

Supreme Court Judgments

Lorraine (Ville) v. 2646-8926 Québec inc.

Collection: Supreme Court Judgments

Date: 2018-07-06

Neutral citation: 2018 SCC 35

Case number: 37381

Judges: Wagner, Richard; Abella, Rosalie Silberman; Moldaver, Michael J.; Karakatsanis, Andromache; Gascon, Clément; Côté, Suzanne; Brown, Russell; Rowe, Malcolm; Martin, Sheilah

On appeal from: Quebec

Notes: [Case in Brief](#)
[SCC Case Information](#)

SUPREME COURT OF CANADA

CITATION: Lorraine (Ville) v. 2646-8926 Québec inc.,
2018 SCC 35**APPEAL HEARD:** January 9, 2018
JUDGMENT RENDERED: July 6, 2018
DOCKET: 37381**BETWEEN:****Ville de Lorraine and
Municipalité régionale de comté de Thérèse-De Blainville**
Appellants

and

2646-8926 Québec inc.
Respondent

- and -

**Communauté métropolitaine de Montréal and
Québec Association of Construction and Housing Professionals Inc.**
Intervenors

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 48)

**Wagner C.J. (Abella, Moldaver, Karakatsanis, Gascon, Côté,
Brown, Rowe and Martin JJ. concurring)**

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

LORRAINE (VILLE) v. 2646-8926 QUÉBEC INC.

**Ville de Lorraine and
Municipalité régionale de comté de Thérèse-De Blainville**

Appellants

v.

2646-8926 Québec inc.

Respondent

and

**Communauté métropolitaine de Montréal and
Québec Association of Construction and Housing Professionals Inc.**

Intervenors

Indexed as: Lorraine (Ville) v. 2646-8926 Québec inc.

2018 SCC 35

File No.: 37381.

2018: January 9; 2018: July 6.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

Municipal law — By-laws — Validity — Judicial review — Time — Action to annul zoning by-law for abuse of power — Reasonable time — Exercise of superintending and reforming power of superior courts with respect to government actions — Amendment to municipal zoning by-law having effect of precluding future construction of residential subdivision on large portion of lot belonging to legal person — Whether by-law that is contested for being abusive can be declared to be inoperable in respect of party contesting it if that party did not institute its action within reasonable time — Whether action in nullity was prescribed in accordance with general law rules of prescription — Code of Civil Procedure, CQLR, c. C-25, art. 33 — Civil Code of Québec, art. 2922.

On July 7, 1989, 2646-8926 Québec inc. (“Company”) purchased a wooded lot in a residential zone in Ville de Lorraine (“Town”), intending to eventually subdivide the lot for residential construction. On June 23, 1991, the Town adopted by-law U-91, the effect of which was that approximately 60 percent of the area of the Company’s lot became part of a conservation zone in which the authorized uses were limited to recreational and leisure activities. The Company’s majority shareholder learned of the by-law in late 2001 or early 2002. In 2004, the Town informed the Company that it did not intend to change the zoning restrictions applicable to the lot. In November 2007, the Company brought an action against the Town in which it sought to have the by-law declared to be null, alleging that it had been a victim of disguised expropriation. In 2010, the Company amended its motion to institute proceedings to request that the Town’s by-law URB-03, which had replaced by-law U-91, and by-law 10-02 of the Municipalité régionale de comté de Thérèse-De Blainville be declared to be null. The latter by-law had been adopted to bring the land use and development plan into line with the restrictive zoning designation for the portion of the Company’s lot that was affected by by-law U-91. The Superior Court dismissed the action in nullity for being out of time. The Court of Appeal allowed the appeal and declared the by-laws to be inoperable in respect of the Company.

Held: The appeal should be allowed.

The Superior Court judge exercised his discretion under art. 33 of the Code of Civil Procedure judicially. A plaintiff who intends to contest a zoning by-law he or she considers abusive must bring an action within a reasonable time. In this case, the judge was justified in applying the presumption of legal knowledge to determine that the starting point for reasonable time was June 23, 1991. Sixteen years elapsed between the adoption of by-law U-91 and its being contested in court. In addition, the time that elapsed after

the Company's majority shareholder had acquired factual knowledge of the by-law was at least 5 years. Given the discretionary nature of the Superior Court's power of judicial review, that 5-year period was in itself sufficient for that court to dismiss the action in nullity for being out of time.

