Disguised Expropriation: Protecting Oil and Gas Interests

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The concept of expropriation concerns the power of a public authority to deprive a property owner of the enjoyment of the attributes of his or her right of ownership.[1] As the Supreme Court of Canada recently stated in the case of *Lorraine (Ville) v 2646-8926 Québec Inc.,* 2018 SCC 35, disguised (also known as *de facto*) expropriation involves an abuse of power which "occurs where a public body exercises its power of regulation unlawfully, that is, in a manner inconsistent with the purposes the legislature was pursuing in delegating the power … it is the reasons for the act which must be assessed. The courts will accordingly determine whether the act is fraudulent, discriminatory, unjust or affected by bad faith, in which case it will be treated as an abuse of power".[2] This occurs "[w]hen property is expropriated outside [the] legislative framework for an ulterior motive, such as to avoid paying an indemnity".[3]
In *Lorraine,* the Supreme Court considered the legitimacy of environmental regulation that impacted private property interests, affirming its previous position that the cause of action for *de facto* expropriation is a viable cause of action for testing the legitimacy of government action. It is clear that government action undertaken in the pursuit of environmental protection is increasingly being scrutinized as disguised or *de facto* expropriation, given its impacts on development rights, including those in the construction and oil and gas sectors.

In *Lorraine*, the plaintiff had purchased a wooded lot in a residential zone in the Town of Lorraine, Quebec, intending to eventually subdivide it for residential construction. A few years later, the Town adopted a by-law which caused more than half of the plaintiff's lot to become part of a conservation zone in which the authorized uses were limited to recreational and leisure activities, preventing the plaintiff's residential construction plans.

As confirmed by the Supreme Court, two remedies are available to persons and corporations whose rights are impacted by government action: (1) they may seek a declaration of invalidation or inoperability of the statutory, regulatory or administrative act which caused the right to be improperly expropriated, or (2) "if this option is no longer open to them",[4] they can claim an indemnity proportional to the value of the right that has been wrongly taken away or rendered worthless. The Supreme Court has previously affirmed these two avenues of relief in *Canadian Pacific Railway Co. v. Vancouver (City)*.[5]

As proved fatal to the first option in the *Lorraine* case, the action to declare the government act invalid must be brought within a reasonable timeframe from the moment that the expropriation occurred, all circumstances considered.[6] The issue of whether compensation is due to the plaintiff in *Lorraine* has been deferred to a later determination by the courts as the issues were bifurcated.

In the context of government action in the pursuit of environmental protection, in *The Queen in Right of British Columbia v Tener,*[7] the Supreme Court of Canada considered the enactment by the Province of British Columbia of legislation that required mineral claim owners to obtain permits before exploiting the resources located within provincial parks. The classification of the park in which Tener's claim was located resulted in permit claims being repeatedly denied, and ultimately, in a letter indicating that no new permits would be issued. The statute was silent on compensation. The Supreme Court found that, while the Crown had not acquired Tener's mineral rights, nor even the right to exploit them, the prohibition of Tener's operations added value to the Crown's land in preserving it – an acquisition of benefits in parallel with Tener's effective loss of mineral rights – similar to an unjust enrichment. The majority held that the Crown benefited from its refusal to issue a permit because its refusal "amounts to a recovery by the Crown" of part of the mineral interest the Crown had previously granted.[8] The Court also said that this recovery "took value from the respondents and added value to the park", and thus benefited the Crown.[9] Therefore, Tener was entitled to compensation. The Court stated that, "[e]xpropriation or compulsory taking occurs if the Crown or a public authority acquires from the owner an interest in property. Difficulty in computing the value of the interest taken is not relevant to either the right to compensation or indeed the determination of the interest so taken".[10] In that instance, the acquisition of benefits by the Crown, without an express denial of compensation, was sufficient to entitle the landowner to compensation.

Similar to the decision in *Tener*, in *Casamiro Resource Corp v British Columbia (Attorney General),*[11] the British Columbia Court of Appeal held that the mineral rights in a park had become "meaningless pieces of paper" as a result of legislation authorizing the Lieutenant Governor in Council to issue an order in council refusing issuance of a resource use permit in a park.[12] In that instance, compensation was awarded for the taking by the Crown.

Nevertheless, in considering the second option, the Quebec courts have potentially added a further element to consider in determining whether a given statutory, regulatory or administrative act constitutes disguised expropriation. The recent Quebec case of *Gastem inc. v Municipalité de Ristigouche-Partie-Sud-Est*,[13] which was decided just before *Lorraine* but is not considered in *Lorraine*, demonstrates that the analysis in Quebec can involve the intent behind the government action.

