

**THE INVENTION OF ADVANTAGE:
ANNAPOLIS GROUP V. HALIFAX REGIONAL MUNICIPALITY
AND CANADIAN DE FACTO EXPROPRIATION LAW**

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This essay, through exploring the evolution of de facto expropriation in Canada, argues that the Supreme Court of Canada has recently “reformulated” the test for de facto expropriation by inaccurately representing what its own prior cases stated. The Supreme Court asserted that no more than an “advantage” has to be acquired by the state, not an interest in property. After analyzing the Supreme Court’s prior precedents, the article contrasts them with what the Supreme Court said they stood for in its most recent case, Annapolis Group v. Halifax Regional Municipality.

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I. INTRODUCTION

In his 2017 article surveying the Supreme Court of Canada’s property law jurisprudence over nearly a century and a half, Bruce Ziff divided the Supreme Court’s decisions into those that tended the garden and those that ploughed the fields. The former consisted of judgments that were “minimalist and cautious,” the latter those that were “sweeping and ambitious.”¹ Ziff did not have a category for a case like the Supreme Court’s 2022 decision in *Annapolis Group Inc. v. Halifax Regional Municipality*.² The majority (five–four) decision in *Annapolis Group* ploughs a very deep furrow, but it does so while insisting throughout that it is merely tending the garden.

From the inception of the doctrine of de facto expropriation in Canadian law in the 1978 case of *Manitoba Fisheries Ltd. v. The Queen*,³ which Ziff places in the category of judgments that have ploughed the fields,⁴ claimants have been required to show two things. First, as it was differently but essentially similarly put in two of the leading cases, that the

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¹ Bruce Ziff, “Property Law and the Supreme Court: Of Gardens and Fields” (2017) 78 SCLR (2d) 357 at 357 [Ziff, “Property Law”].

² 2022 SCC 36 [*Annapolis Group*]. The majority judgment was authored by Côté and Brown JJ with Wagner CJ, Moldaver, and Rowe, JJ concurring.

³ [1979] 1 SCR 101 [*Manitoba Fisheries*]. The doctrine discussed here has generally been known as de facto expropriation, and I will continue to use that term despite the fact that the majority judgment in *Annapolis Group* uses “constructive taking” (*Annapolis Group, ibid*). It does so because constructive taking supposedly “more accurately captures the nature of the state action at issue and the effect on the landowner” (*Annapolis Group, ibid* at para 17). This may be true, although I do not see the difference and the majority judgment does not say why it is a more accurate term.

⁴ Ziff, “Property Law,” *supra* note 1 at 368.

legislation had taken away “all reasonable private uses of the interest in the land in question,” or was of “sufficient severity to remove virtually all of the rights associated with the property holder’s interest.”⁵ Second, that what had been taken away had been acquired by the state. Claimants do not need to show that title to property has been taken by legislation; that is a *de jure*, not a *de facto*, expropriation. *De facto* expropriation is legislative regulation of property that is tantamount to, but not, *de jure* expropriation. If a claimant is successful compensation will be ordered, not, of course, based upon any constitutional right to property, but on the basis of a common law principle of statutory interpretation usually referred to as the rule laid down in *Attorney-General v. De Keyser’s Royal Hotel*: “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.”⁶ In short, there is no remedy, even if a *de facto* expropriation is made out, if the relevant legislation specifically denies compensation.

The test for whether a *de facto* expropriation has occurred has proved a very difficult one for claimants to meet. There have only been six successful claims among the reported cases, three of them resulting from the same legislation,⁷ and the issue has been the subject of only four Supreme Court decisions, including *Annapolis Group*. While there are those who have argued that the strict test applied by the courts is too onerous, almost all commentators and the courts that have dealt with *de facto* expropriation claims have accepted that the test prior to *Annapolis Group* was as I have stated it, as laid down by prior Supreme Court cases. The majority decision in *Annapolis Group* has altered this long-standing framework, principally by no longer requiring the claimant to show that the state has acquired property rights. Instead the claimant must demonstrate only that the state has acquired an “advantage.”⁸ Exactly what “advantage” means is left unclear by the majority decision, although enough indications are given to show that the majority expects the word to be liberally interpreted so as to provide compensation in a greater number of cases than hitherto. Not only did the majority decision change the law, it did so while insisting that it had not. It reinterpreted the Supreme Court’s prior decisions as standing for the proposition that the acquisition of an “advantage,” not the acquisition of an interest in property, was what the Supreme Court’s prior decisions had rested on.