The alleged abuse of power did not have the effect of relieving the plaintiff of its duty of diligence, that is, the requirement that the plaintiff institute its action within a reasonable time. Furthermore, it was not appropriate in this case to distinguish between inoperability and invalidity of a by-law, which are both remedies that fall within the Superior Court's discretionary exercise of its inherent power to order a remedy where a by-law is abusive. The duty to act within a reasonable time and the presumption of legal knowledge that determines the starting point for reasonable time, which apply in exercising the discretion to dismiss or not to dismiss an action in nullity, are equally applicable to a finding that a by-law is inoperable.

This action in nullity was also prescribed in accordance with the 10-year general law prescriptive period provided for in art. 2922 of the Civil Code of Québec, which, as the Act respecting the implementation of the reform of the Civil Code provides, began to run on January 1, 1994. This means that that period ended on January 1, 2004, well before the action in nullity was filed in November 2007.

A plaintiff who no longer meets the conditions for applying for judicial review still has the right, however, in appropriate cases and if the claim is supported by the evidence, to seek payment of an indemnity for disguised expropriation. This case can continue in the Superior Court on the claims that remain unresolved, including the claim for an indemnity for disguised expropriation.

Cases Cited

Applied: *Immeubles Port Louis Ltée. v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; **distinguished:** *Benjamin v. Montreal (Ville)* (2004), 86 L.C.R. 161; **referred to:** *Développements Vaillancourt Inc. v. Rimouski (City)*, 2009 QCCA 1475; *Morrisette v. St-Hyacinthe (Ville)*, 2016 QCCA 1216; *Wendover-et-Simpson (Corp. municipale) v. Filion*, [1992] R.D.I. 263; *Bérubé v. Municipalité de Saint-Raphaël*, 2017 QCCS 5015; *Produits forestiers PMS inc. v. Terrebonne (Ville)*, 2014 QCCS 4878; *Thériault v. Gatineau (Ville)*, 2005 QCCA 1245; *Benjamin v. Montréal (Ville)*, 2003 CanLII 33374; *Air Canada v. City of Dorval*, [1985] 1 S.C.R. 861; *Côté v. Corporation of the County of Drummond*, [1924] S.C.R. 186; *Marcotte v. Longueuil (City)*, 2009 SCC 43 [2009] 3 S.C.R. 65

Statutes and Regulations Cited

Act respecting land use planning and development, CQLR, c. A-19.1, ss. 5 par. 2, 113 par. 2(3).

Act respecting the implementation of the reform of the Civil Code, art. 6 par. 2.

Civil Code of Lower Canada, art. 2242.

Civil Code of Québec, arts. 952, 2922.

Code of Civil Procedure, CQLR, c. C-25, art. 33.

Code of Civil Procedure, CQLR, c. C-25.01, arts. 34, 529 par. 3.

Expropriation Act, CQLR, c. E-24.

Authors Cited

Chamberland, Luc, dir. *Le grand collectif: Code de procédure civile — Commentaires et annotations*, 2^e éd. Montréal: Yvon Blais, 2017.

Garant, Patrice. *Droit Administratif*, 5^e éd. Cowansville, Que.: Yvon Blais, 2004.

Garant, Patrice, avec la collaboration de Philippe Garant et Jérôme Garant. *Droit Administratif*, 7^e éd. Montréal : Yvon Blais, 2017.

Gervais, Céline. *La Prescription*, Cowansville, Que.: Yvon Blais, 2009.

Héту, Jean, et Yvon Duplessis, avec la collaboration de Lise Vézina, *Droit municipal: Principes généraux et contentieux*, vol. 1, 2^e éd. Brossard, Que.: Wolters Kluwer, 2002 (feuilles mobiles mises à jour octobre 2017).

LeChasseur, Marc-André. *Zonage et urbanisme en droit canadien*, 3^e éd. Montréal: Wilson & Lafleur, 2016.

McCann, Julie. *Prescriptions extinctives et fins de non-recevoir*. Montréal: Wilson & Lafleur, 2011.

APPEAL from a judgment of the Quebec Court of Appeal (Dutil, Schragar and Parent JJ.A.), 2016 QCCA 1803, 2 L.C.R. (2d) 299, 59 M.P.L.R. (5th) 192, [2016] AZ-51339583, [2016] J.Q. n° 15323 (QL), 2016 CarswellQue 11002 (WL Can.), setting aside a decision of Emery J., 2015 QCCS 3135, [2015] AZ-51191890, [2015] J.Q. n° 6300 (QL), 2015 CarswellQue 6544 (WL Can.). Appeal allowed.

