



Compensation in constructive (*De Facto*) expropriation – ignoring the scheme

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Constructive expropriation defined

In 2022, the Supreme Court of Canada [SCC] reconsidered the two-part test to be applied to decide if an arm of government has constructively expropriated property from an owner. An expropriation is 'constructive' (*de facto*) if there is 'effective appropriation of private property by a public authority exercising its regulatory powers.' Not every instance of regulating the use of property is a constructive taking. There must be deprivation of use and enjoyment in a substantial and unreasonable way.¹

The inquiry the courts undertake is:²

- first, has the public authority acquired a beneficial interest in the property or flowing from the property; and
- second, has the state action removed all reasonable uses of the property.

The test is simply stated, but its application is challenging and highly dependent upon the facts in each case.³

Pointe Gourde principle

Once constructive expropriation is established, the question of compensation for the owner arises. A general compensation principle in expropriation law is that the effect of the 'scheme' of the expropriation

on the subject property is to be ignored. The owner is not to be paid more or less on account of the scheme.⁴ This principle – commonly referred to as the *Pointe Gourde* principle – has its roots in the common law, but has since been codified in many expropriation jurisdictions.⁵

The *Pointe Gourde* principle will be the focus of the SCC in November 2023 when the court hears the appeal from the decision of the Newfoundland and Labrador Court of Appeal (NLCA) in *Lynch v. St. John's (City)* 2022 NLCA 29 (*Lynch*).

In 2016, the NLCA held that the Lynch property was constructively expropriated and ordered that the case be referred to the Board of Commissioners of Public Utilities to assess compensation.⁶ [2016 Decision] During the subsequent Board proceeding, the Board sought direction from the Supreme Court of Newfoundland and Labrador (NLSC) on the following question:

Whether the Lynch compensation should be assessed based on the uses permitted by the existing zoning, which are agriculture, forestry, and public utility uses, or whether the existing zoning should be ignored and the value determined as if residential development were permissible.

The NLSC held that compensation should be based on the existing zoning. On appeal, the NLCA disagreed, finding that compensation was to be determined without reference to existing zoning. This result would lead to a valuation based on a more lucrative residential use. In answering the question posed by the Board, the courts necessarily focussed on the *Pointe Gourde* principle that the scheme of the expropriation is to be ignored.

'Scheme' of an expropriation

Before reviewing the *Lynch* fact pattern, it is useful to consider how a 'scheme' of an expropriation was described by the English House of Lords:⁷

58. I turn, then, to the question of how the extent of a scheme should be identified in today's conditions. A scheme essentially consists of a project to carry out certain works for a particular purpose or purposes. If the compulsory acquisition of the subject land is an integral part of such a scheme, the *Pointe Gourde* principle will apply accordingly. Both elements of a project, the proposed works and the purpose for which they are being carried out, are material when deciding which works should

be regarded as a single scheme when applying the Pointe Gourde principle to the subject land.

59. The extent of a scheme is often said to be a question of fact. Certainly, identifying the background events leading up to a compulsory purchase order may give rise to purely factual issues of a conventional character. But selecting from these background facts those of key importance for determining the ambit of the scheme is not a process of fact-finding as ordinarily understood.

60. Take the present case. The purpose for which the claimants' land was acquired can be identified at two different levels of generality: for use as a nature reserve, or for use as a nature reserve to compensate for loss of the Taff/Ely site of special scientific interest through construction of the Cardiff Bay barrage. Factually, each of these stated purposes is correct. Which of these purposes is to be regarded as the more appropriate when identifying the scheme within the meaning of the Pointe Gourde principle is a matter for the tribunal's judgement.

In *Lynch*, there does not appear to have been any 'works' as part of the project for which expropriation was found to have occurred, but the NLCA did identify the purpose of the constructive expropriation.

Lynch fact pattern

The *Lynch* property was acquired through a 1917 Crown grant. It is located in the Broad Cove River (BCR) watershed which feeds a river that is used as a water supply to the City. At the time of the grant, the land was outside municipal boundaries and not subject to any public land use restrictions.