This article analyses the majority judgment in *Annapolis Group*, demonstrating that it has changed the law and that therefore its persistent claim that it has not done so is inaccurate.⁹

⁵ *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999), DLR (4th) 696 (CA) at para 113 [*Mariner Real Estate*]; *Alberta v Nilsson*, [1999] AJ No 645 (QB) at para 48.

⁶ [1920] AC 508 at 542 (HL Eng) [*De Keyser’s Hotel*]. As initially formulated this presumption applied only to statutes which authorized the taking of property, invariably landed property. But its use by the Supreme Court in *Manitoba Fisheries*, *supra* note 3 establishes that in Canadian law it has a slightly broader meaning, applicable not only to land, but any form of property and applicable to statutes which do not authorize a taking but nonetheless have that effect.

⁷ Two of the six successful claims were *Manitoba Fisheries*, *supra* note 3 and *R v Tener*, [1985] 1 SCR 533 [*Tener*] discussed in the following section. Another two were based on the same legislation as the *Tener* case, and decided by the British Columbia Court of Appeal: *Casimiro Resource Co v British Columbia (AG)*, [1991] BCJ No 1097 (CA); *Rock Resources Inc v British Columbia* [2003] BCJ No 1243 (BCCA). The other two successful claims were from Newfoundland: *Sun Construction Company Limited v Conception Bay South (Town)*, 2019 NLSC 102 and *Lynch v St John’s (City)*, 2016 NLCA 35 [*Lynch*]. The last named case was granted leave to appeal by the Supreme Court of Canada on 16 March 16 2023; see *Lynch*, *ibid*, leave to appeal to SCC granted, 40302 (16 March 2023).

⁸ *Annapolis Group*, *supra* note 2 at para 25.

⁹ See in particular *ibid* at paras 25, 40–41.

What matters is what the Supreme Court did, not what it said it did, or did not, do. I do this by comparing what the Supreme Court's three prior judgments held with what the majority said they held. My analysis agrees with the dissenting judgment in *Annapolis Group*, which called the majority judgment a "reformulation" of the existing test.¹⁰ I do not, in this article, deal with the other issues discussed in *Annapolis Group*, such as the difference between the common law and civil approaches to this question, nor do I ask whether de facto expropriation law should rest on whether the state has gained an "advantage" rather than an interest in property. That is a very different question, which I intend to take up later in a longer article. But what links the current article and the one to come is something I am confident that Bruce Ziff would agree with; whatever one's position on the broader question of what the law should be, a necessary starting point is a clear understanding of what the law currently is. Such an understanding, to coin a phrase, is always to one's advantage in scholarship about law.

II. THE SUPREME COURT'S TREATMENT IN ANNAPOLIS OF ITS PRIOR CASES

A. MANITOBA FISHERIES

The Supreme Court's first de facto expropriation decision was the 1978 case of *Manitoba Fisheries*. A federal-provincial scheme regulated the northwestern Ontario and prairie provinces' freshwater fishing industry.¹¹ A combination of federal and provincial statutes gave a monopoly over the interprovincial and international trade in freshwater fish to a federal Crown corporation, the Freshwater Fish Marketing Corporation (FFMC). One of the companies affected, Manitoba Fisheries, sued for more compensation than Manitoba was willing to pay, the action being taken against the federal Crown because the FFMC was created by a federal statute. The Supreme Court held that as a result of the monopoly, property, specifically the company's goodwill, had been taken from the company and effectively given to the FFMC because customers who previously could have chosen to buy fish from Manitoba Fisheries had no choice but to buy from the FFMC. In so holding it also laid out the test enunciated in the introduction to this article. Justice Ritchie stated for the Supreme Court: "Once it is accepted that the loss of the goodwill ... which was brought about by the Act ... was a loss of property and that the same goodwill was ... acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown."¹²