Pierre Paquin, Michel Beausoleil and Emilie Duquette, for the appellants.

Régis Nivoix and Mélanie Dubreuil, for the respondent.

Marc-André LeChasseur and Frédérique St-Jean, for the intervener Communauté métropolitaine de Montréal.

Nikolas Blanchette and Martin F. Sheehan, for the intervener the Québec Association of Construction and Housing Professionals Inc.

English version of the judgment of the Court delivered by

THE CHIEF JUSTICE —

I. Overview

[1] The concept of expropriation concerns the power of a public authority to deprive a property owner of the enjoyment of the attributes of his or her right of ownership. Because of the importance attached to private property in liberal democracies, the exercise of the power to expropriate is strictly regulated to ensure that property is expropriated for a legitimate public purpose and in return for a just indemnity. In Quebec, the Expropriation Act, CQLR, c. E-24, limits the exercise of this power and lays down the procedure to be followed in this regard.

[2] 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.

[3] This appeal concerns an action to annul zoning by-laws that had the effect, according to the owner of one lot, of unlawfully expropriating it.

[4] The owner's action in nullity was initially dismissed by Emery J. of the Quebec Superior Court on the ground that it had not been instituted within a reasonable time. The owner appealed that decision to the Quebec Court of Appeal, which concluded that Emery J. had failed to consider that the appellants' adoption of the contested by-laws represented an abuse of power. The Court of Appeal set aside the decision and declared that the by-laws were inoperable in respect of the owner.

[5] For the reasons that follow, I am of the opinion that the only issue before the Court of Appeal was whether Emery J. had exercised his discretion judicially in dismissing the owner's action in nullity for being out of time. In view of the time that had elapsed between the adoption of the initial by-law and the contestation, that discretion was indeed exercised judicially. A finding that a by-law is inoperable cannot remedy the fact that an action in nullity was brought out of time; both of these grounds — nullity and inoperability — fall within the Superior Court's discretion in the exercise of its inherent jurisdiction to review government actions. Moreover, the action, as a procedural conduit, was prescribed under the substantive law applicable to such matters.

[6] I would therefore allow the appeal and set aside the Court of Appeal's orders declaring the contested by-laws to be inoperable.

II. Background

[7] On July 7, 1989, 2646-8926 Québec inc. ("Company") purchased lot 2 322 934 in the official cadastre of Quebec, registration division of Terrebonne, in Ville de Lorraine ("Town"). This wooded lot was located in the Grand Coteau forest. The municipal zoning by-law in force at the time authorized the construction of residential developments. François Pichette, the Company's majority shareholder, was in fact planning to subdivide the lot for residential construction some 15 years in the future.

[8] On June 23, 1991, the Town adopted by-law U-91, the effect of which was that approximately

60 percent of the area of the Company's lot became part of a conservation zone. The uses authorized in the zone were limited to recreational and leisure activities, such as hiking and cross-country skiing. As a result, the residential subdivision planned by Mr. Pichette was no longer possible on the section of the lot affected by the by-law.

[9] Mr. Pichette did not learn of by-law U-91 until late 2001 or early 2002, when he visited the lot for the first time and saw that some infrastructures for hiking and cross-country skiing, including culverts, stairs, fences and public benches, had been installed on it.

[10] In 2003, Mr. Pichette hired a town planning firm to contact the Town and persuade it to amend its by-law. In early 2004, the Town informed the Company that it did not intend to change the zoning restrictions applicable to the lot. However, it agreed to meet with the Company's representatives.

[11] In March 2005, the Municipalité régionale de comté de Thérèse-De Blainville ("MRC") adopted by-law 01-03.3, which set out its land use and development plan. The map accompanying the plan showed that the Company's lot was in a [TRANSLATION] "[r]esidential with green spaces" zone in which residential subdivisions were authorized. Under s. 5 para. 2 of the Act respecting land use planning and development, CQLR, c. A-19.1, the Town was required to amend its own by-laws to reflect the zoning designation set out in the MRC's plan.

[12] On February 27, 2007, after retaining a lawyer, the Company sent the Town a letter in which it stated that it considered itself to be a victim of disguised expropriation. On November 2, 2007, the Company brought an action against the Town in which it sought to have by-law U-91 declared to be null and also asked that the hiking and cross-country skiing infrastructures be removed. Those infrastructures were in fact removed before the hearing.

