for compensation, which has yet to be answered.

[68] For her part, the respondent cites the Federal Court's findings with approval.

[69] Assuming that the law would allow the Minister to exercise her discretion and compensate the appellants in the absence of regulations, is the failure to do so a fault that engages the Crown's extracontractual civil liability? The basic principle was set out in *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at paragraph 9:

> ... The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence: *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity.

[70] This does not preclude a civil liability action from succeeding, but it must be based on something other than the mere breach of a duty:

> Negligence is also alleged by TeleZone. Tort liability, of course, is based on fault, not invalidity. As the Court made clear many years ago in *The Queen in Right of Canada v.*

Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205, at pp. 222-25, breach of a statute is neither necessary nor is it sufficient to ground a private cause of action.

TeleZone, at paragraph 28

[71] It follows from this case law that the plaintiff has the burden of establishing the existence of a fault that goes beyond the mere invalidity or unlawfulness of anything done or omitted. The appellants attempted to meet this burden by invoking bad faith, relying on the passage of time since the adoption of the Act, the making of the emergency order, and the rendering of the decision in *Groupe Maison Candiac* without being paid any compensation. They rely on *Sibeca*, in which the Supreme Court ruled that bad faith can be established by circumstantial evidence, that is, acts "that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith": *Sibeca*, at paragraph 26.

[72] The factors listed by the Federal Court to justify the Minister's non-payment—the error of law as to her jurisdiction, the unusual context of the sparse use of emergency orders, the need to "set the parameters that should guide the examination of claims", and "balancing economic, social or political considerations"—do not justify non-payment forever, but they may explain a rational reluctance to move forward on this issue until the right to do so is beyond doubt. One could add to the list of relevant factors the fact that the decision in this case was appealed, which creates another area of uncertainty. It is clear that the Minister will have to deal with the appellants' claim in the not-too-distant future, but that does not make the delay a fault within the meaning of the CLPA.

[73] The appellants challenge the Federal Court's finding that monetary relief is not the appropriate remedy in this case: memorandum, at paragraph 56. The issue is not whether monetary relief is appropriate, but rather whether the appellants can, on the one hand, rely on the CLPA in seeking monetary relief and, on the other hand, fail to meet the conditions for extracontractual civil liability that are set out in the CLPA.

[74] For these reasons, I have not been persuaded that the Federal Court erred in determining that the Minister had not committed a fault within the meaning of the CLPA.

(3) The cause of the damage suffered by the appellants

[75] Given my findings as to the status of the Governor in Council and the lack of a fault on the part of the Minister, the issue of whether any fault caused the damage claimed by the appellants does not arise.

[76] For these reasons, I would dismiss the appellants' claim that is based on the CLPA.

B. *Disguised expropriation*

[77] The Federal Court dismissed the appellants' claim according to which they were entitled to compensation on account of the disguised expropriation of their land, which was carried out through the making of the emergency order without concomitant compensation. This claim was based on the suppression of the reasonable uses of the land to which the emergency order applies and the lack of a clear and explicit provision setting aside the obligation to compensate the appellants for the dispossession of their land. The Federal Court dismissed this claim on the basis that Parliament has provided

a mechanism for compensation—section 64 of the Act—for losses suffered as a result of the making of an emergency order. The Court agreed with the respondent's assertion that "... in adopting section 64 of the Act, Parliament ended up ruling out the general law remedy for disguised expropriation, arising from both the common law interpretative presumption and article 952 of the CCQ, [TRANSLATION] 'in favour of a statutory compensation plan specifically adapted to the objectives pursued by the [Act]'": Decision, at paragraph 225.

[78] The appellants argue that this conclusion is erroneous. They rely on the common law presumption that unless [TRANSLATION] "there is a clear and unequivocal legislative provision, a statute cannot have the effect of dispossessing a person of his or her property without just and prior compensation"; this presumption was applied in Canadian law by the Supreme Court in *Manitoba Fisheries Ltd. v. The Queen*, 1978 CanLII 22, [1979] 1 S.C.R. 101 (*Manitoba Fisheries*) and *R. v. Tener*, [1985] 1 S.C.R. 533, 1985 CanLII 76 (*Tener*).