Although the majority judgment in *Annapolis Group* actually quoted these words from *Manitoba Fisheries*, as well as other references by Justice Ritchie to the loss and acquisition of property, it nonetheless stated that the essence of *Manitoba Fisheries* was that the

¹⁰ *Ibid* at para 155. The dissent was authored by Kasirer and Jamal JJ, with Karakatsanis and Martin JJ concurring.

¹¹ For a full explanation of the complicated federal-provincial arrangements, and the political and economic reasons for those arrangements being made, see Jim Phillips & Jeremy Martin, "*Manitoba Fisheries v. The Queen: The Origins of Canada's De Facto Expropriation Doctrine*" in Bruce Ziff, Eric Tucker & James Muir, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law for the Osgoode Society for Canadian Legal History, 2012) 259 at 259 [Ziff, Tucker & Muir, *Property on Trial*].

¹² *Manitoba Fisheries*, *supra* note 3 at 110.

monopoly created by the federal legislation “conferred an economic advantage upon the state, but not an *actual acquisition* of property.”¹³ Elsewhere it stated that Justice Ritchie’s conclusion about the acquisition of property “rested on his view that the government had acquired an *advantage* through the acquisition of a statutory monopoly that entitled it to *benefits* that would otherwise have flowed to the company.”¹⁴ These two statements are not only contradictory (the Supreme Court both found an acquisition of property and did not find one), they are also simply wrong. The Supreme Court did find that there had been an “actual acquisition of property,” and that acquisition did not “[rest] on” a prior finding of an advantage.¹⁵ Of course one could say that in acquiring the goodwill the state gained an “advantage,” one of many ways in which the state gains an “advantage” from legislation regulating private property in the public interest. The state gains a fiscal “advantage” from taxation, and electoral “advantages” (and disadvantages) from any number of land use regulations, from heritage protection to environmental law and much in between. But the way the majority put it has the cart before the horse. The state’s gaining of an “advantage” was not the essence of *Manitoba Fisheries*, not the reason that the state was required to pay compensation. Compensation was ordered because the legislation had both deprived the plaintiff of its property (goodwill) and effectively transferred that property to the Crown corporation.

The Supreme Court’s judgment in *Manitoba Fisheries* did use the word “advantage” at one point, and the majority in *Annapolis Group* used that to bolster its argument that that case had been about an “advantage.” But the reference to advantage in *Manitoba Fisheries* was not a reference to what the state had gained. In order to find that the loss of goodwill was a loss of property the *Manitoba Fisheries* Court had first to establish that goodwill was a form of property. In doing so Justice Ritchie defined goodwill as “the whole *advantage* ... of the reputation and connection of the firm.”¹⁶ In quoting this passage the majority in *Annapolis Group* emphasised the word “advantage” and argued that Ritchie’s use of the word supported their interpretation that *Manitoba Fisheries* was about the acquisition of one. They stated: “In other words, the monopoly created by the Act restricted competition in the industry, thereby allowing the state to acquire all of the advantage that Manitoba Fisheries had previously enjoyed on the basis of its reputation and connections.”¹⁷ These are indeed “other words”¹⁸ from those used in *Manitoba Fisheries*. More importantly, they are the wrong words to describe what that case held. A more accurate summary would read: “the monopoly created by the Act restricted competition in the industry, thereby allowing the state to acquire all of the goodwill, a species of property, [not advantage] that Manitoba Fisheries had previously enjoyed.”

¹³ *Annapolis Group*, *supra* note 2 at para 29 [emphasis in original].