[13] On April 28, 2010, the MRC adopted by-law 10-02, which amended the 2005 land use and development plan by extending an area restricted to [TRANSLATION] "green space" use to the woods of the Grand Coteau forest. That amendment brought the land use and development plan into line with the restrictive zoning designation for the portion of the Company's lot that was affected by by-law U-91. The Company then amended its motion to request that by-law 10-02 also be declared to be null.

[14] On July 13, 2010, the Town adopted by-law URB-03 to replace by-law U-91. The new by-law did not change the uses permitted on the Company's lot. The Company once again amended its motion to institute proceedings to ask that this by-law be declared null as well.

[15] Finally, on October 3, 2012, the Company added a conclusion to its motion by which it sought an indemnity for disguised expropriation.

III. Judicial History

A. Quebec Superior Court, 2015 QCCS 3135

[16] At the parties' request, Emery J. of the Superior Court split the proceeding in order to consider the action in nullity on its own first. The claims for an indemnity for disguised expropriation and for reimbursement of the taxes paid by the Company were therefore not resolved.

[17] Emery J. dismissed the action to annul the three contested by-laws, finding that it was [TRANSLATION] "prescribed" because it had not been instituted "within a reasonable time during the 10-year prescriptive period" (para. 52 (CanLII)). He concluded that the Company was presumed to have had knowledge of the content of by-law U-91 from the moment it was adopted in 1991 and that 16 years had elapsed between that moment and the filing of the action in nullity in 2007. In Emery J.'s opinion, even if it was assumed that the Company had not had factual knowledge of the by-law until 2002, that 5-year period would also be unreasonable. He found that the evidence showed that between 2003 and 2007, the Town had never expressed any intention of amending its zoning by-law in the Company's favour.

[18] Finally, Emery J. stated that he would not address the issue of the costs that might be awarded if the claims for a compensatory indemnity and for reimbursement of the taxes that had been paid were ultimately rejected.

B. Quebec Court of Appeal, 2016 QCCA 1803, 2 L.C.R. (2d) 299

[19] The Court of Appeal allowed the appeal, declared by-laws U-91, URB-03 and 10-02 to be

inoperable in respect of the Company and referred the matter back to the Superior Court to consider and rule on the claims that had been split from the original proceeding.

[20] The Court of Appeal began by expressing the view that Emery J. had properly applied the relevant legal principles in concluding that the action in nullity should be dismissed for being out of time. But in its opinion, Emery J. had erred in law in failing to consider the fact that the Company was the victim of an abuse of power in the form of a disguised expropriation. The Court of Appeal found that the Town had carried out a disguised expropriation in that it had limited how the lot could be used by amending the zoning by-law and installing infrastructures of public utility on the lot. In doing so, the Town had abused its power of regulation. Citing the principles set out in *Montreal (Ville) v. Benjamin* (2004), 86 L.C.R. 161 (Que. C.A.), the Court of Appeal concluded that it could order a remedy with respect to that abuse despite the late filing of the action in nullity.

[21] The Court of Appeal accordingly declared that the impugned by-laws were inoperable in respect of the Company. Given the significant amount of time that had passed between the adoption of the by-laws and the contestation thereof, the interest in preserving legal certainty precluded a declaration of nullity. The case was returned to the Superior Court to resume the hearing and reach a decision on the damages being claimed, which had been split from the original proceeding.

IV. Analysis

[22] This appeal essentially raises the following question: Can a by-law that is contested for being abusive be declared to be inoperable in respect of the party contesting it if that party did not institute its action within a reasonable time?

[23] This issue must first be placed in its procedural context in order to clarify the consequences of the splitting of the proceeding in the Superior Court. In its action, the Company was seeking a series of remedies for the Town's abusive conduct: the nullity or inoperability of the contested by-laws, payment of an indemnity and reimbursement of the taxes it had paid. As requested by the parties at the start of the hearing, Emery J. agreed to split the proceeding and to limit the judgment now at issue in this appeal to a determination of the validity of the municipal by-laws. The issue whether, as a result of the Town's actions, an indemnity is payable under art. 952 of the Civil Code of Québec ("C.C.Q.") therefore remains unresolved.

