Federal Court  Cour fédérale

Date: 20240508

Docket: T-1450-23

Citation: 2024 FC 709

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 8, 2024

PRESENT: Mr. Justice McHaffie

BETWEEN:

DENIS VACHON (ESTATE OF), FRANÇOIS GENDRON, KURT LUCAS, MONIQUE LACROIX, JOSEPH VALLÉE, YOLANDE BOULET, COOP DE VIE COMMUNAUTAIRE LA CHAINE, JOSÉE MORIN, SYLVAIN CÔTÉ, LES INVESTISSEMENTS RAYPI INC

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This decision involves two motions in the context of an application for judicial review: a motion to strike the notice of application and a motion to amend it. The underlying application seeks to invalidate a decision by the Minister of Public Works and Government Services [the

Minister] to have the Crown expropriate lands necessary for the construction and operation of a rail line bypassing downtown Lac-Mégantic. The lands in question include lands owned by the applicants.

[2] The respondent, the Attorney General of Canada, is seeking to have the applicants' notice of application struck in its entirety, on the grounds that it has no prospect of success. The Attorney General notes that Associate Chief Justice Gagné has already held that the applicants' application does not raise a serious issue to be tried: *Vachon Estate v Canada (Attorney General)*, 2023 FC 1582 at paras 43–77. The Attorney General claims that the application is also doomed to fail, for essentially the same reasons, and that it should therefore be struck.

[3] The applicants, on the other hand, seek leave from this Court to amend their notice of application to add (a) allegations that the Minister exhibited bias; and (b) allegations of fact already raised in their motion for an injunction. The Attorney General opposes this motion on the basis of procedural issues and, more substantively, claiming that the allegations contained in the motion are also doomed to fail.

[4] For the reasons that follow, I find that the Attorney General's motion to strike must be granted and the applicants' motion to amend must be dismissed. In both cases, the determinative issue is the lack of any prospect of success of the application.

[5] The *Expropriation Act*, RSC 1985, c E-21, authorizes the Crown to expropriate any immovable real right that, in the opinion of the Minister, is required by the Crown for a public

work or other public purpose. In doing so, the *Expropriation Act* gives the Minister broad discretion to assess and decide what is in the "public interest" and what immovable real rights are required for this purpose. The jurisprudence on expropriation and, more broadly, administrative law, establishes that such a decision is subject to a low level of legal constraint and can be challenged only in limited circumstances. The grounds put forward by the applicants in their notice of application and their proposed amended notice of application do not raise such circumstances, even if all the alleged facts are taken as true. Despite the very high threshold applicable to motions to strike, I find that the applicants' application is doomed to fail and must be struck out.

[6] The Attorney General's motion to strike is therefore granted. The applicants' motion to amend is dismissed. In consideration of all of the circumstances, no costs are awarded.

II. Issues

[7] The parties' motions raise the following issues:

A. Should the applicants be granted leave to amend their notice of application?

B. Should the notice of application be struck out in full or in part?

[8] As explained below, these two issues are linked, in the sense that amendment of a pleading should not be authorized if the amendment itself is liable to be struck out.

III. Analysis

A. *Amendment of the notice of application*

(1) Principles

[9] Rule 75 of the *Federal Courts Rules*, SOR/98-106, provides that the Court may allow a party to amend a document on such terms as will protect the rights of all parties. In applying this rule, the Federal Court of Appeal has identified the following principles:

(a) the central issue is whether it is more consonant with the interests of justice that the amendment be permitted or denied: *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 at para 3, citing *Continental Bank Leasing Corp v Canada*, 1993 CanLII 17065 (TCC);

(b) as a general rule, an amendment should be allowed at any stage of a proceeding for the purpose of determining the real questions in controversy between the parties, provided that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice: *Janssen* at para 9; *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at para 20;

(c) however, the proposed amendment must have a reasonable prospect of success, and it will be refused if it is "plain and obvious," assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *McCain* at para 20, citing *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 29–32, and *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17;

(d) in deciding whether an amendment has a reasonable prospect of success, it must be examined in the context of the law and the litigation process, and a "realistic" view must be taken; it is often helpful for the Court to ask itself whether the amendment, if it were already part of the proposed pleadings, would be a plea capable of being struck out: *McCain* at paras 21–22; and

(e) a proposed amendment must meet the requirements for pleadings, including Rule 301(e), which requires a notice of application to set out "a complete and concise statement of the grounds intended to be argued": *Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 244 at paras 11–12; see also *McCain* at para 23 in the context of an action.

[10] The parties generally agree on these principles. However, they do not agree on their application to the amendments proposed by the applicants. To understand these amendments, it is first necessary to consider the context in which they are proposed and the applicants' current notice of application.

(2) Current notice of application

[11] The application for judicial review underlying the two motions arises in the context of the horrific tragedy that struck the community of Lac-Mégantic on July 6, 2013, when a train carrying crude oil derailed, causing a major fire and multiple explosions. Forty-seven people were killed, including loved ones of some of the applicants.

[12] In May 2018, the governments of Canada and Quebec announced a plan to build a rail bypass rerouting the railway away from downtown Lac-Mégantic. The planned bypass involves creating a rail corridor on lands within the City of Lac-Mégantic and the municipalities of Nantes and Frontenac. Nantes is a community that lies northwest of Lac-Mégantic, while Frontenac lies east of the town.

[13] On January 24, 2023, the Minister of Transport asked the Minister to initiate an expropriation process to acquire the lands necessary for the construction of the Lac-Mégantic rail bypass that could not be acquired by negotiation. The Minister of Transport underlined the importance of acting quickly, given the imminence of the tenth anniversary of the tragedy and the Government of Canada's desire to begin construction in the fall of 2023. For the same reasons, the Minister of Transport also reiterated the importance of obtaining an order from the Governor in Council shortening the statutory period of 90 days before which the Crown may not take possession of the lands: *Expropriation Act*, subsection 19(2).

[14] The Minister signed notices of intention to expropriate, which were published in the land register of the Frontenac registration division. The notices state that His Majesty in Right of Canada requires the lands for the construction and operation of a rail bypass rerouting trains away from downtown Lac-Mégantic.

[15] Approximately 1,500 objections to the planned expropriations were filed with the Minister under section 9 of the *Expropriation Act*. The Minister therefore ordered that a public hearing be held to address the objections and asked the Attorney General of Canada to appoint a

hearing officer under section 10 of the *Expropriation Act*. Julie Banville was appointed hearing officer and held public hearings on May 4, 5, 8 and 9, 2023.

[16] On May 25, 2023, the hearing officer submitted her report summarizing the grounds of the objections presented at the public hearings, including those of the applicants. After reviewing the report, the Minister decided to confirm the notices of intention to expropriate and to ask the Attorney General to publish notices of confirmation in the land register.

[17] The applicants' application for judicial review, filed on July 12, 2023, seeks to have the Minister's decision and the notices of confirmation of intention to expropriate quashed with respect to the applicants' lands. On August 4, 2023, the notice of application was slightly amended, with leave from the Court, to reflect changes to its style of cause. To avoid confusion with the amendments being sought in the context of these motions, I will refer to the amended application filed on August 4, 2023, as the "notice of application" or the "current notice of application."

[18] The current notice of application alleges that the notices of confirmation of intention to expropriate are illegal and were rendered without authority. In particular, the applicants allege that (i) the Minister should have applied section 4.1 of the *Expropriation Act* rather than section 4 (paragraphs 14, 46–48); (ii) the bypass is solely for the benefit of the railway company involved in the project, Centre du Maine et du Québec Inc [CMQ], whose main shareholder is the Canadian Pacific Kansas City railway company [CPKC] (paragraph 15); (iii) the Minister did not follow the process set out in section 4.1 of the *Expropriation Act* because CMQ never

requested a bypass (paragraphs 15, 37–39); (iv) pursuant to section 98 of the *Canada Transportation Act*, SC 1996, c 10, construction of the bypass is conditional on the approval of the Canadian Transportation Agency [CTA], which has yet to render its decision (paragraphs 16, 19, 22, 45, 48); (v) CMQ submitted the application to the CTA, although this was the Minister of Transport's responsibility, placing the Minister in a situation of conflict of interest (paragraphs 17–18); (vi) the Minister is not authorized to initiate the expropriation process and acted in bad faith, knowing the process undertaken does not comply with the *Expropriation Act* (paragraphs 21, 23); (vii) the planned bypass risks causing significant negative environmental impacts (paragraphs 25, 27–32); (viii) even if the Minister invokes another public purpose, the project or the proposed route lacks social acceptability (paragraphs 26, 41); (ix) the notices of intention to expropriate and the notices of confirmation do not state under which section of the *Expropriation Act* they have been issued, rendering them invalid (paragraph 40); and (x) the project is not a public work under federal jurisdiction, such as a seaport, airport or penitentiary (paragraph 41).