In 1959, the City's control area was expanded with the result that the Lynch

property became subject to the City's pollution control and expropriation powers. However, while use and development of the property became restricted, residential development was not expressly prohibited.

In 1964, the *City Act* was amended to generally prohibit erection of buildings above a certain elevation. In 1978, the *City Act* was amended to provide the City with discretion to permit building, but there was no guidance regarding the exercise of the discretion. As at 1978, the type and use of permitted buildings was not limited to any particular category such as agriculture, forestry or public utility use, which was to come later.

In 1992, an expansion of the City's boundaries captured the Lynch property. At this point, the property not only remained subject to restrictions on building and expropriation powers for pollution control purposes under the *City Act*, but also became subject to general land use zoning powers of the City. Shortly thereafter, a Municipal Plan and *Development Regulations* implementing the plan were adopted designating a Watershed zone that included the Lynch property. No permitted uses were listed, but three discretionary uses – agriculture, forestry, and public utility – were contemplated.

In 1996, a policy document commissioned by the City recommended that the City continue the *City Act* restriction on erection of new buildings in the watershed. The authors further recommended the continuation of a ban on urban development with a long-term intention to revert the areas to 'natural, pristine conditions.' The NLCA found that adoption of the policy recommendations demonstrated that the Watershed zoning restrictions in the Municipal Plan and *Development Regulations* implementing the plan had a direct connection back to the provisions of the *City Act*.

In 2011, the Lynches inquired about the uses to which their property might be put and were verbally advised by the City that no development would be allowed. In 2013, this position was formally reinforced

when an application to develop a 10-lot residential subdivision was not approved. The City relied upon the *City Act* and the Watershed zone under the *Development Regulations*, both embodying the purpose of protecting the BCR watershed from pollution and safeguarding the drinking water supply.

The City's 2011 and 2013 communications to the Lynches were the base upon which the Court of Appeal found in the 2016 Decision that there was constructive expropriation.⁸ The Court of Appeal relied upon the two-part test set out in the SCC decision in *Canadian Pacific Railway v. Vancouver (City)*.⁹

The Pointe Gourde issue in Lynch

The question posed by the Board of Commissioners required the courts to consider the scheme of the expropriation as a necessary step in determining whether compensation should be determined on the basis of agriculture/forestry/public utility zoning or on zoning that would allow residential use.

The 2016 Decision established that the process of expropriation began with the 1964 amendment of the *City Act* and ended with the 2013 refusal to allow development. But, was the 1994 amendment of the *Development Regulations* creating the discretionary agriculture/forestry/public utility use part of the expropriation scheme? Under the *Pointe Gourde* principle, if the 1994 amendment was part of the scheme, then zoning and restriction on permitted use introduced by the amendment was to be ignored in setting compensation.

The NLCA recounted the Lynch position as follows:¹⁰

[46] The appellants characterize the scope of the expropriation scheme more broadly. They suggest that every enactment, and every action taken by the City, between 1964 and 2013 affecting the appellants' property and related

to the City's overarching concern for pollution control and provision of a safe water supply, are part of the scope of the expropriation scheme to be ignored for valuation purposes. On the basis asserted by the appellants, the 1994 *Development Regulations* would be ignored and valuation would not be restricted to the three discretionary used identified in the regulations.

The NLCA's analysis of the *Pointe Gourde* principle began with a review of the province's expropriation legislation at section 27(a) that provides in part as follows:

(a) the compensation shall be an amount based on the fair market value of the land and on existing use value *at the time of the beginning of expropriation proceedings* ... (Emphasis added.)

The NLCA held that 'beginning' is not necessarily when a formal notice of expropriation is issued or, in the case of constructive expropriation, the date on which the expropriation crystallizes. Rather, the court must determine when a development scheme leading to expropriation began. Commencement of the scheme is not the act of expropriation. (Does this specific language in the statute make the result unique to Newfoundland and Labrador? Take for example the situation in British Columbia where compensation is based on the market value "at the date of expropriation".)

