Significant expansion to the law of “constructive takings”: Annapolis Group Inc v Halifax Regional Municipality

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On October 21, 2022, the Supreme Court of Canada (SCC) released a landmark decision with *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36 (*Annapolis*).

This decision provides further direction on the common law of *de facto* expropriation, or constructive taking, the latter being the preferred term from the SCC. This concept refers to situations where a private owner claims their land has been “taken” by the state, but there is no formal (or *de jure*) expropriation – *de jure* expropriation being where the state compulsorily acquires a property interest through its statutory authority in accordance with legislation governing expropriations and the payment of compensation.[1]

In 2006, the SCC in *Canadian Pacific Railway Co. v Vancouver (City)* (*CPR*) defined the common law test for when a *de facto* expropriation occurs, being when:

1. the government acquires a beneficial interest in private property or flowing from it; and
2. removes all reasonable uses of that property.[2]

In a split 5-4 decision, the SCC majority in *Annapolis* updated the test by stating that:

1. an “acquisition” does not require an actual acquisition of the property; instead, the interest acquired can *flow from* the property as well as being an interest *in* property;[3]
2. the “beneficial interest” acquired can be an *advantage* in respect of the lands;[4] and
3. the *intention* of the government behind the exercise of its regulatory authority may be relevant to determining whether an owner has lost all reasonable uses of its property.[5]

The majority affirmed that in assessing whether a constructive taking has occurred, the courts ought to focus on the *advantage* that flows to the state from the acquisition and

the *effect* of the taking on the property owner, emphasizing that substance, and not form is to prevail.[6]

In a strong dissent, the minority warned that instead of clarifying the test from *CPR*, the majority's reasons depart from it. In their view, the majority's decision dramatically expands the potential liability of municipalities engaged in land use regulation in the public interest and throws into question settled law that a refusal to "up-zone" property does not constitute a constructive taking.

As *Annapolis* was an appeal from a summary judgment application, the SCC did not apply the majority's test to the facts to determine if a constructive taking had occurred in this instance. With this clarified legal test, the matter will return to the Nova Scotia courts to determine if a taking, or one of the other torts at issue, can be made out on the facts of this case.

Background and lower court decisions

Annapolis Group Inc. (Annapolis) is a land developer in the Halifax area. Starting in the 1950s, Annapolis began to gradually accumulate 965 acres of vacant, treed land, with the intention of eventually developing it (the Lands).[7]

In 2006, the Halifax Regional Municipality (HRM) adopted a planning strategy to guide for land development in the municipality. This strategy (1) identified a portion of the Lands for possible future inclusion in a regional park; (2) zoned the Lands "Urban Settlement" and "Urban Reserve", denoting lands that may be developed within 25 years or after 25 years, respectively; and (3) prohibited serviced development prior to HRM adopting a "secondary planning process" and an amendment to the applicable land use/zoning bylaw.[8]

Beginning in 2007, Annapolis began seeking approvals to advance the development of the Lands.[9] In 2016, HRM passed a resolution refusing to initiate the secondary planning process "at that time."[10]

Annapolis sued HRM in 2017, claiming compensation in the amount of more that $120 million based on *de facto* expropriation, unjust enrichment, and abuse of/misfeasance in public office.[11] Annapolis alleges that HRM effectively transformed portions of the Lands into a public park by encouraging members of the public to use those portions for hiking, cycling, canoeing, camping, and swimming.[12]

In the first instance, HRM asked the Nova Scotia Supreme Court (NSSC) to dismiss the *de facto* expropriation part of Annapolis' claim by way of summary judgment, without allowing it to proceed to trial.[13] The trial judge denied HRM's application, holding that several of the facts could be material and the matter could not be dismissed summarily.[14] The Nova Scotia Court of Appeal reversed the NSSC's ruling, concluding that, for a "beneficial interest" to be acquired, land must "actually be taken" from Annapolis and that neither encouraging the public to trespass on the Lands nor not adopting a development plan could amount to *de facto* expropriation; additionally, the facts to conclude the test had not been met were not disputed. [15]

