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Annapolis Group Inc v Halifax Regional Municipality, 2022 SCC 36 - A new chapter on *de facto* Expropriation?

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Expropriation has been described as the "forcible acquisition by the Crown of privately-owned property, for public purposes"[1] and as an "ultimate exercise of governmental authority."[2] Described like that, it is not surprising that there is a rich history of caselaw concerning the exercise. Most recently, in October 2022, the Supreme Court of Canada (the "SCC") released its decision in *Annapolis Group Inc v Halifax Regional Municipality*, reconsidering the test for *de facto* expropriation, also known as constructive taking.

The *Annapolis Group* decision (in a 5-4 majority) suggests a shift in the common-law approach to constructive taking by emphasizing that the authority's acquisition of "beneficial interest" (a phrase that had become central in expropriation) to mean an advantage flowing from the land. However, the SCC's decision addressed only a partial summary judgment motion by Halifax to strike the respondent's ("Annapolis") claim for expropriation on the basis there was no cause of action because there was no actual acquisition. Thus, the SCC did not actually apply its stated approach to the merits of the dispute - instead, Annapolis was permitted to trying to prove its expropriation claim against Halifax.

Well before *Annapolis Group*, in 2006 the SCC had released the decision in *Canadian Pacific Railway v Vancouver*[3] and in doing so arguably set a high-water mark for claimants trying to establish a constructive taking. With *CPR v Vancouver*, claimants were required to show a public authority gained a beneficial interest in property through regulation, which some courts began to interpret as an acquisition of an interest in the subject land.[4] With the ruling in *Annapolis Group,* the SCC expands on the assessment surrounding a constructive taking, and (suggest the SCC dissenters) may have lowered the threshold for aggrieved owners advancing claims for same. This article discusses the treatment of constructive taking in Canada, as it informed the majority in *Annapolis Group*, and the potential implications *Annapolis Group* could have on subsequent decisions applying the reformulated approach.

Annapolis Group Inc v Halifax Regional Municipality

The history leading to *Annapolis Group* warrants review. Starting in the 1950s, Annapolis acquired acres of property near Halifax with the intention of developing and reselling the land. In 2006, the Regional Municipality of Halifax introduced a Municipal Planning Strategy that set

[1] *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 60 at para 18 [hereinafter *Annapolis Group*].
[2] *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32 at para 20.
[3] *Canadian Pacific Railway v Vancouver (City)*, [2006] 1 SCR 227 [hereinafter *CPR v. Vancouver*].
[4] *Annapolis Group*, para. 41.

zoning for future development, including over Annapolis' land. In the years that followed, Annapolis unsuccessfully attempted to obtain development approval. Eventually, it brought a claim against Halifax for expropriation (along with other claims including as unjust enrichment), alleging Halifax's zoning measures deprived the land of all reasonable or economic use and in doing so, effectively expropriated the land without any compensation.

Before Annapolis could go to trial, Halifax sought partial summary dismissal of Annapolis' expropriation claim, alleging that claim had no reasonable chance of establishing Halifax had acquired a beneficial interest in the land or flowing from the land, or that Annapolis had been deprived of all reasonable use. Halifax argued there had been no change of use, that there were no material facts in dispute, and that Halifax's continuance of existing zoning could not constitute the basis for an expropriation claim.

The motion judge dismissed Halifax's application, finding (among other things) that there were material facts in dispute surrounding the property's use as a park, its promotion of same, and the interplay with future planning approvals. However, the Nova Scotia Court of Appeal overturned, and struck Annapolis' claim.

In the SCC's majority ruling, the Court restored the motions judge's decision, allowing Annapolis future opportunity to advance its claim for constructive taking via trial. The SCC majority examined the jurisprudence upon which the *CPR v Vancouver* test was based, finding that the central phrase of "acquiring a beneficial interest" more concerned the *effect* of a regulation on a landowner, and less on whether proprietary interest in the land was actually acquired by the governing authority.[5]

The Court held that the pre-*CPR v Vancouver* jurisprudence supported the view that "beneficial interest", which the authority must acquire to ground an expropriation claim, did not refer to actual acquisition of interest by the authority, but rather, more broadly to mean "an advantage" flowing from the landowner to the Crown.[6] By interpreting *CPR v Vancouver* in a seemingly restrictive manner and requiring a claimant to establish an authority's actual acquisition of the subject lands, the SCC's majority cited a risk of eroding the distinction between *de facto* and *de jure* expropriation.

In contrast, and harkening the reasoning in *CPR v Vancouver*, the four-judge dissent in *Annapolis Group* disagreed with the majority, finding that "beneficial interest" should be understood in proprietary terms, and not the broader notion of an "advantage." The minority opined that the majority's accepting Annapolis' plea to deviate from the Court's decision in *CPR v Vancouver* could "radically" change the landscape of municipal planning by affording a "windfall to developers" and expanding the potential liability of municipalities engaged in land use regulation.[7]

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[5] *Annapolis Group*, at para 38.
[6] *Annapolis Group*, at para 38 & 40.
[7] *Annapolis Group*, at para 91.