[19] In the context of the applicants' motion for an injunction, Associate Chief Justice Gagné grouped the grounds raised in the notice of application under four headings: (1) the use of section 4 of the *Expropriation Act* rather than 4.1 and the lack of a request put forward by a railway company; (2) the lack of public interest of the project, which would only benefit private interests; (3) the prematurity of the expropriation notices, since the CTA has still not approved construction of the bypass; and (4) the serious environmental issues and lack of social acceptability associated with the project: *Vachon Estate* at para 44. The applicants did not object to this categorization in the context of these motions.

(3) The proposed amendments

[20] The applicants seek to make two amendments to their notice of application.

[21] The first, at paragraph 44, would add an allegation raising an apprehension of bias on the part of the Minister. In seven subparagraphs, the proposed amendments specify that this apprehension arises from the following facts: (a) the decision to confirm the expropriation was premeditated as early as January 2023 for the political interests of the Minister in connection with the tenth anniversary of the tragedy; (b) a memorandum addressed to the Minister by her Deputy Minister on May 30, 2023 [the Memorandum], establishes that the decision was dictated by the Minister of Transport; (c) the Memorandum shows that Transport Canada is the [TRANSLATION] "project manager" and dictates the decisions in collaboration with Public Works and Government Services Canada and the Department of Justice; (d) the Memorandum states that Transport Canada will be able to transfer the lands to CMQ for construction, without producing any documentation in support of this, and that CMQ has not requested that a bypass be constructed; (e) the Memorandum suggests that the Minister's decision was written before she had received an English translation of the report of hearing officer Banville and that the Minister cannot make a decision based on railway safety arguments; (f) an email sent to the Minister on June 9, 2023, highlighted the existence of a ministerial order from Quebec's Ministry of Natural Resources refusing to authorize mining activity in the region because it would have a negative impact in a large area required for supplying the town with drinking water; and (g) the Minister, in her decision, called into question the results of the referendum conducted by the Municipality

of Frontenac, while [TRANSLATION] “glorifying” a Facebook page published under the direction of the City of Lac-Mégantic in favour of the bypass project.

[22] The second amendment, at paragraph 48.1, states that [TRANSLATION] “[t]he applicants wish to reiterate the facts mentioned at paragraphs 15, 16, 17, 18, 25 and 42 to 54 of their application for an interlocutory injunction.”

(4) The main issue

[23] The applicants claim that the purpose of the amendments is to add references to facts they did not become aware of until after receiving the documents provided pursuant to Rules 317 and 318 of the *Federal Courts Rules*. They claim the amendments will help identify the real questions in controversy between the parties and will not result in injustice to the Attorney General of Canada. They also note that this is the first time the federal government is invoking the *Expropriation Act* to build a railway line.

[24] The Attorney General raises several arguments against the amendments proposed by the applicants. He argues the applicants have not justified the six-month period they allowed to elapse between their receipt of the documents in question and the proposed amendments, a delay that was prejudicial to him. He also submits that the purported incorporation by reference into the proposed new paragraph 48.1 is not compliant with Rule 301 of the *Federal Courts Rules*. More substantively, the Attorney General submits that the amendments are unfounded in law and that, like the grounds in the current notice of application, they have no reasonable prospect of success.

[25] As stated above, leave will not be granted to amend a pleading if it is plain and obvious, assuming the facts pleaded to be true, that the pleading has no reasonable prospect of success and is therefore liable to be struck out: *McCain* at paras 20–22. I conclude that this is the determinative issue in this case.

[26] As the lack of prospect of success is relevant to the determination of both the applicants' motion to amend and the Attorney General's motion to strike, I will address that issue after dealing with the principles applicable to striking pleadings. As I find below that the proposed amendments have no prospect of success, it follows that this Court cannot approve the amendments and that the applicants' motion to amend must be denied.

B. *Striking of the notice of application*

(1) Principles

[27] The *Federal Courts Rules* do not expressly cover the possibility of striking a notice of application, as they do in the context of an action: *Federal Courts Rules*, Rules 169, 221. Nevertheless, the Court has a plenary jurisdiction to restrain the misuse of courts' processes, which includes jurisdiction to strike a notice of application: *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 at para 48, citing *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, 1994 CanLII 3529 (FCA), [1995] 1 FC 588 at p 600, and *Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50 [at paras 33–36].

[28] The principles applicable to the exercise of this jurisdiction, established by the Federal Court of Appeal, are the following:

(a) the proper way to contest an application for judicial review is to appear and argue at the hearing of the application: *David Bull* at pp 596–597; *876947 Ontario Limited (RPR Environmental) v Canada (Attorney General)*, 2013 FCA 156 [*RPR Environmental*] at para 9; *JP Morgan* at para 48;

(b) the Court will therefore strike a notice of application only where it is "so clearly improper as to be bereft of any possibility of success," namely in the exceptional case where there is a "fatal flaw" striking at the root this Court's power to entertain the application or some other circumstance that suggests that the proceeding is "doomed to fail": *Bernard v Canada (Attorney General)*, 2019 FCA 144 [*Bernard I*] at para 33; *JP Morgan* at para 47;

(c) this very high threshold is the same as that applicable in the context of a motion to strike an action: *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paras 32–33; *Federal Courts Rules*, Rule 221(a);

(d) the facts alleged in the notice of application are taken to be true, unless they are patently ridiculous, incapable of proof, or based on assumptions or speculations: *JP Morgan* at para 52; *Wenham* at para 33; *Canada v Scheuer*, 2016 FCA 7 at para 19; *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC) at para 27;

(e) affidavits are therefore generally not admissible to support or oppose a motion to strike, but documents referred to and incorporated by reference in a notice of application may be

appended to an affidavit for the assistance of the Court, and the Court may also consider the impugned decision: *JP Morgan* at paras 51–54, 56–57; *Wenham* at para 33;

(f) the notice of application must set out "a complete and concise statement of the grounds intended to be argued," and the applicant may not supplement or buttress it by making new allegations in an affidavit (or in written representations): *JP Morgan* at paras 38–45, 52; *Federal Courts Rules*, Rule 301(e);

(g) to determine whether an application for judicial review discloses a cause of action, the Court must read the notice of application generously with a view to accommodating any inadequacies in the allegations and in such a way as to get at its real essence by reading it realistically, holistically and practically without fastening onto matters of form: *JP Morgan* at paras 49–50; *Wenham* at para 34; *Mohr v National Hockey League*, 2022 FCA 145 at para 48;

(h) even if Rule 221 refers to a "reasonable" cause of action, and the case law refers to a "reasonable" prospect of success, the task is not to assess the odds of an applicant ultimately succeeding, or the evidence that may be put forward, but simply to determine whether it is plain and obvious that the application will fail: *Wenham* at paras 29–31, 36; and

(i) this determination is reached against the legal background of the application, taking into account, in the case of an application for judicial review, issues such as the standard of review and the existence of a ground of review known to administrative law: *Wenham* at paras 30, 36(II); *Bernard v Canada (Professional Institute of the Public Service)*,

2020 FCA 211 at para 16; *JP Morgan* at paras 67–70, 80; *McCain* at para 21; *Mohr* at paras 53–54; *RPR Environmental* at para 5.

[29] In light of this last principle in particular, it is necessary to set out the legal context of the decision in issue, namely expropriation by the Crown under the *Expropriation Act*, before turning to an analysis of the notice of application.

(2) Legal context

a) *Provisions of the* Expropriation Act

[30] Subsection 4(1) of the *Expropriation Act* grants to the Crown the authority to expropriate any immovable real right that, in the opinion of the Minister, is required for a public work or other public purpose:

Authority to expropriate	**Pouvoir d'exproprier**
4 (1) Any interest in land or immovable real right, including any of the interests or rights mentioned in sections 7 and 7.1, that, in the opinion of the Minister, is required by the Crown for a public work or other public purpose may be expropriated by the Crown in accordance with the provisions of this Part.	**4 (1)** La Couronne peut exproprier, en conformité avec les dispositions de la présente partie, tout droit réel immobilier ou intérêt foncier, y compris l'un des droits ou intérêts mentionnés aux articles 7 et 7.1, dont elle a besoin, de l'avis du ministre, pour un ouvrage public ou à une autre fin d'intérêt public.
[Emphasis added.]	[Je souligne.]

[31] The *Expropriation Act* also includes a provision, section 4.1, that addresses the situation where a request to expropriate originates from a railway company. As Associate Chief Justice Gagné has explained, this provision was added to the *Expropriation Act* in the context of the 1996 repeal of the *Railway Act*, RSC 1985, c R-3, and the consolidation of that statute and the *National Transportation Act, 1987* in the new *Canada Transportation Act*: *Vachon Estate* at para 21; *Canada Transportation Act*, long title. The relevant paragraphs of section 4.1 read as follows:

Request by railway company to expropriate	**Demande d'expropriation**
4.1 (1) If a railway company, as defined in section 87 of the *Canada Transportation Act*, requires an interest in land or immovable real right for the purposes of its railway and has unsuccessfully attempted to purchase the interest or right, the railway company may request the Minister of Transport to have the Minister have the interest or right expropriated by the Crown in accordance with this Part.	**4.1 (1)** La compagnie de chemin de fer — au sens de l'article 87 de la *Loi sur les transports au Canada* — présente au ministre des Transports une demande pour que le ministre fasse exproprier par la Couronne, conformément à la présente partie, le droit réel immobilier ou intérêt foncier dont elle a besoin pour un chemin de fer et qu'elle n'a pu acheter.