[79] The appellants rely on the Supreme Court decision in *Lorraine (Ville) v. 2646-8926 Québec Inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577 (*Lorraine*), in which the Court, per Chief Justice Wagner, wrote:

> .... Where a municipal government improperly exercises its power to regulate the uses permitted within its territory in order to expropriate property without paying an indemnity, two remedies are therefore available to aggrieved owners. They can seek to have the by-law that resulted in the expropriation declared either to be null or to be inoperable in respect of them. If this option is no longer open to them, they can claim an indemnity based on the value of the property that has been wrongly taken from them.

[80] The appellants allege that the emergency order does indeed prevent any reasonable use of their land and thus brings about a disguised expropriation. The presence of a compensation plan that was never implemented cannot change the character of the order's consequences.

[81] For her part, the respondent supports the Federal Court's findings. She emphasizes the taking factor referred to in the Federal Court's Decision. From this perspective, there can be a disguised expropriation only if there is [TRANSLATION] "... the taking of an interest in the property by the public authority and the suppression of all reasonable uses of that property": memorandum of the respondent, at paragraph 90. The respondent denies that there has been a taking of the appellants' land in this case because the appellants retain full ownership of their land, which remains private land.

[82] I will begin my analysis by reviewing the case law of the Supreme Court, particularly *Manitoba Fisheries* and *Tener*, to identify the parameters of the doctrine of disguised expropriation. I will then examine the Quebec case law. I will conclude by reviewing the issue of the use of Quebec law to fill a legal vacuum in the federal system.

[83] The plaintiffs in *Manitoba Fisheries*, sellers and exporters of freshwater fish, lost the goodwill of their business when the federal government passed legislation requiring all interprovincial and international exports of freshwater fish to be processed through the Freshwater Fish Marketing Corporation. The federal legislation provided that the transition of private companies operating in the field would be made under the agreements entered into by the federal and provincial governments. An agreement was

reached between Canada and Manitoba, but the province chose not to compensate *Manitoba Fisheries*.

[84] At page 110 of its decision, the Supreme Court wrote:

> Once it is accepted that the loss of the goodwill of the appellant's business which was brought about by the Act and by the setting up of the Corporation was a loss of property and that the same goodwill was by statutory compulsion acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown.

[85] The Court then adopted the remarks of Justice Smith, who denied the application to strike out the statement of claim of *Manitoba Fisheries*. In that application, Canada argued that the proceedings should be directed at Manitoba, not Canada. Justice Smith rejected this contention:

> …. It was a statute of the Parliament of Canada that took away their business and prohibited them from engaging in the fish exporting business. This was necessarily so, since interprovincial and international trade fall within the sole jurisdiction of the Parliament and Government of Canada, and though it seems to be the case that the statute in question, the *Freshwater Fish Marketing Act*, was enacted in response to requests from several of the provinces, the statute is an Act of Parliament alone. Nor does the agreement of June 4, 1969, between Canada and Manitoba alter the situation. The plaintiffs are not parties to the agreement and were given no legal rights under it.

Manitoba Fisheries, at page 117.

[86] Once the Supreme Court accepted this finding, it proceeded directly to its conclusion [at page 118]:

> It will be seen that in my opinion the *Freshwater Fish Marketing Act* and the Corporation created thereunder had the effect of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless and that the goodwill so taken away constitutes property of the appellant for the loss of which no compensation whatever has been paid. There is nothing in the Act providing for the taking of such property by the Government without compensation and as I find that there was such a taking, it follows, in my view, that it was unauthorized having regard to the recognized rule that "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation" *per* Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel*, *supra*.

[87] The determinative fact in *Manitoba Fisheries* is that Manitoba Fisheries had no remedy as regards the loss of its goodwill, either under the *Freshwater Fish Marketing Act* [R.S.C., 1985, c. F-13] or under the agreement between Canada and Manitoba. Once it was established that there had been a taking of the goodwill for the benefit of the Corporation and that *Manitoba Fisheries* had no other remedy, the Supreme Court applied the principle set out in *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508, [1920] UKHL 1 (BAILII) (*De Keyser's Royal Hotel*) in order to compensate *Manitoba Fisheries*.

[88] In my view, *Manitoba Fisheries* is of no help to the appellants. There has been no taking in the facts since the respondent has acquired no interest whatsoever in the appellants' land. The appellants remain full owners of the land, even if their enjoyment

of it is limited. Furthermore, the appellants are not without other remedies, a subject that I will address in more depth below.

