De Facto Expropriation – Guidance from the Supreme Court of Canada

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In 2021,[1] I reported that the Supreme Court of Canada would be re-examining the law around *de facto* expropriation. That re-examination appears in *Annapolis Group Inc. v. Halifax Regional Municipality* 2022 SCC 36 [*Annapolis*] released on October 21, 2022. A slim majority of the Supreme Court of Canada panel hearing the case brought an interpretation to existing case law that theoretically expands the circumstances under which *de facto* expropriation will be found but it will be interesting to see over time if in practice much will change.

Annapolis fact pattern

From the 1950s to 2006, Annapolis Group Inc. acquired 965 acres of land [Lands] in Halifax Regional Municipality for development and resale. In 2006, Halifax council adopted a 25-year municipal planning strategy over an area that included the Lands. The planning strategy contemplated a portion of the Lands to be included in a regional park, but the plan also zoned the Lands for urban development. Development required adoption of a municipal resolution authorizing a secondary planning process and an amendment to the land use by-law.

Annapolis' attempts to develop the Lands beginning in 2007 ended with a resolution passed by Halifax council in 2016 refusing to initiate the secondary planning process. At this time, the municipality was actively encouraging use of the Lands for public park purposes and it was financially supporting organizations that encouraged such use.

Annapolis commenced a lawsuit alleging Halifax had constructively taken (i.e., *de facto* expropriated) the Lands through exercising dominion over the Lands by creating a public park in which Halifax encouraged the public to hike, cycle, canoe, camp and swim on the land, financially supporting organizations that encouraged use of the lands as a park and posting signs depicting the municipality's logo and telephone number. Annapolis also alleged that Halifax was liable for misfeasance in public office and unjust enrichment.

Halifax applied to the Nova Scotia Supreme Court to have the constructive taking aspect of the claim dismissed arguing that, on the basis of the existing law, there was no chance the claim of constructive taking could succeed. The application was dismissed. Halifax's appeal to the Nova Scotia Court of Appeal was allowed. The Court of Appeal ordered that the constructive taking claim be struck.

Annapolis appealed to the Supreme Court of Canada where, in a 5:4 split of the court, it was held that, on a proper interpretation of the case law and with appropriate evidence, Annapolis' constructive taking claim might indeed succeed. Annapolis' appeal was allowed with the court ruling that Annapolis' constructive taking claim can now proceed to trial.

The Supreme Court of Canada decision

The essence of the judgment by the majority can be condensed as follows:

a. *de facto* expropriation is more appropriately referred to as "constructive taking". The taking is "constructive" when there is effective appropriation of private property by the exercise of regulatory powers. No title to property is taken. It differs from a *de jure* taking which is a formal expropriation and a taking of title;[2]
b. constructive taking occurs where:[3]
   i. a beneficial interest in, or an advantage flowing from, property accrues to the state; and
   ii. the state's action removes all reasonable uses of the private property;
c. not every instance of regulating property is a constructive taking. The line is crossed when the effect of regulatory activity leaves no reasonable use of the property;[4]

d. evidence of a government's intention related to the subject property is not sufficient, nor required, to establish constructive taking. The focus is on the effect of the government's actions;[5]
e. zoning that preserves private land as a public resource may constitute a "beneficial interest" flowing to a government where it removes all reasonable uses of that land.[6]

Not surprisingly, a finding of constructive taking is fact dependent. Factors that can be considered include but are not limited to the following:[7]

a. does the government action target a specific owner or does it more generally advance a public policy objective;
b. did the owner have notice of the restrictions at the time the property was acquired;
c. are governmental restrictions on use consistent with the owner's reasonable expectations;
d. what is nature of the land and its historical and current uses (e.g., where the land is undeveloped, the prohibition of all potential, reasonable uses may amount to a constructive taking);
e. mere reduction in land value due to land use regulation on its own will not suffice;
f. what is the substance of the advantage to the state (e.g., permanent or indefinite denial of access to property or government's permanent or indefinite occupation could constitute a taking);
g. regulations leaving only notional use of the land, deprived of all economic value will satisfy the test;
h. confining uses of private land to public purposes such as conservation, recreation or institutional uses could suffice.

Before a property owner takes too much comfort from the list of factors set out above, it is important to note that the majority of the Supreme Court of Canada held that Halifax could defeat Annapolis' constructive taking claim by showing a *single* reasonable use of the property.[8] But what is a "single reasonable use"? In *Annapolis*, the majority found that even leasing the Lands was not a reasonable use if they were otherwise being used for public park purposes.[9] However, in *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5 [*CPR*], a case the panel hearing *Annapolis* held is still good law, the Supreme Court of Canada held that the Canadian Pacific Rail's Arbutus Corridor in Vancouver had a reasonable use for railway purposes even if it would not be economically feasible to operate a railway through the corridor.[10] For property owners, forecasting when a court will find that there is no single reasonable use of property following regulation by government is not going to be an easy task and will add significantly to the uncertainty inherent in litigation.

Does *Annapolis* change the law?

Prior to *Annapolis*, the leading authority on the law of *de facto* expropriation/ constructive taking was the Supreme Court of Canada decision in *CPR*. In *CPR* at paragraph 30, McLachlin C.J. wrote that there are two requirements to constitute a constructive taking:

a. an acquisition of a beneficial interest in the property or flowing from it; and
b. removal of all reasonable uses of the property.[11]

The majority in *Annapolis* found that properly interpreted, *CPR* did not dictate a requirement for creation of a beneficial interest in the affected land itself. Since the test contemplates an interest flowing from the property, it is enough to identify an advantage – not an actual acquisition.[12] They found that the *CPR* test is "... concerned with the *effect* of a regulatory measure on the landowner, and not with whether a proprietary interest was actually acquired by the government." [13] This might appear to be an easing of requirements to establish constructive taking. However, the requirement that there be not a single reasonable use of the affected property, together with the need to establish a benefit or advantage flowing to a government will surely make findings of constructive taking rare.

Somewhat ominously, the majority of the court in *Annapolis* noted governments' power to pass legislation expressly immunizing them from paying compensation to owners when property rights are confiscated.[14]

Closing

It is arguable whether *Annapolis* has done much to expand the situations in which constructive taking will be found. The first arm of the test has been broadened, but significant hurdles remain.

One thing is certain: *Annapolis* illustrates that land development is not for the faint of heart. Annapolis' land acquisition started in the 1950s. Active attempts to develop the Lands occurred from at least 2006 to 2016. The legal action related to the development process and the claim of constructive taking looks to be in its 6th or 7th year. The consequence of the Supreme Court of Canada decision is that the case is going back to trial to determine if the evidence supports a claim of constructive taking in accordance with the Court's new guidance and, of course, there is the possibility of further levels of appeal once the trial decision is released.

End notes

1 *Canadian Property Valuation*, Volume 65, Book 4, 2021
2 *Annapolis*, para. 18
3 *Annapolis*, para. 44
4 *Annapolis*, para. 19
5 *Annapolis*, paras. 52, 53, 57: Intention will be important in establishing claims under bad faith and ulterior motive.
6 *Annapolis*, para. 58
7 *Annapolis*, para. 45
8 *Annapolis*, para. 75
9 *Annapolis*, paras. 75, 76
10 *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5
11 *CPR*, para. 30 and *Annapolis*, para. 25
12 *Annapolis*, para. 25
13 *Annapolis*, para. 38
14 *Annapolis*, paras. 22, 78