¹⁴ *Ibid* [emphasis in original].

¹⁵ *Ibid*.

¹⁶ *Ibid* [emphasis in original], quoting *Manitoba Fisheries*, *supra* note 3 at 107.

¹⁷ *Annapolis Group*, *ibid*.

¹⁸ *Ibid*.

B. *TENER*

Much the same could be said about the *Annapolis Group* majority's use of the second Supreme Court decision allowing a de facto expropriation claim in *Tener*.¹⁹ In *Tener*, predecessors in title to the claimants had been granted "all minerals" under land delineated in a 1937 grant, as well as "the right to the use and possession of the surface of such mineral claim ... for the purpose of winning and getting from and out of such claim the minerals contained therein, including all operations connected therewith or with the business of mining."²⁰ The grant had an internal limitation, being "subject to the laws for the time being in force respecting mineral claims."²¹ Over the ensuing decades a series of statutory measures in relation to the province's parks, not in relation to mineral claims and therefore not part of the internal limitation, made exploitation of the claims in the 1937 grant more and more difficult. These measures reached their culmination in 1982 when the claimants were told to stop applying for a development permit because one would never be granted.

For a majority of the Supreme Court, Justice Estey held that a notice issued in 1978 refusing a permit reduced "[t]he property rights which were granted to the respondents or their predecessors in title in 1937," and that "[t]he 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. Such a conclusion is consistent with this court's judgment in *Manitoba Fisheries Ltd. v. The Queen*."²² Slightly later, Justice Estey made essentially the same point: "the loss of access [was] the interest which ... has now been taken from the respondents."²³ To very similar effect a concurring judgment of Justice Wilson, for herself and Justice Dickson, identified the interest taken as a profit à prendre, a property right, consisting of "both the mineral claims and the surface rights necessary for their enjoyment."²⁴ The government's action prevented the holder of the profit from going onto the land and severing the minerals, and that constituted an expropriation. "[T]he absolute denial of the right to go on the land and sever the minerals so as to make them their own deprives the respondents of their profit à prendre," she stated, because "[w]ithout access the respondents cannot enjoy the mineral claims granted to them in the only way they can be enjoyed, namely by the exploitation of the minerals."²⁵ On the issue of whether the Crown had acquired what had been taken, Justice Wilson thought that *Manitoba Fisheries* was the "complete answer."²⁶ Just as Manitoba Fisheries' customers had been forced to do business with the new Crown corporation, thereby effectively transferring the former's goodwill, so here, by depriving the holder of the profit of the right to go onto the land and sever the product from it, "the owner of the fee [the Crown] has effectively removed the encumbrance from its land."²⁷ The doctrine of merger — whereby the lower interest (the profit) is absorbed into the higher (the fee simple) "operate[s so as] to make the respondents' loss the appellant's gain."²⁸

¹⁹ *Tener*, *supra* note 7.

²⁰ *Ibid* at 553.

²¹ *Ibid* [emphasis omitted].

²² *Ibid* at 563.

²³ *Ibid* at 564.

²⁴ *Ibid* at 540.

²⁵ *Ibid* at 550.

²⁶ *Ibid* at 551.

²⁷ *Ibid* at 553.

²⁸ *Ibid* at 552.

In short, both judgments held, albeit in different ways, that when it granted the mineral rights the government had also granted a right to use the surface. When it enacted the regulation it had not only removed that right, it effected a reversion of the right to itself as owner of the fee simple. It had removed a burden from its own land, and that burden was the very property right which had been taken from the citizen.

