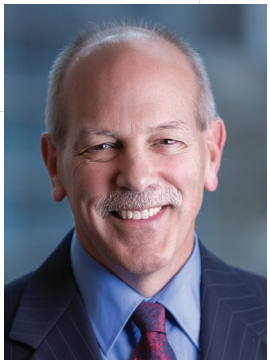

De facto expropriation soon to be revisited

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Under Canadian law, there is a presumption that, when the state takes private property, compensation will be paid. In opposition to this general principle, there is the power of the state, particularly local government, to strip away property rights and associated value through land use regulation without compensating the owner. One recognized, but not a particularly successful avenue for challenging impairment of property rights through land-use regulation, is to claim compensation under the principle of *de facto* expropriation.

In the coming months, the Supreme Court of Canada will revisit the law regarding *de facto* expropriation[1] and so it is timely to consider what is currently required to establish this cause of action in anticipation of the court's fresh look on the matter.

De facto expropriation was considered by the Supreme Court of Canada in *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5 [*CPR*]. CPR owned a land corridor that was no longer used in its rail service. The City of Vancouver council passed an Official Development Plan by-law designating the corridor for use as a public thoroughfare for transportation and uses such as heritage walks, nature trails, and cycling paths. Development contrary to the plan was prohibited. Use as a rail line was not prohibited, but it was uneconomic to do so. The court noted that "The effect of the by-law was to freeze re-development potential of the corridor and to confine CPR to uneconomic uses of the land." CPR sought to have the by-law struck down or to be compensated for the restrictions on the use of the corridor. CPR was unsuccessful on both grounds.

Concerning the claim for compensation, CPR relied upon the presumption noted above that a property owner is to be compensated when the state takes its property. CPR asserted that the City's by-law was a *de facto* expropriation because the by-law was effectively a taking preventing re-development for any profitable purpose. The Supreme Court of Canada held that *de facto* expropriation claims require the claimant to prove two elements: 1) acquisition of a beneficial interest in the property or flowing from it, and 2) removal of all reasonable uses of the property. The court held that CPR had not proved either element. First, the City had not acquired a beneficial interest, but merely some assurance that the land would be used or developed consistent with the by-law. Second, the by-law did not remove all reasonable uses of the property. The court noted that the inquiry is not concerned with the highest and best use of the property. Rather, the inquiry is into the nature of the land and the range of reasonable uses to which the property had been put. The by-law did not prevent CPR from operating a railway along the corridor. The fact that running the railway would be uneconomic was not determinative of the question.

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If *de facto* expropriation was not available in *CPR*, then when will it be available? Three examples might serve to clarify. The first example, *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 SCR 101 (SCC) [*Manitoba Fisheries*], does not expressly speak of *de facto* expropriation, but it does discuss the concepts of government "taking" and expropriation, and it reinforces the

presumption of no taking of property without compensation. In *Manitoba Fisheries*, the appellant had owned and operated a fish exporting business until the federal government passed legislation giving a Crown corporation a monopoly on such activities and thereby wiping out the appellant's business. The appellant successfully sued for compensation. Mr. Justice Ritchie, writing for the Supreme Court of Canada stated in part:

> It will be seen that, in my opinion, the *Freshwater Fish Marketing Act* and the Corporation created thereunder had the effect of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless, and that the goodwill so taken away constitutes property of the appellant for the loss of which no compensation whatever has been paid. There is nothing in the Act providing for the taking of such property by the government without compensation and, as I find that there was such a taking, it follows, in my view, that it was unauthorized having regard to the recognized rule that "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation" *per* Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel, supra.*

In *R. v. Tener*, [1985] 1 SCR 533 (SCC) [*Tener*], the British Columbia government decided that it would no longer issue permits allowing miners to work their Crown-granted mineral claims in Wells Gray Park, so that the land was enhanced as a public park. The Supreme Court of Canada found that a *de facto* expropriation had occurred. The court held that the government had, in effect, taken back what it had granted in the mineral claims by preventing the very use for which the mineral claims had been granted. Further, there was a corresponding benefit through the enhancement of the public park.

In *Casamiro Resources Corp. v. British Columbia (Attorney General)* 1991 CarswellBC 86 (BCCA), the British Columbia Court of Appeal applied *Tener* to another situation involving mineral rights affected by the creation of Strathcona Park. A combination of legislation prevented owners of mineral rights from exercising those property rights. Madam Justice Southin, writing for the court, stated that a particular Order-in-Council prohibiting the issuance of permits for mineral claims was an expropriation on the basis that the Crown grants became "meaningless pieces of paper." In her reasons for judgment, her ladyship wrote in part:

> ... The fact that the Lieutenant Governor in Council does not call his act an expropriation and has not followed the procedures

laid down in the *Expropriation Act*, does not deprive the owner of the rights given to owner by ss. 9 and following of the *Expropriation Act* ...