While the decision in *Annapolis Group* stemmed from a motion for partial summary judgement, it suggests future reform in application of the test for constructive taking.

Expropriation, More Broadly?

Annapolis Group explores much of the central tenants of expropriation. Expropriation is typically described in two forms: (i) actual or *de jure* expropriation, whereby a government authority formally acquires title or possession of the land via legislation; and (ii) constructive taking or *de facto* expropriation, where there is an effective appropriation of private property via government exercise of regulatory powers that significantly impairs an owner's use and enjoyment of property. In Quebec, courts also recognize disguised expropriation, which is based on the *Civil Code of Québec,* but which focusses on use much less on the "acquisition branch of the CPR test".

With the event of a common law expropriation there is a presumptive right to compensation, although rebuttable via clear statutory language.[8] Perhaps because clear statutory language can limit use without creating corresponding rights to compensation, courts' considering expropriation may be confined to deciding whether the regulation in question entitles the respondent to compensation, rather than passing judgment on the manner in which a legislature "apportions the burdens [between private and public interests] flowing from use regulation."[9]

Historical Treatment of Constructive Taking and Discussed in Annapolis Group

In *Annapolis Group*, the SCC explored the pre-*CPR v Vancouver* case law to underscore consistency with the jurisprudence discussing "beneficial interest." First up, was the SCC's 1979 decision in *Manitoba Fisheries Ltd v The Queen*[10]*,* which yields perhaps the clearest support for the notion that intangible interests[11], other than land itself, may be considered property and subject to expropriation.

In *Manitoba Fisheries,* the Court was asked to decide whether a regulation restricting a corporation's rights on fish marketing and export had formed a taking.[12] The Court concluded that the impugned regulation "had the affect of depriving the appellant of its goodwill" and "rendering its physical assets virtually useless and that the goodwill so taken away constitutes property of the appellant for the loss of which no compensation whatever has been paid."[13] Not only did the regulation deprive the appellant of its rights, but in essence, transferred the

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[8] *Annapolis Group,* at para 21; see also *Attorney-General v De Keyser's Royal Hotel*, [1920] AC 508 (HL) at p 542.
[9] *Mariner Real Estate v Nova Scotia (AG)*, 1999 NSCA 98 at para 41 [hereinafter *Mariner*].
[10] *Manitoba Fisheries Ltd v The Queen*, [1979] 1 SCR 101 [hereinafter *Manitoba Fisheries*].
[11] Such as an advantage flowing from the land.
[12] The claimant, Manitoba Fisheries Ltd. ("MF"), was a privately held commercial fishery. Parliament enacted an Act which granted a federal Crown corporation a monopoly over the export of fish in Manitoba but allowed the corporation to delegate licenses to individual enterprises, such as MF. MF did not receive a license and went out of business.
[13] *Manitoba Fisheries*, at p 118.

appellants goodwill to the Crown. The Court focused on the *effect* of the regulation and the advantage – good will in a business enterprise - acquired therefrom by the public authority via regulation.

By virtue of its legislation (creating a provincial monopoly), the government had gained an economic advantage (in respect of the export of fish) that would otherwise have flowed to the corporation, but not actual acquisition of property. This led to the conclusion that "once it is accepted that the loss of goodwill of the appellant's business which was brought about by the Act and by the setting up of the Corporation was a loss of property and that the same goodwill was by statuary compulsion acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown."[14]

Next, the SCC examined the 1985 decision in *R v Tener*[15], which considered the Crown's gain in terms of non-monetary "value."[16] In *Tener* the Province of British Columbia denied the Teners a permit for mineral development and exploration on lands that were eventually located within a provincial park. Estey J., writing for the majority, indicated that the Province did not merely prevent the respondent from realizing their interests, but expropriated their interest in that it acquired, through refusal of extraction, the right granted to the Teners. Specifically, although the Teners maintained their mineral rights, the Province had regulated away rights to mineral exploration and so recovered the Tener's mineral rights while securing the advantage of preserving the land as a public park. In concurring, Wilson J. opined that the impugned regulation had the effect of depriving the respondent of their goodwill and transferring an *advantage* to the government, much like in *Manitoba Fisheries*. That the Teners need not to have established that the Province actually acquired a proprietary interest in land was underscored by Wilson J.'s reasons: "while the grant or refusal of a licence or permit may constitute mere regulation in some instances, it cannot be viewed as mere regulation when it has the effect of defeating the respondents' entire interest in the land."[17]

