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Lenczner Slaght Successful for Annapolis at Supreme Court of Canada

In *Annapolis Group Inc. v Halifax Regional Municipality*, our expert litigators were successful at the Supreme Court of Canada in reversing a decision of the Nova Scotia Court of Appeal granting summary judgment against Annapolis Group Inc. (“Annapolis”). The Supreme Court of Canada concluded that Annapolis’ claim for *de facto* expropriation (or, “constructive taking”, the term preferred by the majority of the Supreme Court) could proceed to trial. Peter Griffin, Scott Rollwagen, Rebecca Jones and Amy Sherrard were counsel to Annapolis Group, the successful appellant.

The Annapolis case directly addresses when land use regulation may cause a constructive taking.

Beginning in the 1950s, Annapolis acquired 965 acres of land (the “Annapolis Lands”) with the intention of eventually securing enhanced development rights and reselling it. In 2006, Halifax adopted the Regional Municipal Planning Strategy, a guide for land development in the municipality over a 25-year period. While the Planning Strategy reserved a portion of the Annapolis Lands for possible future inclusion in a regional park, it also zoned the Lands as “Urban Settlement” and “Urban Reserve”, which denote areas where urban forms of development may occur (within 25 years in the case of Urban Settlement and beyond 25 years in the case of Urban Reserve). While the designations contemplate future residential serviced development, it cannot proceed unless Halifax adopts a resolution authorizing a “secondary planning process” and an amendment to the applicable land use by law.

In 2007, Annapolis began its applications to Halifax for secondary planning approval for serviced development on the Annapolis Lands. After repeated delays and a failed facilitation process, ultimately, by resolution dated September 6, 2016, Halifax refused to initiate the secondary planning process. In its initial Planning Strategy, Halifax intended to designate the Annapolis Lands as a regional park, but ultimately designated them for serviced development admitting that it could not afford to pay for the lands if designated as park land in the regional plan. Annapolis sued seeking compensation for, among other things, *de facto* expropriation (or, a “constructive taking” of the

Annapolis Lands). Annapolis alleged that Halifax's regulatory measures deprived it of all reasonable uses of the Annapolis Lands and that Halifax acquired a beneficial interest in the Annapolis Lands by exercising dominion over them so as to effectively create a public park without paying for it. Annapolis alleged that members of the public who hike, cycle, canoe, camp, and swim on the Annapolis Lands, are encouraged to do so by Halifax, and that Halifax financially supports organizations that encourage people to use the Annapolis Lands as a park.

Halifax moved for summary judgment to dismiss Annapolis' *de facto* expropriation claim. While Halifax was unsuccessful on its summary judgment motion before the Supreme Court of Nova Scotia, its motion for partial summary judgment was granted by the Nova Scotia Court of Appeal, which interpreted the Supreme Court of Canada's decision in *Canadian Pacific Railway Co. v Vancouver (City)* ("CPR") as requiring a public authority to actually acquire a legal interest in the lands before there could be a claim for *de facto* expropriation. The Court of Appeal rejected evidence that Halifax wanted the lands as a park as irrelevant to a *de facto* expropriation claim.

On appeal to the Supreme Court of Canada, a majority of the Court adopted a broader and fact-specific reading of the test for a constructive taking from *CPR*. The Court accepted that a constructive taking occurs where: (1) a beneficial interest — understood as an advantage — in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource; and (2) the impugned regulatory measure removes all reasonable uses of the private property at issue. The majority also agreed that an authority's intention, while not an element of the test, can be relevant in deciding whether the authority is in substance taking a subject's property without paying for it. In result, the Supreme Court of Canada overturned the Court of Appeal's decision, holding that Annapolis' constructive taking claim may proceed to trial and Annapolis is entitled to adduce evidence at trial to show that, by holding Annapolis' land out as a public park, Halifax has acquired a beneficial interest therein; and that, because Halifax is unlikely to ever lift zoning restrictions constraining the development of Annapolis' land, Annapolis has lost all reasonable uses of its property. Further, and in support of the latter proposition, Annapolis may adduce evidence of Halifax's intention in not doing so.

The Annapolis decision is now the leading case on the test for constructive taking, or *de facto* expropriation, and will undoubtedly be of great significance for the law of expropriation

moving forward. The Supreme Court of Canada's decision offers a welcome clarification to the *CPR* test, confirming that a property owner is not required to prove that the public authority has actually acquired a legal interest in their property but that the acquisition of an advantage, coupled with removal of all reasonable uses, can suffice.