Power of Minister	**Pouvoir du ministre**
(2) The Minister shall have the interest in land or immovable real right expropriated by the Crown in accordance with this Part if	**(2)** Avec l'agrément du gouverneur en conseil donné sur recommandation du ministre des Transports, lorsqu'il estime que la compagnie de chemin de fer a besoin du droit réel immobilier ou intérêt foncier pour un chemin de fer, le ministre fait exproprier par la Couronne ce droit ou intérêt en conformité avec la présente partie.
(a) the Minister of Transport is of the opinion that the interest or right is required by the railway company for its railway and recommends to the Governor in Council that it be expropriated in accordance with this Part; and	
(b) the Governor in Council consents to the expropriation of the interest or right.	
Deemed opinion	**Présomption**
(3) If the Minister of Transport is of the opinion that the interest in land or immovable real right is required by the railway company for its railway, the Minister is deemed to be of the opinion that the interest or right is required by the Crown for a public work or other public purpose.	**(3)** Si le ministre des Transports recommande l'expropriation, le ministre est censé être d'avis que la Couronne a besoin du droit réel immobilier ou intérêt foncier pour un ouvrage public ou à une autre fin d'intérêt public.
[Emphasis added.]	[Je souligne.]

[32] Sections 4 and 4.1 are found in Part I of the *Expropriation Act*. This Part of the Act sets out the procedure to follow such that an expropriation under section 4 or section 4.1 is carried out "in accordance with [the provisions of] this Part." Associate Chief Justice Gagné described this procedure in detail in her decision on the motion for an injunction, and there is no need to repeat that discussion here: *Vachon Estate* at paras 22–28. It suffices to note that the procedure set out in Part I includes the registration and publication of a notice of intention to expropriate (sections 5 and 8); a process providing for objections by any person who objects to the intended

expropriation (section 9); the appointment of a hearing officer, the holding of a public hearing, and an obligation on the hearing officer to submit a report "on the nature and grounds of the objections made" (section 10); the Minister's authority to confirm or abandon the intention to expropriate "after receiving and considering the report" of the hearing officer (section 11); and the Minister's duty to provide a copy of the report and a statement of the reasons that the Minister had for rejecting any objections that were not given effect (section 13).

[33] If the Minister decides to confirm the intention to expropriate, she does so by requesting that the Attorney General of Canada register a notice of confirmation in the office of the registrar where the notice of intention was registered (section 14). On the registration of the notice of confirmation, the right confirmed to be expropriated becomes and is absolutely vested in the Crown (section 15).

[34] Finally, paragraph 23(b) of the *Expropriation Act* creates a presumption with respect to the Minister's opinion that an immovable real right is required for a public work or other public purpose:

Notice conclusive except against Crown	**Avis péremptoirement opposable sauf à la Couronne**
23 Unless questioned by the Crown,	**23** Sauf si la Couronne le conteste :
[…]	[…]
(b) it shall be deemed that	**b)** il est considéré que, selon le cas :
(i) all of the interests or rights to which a notice of intention relates are,	**(i)** tous les droits ou intérêts visés par l'avis d'intention sont,

(ii) a more limited interest or right only to which a notice of confirmation relates is, or	**(ii)** un droit ou intérêt plus restreint visé seulement par un avis de confirmation est,
[…]	[…]
in the opinion of the Minister required by the Crown for a public work or other public purpose;	selon le ministre, requis par la Couronne pour un ouvrage public ou à une autre fin d'intérêt public;
[Emphasis added.]	[Je souligne.]

[35] I note that section 23 could be read as allowing only the Crown to question whether the rights or interests to which a notice of intention relates are, in the opinion of the Minister, required by the Crown for a public work or other public purpose. That said, the Attorney General accepts that this provision simply creates a presumption that can be rebutted by an applicant.

b) *Standard of review applicable to the merits of expropriation decisions*

[36] The Attorney General does not dispute that it is open to this Court to review a decision by the Minister to confirm an intention to expropriate. In reaching such a decision, the Minister is exercising a power or authority conferred by an Act of Parliament. She is therefore acting as a "federal board, commission or other tribunal" within the meaning of section 2 of the *Federal Courts Act*, RSC 1985, c F-7, and the Court has jurisdiction to review her decision in accordance with sections 18 and 18.1 of that Act.

[37] The parties also agree that the standard applicable to judicial review of the merits of the Minister's decision is that of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. An applicant seeking to have a decision made by

the Minister under the *Expropriation Act* set aside must therefore establish that the decision is unreasonable, in the sense that it is internally inconsistent or that it is not justified in light of the factual and legal constraints that bear on it: *Vavilov* at paras 99–101.

[38] That said, the Supreme Court of Canada confirmed that reasonableness is a standard that accounts for context: *Vavilov* at paras 88–90. What is "reasonable" in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review: *Vavilov* at para 90. Where a legislature gives a decision maker wide discretion, such as the power to make a decision "in the public interest," the decision maker has "greater flexibility" in interpreting the meaning of the statute and in exercising their discretion: *Vavilov* at paras 108, 110; *11316753 Canada Association c Canada (Transports)*, 2023 CAF 28 [*'753 Canada (FCA)*] at paras 24, 29–30, 45–52.

[39] Such decisions, which are based on policy considerations and assessed on polycentric, subjective, or indistinct criteria, are very much unconstrained and subject to "a low level of legal constraint" justifying a high degree of deference from the reviewing court: *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 (aff'd 2022 SCC 30) at para 28, citing *Vavilov* at para 110; *'753 Canada (FCA)* at para 51, affirming *11316753 Canada Association v Canada (Transport)*, 2021 FC 819 [*'753 Canada (FC)*] at paras 42–43. At the same time, there is no such thing as absolute and untrammelled "discretion," and any exercise of discretion must accord with the purposes for which it was given: *Vavilov* at para 108, citing *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121 at p 140.

[40] Decisions made in the specific context of expropriation have long been recognized as highly discretionary decisions that are inherently political in nature. This is confirmed by the *Expropriation Act*, which refers to a "public work or other public purpose" and gives the Minister the discretion to determine whether, in her opinion, the Crown requires an immovable real right for such purpose: *Expropriation Act*, ss 4(1), 4.1(3), 5(1), 11(3), 23(b).

[41] In *Walters*, the Supreme Court reviewed the approval of an expropriation by a school board under the expropriation legislation then applicable in Ontario, the *Expropriations Act*, RSO 1970, c 154: *Walters v Essex County Board of Education*, 1973 CanLII 20 (SCC), [1974] SCR 481. Like the federal *Expropriation Act*, the Ontario legislation provided for the preparation of a report by an inquiry officer and required the approving authority to "consider" the report before approving or disapproving the expropriation: *Walters* at pp 482–484. The Walters family tried to have the expropriation of their farm annulled on grounds, among others, that the report of the inquiry officer had disapproved of the proposed expropriation and that the school board had not adequately "considered" the report as required by the statute: *Walters* at pp 483, 485–486.

[42] In rejecting the Walters' appeal, Justice Laskin (later Chief Justice) noted that the legislature had "left little room for judicial supervision of an approving authority's discharge of its duty to approve or disapprove an expropriation" short of an attack on the good faith of the decision maker, and that "[t]he Court [was] given no role to review the merits of an expropriation proposal": *Walters* at pp 487–488. He described the political nature of the decision in the following terms, referring to administrative law concepts current at the time:

> To use case-honoured terminology, the Board as an approving authority is neither a judicial nor a quasi-judicial body, but is invested with the widest discretionary power to determine, subject only to considering the inquiry officer's report, whether an expropriation should proceed. The sanction for a wrong-headed decision (absent bad faith), having regard to its duty to give reasons, is public obloquy not judicial reproof.
>
> [Emphasis added; *Walters* at p 489.]

[43] Justice Laskin's words echo those of the Minister of Justice who presented the *Expropriation Act* to Parliament in 1970. In response to a question about the statutory public hearing, the Honourable John Turner noted that "[t]he Minister of Public Works will be responsible for the expropriation to his colleagues and to the Parliament of this country, and that is a responsibility he will have to accept. His responsibility will be a political one, not a judicial one, because the decision to expropriate is, in the first instance, an administrative decision for which he bears political responsibility" [emphasis added]: *House of Commons Debates*, 28-2, No 4 (9 February 1970) at p 3374; see also Eric CE Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Scarborough : Carswell, 1992) at pp 51–53. Obviously, the statements made by the Minister of Justice in 1970 do not constrain the Court in its task of reviewing the Minister's decision, but they do support Justice Laskin's fairly obvious conclusion that expropriation by the Crown is an inherently discretionary and political decision.

