The Unintended Taking?

The State of De Facto Expropriation in Canada

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Revisiting first principles…

What is an “expropriation”?

> It is the compulsory (i.e., against the wishes of the owner) acquisition of property, usually real property, by the Crown or by one of its authorized agencies.
>
> - Professor Eric Todd


I'M FROM THE
GOVERNMENT,
I'M HERE
TO HELP

A Creature of Statute

Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected," unless he can establish a statutory right. The claim, therefore, of the appellants, if any, must be found in a Canadian statute.

Lord Parmoor speaking for the Judicial Committee of the Privy Council in *Sisters of Charity of Rockingham v. The King (1922)*, 67 D.L.R. 209

A Presumption in Favour of Compensation

The recognized rule for the construction of statutes is 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.

Lord Atkinson speaking for the House of Lords in *Attorney-General v. De Keyser's Royal Hotel Ltd,* [1920] AC 508 at 542, 579

Medical Assn. (British Columbia) v. British Columbia, 1984 CarswellBC 409, [1985] 2 WWR 327

We think the [Presumption] may be divided into three parts:

1. *The first is that the property of the subject cannot be taken by the Crown without some form of authorization.*
2. *The second is that the authorization must be clear. If there is any ambiguity about whether the Crown may take the subject's property, the authorization must be construed in favour of the subject.*
3. *The third is that, even if the authorization clearly permits the taking of the subject's property, there is a presumption, based on justice and fairness, that the Crown will pay compensation to the subject. That presumption can only be rebutted by a clear contrary intention in the authorization.*

Justice Lambert speaking for the BC Court of Appeal (para. 16).

How would you describe “de facto expropriation”?

De facto expropriation occurs when lawful government action or regulation does not purport to acquire title or property interests, but nevertheless results in the effective expropriation of property. When *de facto* expropriation occurs, the taking of property is implied.

It is a construct of the common law to ensure that expropriating authorities do not, in effect, take property without paying compensation to an owner, thereby reflecting the presumption in favour of compensation.

Manitoba Fisheries Ltd. v. R., [1978] 6 WWR 496 (SCC)

- The *Freshwater Fish Marketing Act* had the effect of taking away business and diverting that business to the Crown Corporation.
- Page 104 → the Provincial Crown ADMITTED that the whole of industry's customer base had been acquired by the Crown Corporation.
- Page 116 → the Court found that the Minister made a "close" acknowledgement that contemplated compensation for loss of goodwill.
- Justice Ritchie for the SCC at page 110 → *Once it is accepted that the loss of the goodwill of the appellant's business… was a loss of property, and that the same goodwill was by statutory compulsion acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown.*

R. v. Tener, [1985] 1 SCR 533

- The denial of a park use permit to explore or work mining claims was held to be a *de facto* expropriation attracting compensation.
- Justice Estey for the majority) at para. 47 (CanLII) → *Expropriation occurs if the Crown of public authority acquires from the owner an interest in property.*
  - Para. 48 → *What right did the respondent lose and what interest did the government acquire?*
  - Para. 59 → *The denial of access to these lands amounts to a recovery by the Crown of a part of the right granted to the respondents in 1937. This acquisition by the Crown constitutes a taking from which compensation must flow.*
- Justice Wilson, in her concurring reasons, offers more. She found that the owners had a profit-a-prendre, which had been extinguished by the "doctrine of merger" and reverted to the Crown.
  - Para. 37 → *By depriving the holder of the profit of his interest, the owner of the fee (the Crown) has effectively removed the encumbrance from its land.*
  - Same para → *This case seems stronger than Manitoba Fisheries inasmuch as the doctrine of merger would appear to operate to make the respondents' loss the appellant's gain.*