This is not, however, how the majority in *Annapolis Group* described the decision in *Tener*. They first stated that the government's action secured it an *advantage* (their emphasis) by restricting the use of the land to a park, then quoted from *Tener* the words used by Justice Estey that I quoted above: "the denial of access ... amounts to a recovery by the Crown of part of the right granted to the respondents in 1937."²⁹ "Thus," the majority said, Justice Estey's analysis "adhered closely to that in *Manitoba Fisheries*."³⁰ It is true to say that it did adhere closely to *Manitoba Fisheries*, but that was because like *Manitoba Fisheries* the Supreme Court focused on the property rights lost by the claimant and the property rights gained by the state. The majority in *Annapolis Group* quoted the words used above about the denial of access, but omitted to say what "right" granted in 1937 was recovered by the Crown. Justice Estey, as noted above, called them "property rights ... granted to the respondents or their predecessors in title in 1937."³¹ Neither Justice Estey nor Justice Wilson said that the province gained an "advantage," but the majority in *Annapolis Group* said it did, with advantage italicized as usual. But the majority rather gave the game away by saying that the "advantage" came from "preventing the Teners from exploiting their mineral rights."³² The province did exactly that. It prevented exploitation by taking away the right of access, a property right. It is true that Justice Estey referred to a number of ways in which the province benefitted from the legislation other than by the acquisition of property rights, but none of those ways was said to be a recovery of the property rights granted in 1937 and none of them was what triggered compensation.³³

It bears noting at this point that the account I have given of the Supreme Court's decisions in both *Manitoba Fisheries* and *Tener* is consistent with the accounts in almost all of the literature on de facto expropriation in Canada. Some of this literature, too voluminous to cite in this short article, is purely descriptive of the law as the author(s) understand it, and some of it goes further and is critical of what the author(s) see as Canada's too restrictive approach

²⁹ *Ibid* at 563.

³⁰ *Annapolis Group*, *supra* note 2 at para 34.

³¹ *Tener*, *supra* note 7 at 563.

³² *Annapolis Group*, *supra* note 2 at para 35.

³³ In different places of a less than well-organized judgment, Justice Estey said that the province had gained "a negative right not to compensate the respondents for future mineral development by forestalling any such development" (*Tener*, *supra* note 7 at 556), that "the Crown, by preventing the respondents from exercising their right to development of these mineral lands, has taken another step in the establishment of Wells Gray Provincial Park" (*Tener*, *ibid*), and the notice refusing a development permit "took value from the respondents and added value to the park" (*Tener*, *ibid* at 564). But none of these statements were stated to be what amounted to an expropriation. It was the denial of access which was tantamount to an expropriation. Nonetheless some authors have argued incorrectly that *Tener* was about the taking of "value": see Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, without Feeling" (2007) 40:1 UBC L Rev 315 at 330 [Brown, "Constructive Taking"]. This argument was comprehensively and convincingly negated by Justice Cromwell in *Mariner Real Estate*, *supra* note 5 at paras 65, 67.

to compensation for de facto expropriation.³⁴ But what matters for current purposes is that only one person who has written on the subject has suggested that *Manitoba Fisheries* and *Tener* were about the government gaining an “advantage.” Justice Brown made this argument in two articles published when he was a faculty member at the University of Alberta. He argued at that time that the problem with the Canadian jurisprudence on de facto expropriation was that it concerned itself with whether an interest in property had been acquired by the state. That question was “irrelevant.”³⁵ What mattered was not whether the state had gained an interest in property, but “the loss to the plaintiff derived from the derogation by the public authority” of its rights of use and enjoyment.³⁶ The state could never benefit from regulation “in a proprietary sense, but rather only in the sense that it acquires a mere advantage.”³⁷ Justice Brown also used the term “advantage” in analyzing the *CPR* case, discussed below, as he did in a slightly later piece.³⁸ But these articles support my point about the prior jurisprudence, for they critique the Supreme Court for requiring the acquisition of an interest in property.