The three examples above demonstrate the possibility of a claim for compensation without a physical taking of property, but it is very difficult to overcome the strong judicial authority in favour of land use regulation even though the courts have long recognized that land use regulation can be detrimental to the financial interests of landowners. For example, in *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98 (N.S.C.A.) [*Mariner*], at paragraph 42 Cromwell, J.A. wrote:

> 42 In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation. It is settled law, for example, that the regulation of land use which has the effect of decreasing the value of the land is not an expropriation ... I would refer, as well, to the following from E.C.E. Todd, *The Law of Expropriation in Canada*, (2nd, 1992) at pp. 22-23:
>
> Traditionally the property concept is thought of as a bundle of rights of which one of the most important is that of user ...
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> Today the principal restrictions on land use arise from the planning and zoning provisions of public authorities. **By the imposition, removal or alteration of land use controls a public authority may dramatically increase, or decrease, the value of land by changing the permitted uses which may be made of it. In such a case, in the absence of express statutory provision to the contrary an owner is not entitled to compensation or any other remedy notwithstanding that subdivision approval or rezoning is refused or development is blocked or frozen pursuant to statutory planning powers** in order, for example, to facilitate the future acquisition of the land for public purposes. "Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down ... (but) a taker may not, through the device of zoning, depress the value of property as a prelude to compulsory taking of the property for a public purpose.: ... (emphasis added)

This juxtaposition of expropriation and land use regulation was in issue in *Halifax Regional Municipality v. Annapolis Group Inc.* 2021 CarswellNS 4, leave to appeal to the Supreme Court of Canada allowed, 2021 CarswellNS 455/456 [*Annapolis*]. *Annapolis* is the vehicle by which the Supreme Court of Canada will review the law of *de facto* expropriation. The Halifax Regional Municipality (HRM) passed a planning strategy to guide development. Two designations applied to the owner's land: 1) Urban Settlement allowing urban forms of development over a 25-year period, and 2) Urban Reserve identifying land that could be developed beyond the 25-year horizon. The plan included conceptual boundaries for a regional park. The development required resolution by HRM Regional Council and amendment of a land-use by-law. The owner wanted to develop what necessitated an HRM secondary planning phase for the property, but, in the end, HRM passed a resolution refusing to initiate the secondary planning process. Further, HRM was actively supporting and promoting the use of Annapolis' property by the public for recreational purposes. Annapolis commenced a lawsuit taking the position that the land had been *de fact* expropriated.

The Nova Scotia Court of Appeal acknowledged the legal principle that, unless there is express language in the legislation to the contrary, the legislation is not to be interpreted as allowing the taking of property without compensation. Nevertheless, the court, relying on *CPR* and the *de facto* expropriation case law before *CPR* held that the two-part test had not been made out.

In coming to its conclusion, the Nova Scotia Court of Appeal referred to a line of case authority that will be an important part of Annapolis' argument at the Supreme Court of Canada hearing. The concept of "disguised expropriation" has been developing in Canada, particularly under the Civil

Code in Quebec. The Supreme Court of Canada recognized the concept in *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35 [*Lorraine*]. The Court of Appeal's view of the "disguised expropriation" is captured in paragraphs 78 to 82 of *Annapolis*:

> 78 The civil case of *Lorraine* ... does not dictate a contrary conclusion. In that case, the plaintiff claimed a series of remedies including a declaration that the by-laws were a nullity and the Municipality's action was a disguised expropriation. Only the timeliness of the action came before the Supreme Court. However, in dismissing the claim, the Court noted that the disguised expropriation claim could continue.
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> 79 The Motions Judge here referred to the following excerpt from the opening two paragraphs of the Supreme Court of Canada's decision:
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> 35 As for *de facto* or constructive expropriation, the concept is addressed by the Supreme Court of Canada in Chief Justice Wagner's opening paras. in *Lorraine* ...:
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> 1 **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.** Because of the importance attached to private property in liberal democracies, the exercise of the power to expropriate is strictly regulated to ensure that property is expropriated for a legitimate public purpose and in return for a just indemnity. In Quebec, the *Expropriation Act*, CQLR, c. E-24, limits the exercise of this power and lays down the procedure to be followed in this regard.
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> 2 **When property is expropriated outside this legislative framework for an ulterior motive, such as to avoid paying an indemnity, the expropriation is said to be disguised.** Where a municipal government improperly exercises its power to regulate the uses permitted within its territory in order to expropriate property without paying an indemnity, two remedies are therefore available to aggrieved owners. They can seek to have the by-law that resulted in the expropriation declared either to be null or to be inoperable in respect of them. If this option is no longer open to them, they can claim an indemnity based on the value of the property that has been wrongly taken from them. [emphasis in original]
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> 80 The statement that property expropriated outside of the legislative framework for an ulterior motive is "disguised" does not mean that the two branches of the legal test for *de facto* expropriation do not need to be met.
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> 81 This was recently affirmed in *Ville de Québec c. Rivard*, 2020 QCCA 146 (C.A. Que.). After referencing *Lorraine*, the Court stated:
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> 63 It has been long recognized that, in order to be deemed disguised expropriation, legislation must be to such a degree restrictive that it makes impossible the exercise of the right of ownership, and be tantamount to a confiscation, insofar as the zoning is deployed to expropriate without compensation.
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> 82 With respect, *Lorraine (Ville)* does not expand the well-settled criteria for establishing *de facto* expropriation. Motive is not a material fact in the context of a *de facto* expropriation claim.

We shall soon see if the current understanding of *de facto* expropriation will prevail, whether the two-part test set out in *CPR* will remain unaltered and what role "disguised expropriation" may have in protecting property rights.

End note

[1] *Annapolis Group Inc. v. Halifax Regional Municipality*, Supreme Court of Canada File No. 39594

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