

# Supreme Court of Canada clarifies law on de facto expropriation

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## Introduction

On October 21, 2022, the Supreme Court of Canada (SCC) released its decision in *Annapolis Group Inc v. Halifax Regional Municipality* which revisited the test for constructive taking, also known as de facto expropriation.<sup>[1]</sup>

In a 5-4 decision, the SCC clarified the circumstances in which government regulation of land use may amount to a constructive taking of private property. Instead of requiring a property owner to show that a government authority obtained a formal proprietary interest in property, the SCC explained that a claimant must demonstrate: (1) that the government obtained an “advantage” flowing from the property; and, (2) the regulation eliminates all reasonable or economic uses of the property.

## Expropriation

By way of background, at law, a “taking” or “expropriation” is the “forcible acquisition by the Crown of privately owned property...for public purposes”.<sup>[2]</sup> There are two forms of taking: (1) de jure taking, when the government formally acquires title or possession of the property through legislation; and, (2) constructive, or de facto, taking, where there is an effective appropriation of property by government exercising regulatory powers that significantly impair an owner’s use and enjoyment of property.<sup>[3]</sup> At common law, there is a presumptive right to compensation when the government takes private property. This presumption may only be displaced by clear statutory language stating that compensation is not required.<sup>[4]</sup>

## Factual background

Annapolis Group Inc. (Annapolis) owned 965 acres of land (the Annapolis Lands or Lands) in Halifax which it intended to develop. From 2006 onwards, Halifax Regional Municipality’s (Halifax) municipal planning strategy contemplated the possibility of development on the Annapolis Lands, but development could not occur until Halifax adopted a resolution authorizing a “secondary planning process” and an amendment to the applicable land use by-law.

After attempting to develop the Lands for several years, Halifax denied Annapolis the necessary authorizations in 2016. Annapolis then commenced a claim for, among other things, constructive taking. Annapolis alleged that Halifax’s regulatory measures deprived it

of all reasonable or economic uses of its land and that Halifax had acquired a beneficial interest in the Lands by encouraging and allowing members of the public to use the Lands for recreational activities.

Halifax sought summary dismissal of Annapolis' constructive taking claim. The motions judge dismissed the motion for summary dismissal, finding that the claim raised genuine issues of material fact requiring trial, such as whether Halifax was in fact encouraging the public to use the Lands as a park. The Nova Scotia Court of Appeal overturned the motions judge, summarily dismissing the constructive taking claim on the basis that it had no reasonable chance of success.

## The SCC majority opinion

The majority of the SCC allowed the appeal and ordered that Annapolis' claim proceed to trial to determine: (1) whether Halifax is, in fact, promoting the Annapolis Lands as a public park; and, (2) whether Halifax's actions have eliminated all reasonable uses of the Lands.

### A beneficial interest is an advantage

The majority confirmed that the test for constructive taking requires a claimant to show that government: (1) acquired a beneficial interest in the private property; and, (2) removed all reasonable use of the property. But the majority explained that "beneficial interest" must be understood broadly as an "advantage" flowing from the property to the state and does not need to be an actual proprietary acquisition.<sup>[5]</sup>

### Circumstance must inform the constructive taking analysis

Further, the majority instructed courts deciding whether a regulatory measure amounts to a constructive taking to consider substance over form and assess, among other things, the nature of the land, the nature of the government action, notice to the owner of restrictions at the time of property acquisition, and whether the restrictions are consistent with the owner's reasonable expectations.<sup>[6]</sup> In other words, context is part of the constructive takings analysis.

Notably, the majority stated that "regulations that leave a rights holder with only notional use of the land, deprived of all economic value" would constitute a constructive taking as would "confining the uses of private land to public purposes, such as conservation, recreation, or institutional uses".<sup>[7]</sup>

### Motive is relevant

The other key issue the majority addressed was whether the intention of a public authority in regulating property is relevant to the test for constructive taking. Here, the majority held that, while the intention of government is not an element of the test for constructive taking, it may provide evidence to help show that a constructive taking occurred.<sup>[8]</sup> For example, an intention to take constructively is evidence that may support a finding that a landowner has lost all reasonable uses of the land. However, this does not change the substance of the test, which is whether government restrictions on property confer an advantage on government that effectively amounts to a taking.<sup>[9]</sup>

## Common law property rights confirmed

The majority also noted that Canadians have common law rights in property even though there are no property rights in the *Canadian Charter of Rights and Freedoms*. The lack of property rights in the *Charter* does not preclude claims for constructive takings based on these common law rights.<sup>[10]</sup>

## The SCC dissenting opinion

The dissent would have dismissed the appeal. Disagreeing with the majority, the dissent held that the “beneficial interest” acquired by government must be understood as a proprietary interest, not the broader idea of an “advantage”, and that intention is not relevant to a takings analysis.<sup>[11]</sup>

## Conclusions

The SCC’s clarification provides a more substantive and contextual understanding of the test for constructive taking, or de facto expropriation, which focuses on effects to the property owner. Following this decision, government can no longer argue that the law requires a transfer of a formal property interest from the property owner to government to establish a constructive taking.

Importantly, this case also clearly establishes that zoning “which effectively preserves private land as a public resource” may give rise to a claim for constructive taking if it also deprives the property owner of all reasonable uses of the land.<sup>[12]</sup>

However, the SCC confirmed that any right to compensation can be limited by statute.<sup>[13]</sup> Several statutes that give government power to regulate land use contain language that may be used as a basis to argue that no compensation should be paid. The scope and effect of such language will depend on the nature of any constructive taking and the kind of claims that are made.

Going forward, property owners will have a path to establishing a claim for constructive taking when government regulation and land use decisions have the effect of depriving property owners of all reasonable uses of their property, subject to any statutory limitations.

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[1] Note that the majority expressed a preference for the term “constructive taking” as opposed to “de facto” or “regulatory taking” (*Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 at para 17 [*Annapolis*]).

[2] *Annapolis* at para 18.

[3] *Annapolis* at paras 18-19.

[4] *Annapolis* at paras 21-22.

[5] *Annapolis* at para 40

[6] *Annapolis* at para 45.

[7] *Annapolis* at para 45.

[8] *Annapolis* at para 53.

[9] *Annapolis* at para 53.

[10] *Annapolis* at para 24.

[11] *Annapolis* at paras 85, 86, 110, 119.

[12] *Annapolis* at para 58.

[13] *Annapolis* at paras 21-22, 78.