[44] It is also worth noting that the *Expropriation Act* explicitly provides that the Federal Court plays a certain role in the context of an expropriation, for example, to determine the state of the title to the land and to determine the compensation to which the owner of the expropriated land is entitled: *Expropriation Act*, sections 2(1) ("Court"), 18, 31–35. However, like the Ontarian statute considered by the Supreme Court in *Walters*, the *Expropriation Act*

provides no role for the Court in reviewing decisions to undertake, abandon, or confirm an expropriation.

[45] The Attorney General also cites, as did Associate Chief Justice Gagné, this Court's decision in *Canada v Ladouceur*, [1976] FCJ No 415 (this judgment was appealed, but it appears that the appeal was not pursued). That decision involved the expropriation of immovable property for the purpose of building the Mirabel Airport, carried out under the former *Expropriation Act*, RSC 1970, c E-19. Mr. Ladouceur, whose lands had been expropriated, objected to the sufficiency of the compensation paid and the validity of the expropriation. At the outset of the trial, the Court heard a motion from the Crown to strike two paragraphs of Mr. Ladouceur's statement of defence alleging that his property "was not required for purposes of public utilities in conformity with the law." Justice Addy rendered an oral judgment, which he later incorporated into his final judgment, granting the motion in part: *Ladouceur* at para 2 and Annex "A". Justice Addy held the following:

> It is, however, in the interest of both parties not to prolong a trial unnecessarily and once it becomes evident that one could not, under any consideration even in interpreting the pleading as broadly and as generously as possible, come to any conclusion at law which would be favourable to the party pleading, that pleading should be struck out.
>
> This principle certainly applies to paragraph 9(a) as there is well-established jurisprudence confirmed by the Supreme Court of Canada in the case of *Calgary Power Limited v. Copithorne*, [1959] SCR 24, to the effect that <u>an expropriated party cannot attack an expropriation on the grounds that the property might not be required for the public purpose for which the Minister declared that he was expropriating it unless one brings into issue the good faith of the Minister</u>.
>
> <u>In other words, the judgment of the Minister cannot be questioned</u>.
>
> [Emphasis added; *Ladouceur* at Annex "A".]

[46] It goes without saying that administrative law, and more specifically the law of judicial review, has evolved since the decisions of the Supreme Court in *Walters* and this Court in *Ladouceur*. Therefore, it cannot be asserted with confidence that the approach according to which the Minister's decision can only be overturned on grounds of bad faith is still valid. Further, although the Attorney General cites *Walters* and *Ladouceur*, as well as the presumption set out in section 23, he recognizes that the reasonableness standard as set out in *Vavilov* is applicable.

[47] That said, the foregoing confirms that an applicant seeking to have a decision to confirm an expropriation set aside must establish that the decision does not meet the standard of reasonableness as that standard is defined for a decision that is highly discretionary and political in nature. The issue in the context of the Attorney General's motion to strike is therefore whether it is plain and obvious that the grounds raised by the applicants can under no circumstances meet this requirement and are therefore doomed to fail.

c) *Standard applicable to allegations of bias*

[48] The amendments proposed by the applicants allege bias on the part of the Minister. Bias is an issue of procedural fairness, which is not reviewed on a standard of reasonableness. However, the proposed amendments and the parties' claims raise the issue of the level of impartiality to which the Minister is bound in the context of a decision to confirm an expropriation.

[49] The proposed amendments refer to an [TRANSLATION] "apprehension of bias." This language evokes the "reasonable apprehension of bias" standard that applies to the decisions of many administrative decision makers and to judges: *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at paras 45–47; *Wewaykum Indian Band v Canada*, 2003 SCC 45 at paras 57–61.

[50] However, the Attorney General submits that in the case of discretionary and political decisions based on an assessment of the public interest, the standard applicable to issues of bias is not that of a "reasonable apprehension of bias" but that of a "closed mind": *Pelletier v Canada (Attorney General)*, 2008 FCA 1 at paras 49–57, citing *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at para 31, and *Old St Boniface Residents Assn Inc v Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 SCR 1170 at pp 1197–98; *Elson v Canada (Attorney General)*, 2017 FC 459 at paras 142–46. The applicants accepted this proposal during the hearing, and I fully agree.

[51] *Pelletier* involved a decision by the Minister of Transport to remove the chair of the board of directors of VIA Rail, who had been appointed to the position during pleasure. The Court of Appeal noted that such a decision is a policy-making discretionary administrative decision, "which attracts, at best, a standard of impartiality of a closed mind": *Pelletier* at para 55. The Court of Appeal held that this Court had erred in law in applying the standard of reasonable apprehension rather than that of the closed mind: *Pelletier* at para 57.

[52] The Minister's decision in this case is also a policy-making discretionary administrative decision that takes the public interest into account and is not constrained by statute: *Elson* at para 146. The *Expropriation Act* stipulates that the Minister receive and consider the hearing officer's report, indicating that she must not be closed-minded, but the Minister is only held to this standard with respect to the issue of bias.

[53] The applicants will therefore have to establish, in the context of this application, that the Minister had a closed mind when she decided to confirm the intention to expropriate. In the context of the motions before me, particularly the applicants' motion to amend, the issue is therefore whether it is plain and obvious that the allegation proposed by the applicants that the Minister was biased cannot meet this standard and is therefore doomed to fail.

d) *Role of Associate Chief Justice Gagné's decision*

[54] As mentioned above, Associate Chief Justice Gagné had before her the applicants' motion for an injunction. In dealing with this motion, she had to apply the test established by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at p 334. She therefore had to consider, among others, the issue of whether the applicants' application for judicial review raised a serious issue to be tried: *Vachon Estate* at para 38.

[55] After reviewing the notice of application and its legal context, Associate Chief Justice Gagné held that none of the four main grounds raised by the applicants, according to the categorization set out in paragraph [19] above, raised a serious issue to be tried: *Vachon Estate* at

paras 43–77. She also held that the applicants had failed to demonstrate irreparable harm and that the balance of convenience did not tilt in their favour: *Vachon Estate* at paras 78–99. She therefore dismissed the motion for an injunction: *Vachon Estate* at para 102. This decision was not appealed.

[56] The Attorney General highlights the Associate Chief Justice's conclusions and asserts that the low threshold of the "serious issue to be tried" test applicable to injunctions is a corollary of that applied when considering a motion to strike, in which the Court considers whether the underlying application "has no prospect of success" or is "doomed to fail." The Attorney General notes that an application that does not satisfy the first prong of the *RJR-MacDonald* test is "frivolous" and/or "vexatious" and submits that such an application is necessarily doomed to fail: *RJR-MacDonald* at pp 335, 337–38, 348; *Bernard I* at para 34; see also *R v Haevischer*, 2023 SCC 11 at paras 67–68, in which the Supreme Court stated that a "frivolous" application, in the "manifestly frivolous" standard applicable to the summary dismissal of an application in the criminal context, is one that is "doomed to fail."

[57] I agree that it is difficult to see much difference between the test of "no serious issue to be tried" and that of a case with "no prospect of success" or that is "doomed to fail." Both suggest a case that simply cannot succeed. In neither case will there be any extensive review of the merits: *RJR-Macdonald* at p 337; *Sierra Club Canada Foundation v Canada (Environment and Climate Change)*, 2020 FC 663 at paras 3, 25–30. In neither case is the novelty of the claim or issue determinative: *2788610 Ontario Inc v Bhagwani et al*, 2022 ONSC 905 at para 15; *Air Passenger Rights v Canada (Transportation Agency)*, 2020 FCA 155 at para 32; *Paradis*

Honey Ltd v Canada (Attorney General), 2015 FCA 89 at para 37. This Court has, at least, noted the connection between the tests: *Sierra Club Foundation* at para 3; *Asghar v Canada*, 2017 FC 947 at paras 11–14, 29, 33–34; *Paszkowski v Canada*, 2001 CanLII 22070 (FC) at paras 2–4, 7; *Cabra v Canada (Citizenship and Immigration)*, 2015 FC 822 at paras 15–16; but see also *Engineered Controls v Gas Equipment Supplies*, 2003 BCSC 697 at paras 2–4, 13–14, 22–28.

[58] That said, there are important differences between a motion for an injunction and a motion to strike. In particular, a motion for an injunction requires evidence, whereas no evidence may be considered on a motion to strike: *JP Morgan* at para 51; *Wenham* at para 25. Associate Chief Justice Gagné had affidavits before her, although she referred to that evidence primarily in considering irreparable harm rather than in considering whether there was a serious issue to be tried. This Court has also suggested in some decisions that the "serious issue to be tried" test for injunctions is more exacting than the "plain and obvious" criterion to be applied in motions to strike: *Pacific Fishermen's Defence Alliance v Canada*, 1987 CanLII 8961 (FC), [1987] 3 FC 272 at pp 284–85; *Sauvé v Canada*, 2014 FC 119 at para 41, in the context of the *Federal Courts Rules*, Rule 417.