The NCLA's review of the case law provided the following general principles:¹¹

- compensation is based on existing use at the commencement of the expropriation proceedings. (Time and new cases from other jurisdictions will tell if this is unique to Newfoundland and Labrador);
- any change in value caused by the scheme is to be ignored;
- *Pointe Gourde* is not to be pressed too far – a fair and reasonable result is the objective;
- an expropriating authority cannot downzone a property in anticipation of the need to acquire property;

- if a zoning bylaw is of general application, not linked to the expropriation, then it is not ignored;
- there must be a causal connection between the imposition of the use restriction and the subsequent expropriation;
- the scope of the intended works and their purpose are not necessarily found only in formal resolutions or documents of the acquiring authority; and
- in case of doubt, a narrower rather than broader view of the scheme will be taken.

In its application of the principles the NLCA extracted from the case law, the court held that the *Development Regulations* and the *City Act* in relation to watershed issues had one central focus and intent – prevention of pollution of the City's water supply. Expropriation to achieve the objectives was not excluded from the legislative authority.¹² The state of mind of the City in adopting the regulations limiting land use in 1992 was to further the objective of water pollution control mandated by the *City Act*. The policy was to use the powers under the *City Act* in a way complementary to the powers under the Municipal Plan and the zoning bylaw, with the ultimate intention to revert the lands back to a natural and pristine condition. This meant refusing all development and use which amounted to constructive expropriation. Expropriation was the logical result of the zoning policy – the causal connection could be inferred between the adoption and application of the watershed zoning regulations and the expropriation. The *Development Regulations* were not an independent enactment.

Closing

Once constructive expropriation (*de facto*) is established, expropriation legislation determines how the affected owner is to be compensated. This will generally give rise to a consideration of the *Pointe Gourde* principle in accordance with its codification in the relevant jurisdiction and require an identification of the scheme of the expropriation. The identification of the scheme in a constructive expropriation can be challenging because there are less

obvious indicators of the scheme compared to an actual expropriation and an owner must establish a causal connection between all the actions taken (or not taken) by a regulatory authority. Expropriation practitioners await the guidance the Supreme Court of Canada that will come from the *Lynch* appeal.

End notes

- ¹ *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 (*Annapolis*), paras. 18-19
- ² *Annapolis*, para. 44
- ³ "De Facto Expropriation – Guidance from the Supreme Court of Canada", Canadian Property Valuation, Vol. 67, Book 1, 2023, pages 46-47
- ⁴ Todd, Eric C.E. *The Law of Expropriation and Compensation in Canada*. 2d ed. Toronto: Carswell Thomson Professional Publishing, 1992, pp. 158-160
- ⁵ *Pointe Gourde Quarrying & Transport Co. v. Sub-Intendent of Crown Lands*, (1947) A.C. 565 (H.L.); see for example *Expropriation Act*, RSNL 1990, c E-19, s 27; *The Expropriation Act*, CCSM c E190, s 27(2); *Expropriations Act*, RSO 1990, c E.26, s 14(4)(b); *Expropriation Act*, RSBC 1996, c 125, s 33; *Expropriation Act*, RSA 2000, c E-13 s 45; *Expropriation Act*, RSNB 1973, c E-14, s 39(4); *Expropriation Act*, RSNS 1989, c 156, s 33
- ⁶ 2016 NLCA 35
- ⁷ *Waters and Others v. Welsh Development Agency*, 2004 UKHL 19 at para. 58
- ⁸ 2016 NLCA 35 at paras. 22, 24, 66-67
- ⁹ 2006 SCC 5, subsequently re-visited in *Annapolis* cite above.
- ¹⁰ 2022 NLCA 29, para. 46
- ¹¹ 2022 NLCA 29, para. 109
- ¹² 2022, NLCA 29, para. 112

This article is provided for the purposes of generating discussion and to make practitioners aware of certain challenges presented in the law. It is not to be taken as legal advice. Any questions relating to the applicability of expropriation legislation in particular circumstances should be put to qualified legal and appraisal practitioners. ■