[24] Moreover, the splitting of the proceeding by Emery J. attests to the fact that the Company’s request for a declaration of nullity was made in the alternative to the other main remedy it was seeking. If the action in nullity had been allowed and the zoning by-laws had been declared to be invalid or inoperable, there would no longer have been any factual basis for the indemnity being sought for disguised expropriation.

A. An Action to Annul a By-Law Considered to Be Abusive Must Be Instituted Within a Reasonable Time

[25] An action to annul a municipal by-law for abuse of power must be instituted within a reasonable time. The Superior Court hears an action in nullity pursuant to its general superintending and reforming power with respect to government actions, including the acts of municipal councils (Code of Civil Procedure, CQLR, c. C-25, art. 33 (now Code of Civil Procedure, CQLR, c. C-25.01, art. 34 (“C.C.P.”))). Because the exercise of this inherent power is discretionary, the Superior Court may dismiss an action that has not been brought within a reasonable time. However, the discretion to do so may be exercised only where the plaintiff seeks to have a by-law declared to be null for being abusive, not where nullity is being sought on the basis of lack of jurisdiction or excess of jurisdiction. Gonthier J. summarized the effects of this distinction in *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at p. 342, endorsing the following comment of Professor Rousseau:

[TRANSLATION] . . . the presence of excess of jurisdiction or ultra vires still allows the action in nullity to be brought any time during the thirty-year period provided for by general civil law (art. 2242 [of the Civil Code of Lower Canada]), while if the disputed decision is instead affected by abuse of power, the court may exercise its discretion and dismiss the action even if it is within this time limit.

(Quoting G. Rousseau, “Aspects contentieux de la résolution et du règlement en droit municipal” (1986), 46 R. du B. 627, at pp. 652-53.)

[26] An abuse of power occurs where a public body exercises its power of regulation unlawfully, that is, in a manner inconsistent with the purposes the legislature was pursuing in delegating the power:

A municipality must exercise its powers in accordance with the purposes sought by the legislature. It vitiates its acts and decisions if it abuses its discretionary power. A municipal act committed for unreasonable or reprehensible purposes, or purposes not covered by legislation, is void. This illegality results not from the breach of specific provisions but from limitations

void. This negation results not from the breach of specific provisions but from limitations imposed by the courts on the discretionary power of government and affects the substance of the disputed decision, since it is the reasons for the act which must be assessed. The courts will accordingly determine whether the act is fraudulent, discriminatory, unjust or affected by bad faith, in which case it will be treated as an abuse of power

(Immeubles Port Louis, at p. 349)

[27] It is settled law that a “disguised” expropriation, insofar as it occurs in the guise of a zoning by-law, constitutes an abuse of the power of regulation conferred on the body in respect of such matters (Développements Vaillancourt Inc. v. Rimouski (City), 2009 QCCA 1475, 98 L.C.R. 1, at para. 22). Where a municipal government limits the enjoyment of the attributes of the right of ownership of property to such a degree that the person entitled to enjoy those attributes is de facto expropriated from them, it therefore acts in a manner inconsistent with the purposes being pursued by the legislature in delegating to it the power “to specify, for each zone, the structures and uses that are authorized and those that are prohibited” (Act respecting land use planning and development, s. 113 para. 2(3)).

[28] This means that a plaintiff who intends to contest a zoning by-law he or she considers abusive must bring an action within a reasonable time. It is important to note that the recent codification of the duty to act within a reasonable time in art. 529 para. 3 of the C.C.P. has not changed the common law principles on which this concept is based (Morrissette v. St-Hyacinthe (Ville), 2016 QCCA 1216, at para. 37 (CanLII); L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (2nd ed. 2017), at p. 2304).

[29] In the instant case, Emery J. exercised his discretion judicially in dismissing the action in nullity for being out of time. And as the Court of Appeal recognized (at para. 8), he was justified in applying the presumption of legal knowledge to determine that the starting point for reasonable time was June 23, 1991.

[30] Despite the applicability of the presumption of legal knowledge, Emery J. also found that Mr. Pichette had become aware of by-law U-91 no later than in early 2002. That finding of fact is not in dispute, and neither is the finding that the Town at no time indicated to the Company’s representatives that it had any intention of amending the by-law.