[59] As there is no case law equating the two norms more directly, the Attorney General is not claiming that the issue before this Court has already been dealt with by the Associate Chief Justice or that the principle of horizontal *stare decisis* applies to bind the Court in its decision. Rather, the Attorney General merely claims that striking out the notice of

application is [TRANSLATION] “consistent” with the Associate Chief Justice’s conclusion that the notice of application fails to raise a serious issue.

[60] Given the differences between motions to strike and motions for an injunction, I conclude that the Court is not bound by Associate Chief Justice Gagné’s decision, either by the principle of horizontal *stare decisis* or otherwise. The Court must therefore make its own decision as to whether it is plain and obvious that the notice of application is doomed to fail. In so doing, the Court must apply the appropriate standard for motions to strike and not the “serious issue to be tried” test. However, the Associate Chief Justice’s decision constitutes relevant jurisprudence on the issues before the Court, especially in its aspects that are based solely on the legal context and the notice of application and that do not deal with the evidence that was before the Court when the motion for an injunction was considered.

(3) Grounds in the current notice of application

[61] The applicants claim that the Minister’s decision is unreasonable and that the Minister acted in bad faith, raising the grounds summarized at paragraph [18]. The applicants’ grounds are, in substance, as follows: (a) grounds relating to the application of sections 4 and 4.1 of the *Expropriation Act*; (b) grounds relating to the *Canada Transportation Act*; (c) grounds alleging that the bypass is not a public work or other public purpose; (d) an allegation that the project is likely to cause significant negative environmental impacts; and (e) an allegation that the Minister is not authorized to initiate the expropriation process and has acted in bad faith. This grouping of the grounds is slightly different from that of Associate Chief Justice Gagné, but it addresses the same grounds as those found in the notice of application.

[62] The issue on this motion is whether these grounds, or at least some of them, have any prospect of success or, conversely, whether they are doomed to fail. In this respect, I note that what matters is not the number of grounds raised in the notice of application but their viability: *Mohr* at para 53. A notice of application with numerous grounds is equally liable to be struck out if all the grounds are without merit.

[63] I also note that the applicants, in their written submissions, have raised other arguments unrelated to the grounds in the notice of application. These include arguments regarding the choice of the route for the bypass; the current location where railway cars are marshalled; the evacuation radius in the event of a hazardous spill; the purported safety of the proposed route; the Minister's observation regarding the percentage of Lac-Mégantic residents showing symptoms of post-traumatic stress disorder and the medical and scientific literature on treating these symptoms; and the quality and relevance of the studies conducted. However, it is not open to the applicants to raise new grounds or facts to buttress or broaden their notice of application in response to a motion to strike. Both the Court and the Attorney General are entitled to assume that the notice of application includes everything substantial that is required to grant the relief sought: *JP Morgan* at paras 39, 52.

[64] The Court's analysis therefore focuses on the grounds raised in the notice of application. For the following reasons, I conclude that none of these grounds has any prospect of success.

[65] Before turning to the grounds in the notice of application, I note that the applicants point out that the Attorney General objected, under Rules 317 and 318 of the *Federal Courts Rules*, to

the production of some of the documents requested in their notice of application. In my opinion, this does not affect the analysis of the Attorney General's motion to strike, for two reasons. First, Case Management Judge Steele stayed proceedings in respect of the Attorney General's Rule 318 objections pending the outcome of these motions, and her order was not appealed. Second, it is the notice of application that determines relevance and therefore the scope of the documents that may be requested under Rule 317 and not vice versa: see *Iris Technologies* at paras 36–43. Applicants must set out in their notice of application the grounds on which they claim that the decision under review should be set aside and cannot rely on documents or arguments yet to come to justify their application: *JP Morgan* at paras 38–45, 52.

a) *Grounds relating to the application of sections 4 and 4.1 of the* Expropriation Act

[66] In their notice of application, the applicants raise three grounds relating to the application of sections 4 and 4.1 of the *Expropriation Act*.

[67] First, they claim the notices of intention to expropriate and the notices of confirmation are invalid because the section of the Act under which they have been issued is not specified. This ground has no merit. Subsection 5(1) of the *Expropriation Act* sets out the contents of a notice of intention to expropriate, while subsection 14(1) sets out the contents of a notice of confirmation of intention. Neither provision states that the notice must specify the section of the Act under which it has been issued. It is worth noting that there are only two sections in the *Expropriation Act* that give the Crown the power to expropriate, namely sections 4 and 4.1. As discussed above, section 4.1 does not apply. The argument that the entire expropriation process

is invalid because the Minister did not specify that the notices were issued under the only section capable of applying in the case has no prospect of success.

[68] Next, the applicants claim that the Minister should have applied section 4.1 of the *Expropriation Act* and not section 4. This ground also has no prospect of success. Section 4.1 clearly states that, if a railway company requires an immovable real right for the purposes of its railway, the railway company may request the Minister of Transport to have the Minister of Public Works and Government Services have the right expropriated by the Crown. The applicants' notice of application clearly alleges that no railway company has made such a request in this case. Section 4.1 of the *Expropriation Act* therefore plainly has no application.

[69] The applicants' argument is effectively that where a railway track is involved, only section 4.1 can apply and any use of section 4 is excluded. In essence, they appear to be arguing that section 4.1 of the *Expropriation Act* limits the Minister's authority under section 4 by excluding railway lines from public works or other public purposes. There is nothing in the wording of section 4 or in the legislative history or purpose of the Act to suggest that the "widest discretionary power" vested in the Minister by section 4 is limited in this way: *Walters* at p 489; *'753 Canada (FCA)* at para 46. The applicants' argument would require interpreting subsection 4(1) as if it read "[a]ny […] immovable real right […] that, in the opinion of the Minister, is required by the Crown for a public work or other public purpose with the exception of railways or railway lines may be expropriated by the Crown […]" or "subject to section 4.1, any […] immovable real right […] may be expropriated by the Crown […]." The fact that

section 4.1 gives railway companies the ability to make requests to the Minister of Transport simply does not support such a reading of section 4. The argument is doomed to fail.

[70] I note that this is not a situation where the wording of subsection 4(1) is capable of being interpreted in at least two different ways or where there are "competing, credible interpretations": *Mohr* at paras 45–52. To the contrary, the applicants' argument is at odds with sections 4 and 4.1 of the *Expropriation Act* and cannot be justified either by the scheme or purpose of the Act or by its legislative history: see *Mohr* at paras 13–15, 33–42.

[71] It should also be pointed out that the Minister obviously concluded that section 4 gave her the right to have the Crown expropriate immovable real rights for the construction of a rail line at the request of the Minister of Transport and not at the request of a railway company. In the context of a judicial review, the question is therefore whether this conclusion is unreasonable, which supports the conclusion that the applicants' argument is doomed to fail. In this regard, I note that it does not appear from the notice of application or from the record before the Court as a whole that the applicants made this argument to the Minister in their objections to the notices of intention to expropriate. This is another reason why this argument cannot succeed: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–26.

[72] The last ground under this heading in the notice of application is that the Minister did not follow the process set out in section 4.1 of the *Expropriation Act*, because CMQ never asked for a bypass. For the reasons stated above, the fact that CMQ did not submit a request to the Minister

of Transport does not affect the Minister's authority to issue a notice of intention to expropriate under sections 4(1) and 5. The process set out in section 4.1 is therefore irrelevant. The argument that the Minister's decision is invalid or unreasonable because she failed to follow this process is doomed to fail.

b) *Grounds relating to the* Canada Transportation Act

[73] Subsection 98(1) of the *Canada Transportation Act* provides that a railway company shall not construct a railway line without the approval of the CTA. The applicants state in the notice of application that CMQ has applied for CTA approval but that the CTA has not yet made its decision. I understand this statement, as did Associate Chief Justice Gagné, to be an argument that the Minister's decision is premature since the construction of the railway line, which is the reason for the expropriation, has not yet been approved: *Vachon Estate* at paras 44, 57–62.

[74] The Minister dealt with this issue in her decision to confirm the intention to expropriate. She said the following:

> Under Section 98 of the *Canada Transportation Act*, a railway company must obtain approval from the Canadian Transportation Agency (CTA) before building a new railway line. The CTA may then authorize construction if it determines that the location of the line is both suitable and reasonable. CTA approval is therefore required for construction of the Lac-Mégantic rail bypass. However, it should be noted that the project to acquire the land required for the bypass does not depend on the CTA's decision; a decision has been rendered on the authorizations required for the construction component of the project. Under the *Expropriation Act*, Her Majesty is under no obligation to retrocede the properties despite a favorable decision by the Minister of PSPCPSPC [*sic*] to confirm the expropriation. The federal government is committed to completing this project. However, should the CTA refuse to approve the construction project, the federal government will

> analyze the situation at the appropriate time, in accordance with the laws and directives governing federal real estate transactions.
>
> […]
>
> Construction of the bypass can begin once the land acquisition process has been completed and all regulatory approvals have been obtained, including CTA approval. Nor is it atypical for projects of this scale for the CTA approval application to progress in parallel with the land acquisition process.
>
> [Emphasis added; Minister's decision at pp 25–26.]