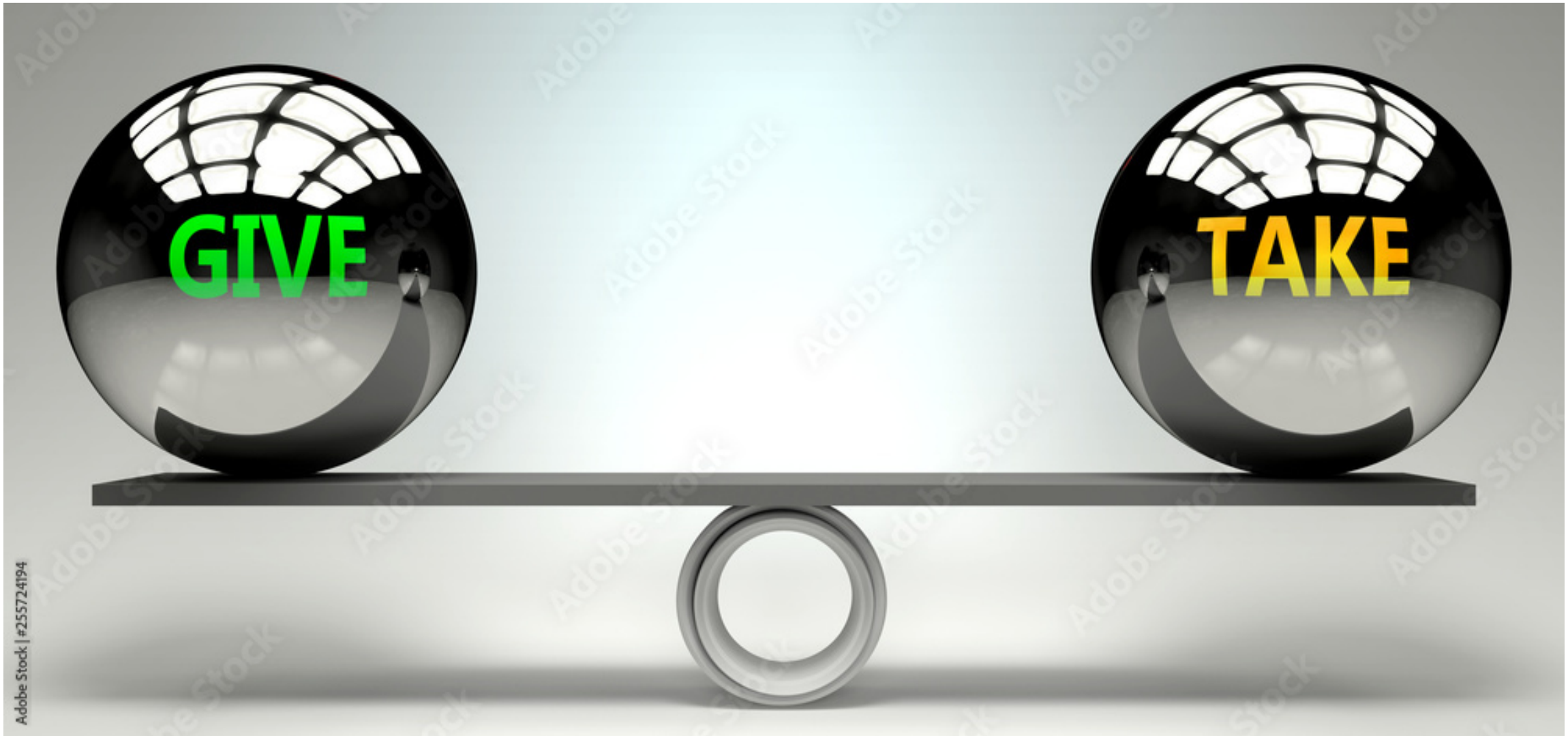
A Symmetry of Loss and Gain

To qualify for compensation there must be an expropriation, if not in name, then in effect. The limitation on usage must be balanced by some corresponding acquisition by the authority.

Justice Huband for the Manitoba Court of Appeal in *Steer Holdings Ltd. v. Manitoba,* [1993] 2 W.W.R. 146 (MBCA) at para. 23

For the presumption of compensation to apply… legislation must create what is in essence an expropriation… The state must acquire the property taken from the plaintiff.