[31] The replacement of by-law U-91 adopted in 1991 with the 2010 by-law URB-03 — which

[31] The replacement of by-law U-91, adopted in 1971, with the 2016 by-law U-91, which in no way changed the restrictions applicable to the use of the Company's lot — did not have the effect of restarting the computation of reasonable time in relation to legal knowledge of the content of that by-law (Wendover-et-Simpson (Corp. municipale) v. Filion, [1992] R.D.I. 263 (Que. C.A.), at p. 267).

[32] In the end, 16 years elapsed between the adoption of by-law U-91 and its being contested in court. In addition, the time that elapsed after the Company's majority shareholder had acquired factual knowledge of the by-law was at least 5 years. Given the discretionary nature of the Superior Court's power of judicial review, that 5-year period was in itself sufficient for that court to dismiss the action in nullity for being out of time (Rimouski, at para. 32; Bérubé v. Municipalité de Saint-Raphaël, 2017 QCCS 5015; Produits forestiers PMS inc. v. Terrebonne (Ville), 2014 QCCS 4878). The Company was unable to show that the power to penalize its lack of diligence had not been exercised judicially.

[33] That conclusion sufficed to justify dismissing the action in nullity and referring the matter back to the Superior Court to consider the claims that remained unresolved. With respect, however, I am of the view that the Court of Appeal made two errors in its subsequent analysis.

[34] First, the Court of Appeal could not conclude that the abuse of power it had found to exist had the effect of relieving the plaintiff of its duty of diligence, that is, the requirement that the plaintiff institute its action within a reasonable time. On the contrary, remedying an abuse of power is a function that goes to the very heart of the Superior Court's inherent jurisdiction, which entails the exercise of its discretion to penalize lack of diligence. As this Court noted in Immeubles Port Louis, a plaintiff who brings an action seeking a remedy for a municipality's abuse of its power of regulation has a duty to act within a reasonable time:

In municipal law and with respect to the direct action in nullity, reliance has been placed primarily on the plaintiff's duty of diligence in proceedings involving abuse of power. [p. 369]

[35] Second, the Court of Appeal erred in distinguishing between invalidity of a by-law, as declared by the Superior Court in the exercise of its inherent jurisdiction, and inoperability of a by-law, as ordered to remedy an abuse of power. Inoperability and invalidity are both remedies that fall within the Superior Court's discretionary exercise of its inherent power to order a remedy where a by-law is abusive. The duty to act within a reasonable time that applies in exercising the discretion to dismiss or not to dismiss an action to

within a reasonable time that applies in exercising the discretion to dismiss or not to dismiss an action to annul a by-law is therefore equally applicable to a finding that a by-law is inoperable (*Thériault v. Gatineau (Ville)*, 2005 QCCA 1245, at paras. 12–14 (CanLII)). This is why the presumption of legal knowledge that determines the starting point for reasonable time also applies to an action to have a by-law declared to be inoperable (*Rimouski*, at para. 27).

[36] Although a certain flexibility may be desirable in determining whether the time taken was reasonable in cases in which a declaration of inoperability is sought (*M.-A. LeChasseur, Zonage et urbanisme en droit canadien* (3rd ed. 2016), at p. 439), that flexibility cannot be interpreted such that it overrides the duty to act within a reasonable time. In other words, contrary to what the Company argues, a person instituting an action for a declaration of inoperability is not relieved of the duty to be diligent in bringing the matter before the Superior Court in order to have that court exercise its inherent jurisdiction to review government actions.

[37] In my opinion, these errors likely resulted from a misreading of *Benjamin*, a case in which the Quebec Court of Appeal had held that, even though the plaintiff had not brought a direct action in nullity to remedy the alleged disguised expropriation of his property, it was open to him to bring an action to claim an indemnity (paras. 47–62). An action to annul the zoning by-law, the usual remedy in such circumstances, would probably have been dismissed for being out of time. Unlike the instant case, therefore, *Benjamin* did not involve an action to have a by-law declared null or inoperable, nor did it involve the exercise of the Superior Court's power of review as a court of original general jurisdiction. The duty to act within a reasonable time in filing an action to claim an indemnity was thus unrelated to the availability of the action, as the trial judge had in fact properly noted (*Benjamin c. Montréal (Ville)*, 2003 CanLII 33374 (Que. Sup. Ct.), at para. 40).

[38] In the case at bar, it was the issue of the indemnity that was not before the Quebec Court of Appeal; the claim for an indemnity had been suspended when the proceeding was split. The only question before the Court of Appeal was therefore whether Emery J. had exercised his discretion judicially in dismissing the action in nullity for being out of time.