[89] The facts in *Tener* are distinct from those in *Manitoba Fisheries*. They are very well summarized in the summary of the case that appears in the Supreme Court Reports [*Tener*, at page 533]:

> Respondents were the registered owners of mineral claims on lands now located within Wells Gray Provincial Park. The conditions governing the exploitation of a natural resource in Wells Gray Park gradually became more onerous and, for several years prior to the action, respondents were denied the park use permit necessary to explore or work the claims. Respondents were finally advised by letter that no new exploration or development work would be permitted under current park policy [the Notice] and were asked to itemize a quit claim price. This action was commenced—and came by way of stated case—because respondents considered their opportunity to explore their claims had been conclusively denied. The central issue was whether a refusal by the Crown to grant a park use permit needed by respondents to exploit their mineral claims gives rise to a statutory right to compensation.

[90] The statutory context was quite complicated as there were several statutes that dealt with the issue of compensation. In the end, the Supreme Court determined that the relevant provision was section 11 of the *Park Act* [S.B.C. 1965, c. 31], which incorporated by reference certain sections of the *Department of Highways Act*:

> **11.** For the purpose of the establishment or enlargement of any park or recreation area, the Minister, on behalf of Her Majesty the Queen in right of the Province, with the approval of the Lieutenant Governor in Council, may
>
> (a) purchase or otherwise acquire, accept, and take possession of land, improvements on land, timber, timber rights, and other rights;
>
> ...
>
> (c) expropriate land, and the provisions of the *Department of Highways Act* shall apply, mutatis mutandis, in event of expropriation.

Tener, at paragraph 53.

[91] The Supreme Court clarified the meaning of this provision by interpreting it according to the ordinary process of statutory interpretation, which led it to conclude that “land” includes an interest in land (mineral claims) and that the extinction of an interest in land must be included within the ordinary meaning of the term “expropriation of land”: *Tener*, at paragraph 53.

[92] The Supreme Court began its analysis by asking what right the respondents had lost and what right the government had gained. The Supreme Court concluded that the increasingly restrictive permits leading to the denial of any permit (the Notice) were intended to protect the value of the park within which the respondents’ mineral claims were located. The Notice therefore “took value from the respondents and added value to the park”: *Tener*, at paragraph 60.

[93] The Supreme Court then concluded that the Notice constituted an expropriation within the meaning of the *Department of Highways Act*, leaving only the issue of the compensation assessment.

[94] What distinguishes *Tener* from *Manitoba Fisheries* is the fact that the plaintiffs in *Tener* asserted their rights to compensation under the statute dealing with expropriation of land, while the plaintiff in *Manitoba Fisheries* succeeded by invoking the common law doctrine of disguised expropriation. The Supreme Court's conclusion in *Tener* was the result of its interpretation of the *Park Act*. The leading case *De Keyser's Royal Hotel* is included only as a reminder of the principle of compensation. However, as in *Manitoba Fisheries*, the Supreme Court found that there had been a taking of property by the public authority.

[95] This brings us to the Quebec case law. The Quebec context differs from that of the common law provinces because of article 952 of the CCQ and section 6 of the Quebec Charter. There is an abundance of case law dealing with abusive zoning and the remedy for disguised expropriation. The Supreme Court set out the remedies for abusive zoning in paragraph 2 of *Lorraine*, which I have reproduced once again below for ease of reference:

> When property is expropriated outside this legislative framework for an ulterior motive, such as to avoid paying an indemnity, the expropriation is said to be disguised. Where a municipal government improperly exercises its power to regulate the uses permitted within its territory in order to expropriate property without paying an indemnity, two remedies are therefore available to aggrieved owners. They can seek to have the by-law that resulted in the expropriation declared either to be null or to be inoperable in respect of them. If this option is no longer open to them, they can claim an indemnity based on the value of the property that has been wrongly taken from them. (Emphasis added.)

[96] It should be noted that the remedy for disguised expropriation pursuant to article 952 of the CCQ is only available if owners cannot avail themselves of administrative law remedies. This is not the case here because the appellants did not exercise their rights to ensure compliance with the Act.

[97] The facts of *Lorraine* are relevant. The plaintiff had purchased land in Ville de Lorraine when zoning authorized the construction of residential developments. The city changed the zoning by adopting a new by-law whereby most of the plaintiff's land became a conservation zone. Over time, the city installed some infrastructure for hiking and cross-country skiing, including culverts, stairs, fences and public benches. In short, the city acted as though it had acquired a right of ownership over this private land allowing it to use it as a public park, which is akin to taking.