My account is also consistent with the vast majority of the reported cases. There is not space here to review these cases, but *Mariner Real Estate* is worth noting because it was referenced in *CPR*, the final Supreme Court case discussed here.³⁹ *Mariner Real Estate* involved a challenge to the province’s *Beaches Act*.⁴⁰ The plaintiffs’ land was designated as a beach and thereby subjected to a number of restrictions on its use. Landowners who wanted to build residential housing on their land argued that the *Beaches Act* effected a de facto expropriation. Justice Cromwell first held that their property had not been taken, even though much of the economic value had been lost. He stated, *inter alia*: “In this country, extensive restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation.”⁴¹ Elsewhere he similarly noted that to constitute a de facto expropriation “there must be a confiscation of ... ‘all reasonable private uses of the [interest in the] lands in question.’”⁴² He also found that “there must not only be a taking away of land from the owner but also the acquisition of land by the expropriating authority.”⁴³ For these propositions he cited *Manitoba Fisheries* and *Tener* and a number of provincial appeal court decisions.

³⁴ See e.g. Ziff, “Property Law,” *supra* note 1 at 369, who would prefer a more expansive approach to compensation. But his summary of what the Supreme Court decided in *Manitoba Fisheries* is the same as mine: “What it [*Manitoba Fisheries*] had lost ... was its goodwill. Moreover, the Court accepted that the effect of the creation of the [FFMC] ... had been to transfer that goodwill to the new agency” (Ziff “Property Law,” *ibid* at 368). Ziff treats *Tener* much more briefly but, again, the same way that I do.

³⁵ Brown, “Constructive Taking,” *supra* note 33 at 323.

³⁶ *Ibid* at 326.

³⁷ Russell Brown, “Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience” (2009) 1:3 *Int’l J. Built Env’t* 179 at 189.

³⁸ Brown, “Constructive Taking,” *supra* note 33 at 331.

³⁹ *Canadian Pacific Railway Co v Vancouver (City)*, 2006 SCC 5 [*CPR*].

⁴⁰ Brown, “Constructive Taking,” *supra* note 33; *Beaches Act*, RSNS 1989, c 32.

⁴¹ *Mariner Real Estate*, *supra* note 5 at para 42.

⁴² *Ibid* at para 48, citing and approving the phrase used in RJ Bauman, “Exotic Expropriations: Government Action and Compensation” (1994) 52:4 *Advocate* 561 at 574.

⁴³ *Mariner Real Estate*, *supra* note 5 at para 91.

C. CANADIAN PACIFIC RAILWAY

I turn to the Supreme Court's third, and most recent, decision on de facto expropriation, *CPR*.⁴⁴ In 1902 the CPR was granted a rail corridor through Vancouver (the Arbutus corridor) which ceased being used for passenger traffic in 1954 and for freight in 2001. The CPR wanted to stop using it altogether and to develop the land for residential and commercial use, but was prevented from doing so by a city bylaw passed a year before the CPR stopped using the line which designated the corridor as a "public thoroughfare"⁴⁵ for transportation, or as a mix of paths and parks that the city termed a "greenway."⁴⁶ The CPR sued for compensation, and at first instance the trial court held that the bylaw was ultra vires the city. That decision was overturned by the British Columbia Court of Appeal, and the Supreme Court dismissed an appeal from the British Columbia Court of Appeal. Compensation was not an issue in the case because the bylaw specifically denied it. That is, as noted above, compensation rests on the *De Keyser's Hotel* rule, which presumes compensation if there is a taking "unless the words of the statute clearly so demand."⁴⁷ The words of the statute did "clearly so demand"⁴⁸ that no compensation would be paid. Nonetheless the Supreme Court devoted 11 paragraphs of its 64-paragraph judgment to the issue of compensation, in the context of both an alleged de facto expropriation and under the provincial *Expropriation Act*.⁴⁹ The bulk of the judgment dealt with the administrative law issues concerning whether the city had the power to enact the bylaw.

