



Constructive Expropriation

The SCC's decision in *Annapolis v. Halifax*

Land use regulation in Canada

- Canadian courts have been reluctant to find constructive expropriation from restrictions placed by municipalities on property usage and development.
- Section 5 of the Urban and Rural Planning Act:
 - *A person is not entitled to compensation for a reduction in the value of that persons interest in land or for a loss or damage to that persons interest in land resulting from the application of this Act or a plan authorized under this Act.*
- Restrictions on development and land use exist in every municipality in Canada.

What is constructive expropriation?

- Different than a municipality's explicit statutory power to expropriate pursuant to s. 50 of the *URPA*.
- Under constructive expropriation, the municipality does not become the formal or legal owner of the property.
- Constructive expropriation is a claim for compensation for a reduction in property value due to municipal regulatory conduct or decision making
 - *Lynch v St. John's (City)*, 2016 NLCA 35
 - *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5
 - *R. v. Tener*, [1985] 1 SCR 533

Why does constructive expropriation matter to municipalities?

- *Lynch v St. John's (City)*, 2016 NLCA 35
 - Heightened concern following this decision.
 - Is this concern warranted?
- *KMK v St. John's*
 - Heritage designation on Bryn Mawr by City of St. John's.
- *Annapolis*
 - 2022 SCC decision relating to constructive expropriation.
 - Has this decision changed the law?

Factual overview of *Annapolis*

- 1950s
 - Annapolis Group Inc - land developer, acquired 965 acres of vacant treed land with the intention of developing it (the “Land”).
- 2006
 - Halifax Municipality adopted a planning strategy to guide for land development in the municipality. The strategy placed significant restrictions on the Land.
- 2007
 - Annapolis sought approvals to develop the Land.
- 2016
 - Halifax passed a resolution refusing to advance the development of the land.
- 2017
 - Annapolis sued, claiming that Halifax's regulatory measure deprived it of reasonable uses of its Land, which it claimed constituted a constructive taking.

Old test for constructive taking (*CPR*)

Two step analysis:

1. the municipality or government acquired a **beneficial interest** in the property, or flowing from it; and
2. there was a **removal of all reasonable uses** of the property.

New test for constructive taking? (*Annapolis*)

Two step analysis:

1. the owner need only prove that the municipality gained an ***advantage*** from the regulation or flowing from it.
2. more or less remains the same, though intention of municipality is now relevant in deciding whether all reasonable uses of land have been removed.

What changed?

- The majority emphasized that they weren't changing the law based on *CPR*, but rather “*bringing greater clarity*”.
- The dissent believes it significantly expands the potential liability of public authorities when regulating land use.
- Important to remember *Annapolis* was a summary judgment case. The court didn't rule on the facts of the case.

Part two of the *Annapolis* test: removal of all reasonable uses

- Heritage Zone?
 - Unlikely a removal of all reasonable uses.
 - *KMK* – not a removal of all reasonable uses.
- Conservation?
 - Depends on the factual circumstances.
 - *Lynch* - prohibition of “all activity on the Lynch property”
- Agricultural?
 - Unlikely a removal of all reasonable uses.

Part one of the *Annapolis* test: What does “advantage” mean?

Remember Old Test:

- the municipality or government ***acquired a beneficial interest*** in the property, or flowing from it
- New test:
 - No new case law since *Annapolis*
 - Changed to “*obtaining an advantage*”



What is a beneficial interest? (old test)

- Practically, first step meant that the government had to get some sort of proprietary interest in the property through its regulatory action:
 - *Lynch*: by preventing development, government essentially took away the owners' rights to the groundwater under the property, which the City needed for its own water supply;
 - *Tener*: by preventing mining, the government enhanced the value of its own park that surrounded the development.
 - *KMK*: City did not acquire beneficial interest from the heritage zoning.

Three new factors

- Court highlighted three factors that appear to relate to both steps of the test:
 - (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, regulation that leaves a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test. It could also include confining the uses of private land to public purposes such as conservation, recreation, or institutional uses (e.g. schools or municipal buildings))

Application of s.5 of the URPA?

Section 5:

A person is not entitled to compensation for a reduction in the value of that person's interest in land or for a loss or damage that person's interest in land resulting from the application of this Act or a plan authorized under this Act.