[98] The same was true in *Benjamin c. Montréal, (Ville, Cité de Côte Saint-Luc)*, 2003 CanLII 33374 (Q.C.C.S.), in which private land that had been rezoned was incorporated into a municipal park, surrounded by a fence, filled with pathways and streetlights, and worked on in other ways. This state of affairs was considered a disguised expropriation.

[99] This leads me to the observation that, although the Quebec case law does not necessarily make taking an explicit condition for remedy under article 952, it appears that this is the case. It would be surprising if it were otherwise since article 952 deals with expropriation:

> **952.** No owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in return for a just and prior indemnity.

[100] Thus, the use of article 952 to obtain compensation presupposes that there has been an expropriation, that is, a taking.

[101] With respect to the use of Quebec law on a suppletive basis, this issue was decided by this Court in *Groupe Maison Candiac*. Given the compensation plan put in place by the Act, there is no legal vacuum that must be filled by using Quebec law on a suppletive basis.

[102] There was in fact no disguised expropriation because the federal government did not acquire anything from the appellants. After the emergency order was made, the appellants were left with land that was no longer useful to them for the purposes for which they acquired it, but they remain the owners of the land. The Act provides for the possibility of compensation in these circumstances. It is therefore not necessary to rely on the common law principle of disguised expropriation, nor on article 952 of the CCQ or section 6 of the Quebec Charter to do justice to the appellants.

[103] The appellants object to the idea that a plan that has not been implemented can do them justice. Unfortunately, the plan was not implemented because the appellants failed to take the necessary steps to do so. If the Governor in Council or the Minister failed to comply with the Act, the appellants had the tools at their disposal to require their compliance. The appellants were free to choose among the remedies available to them, but they were wrong to consider that these remedies were equivalent in all respects. As I stated above, an action in extracontractual civil liability involves difficulties that are not present in administrative law. The same is true of the remedy relating to disguised expropriation.

[104] It is important to note here that this is not a reiteration of the doctrine that the Supreme Court set aside in *TeleZone*, that is, the need to invalidate an administrative decision by way of judicial review before seeking relief through an action. In this case, the public law remedy was sufficient to ensure compliance with section 64 of the Act, which would lead to compensation for the appellants. The public law remedy is not a preliminary step to be taken before the appellants can assert their right to compensation through an action. Rather, it is the means made available to the appellants to obtain the compensation that they seek. If the appellants are not successful before this Court, it is not because they have not followed the necessary steps, but rather because they have not met the conditions of the relief of which they have availed themselves.

[105] For these reasons, I would dismiss the appeal.

VI. Costs

[106] The appellants also appealed the Federal Court's Decision as to costs. Although the appellants' action was dismissed, the Court did not order them to pay the respondent's costs, including expert fees, and simply dismissed their action without costs.

[107] The appellants contend that at trial, they had requested their full costs and their expert fees. They claim that the Federal Court erred in not awarding these to them. They argue that solicitor-and-client costs are awarded when reasons of public interest are at issue.

[108] The Federal Court was aware of the unusual aspects of the case presented by the appellants, which is why the appellants escaped costs despite the fact that they were the unsuccessful parties. With respect to the public interest in this case, a

distinction must be made between those who represent the public interest in a case in which they have no pecuniary interest and those who pursue their pecuniary interests by invoking the public interest. This is not to say that the issues raised are not important, but the appellants would have sued the respondent for their losses of some $22,000,000 even if the case had been completely trivial. The public interest is not a factor that justifies solicitor-and-client costs in this case.

[109] The appellants also argue that, because their case is akin to a disguised expropriation case, they are entitled to their costs and their expert fees on the same basis as they would be if they had been subject to a proper expropriation. The cases cited by the appellants in support of their claims concern owners who had to incur legal fees in order to invalidate an illegitimate expropriation of their land. In this case, there was neither an illegitimate expropriation nor an invalidation of an illegitimate order.

[110] I have not been persuaded that the Federal Court improperly exercised its discretion as to costs, which would have led it to commit a palpable and overriding error. I would therefore dismiss this ground of appeal.

[111] In terms of this appeal, I agree with the Federal Court that the circumstances do not justify the appellants bearing the respondent's costs.

VII. Conclusion

[112] For these reasons, I would dismiss the appeal without costs.

DE MONTIGNY J.A.: I agree.

LOCKE J.A.: I agree.