[75] The Minister thus effectively concluded that she had the power to confirm the intention to expropriate without waiting for the CTA's approval, and she exercised her discretion to do so. For the applicants' argument in this regard to succeed in this application for judicial review, they must show that the Minister's decision was unreasonable. They simply cannot meet this requirement.

[76] As the Minister noted, acquiring the required lands does not depend on the CTA's decision. There is no indication in the *Expropriation Act* that an expropriation is subject to, or must await, any approval or other condition that may apply to the project that underlies the expropriation. On the contrary, expropriation depends solely on the Minister's opinion that the land is required for a public work or other public purpose. Accepting the applicants' argument would have the absurd effect of requiring land acquisition by expropriation, even for large-scale public projects, to await all relevant regulatory approvals instead of taking place concurrently. This would prevent any preliminary work being carried out on these lands and cause potentially significant project delays. There is nothing in the *Expropriation Act* to support this argument.

[77] It cannot therefore be plausibly argued that the Minister's conclusion is inconsistent with the wording, history and purpose of the *Expropriation Act* or that it is not justified in light of the legal constraints that bear on the decision: *Vavilov* at paras 105, 108–12, 120.

[78] Rather, the Minister's conclusion in this regard is consistent with the only relevant decision before the Court on this issue, with the unfortunate title of *Squaw Point Ranching Co v Red Deer (City)*, 1989 CanLII 3380 (ABKB) [*Red Deer*]. That decision dealt with an application for judicial review of the City of Red Deer's expropriation of lands owned by the applicant in connection with the construction of a railway line. The *Municipal Government Act*, RSA 1980, c M-26, gave the city the power to expropriate, under Alberta's expropriation statute, land for "any municipal purpose." The applicant in that case claimed, as do the applicants in this case, that the land expropriation was premature because the CTA's predecessor, the National Transportation Agency, had not yet approved the rail project: *Red Deer* at para 25. The Court rejected that argument. It noted that the only precondition to the expropriation was that it had to be for a "municipal purpose," and that the approval of the Agency was not a condition precedent to expropriation of the property: *Red Deer* at para 25.

[79] Although *Red Deer* is not based on the same expropriation legislation, it confirms that there is no general principle that an expropriation must await all necessary regulatory or legislative approvals for the underlying project. In addition, it should be noted that the Albertan court reached this conclusion on the basis of expropriation legislation that explicitly allowed owners to object to expropriation if it was not "fair, sound and reasonably necessary in the

achievement of the objectives of the expropriating authority," which the federal *Expropriation Act* does not allow: *Red Deer*, Appendix [*Expropriation Act*, RSA 1980, c E-16, s 6(2)].

[80] The applicants also claim that, under subsection 4.1(1) of the *Expropriation Act*, it is up to the Minister of Transport, not CMQ, to apply for CTA approval. They allege that [TRANSLATION] "[b]y making this request under section 98 of the [*Canada Transportation Act*], the respondents placed themselves in a conflict of interest situation, since it was the responsibility of the Minister of Transport and not C.M.Q. to make that request." It is difficult to understand this argument, which is not expanded upon in the notice of application and was not clarified in the applicants' submissions at the hearing.

[81] To begin with, subsection 4.1(1) of the *Expropriation Act* does not apply in this case, for the reasons given above. In any event, nothing in this subsection requires the Minister of Transport to apply for CTA approval under section 98 of the *Canada Transportation Act*. Indeed, while section 4.1 of the *Expropriation Act* refers to the definition of "railway company" in section 87 of the *Canada Transportation Act*, it does not mention either section 98 or CTA approval. For its part, section 98 of the *Canada Transportation Act* specifies that it is the railway company that makes the application, stating in subsection 98(2) that "[t]he Agency may, on application by the railway company, grant the approval" [emphasis added].

[82] The allegation that [TRANSLATION] "the respondents" (that is, the Attorney General and/or the Minister) placed themselves in a conflict of interest situation appears to be based solely on the allegation that it was the responsibility of the Minister of Transport to file the

application with the CTA, which is clearly not the case. In any event, even if it were up to the Minister of Transport and not CMQ to file the application with the CTA, the notice of application fails to explain how this places the Minister in a conflict of interest situation or how the application to the CTA renders the Minister's decision unreasonable. In this regard, it is worth underscoring that it is not enough, in a notice of application, to make bald statements such as an allegation of conflict of interest without setting out the relevant facts that support it: *JP Morgan* at paras 42–45; *AstraZeneca Canada Inc v Novopharm Limited*, 2010 FCA 112 at paras 2–5.

[83] I therefore conclude that the applicants' allegations regarding section 98 of the *Canada Transportation Act* are completely unfounded and doomed to fail.

c) *Grounds that the rail bypass is not a public work or other public purpose*

[84] The notice of application presents three arguments under this heading. In considering them, it is important to recall that the relevant question under the *Expropriation Act* is whether *in the opinion of the Minister*, the expropriated land is required for a public work or other public purpose: *Expropriation Act*, s 4(1).

[85] First, the notice of application alleges that the rail bypass is solely for the benefit of CMQ. The problem with this argument, its fatal flaw, is that it is contradicted both by the facts alleged in the notice of application itself and by the Minister's decision. As Associate Chief Justice Gagné noted, the notice of application states that CMQ never asked for such a bypass and that it stated that it [TRANSLATION] "had no need" for the bypass and would contribute no funds

towards its construction: *Vachon Estate* at paras 46–47. Like the Associate Chief Justice, I see nothing that could reconcile the allegation that CMQ has no interest in the project with the allegation that the same project is solely for its benefit.

[86] The Minister's decision states that (i) the Lac-Mégantic rail bypass project stems from the tragic event of July 6, 2013; (ii) the project involves the construction of a new railway line to bypass downtown Lac-Mégantic; (iii) the project's objectives are to move the rail line away from the downtown area; to reduce the number of residences, buildings and businesses located near the rail line; and to help the community of Lac-Mégantic move forward and mitigate the traumatic effects associated with the accident: Minister's decision at pp 2, 4–5. The decision also notes that the City of Lac-Mégantic remains firmly committed to the realization of the project, with the aim of removing the rail line from its downtown area by moving it permanently away from the urban centre: Minister's decision at p 6.

[87] In this context, the allegation that the Minister's decision is unreasonable because the project is solely for the benefit of a railway company that itself claims to have no need for it is manifestly unfounded and doomed to fail. If this allegation is taken to be an allegation of fact, I conclude it does not need to be taken as true, because it falls into the category of allegations incapable of proof or based on speculation, given its inconsistency with the other allegations in the notice of application: *Scheuer* at para 19.

[88] Second, the applicants claim that the rail bypass project is not a public work under federal jurisdiction [TRANSLATION] "such as a seaport, airport or penitentiary." Although this argument

is not very detailed in the notice of application or the applicants' submissions, it seems to assert that a rail bypass cannot be a "public work" within the meaning of subsection 4(1) of the *Expropriation Act*.

[89] It appears that the applicants did not put this ground forward in their motion for an injunction as a serious issue to be tried, and it was therefore not dealt with by Associate Chief Justice Gagné in her decision. The parties elaborated on this only briefly in their written submissions, with the applicants raising the issue of [TRANSLATION] "whether the government can build a rail bypass in Canada" and the Attorney General noting that section 23 of the *Expropriation Act* creates a presumption that rights subject to expropriation meet the condition of a public work or a public purpose.

[90] I cannot see any merit in this ground. Neither the notice of application nor the applicants' submissions explain, even hypothetically, why a rail bypass could not be a "public work" within the meaning of subsection 4(1). The reference to [TRANSLATION] "whether the government can build a rail bypass" seems irrelevant, given that construction will not be carried out by the federal government in this project, although both the federal and provincial governments are providing project funding. In any event, even if a rail bypass is not a public work, the Crown's power to expropriate under subsection 4(1) includes not only public works but also other public purposes.

[91] To the extent that this ground is understood to be an argument that the rail bypass project does not fall under federal jurisdiction pursuant to sections 91 and 92 of the *Constitution Act,*

1867—which would require a more than generous reading of the notice of application—it is directly contradicted by the applicants' other argument that the project requires CTA approval under the *Canada Transportation Act*. That federal statute applies only in respect of transportation matters under the legislative authority of Parliament and applies in particular to railway companies and railways within the legislative authority of Parliament: *Canada Transportation Act*, ss 3, 88(1). See also subsection 88(3) of the *Canada Transportation Act* and paragraph 92(10)(c) of the *Constitution Act, 1867*. If that is the argument being put forward, it is manifestly unfounded and doomed to fail.