Justice Goudge for the Ontario Court of Appeal in A&L Investments, 1997 CanLII 3115 (ONCA)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Mariner Real Estate Ltd. v. Nova Scotia (Attorney General), 1999 NSCA 98 (NSCA)

The scope of claims of de facto expropriation is very limited in Canadian law. They are constrained by two governing principles. The first is that valid legislation (primary or subordinate) or action taken lawfully with legislative authority may very significantly restrict an owner's enjoyment of private land. The second is that the Courts may order compensation for such restriction only where authorized to do so by legislation.

Justice Crowell for the NSCA at para. 38

Canadian Pacific Railway v. Vancouver (City), 2006 SCC 5

- City by-law designated CPR corridor for transportation; no residential/commercial redevelopment allowed.
- This BC case is the leading SCC authority on what constitutes *de facto* expropriation.
- Chief Justice McLachlin confirmed the two-part legal test for *de facto* expropriation as follows:
  1. Has the expropriating authority acquired a beneficial interest in private property or flowing from it?
  2. Has there been a removal of all reasonable uses of the property?

  Note: words and phrases like “negated”, “cancelled”, “absolutely prohibited” and “rendered virtually useless” have been used by the courts to connote this type of loss.


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Lynch v St. John's (City), 2016 NLCA 35

The correct approach in these cases is to first ask whether on the facts there has been an acquisition by the authority in question of a beneficial interest and a removal of all reasonable uses of the property, so as to constitute a de facto compulsory taking.

If such acquisition and removal is found, the question then becomes whether there is a statutory provision which, reasonably interpreted, expressly authorizes the taking without compensation.

If no such legislative provision is put forth, the Court must order that compensation be paid by the adoption of an expropriation procedure, mutatis mutandis.

Justice Barry for the NLCA at para. 65

Annapolis Group Inc. v. Halifax Regional Municipality, 2021 NSCA 3

- The NSCA reversed a decision of the lower court and granted summary judgment in favour of Halifax (thereby dismissing Annapolis' *de facto* expropriation claim).
- The thrust of Annapolis' claim was that Halifax's 1) designation of its lands as parkland, and 2) obstruction of their development plans, were tantamount to *de facto* expropriation for which compensation was payable.
- The NSCA canvassed the origin and evolution of *de facto* expropriation and, relying on the two-part *CPR* test, found that Annapolis was unable to establish *de facto* expropriation.

Appeal to the SCC

- In August 2021, owners filed a Notice of Appeal and Factum.
- The thrust of the appeal was that the SCC should eliminate the part of the legal test requiring government to obtain a benefit in or flowing from private property.
- In effect, this this would allow a claimant to establish a right to compensation where *bona fide* regulation results in substantial deprivation of property rights without any corresponding acquisition by government.
- In September 2021, the Canadian Constitution Foundation, Ontario Landowners Association and the Canadian Home Builders' Association intervened in support of the appeal.
- The Attorney General of British Columbia, the Attorney General of Ontario, Ecojustice Canada Society, Attorney General of Canada and Attorney General of Nova Scotia intervened in support Halifax and the current legal test.

Basis of the Appeal

- The Appellant and it supporting interveners argued, *inter alia*, that the Benefit Test should be eliminated:
  1. Because prior Canadian common law did not require it (i.e., it was introduced by CPR).
  2. To align with jurisprudence from the UK and the US.
  3. To align with international treaties.
  4. The acquisition of a beneficial interest is tantamount to an actual taking rather than a de facto taking (Per “Professor” Brown).

Response to the Appeal

- The Respondent and supporting intervenors argued, in response, that:
  1. In fact, Canadian jurisprudence has always contemplated a benefit gained by the authority.
  2. Canada is not the same as other jurisdictions, where property rights are constitutionally protected.
  3. International treaties, such as NAFTA, have little relevance to Canadian jurisprudence. In any event, NAFTA has been replaced by another treaty.
  4. The Benefit Test – or the acquisition of a benefit – does not make *de facto* expropriation the same as *de jure* expropriation. They are different because the latter is expressly authorized by statute whereas the former is implied.

Where are we now?

- The hearing took place in February of this year (via Zoom).
- The SCC decision is expected any time now.
- To be continued…

Why do we even have this cause of action?

- Courts have recognized there has to be a “check” on government power.
- Without it government can frustrate a use through regulatory action while technically leaving the right or ownership interest intact.
- *De facto expropriation* exists to level the playing field, but not too much.