Key takeaways from SCC decision

1. Constructive taking does not require actual acquisition of the lands

The SCC majority held that a constructive taking does not require a state to actually acquire the lands in question. It considered that the first part of the *CPR* test referred to a beneficial interest "in the property **or flowing from it**," and held that inclusion of the term "flowing from it" made clear that the application was broader than requiring an actual acquisition.[16] Further, in the majority's view, requiring an actual acquisition would collapse the distinction between constructive takings and *de jure* takings.[17]

The dissent minority opined that a constructive taking insists upon the acquisition by the state of a proprietary interest and that such interest acquired by the authority must correspond to the deprivation suffered by the owner.[18]

2. "Beneficial interest in or flowing from property" means "an advantage"

In concluding that an actual acquisition is not required, the majority analyzed the meaning of the words "beneficial interest" as used in the first part of the *CPR* test. It found that a beneficial interest, including one "flowing from" the property, can best be understood as "an advantage."[19] Further, it appears the advantage can be to the state itself (as a pseudo-corporate entity)[20] or to the general public at large (speaking to the state's role as an entity on behalf of the public interest).[21]

3. Intention of the public authority is a relevant factor

Although the majority held that the intention of the public authority is not an *element* of the test to determine if a constructive taking occurred, the intention may be *relevant* to determining if all reasonable uses have been extinguished.[22] In effect, the intention of the public authority is a material fact when considering a constructive taking claim.[23]

The dissent disagreed, noting that this interpretation represented a departure from prior jurisprudence and is not an element of the test for a *de facto* or constructive taking.[24] In the view of the dissent, a public authority's motive or intention is not a material fact for such a claim and "cannot compensate for the failure to establish the two required elements of *de facto* expropriation."[25]

4. Application requires a realistic appraisal of matters in context

In holding that the overall test is concerned with effects and advantages, the SCC held that substance and not form must prevail in its application.[26] It directed courts to undertake a "realistic appraisal" of the effects and advantages of the regulatory measure in the context of the specific case, including but not limited to:

1. the nature of the government action, notice to the owner of the restrictions at the time the property was acquired, and whether the government measures restrict the uses of the property in a manner consistent with the owner's reasonable expectations;
2. the nature of the land and its historical or current uses; and
3. the substance of the alleged advantage (*e.g.* whether regulation permanently or indefinitely denies access to the property, leaves a rights holder with only notional use of the land, or confines the uses of private land to public purposes

such as conservation, recreation, or institutional uses (*e.g.* schools or municipal buildings)).[27]

5. Zoning regulation versus constructive taking

Although the primary issue addressed the common law test for constructive taking, the minority expressed significant concerns that the test espoused by the majority would dramatically expand the potential liability of any public authority engaged in the regulation of land.[28]

In the eyes of the dissent, HRM had simply refused to "up-zone" the lands in question and initiate the process for future development, which was a choice well within the municipality's power to make.[29] The dissent held that a simple refusal to up-zone lands should not result in a constructive taking, assuming to be true that the Lands have not changed status from when they were purchased.[30] The majority tried to address this concern, by observing that "in most cases, a public authority will not benefit from a refusal to up-zone vacant land"[31] and that a mere reduction in land value, alone, will not suffice to establish a constructive taking.[32]

Further considerations

A few observations arising from the SCC's decision in *Annapolis*:

1. This case highlights the ongoing tension between a municipality's authority to zone and regulate land use and the interests of landowners to use their lands as they see fit. The majority hints at a broader interpretation of what loss of "all reasonable uses" means; the dissent stands firmly with a municipality's entitlement to regulate land use in the public interest. In the end, by focusing on the first part of the *CPR* test, the question of what a loss of "all reasonable uses" means is left to be considered in the context of each application.
2. Any constructive taking case will turn first and foremost on its facts. As with *CPR* and the cases considered by the SCC in *Annapolis*, it is important to read this decision in its context. In this case, the question of whether constructive taking occurred in the context of a summary judgment motion where the question was whether there were genuine issues requiring trial. Some of the context of this case still remains to be seen, since material facts necessary to establish the *de facto* expropriation claim must be tested at trial.
3. It is open for the legislature to further clarify or limit potential liability where the purpose of the state's actions are to first and foremost regulate land uses. Many provinces already have some form of this wording in their land use regulation legislation, although the scope of the immunity varies.[33] It would be prudent for landowners and municipalities alike to review the scope and interpretation of such legislation in a post-*Annapolis* world.