[92] Third, the notice of application claims that, even if the Minister invokes [TRANSLATION] "another public purpose," the project or proposed route lacks social acceptability. In particular, it cites surveys of residents in the municipalities affected, a referendum in the municipality of Frontenac that showed strong opposition to the project as proposed, and the many letters of objection sent in response to the notices of intention to expropriate.

[93] The Minister addressed the issue of social acceptability in her decision, responding to objections raised by, among others, some of the applicants. She referred to the Frontenac referendum results and the fact that the municipal council of Nantes had withdrawn its support for the project. She also noted that there were voices in favour of the project, including that of the municipal council of the City of Lac-Mégantic. She acknowledged that there were "differing positions on the rail bypass project" and highlighted Transport Canada's continuing efforts to communicate with those affected in the three municipalities. The Minister effectively concluded

that the project remained in the public interest even though there was opposition to it: Minister's decision at pp 4–6.

[94] In this context, it is clear that the applicants' argument regarding the project's lack of social acceptability is no more than a request that this Court reassess the evidence relating to support for and opposition to the project in order to draw its own conclusion on the public interest. In doing so, the applicants are asking the Court to assume a role it does not have in an application for judicial review under the reasonableness standard: *Vavilov* at paras 83, 108, 110, 125–26. It bears repeating that subsection 4(1) of the *Expropriation Act* authorizes the Minister—not the Court, the applicants or those objecting to the expropriation—to decide whether an expropriation is required for a public purpose. Judicial review of such a decision is not an assessment of the project's merits or its advantages and disadvantages.

[95] Subparagraph 11(1)(a)(ii) of the *Expropriation Act* permits the Minister to confirm a notice of intention to expropriate only after "receiving and considering" the report of the hearing officer. The applicants are not alleging that the Minister failed to meet this requirement. On the contrary, the notice of application states that [TRANSLATION] "[t]he Minister, after reviewing the report summarizing the grounds of objection of the witnesses, particularly those of the applicants, nonetheless decided … to confirm the notice of intention to expropriate" [emphasis added]. As the Supreme Court has affirmed, the requirement to "consider" the hearing officer's report means that the Minister must have the report before her, but it does not imply that the Minister must consider it to a particular degree or accept the grounds of objection: *Walters* at pp 486–87.

[96] Since the *Expropriation Act* does not require that an expropriation have a given degree of social acceptability, an alleged lack of social acceptability cannot in itself be a ground for setting aside a decision to confirm an expropriation. The applicants' argument in this respect, which merely reiterates information on social opposition to the project that has already been taken into account by the Minister, has no prospect of success.

[97] In their written submissions, the applicants allege that the *Expropriation Act* does not provide for any presumption of public interest in an expropriation for a railway project. They cite, in contrast, section 46 of the *Telecommunications Act*, SC 1993, c 38, which deals with expropriation for the purpose of providing telecommunications services to the public, and section 49 of the *Broadcasting Act*, SC 1991, c 11, which deals with expropriation for the purpose of carrying out the objects of the Canadian Broadcasting Corporation. This argument cannot be accepted in light of section 23 of the *Expropriation Act*, which applies to any expropriation that is the subject of a notice of intention to expropriate given in accordance with sections 4 and 5. It is also worth noting that subsection 4.1(3) of the *Expropriation Act*, which deals with expropriations requested by a railway company, contains a presumption that is almost identical to those in subsection 46(3) of the *Telecommunications Act* and subsection 49(2) of the *Broadcasting Act*.

[98] I therefore conclude that it is plain and obvious the grounds raised in the notice of application alleging that the planned Lac-Mégantic rail bypass is not a "public work or other public purpose" are doomed to fail.

d) *The allegation regarding negative environmental impacts*

[99] The notice of application also raises the environmental impacts of the project, including risks of drinking water contamination and depletion, and the destruction of wetlands. The applicants claim that the project would have a [TRANSLATION] "major and disproportionate environmental impact." The Minister's decision addresses these environmental issues, with a discussion of the grounds of objection relating to impacts on well water quality and volume, another on the grounds of objection relating to impacts on wetlands and the environment, and a third on environmental studies and public consultations: Minister's decision at pp 14–24.

[100] As with the issue of social acceptability, the applicants' argument simply reiterates their opposition to the project and its underlying rationale. In effect, it challenges the merits of the project, not the Minister's decision that the land is required for a public purpose. On judicial review of a decision to confirm an expropriation, the Court is simply not authorized to substitute its own decision for that of the Minister or to reassess the evidence regarding environmental issues in order to draw its own conclusions on public interest.

[101] The situation here differs from that in the recent decision of this Court in *Halton (Regional Municipality) v Canada (Environment)*, 2024 FC 348, cited by the applicants. In that decision, which is under appeal, Justice Brown concluded that the Minister of the Environment's decision to refer a project to Cabinet under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, then in force, and the subsequent Cabinet decision were unreasonable: *Halton* at paras 1–2, 10–14. Justice Brown found that neither the Minister of the Environment

nor Cabinet had meaningfully grappled with a central and important issue, namely the project's direct adverse environmental effects on human health: *Halton* at paras 10–12, 50–52, 96–107, 134, 144. Conversely, in this case, the Minister clearly considered and addressed the issue of environmental effects in her decision, and the applicants do not allege otherwise.

[102] Although the environmental issues are important, both to the applicants and more generally, this does not mean that they constitute in themselves legal grounds of objection to the Minister's decision: see *Vachon (Estate)* at para 76. This argument is also without legal basis and is doomed to fail.

e) *The allegation that the Minister does not have authority and acted in bad faith*

[103] The final argument raised in the notice of application is that the Minister was not authorized to initiate the expropriation process and acted in bad faith.

[104] The only reason advanced to support this argument is that the Minister knew that the process undertaken did not comply with the *Expropriation Act*. This allegation appears to be linked to the arguments based on sections 4 and 4.1 of the *Expropriation Act* and section 98 of the *Canada Transportation Act*. For the reasons given above, these arguments have no merit. The allegations based on them, claiming that the Minister was not authorized and acted in bad faith, knowing that the process undertaken did not comply with the legislation, have no chance of success.

[105] I note that the new allegations raised in the proposed amendments to the notice of application, regarding the Minister's alleged bias, could also be considered to be related to the issue of bad faith. I will discuss these amendments below.

f) *Conclusion*

[106] For all of these reasons, I conclude that the current notice of application does not raise any ground that could permit this Court to conclude that the Minister's decision is unreasonable. The Attorney General has persuaded me that the application is doomed to fail and is liable to be struck out. The remaining question is whether the proposed amendments could support a viable application for judicial review.

(4) Proposed grounds

[107] As summarized at paragraphs [21] and [22] above, the applicants seek to amend two paragraphs in the notice of application. The first (paragraph 44) alleges bias on the part of the Minister. The second (paragraph 48.1) reiterates facts mentioned at certain paragraphs of their motion for an interlocutory injunction.

a) *Allegation of bias*

[108] As explained above, a decision by the Minister to confirm a notice of intention to expropriate "attracts, at best, a standard of impartiality of a closed mind": *Pelletier* at para 55. Although the notice of application refers to an [TRANSLATION] "apprehension of bias," it also

alleges that the decisions were [TRANSLATION] “rigged in advance.” I take this last allegation to mean that the Minister was closed-minded.

[109] That said, a notice of application cannot merely allege that the Minister had a closed mind. It must also set out the facts that could lead to such a conclusion: *JP Morgan* at paras 42–45. The proposed amendments include seven subparagraphs setting out the facts on which the applicants are relying to support their allegation of bias, as described at paragraph [21] above. The issue is whether these allegations, considered individually or together, could conceivably lead the Court to conclude that the Minister had a closed mind. For the reasons that follow, I conclude that they do not.

[110] The applicants seek to allege that the decision to confirm the expropriation was [TRANSLATION] “premeditated” as early as January 2023 (the date of the letter from the Minister of Transport to the Minister) for political interests in order to meet the date of the tenth anniversary of the tragedy. I agree with the Attorney General that this allegation in no way supports a finding of bias. Section 5 of the *Expropriation Act* requires that the Minister be of the opinion that the Crown requires the land before registering a notice of intention to expropriate. While the *Expropriation Act* requires that the Minister be open to the grounds of objection expressed during the process, the Minister must be of the opinion that expropriation is required in order to initiate the process. This opinion cannot therefore be a sign of bias: *Pelletier* at para 61. The fact that the Minister takes “political” questions into account is also inherent in the nature of the decision and does not mean that the Minister was biased: *’753 Canada (FC)* at paras 87–89, aff’d *’753 Canada (FCA)*. It is also worth noting that question of whether the

Minister had a closed mind is only to be assessed at the stage of consideration of the objections and of the hearing, and not the outset of the process: *Pelletier* at para 64.

