

# The Supreme Court of Canada Redefines Constructive Expropriation

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The Supreme Court of Canada recently released its 5-4 decision in [Annapolis Group Inc. v. Halifax Regional Municipality](#).<sup>[1]</sup> The split decision effectively redefines the test for proving *de facto* expropriation by no longer requiring that public authorities gain a proprietary interest in the land at issue. Instead, and in contrast to previous decisions, the Court found that it was sufficient for landowners to show that the public authority obtained some “advantage” flowing from the property. This arguably lower bar was accompanied by a finding that an authority’s intention could be relevant (although not determinative) in proving a *de facto* expropriation.

## The Law

Expropriation is the involuntary acquisition of private property by a public authority for public purposes. Expropriation can occur in one of two ways. A *de jure* taking is the more common form, in which a public authority acquires title to private land in return for compensation, typically through a statutory expropriation framework. A *de facto*, or as the Court preferred to call it, a “constructive expropriation” occurs when two common law requirements are met: (1) the public authority has acquired a beneficial interest in the property or flowing from it; and (2) the state action has removed all reasonable private uses of the property.<sup>[2]</sup>

## Background

Annapolis Group Inc (“Annapolis”) incrementally acquired 965 acres of land over a 25-year period (the “Lands”) with the ultimate goal of securing development rights. Development was arguably contemplated by Halifax as evidenced by its mixed zoning of the area, but such development was not actually permitted. From 2007, Annapolis made several attempts to have the lands designated for serviced development but was unsuccessful. In 2016 Halifax ultimately refused to initiate the secondary planning process and Annapolis sued and, among other things, claimed a constructive taking on the basis that it had been deprived of all reasonable or economic uses of the land.

## Lower Courts Decisions

Halifax sought a summary dismissal of the constructive expropriation claim, which was refused by the motion judge. The Court of Appeal overturned this decision and granted summary judgment. The Court of Appeal held that Halifax neither removed all reasonable uses of, nor took an interest in the Lands for itself. The Court of Appeal also made clear that Halifax’s intended use of the land was not relevant to the analysis, which focused exclusively on benefit and effect.

## The SCC Majority Decision

In a 5-4 decision, the appeal was allowed and the constructive taking claim ordered to proceed to trial.

The majority of the SCC held that constructive taking of land by an authority did not require that the land actually be taken from the owner and acquired by the authority. In the first part of the test, the “beneficial interest” in the property or flowing from it should be understood as an “advantage” that may fall short of an acquisition.<sup>[3]</sup>

The disputed material facts identified by the motion judge could evidence the intention to create a public park from the Lands. Although not determinative or even necessary to a constructive expropriation claim, the public authority’s intention could be relevant in determining whether it had acquired an advantage.<sup>[4]</sup> The practical effect of the Court’s finding with respect to intention may be that the public authority’s development of land use policies may be subject to increased scrutiny in expropriation litigation, despite the fact that the information may not be necessary to the constructive expropriation test.

The majority also indicated that a successful claim for a constructive taking is not dependent on the enactment of new zoning rules or other regulations. Instead, the analysis should focus on the potential interference of a regulatory scheme in conjunction with its current application and effect.<sup>[5]</sup> If Annapolis could prove that Halifax never planned to develop the land and was using existing regulations to now promote the land as a park, it would support Annapolis’s claim that it had been deprived of all reasonable use and enjoyment to the benefit of the municipality. The claim of deprivation was further strengthened by the fact the Land was not regulated when Annapolis first began acquiring it.<sup>[6]</sup>

### **The SCC Dissent**

The dissent found that the common law test is settled, and absent a justifiable reason, the first part of the test should not be expanded to include an “advantage”.<sup>[7]</sup> Acquiring a beneficial interest clearly requires that the public authority acquire a proprietary interest in the property that deprives the private landowner of all reasonable use of their property.<sup>[8]</sup> In this case, simply refusing to up-zone the lands for development did not result in Halifax acquiring a proprietary interest, and its inaction could not be seen as removing any existing reasonable use of the Lands as currently zoned. No zoning change had occurred, and Annapolis was not entitled to such a change.

Secondly, the public authority’s intention is not relevant to the test for a *de facto* or constructive taking. The concern in the analysis is the effect of the expropriation and benefit gained by the authorities and not its intentions.<sup>[9]</sup>

### **The Takeaways**

There is a sharp divide between the decision of the majority and the dissenting opinion in this case. In the wake of this decision, it is clear that the test for a constructive taking is a contextual one that should consider the circumstances. Although the authority’s intention may be material, the focus of the inquiry is now on the effects of the state action.<sup>[10]</sup> The test does not require a transfer of proprietary interest to the public authority. On a broader scale, especially in light of the dissent, the decision creates uncertainty with respect to whether the failure of a municipality to up-zone lands may give rise to a supportable claim of constructive expropriation.

The majority noted that provincial legislatures remain free to alter the common law in respect of constructive takings and could immunize Halifax by statute from the obligation to pay compensation for taking private property in the public interest. Short of this step, we would note that the provinces could also legislate the test for a constructive taking to provide clarity.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

[1] [Annapolis Group Inc. v. Halifax Regional Municipality](#), 2022 SCC 36.

[2] [Canadian Pacific Railway Co. v. Vancouver \(City\)](#), 2006 SCC 5, [2006] 1 S.C.R. 227.

[3] *Supra* note 1 at para 40.

[4] *Ibid* at para 50.

[5] *Ibid* at para 71.

[6] *Ibid* at para 74.

[7] *Ibid* at para 111.

[8] *Ibid* at para 104.

[9] *Ibid* at para 119

[10] *Ibid* at para 45.

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