- Is this the statutory immunity the court referred to in *Annapolis*?
 - Unclear
- What about section consider the interplay of s. 96 and s. 98

Section 96 and 98 of the URPA

Section 96 (Purchase Notice)

- (a) ... that the land has become incapable of reasonably beneficial use;*
- (b) ... those conditions prohibit the reasonably beneficial use of the land; and*
- (c) the land cannot be made capable of reasonably beneficial use by another development...*

Section 98 (Development Prohibited)

Notwithstanding sections 96 and 97, where development in an area is prohibited under this or another Act or law of the province or of Canada for the purpose of protecting a watershed area or for another environmental reason sections 96 and 97 shall not apply to that land.

Water Resources Act

Property detrimentally affected

42. (1) Where a public water supply area is established under subsection 39(1) and it detrimentally affects the owner of property, that owner is entitled to receive compensation for that injury from the person who operated the waterworks, and the compensation may be decided between the parties.

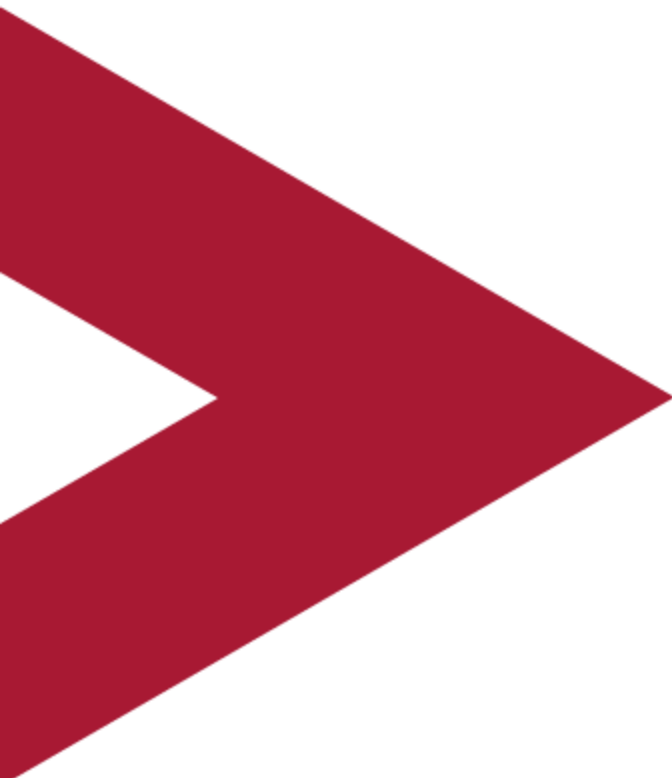
(2) In the case of a dispute between parties as to whether a property is detrimentally affected or the amount of compensation to be paid, the matter shall be decided under the Arbitration Act.

Pain points/liabilities going forward

- Conservation zoning likely a significant target.
 - However: consider *Mariner* problem – sand dunes vs. parks?
- Heritage zoning also a target, but likely defence on second step.
 - Unlikely heritage zoning are a removal of all reasonable uses of land.
- Relevance of intention.
- Relevance of loss of economic value.



Questions?



Environmental considerations in
the adoption and implementation
of municipal regulations,
development plans, and policies.

Development Regulations that reduce the risk of potential flood claims.

- Increase conservation zoning areas in Development Regulations.
- Require land to be developed on the basis of zero-net runoff.
 - Storm water management such as retention ponds, detention ponds and other practices that decrease runoff.
- Development plans for subdivisions and other large developments must include grading plans and stormwater management plans.
 - Preventing stormwater runoff onto adjacent properties or into nearby watercourses.
- Request Flood Risk Mapping



Canada-Newfoundland Flood Damage Reduction Program (CNFDRP)

- Department of Environment and Climate Change has a mandate to undertake Flood Risk Mapping (FRM) under Section 33 of the *Water Resources Act* in order to minimize flood damage in flood prone communities.
- Flood risk maps are based on flood events associated with the 1:20 and 1:100 annual exceedance probability (AEP).
- FRM studies are only undertaken on request from municipalities.
 - Municipalities agree to implement the Policy for Flood plain management if their community is selected for FRM.





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If you have specific questions related to these materials or their application to you, you are encouraged to consult a member of the Firm to discuss your needs for specific legal advice relating to the particular circumstances of your situation.

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