If you have further questions about the *Annapolis* decision or constructive takings, please reach out to any of the authors or key contacts listed below.

Footnotes

[1] The common law concept of a "*de facto* expropriation" is similar to the civil law concept of a "disguised expropriation." See *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36 at paras 46–50 [*Annapolis* SCC].

[2] *Canadian Pacific Railway Co. v Vancouver (City)*, 2006 SCC 5 at para 30.

[3] *Annapolis* SCC, *supra* note 1 at para 25.

[4] *Ibid* at para 27.

[5] *Ibid* at para 53.

[6] *Ibid* at para 45.

[7] *Ibid* at paras 5, 87.

[8] *Ibid* at para 6–7.

[9] *Ibid* at paras 5, 8.

[10] *Annapolis Group Inc. v Halifax Regional Municipality*, 2019 NSSC 341 at para 9 [*Annapolis* NSSC]. See also *Halifax Regional Municipality v Annapolis Group Inc.*, 2021 NSCA 3 at para 18 [*Annapolis* NSCA]; *Annapolis* SCC, *supra* note 1 at para 8.

[11] *Annapolis* SCC, *supra* note 1 at para 97; *Annapolis* NSCA, *supra* note 10 at paras 2, 19.

[12] *Annapolis* NSCA, *supra* note 10 at para 21.

[13] *Annapolis* NSSC, *supra* note 10 at para 1.

[14] *Ibid* at paras 43–44.

[15] *Annapolis* NSCA, *supra* note 10 at paras 71, 89, 91.

[16] *Annapolis* SCC, *supra* note 1 at para 40.

[17] *Ibid* at para 39.

[18] *Ibid* at paras 100, 108, citing *Mariner Real Estate Ltd. v Nova Scotia (Attorney General)*, 1999 NSCA 98, Cromwell JA (as he then was).

[19] *Annapolis* SCC, *supra* note 1 at para 40.

[20] See *Annapolis* SCC, *supra* note 1 at paras 28–31, citing *Manitoba Fisheries Ltd. v The Queen*, [1979] 1 SCR 101.

[21] See *Annapolis* SCC, *supra* note 1 at paras 32–37, citing *The Queen (B.C.) v Tener*, [1985] 1 SCR 533.

[22] *Annapolis* SCC, *supra* note 1 at paras 52–53.

[23] *Ibid* at para 53.

[24] *Ibid* at para 119.

[25] *Annapolis* SCC, *supra* note 1 at para 129, citing *Annapolis* NSCA, *supra* note 10 at para 75.

[26] *Annapolis* SCC, *supra* note 1 at para 45.

[27] *Ibid*.

[28] *Ibid* at paras 85, 115.

[29] *Ibid* at para 87.

[30] See *ibid* at para 90.

[31] *Ibid* at para 77.

[32] *Ibid* at para 45(b).

[33] See e.g. British Columbia's *Vancouver Charter*, SBC 1953, c 55, s 569 and *Local Government Act*, RSBC 2015, c 1, s 458; Alberta's *Municipal Government Act*, RSA 2000, c M-26, s 621;Ontario's *Planning Act*, RSO 1990, c P.13, s 70.8(11); and most relevant to this case, Nova Scotia's *Halifax Regional Municipality Charter*, SNS 2008, c 39, s 270.

By

Emma Blanchard, Isaac Tang, Katie Butler, Stacy McFarlane, Brett Davis

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100 Queen Street
Ottawa, ON, Canada
K1P 1J9

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F 613.230.8842

Vancouver

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200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

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F 604.687.1415

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1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749