The Supreme Court's brief excursus into de facto expropriation was not, it must be said, a model of clarity, despite its being authored by Chief Justice McLachlin. The Supreme Court stated the test as follows, at paragraph 30: "For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property."⁵⁰ "[R]emoval of all reasonable uses of the property"⁵¹ is one of the formulas used to describe when legislation can be said to have taken away property rights, and thus on this aspect of the law *CPR* simply repeated past precedents. However the phrase "acquisition of a beneficial interest in the property or flowing from it"⁵² is a confusing one, not found in previous cases, and it is unclear on its face what it means. For two reasons I think the phrase "acquisition of a beneficial interest in the property"⁵³ is simply a poorly-expressed version of the widely-accepted requirement that the state has to have acquired the interest in property that the claimant lost. First, in the same short paragraph in which Chief Justice McLachlin stated this two-part test she cited it to three cases — *Manitoba Fisheries*, *Tener*, and *Mariner Real Estate*. Nothing is said to the effect that the test as she stated it is any different from that in the cases she cited, even if the words used are different. No matter

⁴⁴ *CPR*, *supra* note 39. There is an excellent analysis of the case and the background to it in Douglas C Harris, "A Railway, a City and the Public Regulation of Private Property: *CPR v. Vancouver*" in Ziff, Tucker & Muir, *supra* note 11 at 455.

⁴⁵ *CPR*, *ibid* at para 4.

⁴⁶ *Ibid*.

⁴⁷ *De Keyser's Hotel*, *supra* note 6 at 542.

⁴⁸ *Ibid*.

⁴⁹ *CPR*, *supra* note 39 at paras 27–37. See also paras 35–36 that dealt with the *Expropriation Act*, RSBC 1996, c 125.

⁵⁰ *CPR*, *ibid* at para 4.

⁵¹ *Ibid*.

⁵² *Ibid*.

⁵³ *Ibid*.

how inelegantly phrased, Chief Justice McLachlin thought she was doing nothing more than stating the well-understood principles to be derived from the leading cases.

Second, two paragraphs later Chief Justice McLachlin stated: “CPR has not succeeded in showing that the City has acquired a beneficial interest related to the land. To satisfy this branch of the test, it is not necessary to establish a forced transfer of property. Acquisition of beneficial interest related to the property suffices. Thus, in *Manitoba Fisheries*, the government was required to compensate a landowner for loss of good will.”⁵⁴ The words “it is not necessary to establish a forced transfer of property”⁵⁵ can best be understood as drawing the familiar distinction between *de jure* and *de facto* expropriation. The reference to the government only needing to acquire a “beneficial interest related to the property”⁵⁶ and the example given that “in *Manitoba Fisheries*, the government was required to compensate a landowner for loss of good will”⁵⁷ cannot be read as the Supreme Court doing away with the acquisition by the government requirement. If that was meant, it would have been said. Moreover, Chief Justice McLachlin said later in the next paragraph that “[t]he City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision.... This is not the sort of benefit that can be construed as a ‘tak[ing].’”⁵⁸ If this is something less than what the city must be shown to have gained, then the requirement that the city must gain something more than an “advantage” remains. An “assurance that the land will be used or developed in accordance with its vision”⁵⁹ would be an “advantage,” but it would not be enough. Chief Justice McLachlin was saying that what must be gained was a right in property. Thus *CPR* is simply a not well-expressed summary of the law established by the two prior Supreme Court precedents.

Yet, in line with its treatment of *Manitoba Fisheries* and *Tener*, the majority judgment in *Annapolis Group* did not see *CPR* this way.⁶⁰ It began its discussion of the case by stating that the Supreme Court’s use of “beneficial interest” referred to “an ‘advantage’ flowing to the state,” for two reasons.⁶¹ First, that “to require actual acquisition would collapse the distinction between constructive (*de facto*) takings and *de jure* takings.”⁶² This is only true if we are referring to an “actual acquisition” of title, but, as we have seen, it is not true if we are referring to an indirect acquisition of a right in property, such as the goodwill in *Manitoba Fisheries* and the access right in *Tener*. Second, according to the majority interpreting “beneficial interest” as “a benefit or advantage accruing to the state ... ensures *CPR*’s coherence to *Manitoba Fisheries* and *Tener*.”⁶³ As I have already argued, it does not such thing because those cases were not about an “advantage” accruing to the state.