[111] The next four proposed subparagraphs refer to the memorandum sent to the Minister by her Deputy Minister. The applicants wish to allege that this memorandum shows that the decision was [TRANSLATION] "dictated" by the Minister of Transport; that he is the [TRANSLATION] "project manager" who controls the decisions in collaboration with Public Services and Procurement Canada and the Department of Justice Canada; that Transport Canada plans to transfer the rights to CMQ even though CMQ did not ask for the bypass; that there are [TRANSLATION] "secret agreements" between the government, CMQ and CPKC; that the decision was drafted before an English translation of the hearing officer's report was available; and that the proposed bypass route would not improve rail safety.

[112] Even accepting the allegation that the planned rail bypass is being led by the Minister for Transport, this fact in no way indicates that the Minister had a closed mind. The Minister is mandated by Parliament to be responsible for expropriations and must be of the opinion that the expropriated land is required for a public work or other public purpose. But the *Expropriation Act* in no way limits who is in charge of the project constituting the public work or other public purpose in question. Nor does it prevent another minister from asking the Minister to exercise her statutory powers to expropriate land for the Crown. The normal operation of the law is not a sign of bias. I agree with the Attorney General that the applicants have failed to raise any allegations of fact that would suggest inappropriate involvement by either minister.

[113] The allegation regarding “secret agreements” is difficult to understand, given that the notice of application itself refers to Transport Canada’s press release announcing these agreements. Even assuming that the intention is to refer to confidential agreements, the existence of confidential agreements between Transport Canada and CMQ in no way supports the conclusion that the Minister’s decision to confirm the intention to expropriate was biased. I also fail to see how the allegation concerning the English translation of the hearing officer’s report can support an allegation that the Minister had a closed mind, even if one takes as true that a draft of her decision had been written before the translation arrived.

[114] The other allegations put forward by the applicants in support of their claim that the Minister had a closed mind relate to rail safety (alleging that the proposed route is no safer than the current one), environmental impacts (referring to an email sent to the Minister after her decision, but before the confirmation notices were registered), and social acceptability (challenging the Minister’s analysis of the evidence). For the same reasons stated above, these allegations merely express the applicants’ disagreement with the Minister’s decision and her conclusion that the project remains in the public interest despite the grounds of objection presented. The notice of application fails to explain how these allegations show or even suggest that the Minister made her decision with a closed mind.

[115] Even if it is assumed that all the allegations of fact proposed in the proposed paragraph 44 are true, including the allegations that, since January 2023, the Minister had been of the opinion that the project was in the public interest; that she took into account political reasons linked to the tenth anniversary of the tragedy; that the project was being led by the

Minister of Transport, who asked the Minister to initiate the expropriation process and to do so expeditiously; that the Minister's decision was made in collaboration with Transport Canada, Public Services and Procurement Canada and the Department of Justice Canada; that Transport Canada entered into confidential agreements with CMQ; and that the drafting of the decision began before the hearing officer's report had been translated into English, it is plain and obvious that these allegations cannot show that the Minister had a closed mind.

[116] The proposed amendments to paragraph 44 are doomed to fail. They should therefore not be allowed under Rule 75 of the *Federal Courts Rules*: *McCain* at paras 20–22.

b) *Facts mentioned in the motion for injunction*

[117] As indicated above, the applicants wish to add to their notice of application a new paragraph 48.1 that states that [TRANSLATION] "[t]he applicants wish to reiterate the facts mentioned at paragraphs 15, 16, 17, 18, 25 and 42 to 54 of their motion for an interlocutory injunction."

[118] I agree with the Attorney General that the incorporation by reference of a number of alleged facts is not compliant with Rule 301(e) of the *Federal Courts Rules*. This Rule requires the notice of application to set out "a complete and concise statement of the grounds intended to be argued." As Justice Stratas has explained, a "complete" statement means all the legal bases and material facts that will support granting the relief sought, while a "concise" statement must include the material facts necessary to show that the Court can and should grant the relief, without including evidence: *JP Morgan* at paras 39–40. As the Attorney General submits,

Rule 301(e) does not allow the extensive incorporation by reference of allegations made in another pleading, as that would only lead to confusion and complications. For example, paragraph 25 of the notice of motion for an injunction itself incorporates by reference paragraph 24 of the notice of application, resulting in referential circularity that is confusing and unnecessary.

[119] In this regard, the applicants' reference to Rule 373(4) of the *Federal Courts Rules* is misplaced. Under this Rule, the Court may order that any evidence submitted at the hearing of a motion for an interlocutory injunction be considered as evidence submitted at the hearing of the proceeding. This section does not enable an applicant to incorporate by reference in the notice of application alleged facts contained in a notice of motion for an injunction.

[120] Consequently, the proposed amendment to paragraph 48.1 cannot be accepted as currently drafted.

[121] That said, this defect is one of form rather than substance. To determine whether the Court could allow paragraph 48.1 to be amended on condition, for instance, that the allegations of fact in question be set out in the notice of application, the nature of the allegations must be considered. This leads to the conclusion that the amendment should not be allowed in any form.

[122] The allegations of fact the applicants refer to in the proposed paragraph 48.1 are taken from a number of paragraphs in their notice of motion for an injunction. These paragraphs contain alleged facts regarding rail safety (paragraphs 15 to 16 and 42); social acceptability

(paragraphs 17, 25 and 49); treatments for trauma (paragraph 18); environmental impacts (paragraphs 43 to 46 and 52 to 54); project cost and the scope of the expropriation (paragraphs 47 to 48 and 50); and the premature nature of the project given the absence of CTA approval (paragraph 51). These allegations of fact largely duplicate those already set out in the notice of application and relate to grounds already considered above. As with the other allegations, the applicants are essentially repeating the grounds that were already raised during the objection process and that were considered but rejected by the Minister in her decision.

[123] It is worth specifying that some of these paragraphs refer to expert opinions, namely those of Dr. Lucie Viau, a psychiatrist, on treating trauma; Mr. Joël Chotte, an engineering consultant, on rail safety; and Dr. Sébastien Raymond, an engineering consultant, on environmental impacts. As the Attorney General notes, the Minister's decision names each of these experts and responds to the objections raised.

[124] It is clear that the applicants disagree with the Minister's conclusion that the expropriation is required for a public purpose and with her subsequent decision to confirm the expropriation. In the context of an administrative decision that is highly discretionary and has a political component, it is plain and obvious that an application for judicial review arising from this disagreement is doomed to fail. Therefore, the proposed amendment to paragraph 48.1 cannot be allowed.

(5) Possibility of amendment

[125] By analogy to Rule 221(1) of the *Federal Courts Rules*, which applies to actions, the Court's inherent power to strike out a notice of application for judicial review includes the power to do so with or without leave to amend.

[126] In the circumstances, I conclude that it is not appropriate to grant the applicants leave to amend their notice of application. The applicants have already presented the amendments they wished to make to the notice of application in response to Associate Chief Justice Gagné's decision. As I have concluded, these amendments are also doomed to fail and should not be allowed. The applicants have neither sought leave to further amend their notice of application nor put forward any other desired amendments that would establish a valid ground for setting aside the Minister's decision to confirm the expropriation.

[127] The notice of application will therefore be struck out in its entirety without leave to amend.

C. *Costs*

[128] The Attorney General seeks costs in the total amount of $3,740 in respect of his motion to strike and the applicants' motion to amend. The applicants do not seek costs, regardless of the outcome of the motions, and request that costs not be awarded against them.

[129] Normally, costs are awarded to the successful party, in this case the Attorney General. In all the circumstances of the case, and in the exercise of my discretion under Rules 400 and 401 of the *Federal Courts Rules*, I conclude that it is in the interests of justice not to award costs on these motions.

IV. Conclusion

[130] It is clear that the applicants are strongly opposed to the planned Lac-Mégantic rail bypass and to the expropriation of their property to carry out the project. That said, opposition to an expropriation, regardless of its good faith and the conviction with which it is expressed, is not a legal ground for setting aside an expropriation or the Minister's decision to confirm it. Even if the alleged facts in the notice of application and in the proposed amended notice of application are assumed to be true, the grounds put forward by the applicants to impugn the decision simply cannot enable them to succeed in their application for judicial review. The application is doomed to fail, and it is not in the interests of justice to continue the proceedings.

[131] The notice of application will be struck out without leave to amend. The applicants' motion to amend will be dismissed.

JUDGMENT in T-1450-23

THIS COURT'S JUDGMENT is that:

1. The Attorney General's motion to strike is granted. The notice of application is struck out in its entirety without leave to amend.
2. The applicants' motion to amend is dismissed.
3. The whole without costs.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1450-23
STYLE OF CAUSE:	DENIS VACHON (ESTATE OF) ET AL v MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES
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