[39] The Court of Appeal correctly decided that question by answering the question in the affirmative at paras. 7 and 8 of its reasons. However, it erred when it then went on to decide an issue that was

not before it, namely whether, the lateness of the action in nullity notwithstanding, the by-law represented a disguised expropriation that justified an order for payment of an indemnity where one was sought.

B. The Action in Nullity Was Prescribed

[40] Furthermore, the action in nullity was prescribed in accordance with the general law rules of prescription.

[41] The courts have consistently held that the government can rely on civil law prescription in defending against an action in which the nullity of a by-law is sought. It is in the context of an action before it that the Superior Court exercises its power of judicial review. The civil law prescriptive period applies to the action in nullity, which is the procedural conduit for the application for judicial review, while compliance with the duty to act within a reasonable time is assessed within that window:

Saying that the direct action in nullity is available does not in every case mean that the plaintiff has thirty years to object. The thirty-year prescription of the direct action in nullity applies to the action at law, to the procedural conduit, while the discretionary power is inherent in the reforming jurisdiction of the Superior Court pursuant to art. 33 of the Code of Civil Procedure [art. 34 of the current C.C.P.].

(Immeubles Port Louis, at p. 357)

[42] In short, in cases of abuse of power, including those in which disguised expropriation is in issue, the Superior Court must consider the reasonableness of the time within which the action in nullity was brought, but must also consider the applicable prescriptive period under the C.C.Q. (J. McCann, *Prescriptions extinctives et fins de non-recevoir* (2011), at pp. 124-25).

[43] Under art. 2242 of the Civil Code of Lower Canada, a public law direct action in nullity was prescribed by 30 years (*Immeubles Port Louis*, at p. 362; *Air Canada v. City of Dorval*, [1985] 1 S.C.R. 861, at p. 873; *Côté v. Corporation of the County of Drummond*, [1924] S.C.R. 186). Since the coming into force of the C.C.Q., such actions have been subject to the 10-year general law prescriptive period provided for in art. 2922 (*Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at para. 38; *C. Gervais, La prescription* (2009), at p. 20; *P. Garant, Droit administratif* (5th ed. 2004), at p. 528 (referred to in the 7th ed. at p. 518)).

[44] In the instant case, the trial judge determined that the starting point for the presumption of legal knowledge was June 23, 1991, the date on which by-law U-91 was adopted. The Company had 30 years from that moment to bring its action in nullity before its right of action would be extinguished. However, that period was reduced to 10 years when the C.C.Q., including art. 2922, came into force. Section 6 para. 2 of the Act respecting the implementation of the reform of the Civil Code provides that the 10-year prescriptive period began to run on January 1, 1994. This means that it ended on January 1, 2004, well before the action in nullity was filed in November 2007.

[45] It must be concluded not only that the Superior Court exercised its discretion judicially in penalizing the Company for not bringing its action in nullity within a reasonable time, but also that the action was already prescribed, as the Town argued at trial (paras. 33-34).

[46] That being said, the outcome of this appeal has no bearing on the conclusions being sought by the Company that were not dealt with by Emery J., including the one relating to the claim for an indemnity for disguised expropriation. Even where a plaintiff no longer meets the conditions for applying for judicial review, he or she still has the right, in appropriate cases and if the claim is supported by the evidence, to seek payment of an indemnity for disguised expropriation (Benjamin (C.A.), at paras. 47-62; J. Héту and Y. Duplessis, with L. Vézina, *Droit municipal: Principes généraux et contentieux* (2nd ed. (loose-leaf)), vol. 1, at p. 8577).

[47] The case can continue in the Superior Court on the claims that remain unresolved because of the splitting of the proceeding, including the claim for an indemnity for disguised expropriation.

V. Conclusion

[48] I would allow the appeal, set aside the Court of Appeal's orders declaring that the contested by-laws are inoperable and restore the order of Emery J. of the Superior Court dismissing the action in nullity, with costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellants: Tandem Avocats–Conseils Inc., Rosemère.

Solicitors for the respondent: Doyon Izzi Nivoix, Montréal.

Solicitors for the intervener Communauté métropolitaine de Montréal: Bélanger Sauvé,
Montréal.

Solicitors for the intervener the Québec Association of Construction and Housing Professionals
Inc.: Fasken Martineau DuMoulin, Montréal.