The majority judgment’s analysis of *CPR* did deal with the awkward (for them) fact that the *CPR* court cited its test not only to *Manitoba Fisheries* and *Tener* but also to *Mariner*

⁵⁴ *Ibid* at para 32.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* at para 33.

⁵⁹ *Ibid*.

⁶⁰ *Annapolis Group*, *supra* note 2 at paras 38–43, see the majority’s discussion of *CPR* under the heading “Defining the Nature of a Beneficial Interest.”

⁶¹ *Ibid* at para 38.

⁶² *Ibid* at para 39.

⁶³ *Ibid* at paras 39–40.

Real Estate. They asserted that *Mariner Real Estate* did not affect their analysis because in *Mariner* Justice Cromwell “held that the respondents’ loss of economic value did not amount to an advantage acquired by the provincial authority.”⁶⁴ This does not capture *Mariner Real Estate* in two ways. First, *Mariner Real Estate* did not say that loss of economic value did not amount to an advantage; it said that the loss of economic value of land is not the loss of an interest in land. Second, while *Mariner Real Estate* did discuss the loss of economic value, it said much else. It said, among other things, and as noted above, that there must be a loss of property, and that required the loss of “all reasonable private uses of the lands in question,”⁶⁵ and that “there must not only be a taking away of land from the owner but also the acquisition of land”⁶⁶ by the state. Thus, the majority did not really deal with the problem that Chief Justice McLachlin cited *Mariner Real Estate* in *CPR*; to do that the majority would have needed to deal with more than just one aspect of *Mariner Real Estate*. The majority in *Annapolis Group* concluded that “*Mariner* does not stray from [focusing] on ... the advantage acquired by the government.”⁶⁷ A more accurate characterization would have been that *Mariner Real Estate* does not stray from focusing on, in Justice Cromwell’s words concluding a lengthy discussion of the point, “that for there to be a taking, there must be ... an acquisition of an interest in land.”⁶⁸

III. CONCLUSION

In their dissent in *Annapolis Group* Justices Kasirer and Jamal made the points I have made here, albeit more succinctly and, as might be expected, more elegantly. They also argued that the majority’s “reformulation” of the prior cases was an “unwarranted departure” from precedent and “significantly expands the potential liability of public authorities when regulating land use in the public interest.”⁶⁹ The warning of increased liability and a consequent diminution of the state’s ability to regulate in the public interest is, in my view, prescient, and even though expanded liability is only “potential” at this point, depending on how future cases are decided, there is a very real danger that the balance between the public and the private interest in property will be radically altered. There are no doubt some that will welcome that development if it occurs. There are others who, particularly in an era of heightened concern about the environment and climate change, will see any limitation of the state’s regulatory room as a profound danger. However this debate plays out, the essentially political question of the public versus the private interest in property rights is one that should be played out in the political arena. Hitherto Canadian courts have accepted that fact, and their reticence to enter the arena has surely been justified by the refusal to include property rights in the *Canadian Charter of Rights and Freedoms*,⁷⁰ both in 1982 and ever since. It would be wrong to make this issue justiciable. It is doubly wrong to do so by, to adapt the word used by the dissent, “reformulating” well-established and widely accepted legal standards.⁷¹

⁶⁴ *Ibid* at para 42.

⁶⁵ *Mariner Real Estate*, *supra* note 5 at para 48 [emphasis omitted], quoting Bauman, *supra* note 42 at 574.

⁶⁶ *Mariner Real Estate*, *ibid* at para 91.

⁶⁷ *Annapolis Group*, *supra* note 2 at para 43 [emphasis omitted].

⁶⁸ *Mariner Real Estate*, *supra* note 5 at para 99.

⁶⁹ *Annapolis Group*, *supra* note 2 at para 85.

⁷⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁷¹ The dissent uses the word “reformulation”: *Annapolis Group*, *supra* note 2 at para 85.