In 2006, the SCC released its decision in *CPR v Vancouver* confirming a two-part test for constructive taking: (i) a public body has acquired a beneficial interest in the subject property or flowing from it; and (ii) that it deprived the owner of all reasonable use of their property.[18] In *CPR v Vancouver*, the SCC held that the City of Vancouver did not engage in constructive taking by enacting a by-law denying Canadian Pacific Railway ("CPR") the ability to develop its land for commercial or residential use. Chief Justice McLachlin (writing a unanimous decision)

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[14] *Manitoba Fisheries*, at p 110.
[15] *R v Tener*, [1985] 1 SCR 533 [hereinafter *Tener*].
[16] *Ibid* at paras 59-60. Here the non-monetary "value" obtained by the Crown was an *advantage* – specifically, preserving the land as a provincial park in the public interest.
[17] *Tener,* at para. 34. Shortly after in 1991, the Province of British Columbia denied the issuance of a resource permit for exploration and development work on private land in *Casamiro Resource Corporation v British Columbia,* 1991 CanLII 211 (BC CA). Writing for the Court, Southin J held, "this order in counsel has the same practical effect as the refusals in the *Tener* case of a park use permit. It has reduced the Crown grant to meaningless pieces of paper…" In both cases, the Province's property rights in Provincial parks were enhanced through the elimination of subsurface rights that could have been realized through mining. In turn, an advantage had flowed to the Crown absent any formal acquisition of land.
[18] *CPR v. Vancouver*, at para 30.

accepted that acquisition of a beneficial interest related to property suffices to establish the first requirement of the test for constructive taking. However, she did not accept that development freeze, which provided "assurance that the land will be used or developed in accordance with [Vancouver] vision" (i.e., a public park) amounted to a beneficial interest.[19] As a result, some later courts appear to have interpreted this to mean that only a proprietary interest in property could satisfy the beneficial interest branch of the test.

The ruling in *CPR v Vancouver* had immediate effect. Namely, after *CPR v Vancouver*, plaintiffs not only had to show that the government acquired a legal interest, but that such an interest was tied to possession of the land. As Professor Russell Brown (now Justice) observed in academic articles, the two-step test established in *CPR v Vancouver*, and particularly the requirement to prove an acquisition of beneficial interest, rendered constructive taking almost unattainable, collapsing the distinction between *de jure* and *de facto* expropriation.[20] Thus the challenge in *Annapolis Group* appeared to be reconciling *CPR* with the prior jurisprudence.

Takeaways

The decision in *Annapolis Group* echoes many of the sentiments in the pre-*CPR v Vancouver* case law. The Court noted that the test for constructive taking is that stated by *CPR v Vancouver*. However, because the test focuses on the *effects* of a regulation and the *advantages* flowing from it, the decision suggests that future courts assessing constructive taking should consider, among other things, the nature of the land, nature of the government action, notice to the owner of restrictions at the time of purchase, and whether the restrictions are consistent with their reasonable expectations.[21]

Apart from notions that *CPR v Vancouver*, may have set the bar too high, certain recent courts have been able to apply the *CPR v Vancouver* analysis in the manner suggested in *Annapolis Group*. For instance, in *Compliance Coal Corporation v British Columbia*[22], the Court was satisfied that the first branch of the *CPR* test had been established where the Province had eliminated mining, which enhanced the value of surface lots owned by British Columbia. The Court opined that this was an "arguable equivalent to the benefit gained by the Province in *Tener* and *Casamiro*."[23] Similarly, Quebec courts appear to have not applied as restrictive a beneficial or "proprietary" interest requirement.[24]

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[19] *CPR v Vancouver*, at para 33.
[20] See Russell Brown, "Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience" (2009) 1 :3 International Journal of Law in the Built Environment 179 at p 186.
[21] *Annapolis Group*, at para 45.
[22] *Compliance Coal Corporation v British Columbia (Environmental Assessment Office)*, 2020 BCSC 621.
[23] *Ibid* at para 96.
[24] In *Dupras v City of Mascouche*, 2022 QCCA 350, the Quebec Court of Appeal agreed with prior decisions whereby the Quebec Court held that expropriation may result from a restrictive by-law or from the combination of a by-law and physical appropriation of land. See also *Montreal (City) v Benjamin*, 2004 CanLII 44591 where the Quebec Court of Appeal granted compensation for disguised expropriation to the owner of land following the adoption of by-laws having the effect of transforming the zoning from industrial to zoning restricted to limited public uses, thus depriving the owner of any use of his land.

Following *Annapolis Group*, claimants will still need to prove that through regulation, a public authority has gained or acquired an "advantage", but that the scope for a *de facto* expropriation may be greater. Thus, it remains to be seen whether courts applying *Annapolis Group* relax the stringent requirements for what constitutes an authority's acquisition of interest. Suffice to say, the discussion in *Annapolis Group* is unlikely to be the last word on the modern test for constructive taking.