In July 2012, Gastem Inc. ("**Gastem**"), a Quebec-based oil and gas exploration and development company, obtained from the Quebec Ministries of Natural Resources and Wildlife; and Sustainable Development, the Environment and Parks (as they were then named) all of the necessary authorizations and permits to build an oil exploration platform on the territory of the Municipality of Ristigouche Partie Sud-Est ("**Ristigouche**"), in Eastern Quebec. In January 2013, however, a few months after Gastem had commenced construction of the platform, some of Ristigouche's citizens raised concerns about Gastem's activities potentially being detrimental to local water quality. Three months later, in early March 2013, in response to its citizen's

apprehensions, Ristigouche adopted a by-law[14](the "**By-Law**") which contains the following provision:

ARTICLE 7: INTERDICTIONS

It is forbidden for anyone to introduce or to permit that be introduced into the soil, by drilling or by any physical, mechanical, chemical, biological or other mean, any substance likely to affect the quality of groundwater or surface water destined to human or animal consumption, within a radius of two kilometers (2 km) of any artesian or surface well serving twenty (20) people or less.[15]

Since Gastem's platform and the planned exploratory drilling area were within the two-kilometre protection radius created by the By-Law, Gastem found itself prevented from pursuing its oil and gas activities in Ristigouche, despite having the provincial permits.

Confronted with this situation, Gastem sold its permits to another oil and gas company in July 2013 and took legal action against Ristigouche shortly thereafter. Gastem's main contention was that the By-Law was specifically targeted at preventing Gastem's otherwise legal activities and was the equivalent of a disguised, uncompensated expropriation. Gastem alleged that Ristigouche acted in bad faith by enacting the By-Law, which enactment amounted to the early termination of Gastem's oil exploration activities, for which Gastem sought compensation.

The Superior Court of Quebec determined that Ristigouche lawfully enacted the By-Law. The decision to enact the By-Law was determined to be political, not operational, and it was not demonstrated that Ristigouche's officials acted in bad faith, were intentionally targeting Gastem in particular, or acted under any undue influence. For the Court, the By-Law was enacted following serious efforts to meet the legitimate concerns of its citizens. Ristigouche had an obligation to protect the environment and water quality, and the By-Law addressed these concerns. Ristigouche had retained the services of experts and could demonstrate that general consultations were conducted and took place in an atmosphere of legitimate concern, and not with a view to maliciously hindering Gastem's activities. Overall, the balance of convenience favoured Ristigouche's 158 citizens' concerns over Gastem's private interests.[16]

Implications

The state of the law on disguised expropriation demonstrates that there is a fine line to be drawn between legitimate and illegitimate government action that impacts property. As may be learned from *Lorraine*, *Canadian Pacific Railway Co. v. Vancouver (City)* and *Gastem*, which all consider the scope of authority of municipalities' planning measures, potential claimants against governments for government action that negatively impacts private property interests should preserve their options for asserting the invalidity of the statutory, regulatory or administrative act by bringing their claims as soon as possible and by retaining ownership of the allegedly expropriated rights. Doing so enables them to preserve their right to pursue two alternative remedies: namely, challenging the validity of the government action and alternatively seeking compensation.

[1]*Lorraine (Ville) v 2646-8926 Québec Inc.*, 2018 SCC 35 ("***Lorraine***"), para 1.
[2]*Lorraine*, para 26. See also *Immeubles Port Louis Ltée v Lafontaine (Village)*, [1991] 1 S.C.R. 326 (1991 CanLII 82), at 349.
[3]*Lorraine*, para 2.
[4]*Lorraine*, para 2.
[5]2006 SCC 5.
[6]*Lorraine*, paras 28-33.
[7]*The Queen in Right of British Columbia v Tener*, [1985] 1 SCR 533 ("***Tener***").
[8]*Tener*, at para 20.
[9]*Tener*, at para 21.
[10]*Tener*, at para 8.
[11]*Casamiro Resource Corp v British Columbia (Attorney General)*, (1991), 80 DLR (4th) 1 (BCCA) ("***Casamiro***").
[12]*Casamiro*, at para 34.
[13]*Gastem inc. v Municipalité de Ristigouche-Partie-Sud-Est*, 2018 QCCS 779 ("***Gastem***").
[14]*By-Law No. 2013-002 Determining Separation Distances to Protect Water Sources and Artesian and Surface Wells in the Municipality of Ristigouche Partie Sud-Est* (our translation), which may be consulted online.
[15]BLG Translation.
[16]*Gastem*, paras 28-78.

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