Economic Effect on Pre-Existing Lawful Use

Manitoba Fisheries Ltd. v. R.**,** [1978] 6 WWR 496 (SCC)

- No economic content left to the rights as a result of the Authority's act

R. v. Tener, [1985] 1 SCR 533 - *Ibid*

Canadian Pacific Railway v. Vancouver (City)**,** 2006 SCC 5

- Owner's rights to operate a railway on the corridor were not removed or rendered uneconomic by the City's Official Development Plan designating it for public thoroughfare for transportation.
- The designation meant CPR couldn't change the use to residential or commercial and was confined to the existing uses, which it said were not economically viable.
- It was NOT the City's act that rendered the existing use uneconomic.

Economic Rationale

Casamiro Resource Corp. v. British Columbia (Attorney General), 1991 CanLII 211 (BC CA)

- Casamiro was a mineral rights holder in land designated as park.
- A right to mine includes a temporary right to disturb the surface of land during the mining process.
- An order in council refusing to issue mineral exploration permits had (just like *Tener)* the "practical effect" of reducing the mineral rights to a "meaningless piece of paper".
- "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 the owner by ss. 9 and following of the Expropriation Act."

Related Causes of Action and Defenses Disclose an Economic Rationale

- **NUISANCE** or **INJURIOUS AFFECTION NO LAND TAKEN** (e.g. Cambie Corridor –method of construction challenged)
- But **STATUTORY AUTHORITY** is a defence to compensation if the damage is inevitable result of the only feasible method. The economic reality of the cost is a compelling factor:

  "there must be some point at which a strong evidentiary record of significant financial disparity that demonstrates one option is practically impossible, becomes a legitimate consideration in determining the practical feasibility of alternatives"

Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority, 2011 BCCA 77 (CanLII) at para 114-116 and 125-126, 133-134, 144-147 (leave to SCC dismissed).

Annapolis at the SCC: "the benefit"

- Was an application to strike, denied at the trial level and imposed at the appellate level.
- It was not driven by evidence.
- But if there was no "benefit" to freezing the development of the land consistent with its existing lawful zoning– what does that do to *Tener where a permit was refused*?

Also: “He said what, now?”

- Halifax staff’s statements:

  “What they [HRM] really wanted to do was have Annapolis’ lands become a regional park, but they didn’t want to say that in the Regional Plan, so they could avoid having to acquire those lands within one year”…

  and, later:

  “…, it is the real intent of a government agency in terms of what they want to do, but they can’t state that because it’s going to cost them more money, or it’s going to cause them other issues”.

  Annapolis Group Inc. v. Halifax Regional Municipality, 2021 NSSC 344 at para 6

More than Just Different Perspective

- *Annapolis* could cause a shift in the rationale.
- The land in question was zoned for “future serviced residential development” (according to the Owner).
- But Halifax argued that by refusing to initiate a secondary approval process for site servicing it did not remove or frustrate the existing lawful uses. *It must have been possible to develop something without servicing*. But this is unclear from the record so far.

Local Government Act, RSBC 2015, c 1

- **Limit on compensation**

  458 (1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from any of the following:

  (a) the adoption of an official community plan;

  (b) the adoption of a bylaw under

  (i) Division 5 *[Zoning Bylaws]*,

  (ii) Division 12 *[Phased Development Agreements]*, or

  (iii) Division 13 *[Other Land Use Regulation Powers]*;

  …

  (2) Subsection (1) does not apply in relation to a bylaw referred to in paragraph (b) of that subsection that restricts the use of land to a public use

Regulation versus Prohibition

Regulation of an activity is distinct from prohibition, and one power does not imply the other. Regulatory power restrains only what the power itself fairly implies.

Peachland (District) v. Peachland Self Storage Ltd. 2013 BCCA 273 at para 24; *Montreal (City) v. Morgan (1920),* 60 S.C.R. 393 at pg 6-7, 13

Government cannot do indirectly that which it is not authorized to do directly.

O.K. Industries Ltd. v. District of Highlands, 2022 BCCA 12 at para 124