TENDING GARDENS, PLOUGHING FIELDS, AND THE UNEXAMINED DRIFT TO CONSTRUCTIVE TAKINGS AT COMMON LAW

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Expropriation law in Canada has operated on the basis of two presumptions at common law: that compensation is owing for the compulsory acquisition of property unless specifically indicated otherwise by statute; and, that no compensation is owing for land use regulation unless specifically provided for by statute. In its decision in Annapolis Group Inc. v Halifax Regional Municipality*, the Supreme Court of Canada abandoned the second presumption that compensation for land use regulation required a statutory foundation. The majority and dissent proceed on the unexamined foundation that there is a common law basis for compensation in claims for constructive takings or de facto takings. This article sets out the earlier consensus, documents the drift to constructive takings at common law, and presents the implications.*

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I. INTRODUCTION

Toward the end of his career as Professor of Law at the University of Alberta, Bruce Ziff surveyed the broad sweep of Supreme Court of Canada jurisprudence in property law.[1] A master of metaphor in academic titles,[2] Ziff divided decisions of the Supreme Court between those in which it had "tend[ed] the garden" of property law and those in which it had ploughed new fields.[3] Where the decisions were "minimalist and cautious," exhibiting "a strong preference for maintaining the *status quo*," the Supreme Court had pruned back exuberant lower court decisions, weeded out invasive doctrinal developments, and maintained the established boundary between judicial and legislative roles.[4] In other decisions, a "sweeping and ambitious" Supreme Court "adopted a more activist posture,"

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

2 See Bruce Ziff, "Bumble Bees Cannot Fly, and Restrictive Covenants Cannot Run" in Anneke Smit & Marcia Valiante, eds, *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2016) 59; Bruce Ziff, "Death to *Semelhago*!" (2016) 39:1 Dal LJ 1, although the latter seems more a call for specific performance than metaphor.

3 Ziff, "Of Gardens and Fields," *supra* note 1 at 357–58.

4 *Ibid* at 357.

"ploughing new fields" of property law, turning over the established order, and "seed[ing]" new doctrine.[5] Under ploughing new fields, Ziff placed the handful of cases — *Manitoba Fisheries Ltd. v. The Queen*,[6] *R. v. Tener*,[7] and *Canadian Pacific Railway Co. v. Vancouver (City)*[8] — in which the Supreme Court had considered claims for the taking of property where title or the formal recognition of ownership remained intact, but in which the claimants had argued that government regulation amounted to a taking of property. The result of these cases, wrote Ziff, was doctrinal innovation, although "its ambit is quite narrow";[9] a new field had been ploughed, but the furrows were shallow.

In 2022, several years after his retirement, the Supreme Court released its decision in *Annapolis Group Inc. v. Halifax Regional Municipality*,[10] a case in which a land development company sought to claim that the municipality had taken its property — a parcel of nearly 1,000 acres — through a planning decision that restricted development for at least the next 25 years.[11] The Halifax Regional Municipality had not acquired title to the land; the Annapolis Group continued to hold the fee simple interest. Rather, the development company sought to claim that the planning decision was tantamount to taking, and therefore that the municipality must pay compensation.[12] In preliminary proceedings on whether this claim could proceed to trial — the Nova Scotia Court of Appeal had struck the claim on the grounds that it had no likelihood of success — a bare majority at the Supreme Court ruled that the claim could proceed.[13] In so ruling, the sharply divided Supreme Court — five in the majority, four in dissent — could not agree on the appropriate label for the claim. Justices Kasirer and Jamal, writing for the dissenting justices who would have upheld the decision of the Nova Scotia Court of Appeal to strike the claim, retained "*de facto* taking[s]" from the previous statement of the Supreme Court in *CPR*.[14] In their decision for the majority that allowed the claim to proceed, Justices Côté and Brown adopted a new formulation: "constructive takings."[15]

There is much that is notable in *Annapolis Group*, including the efforts of the majority and those in dissent to characterize what the majority had done. Although adopting a label — constructive takings — that had not been used by the Supreme Court, Justices Côté and Brown took pains to establish that they were, to borrow Ziff's metaphor, simply tending the garden of property; they were revealing how earlier decisions might be "read in harmony"[16] with each other; they were "bringing greater clarity"[17] to prior statements from the court, with the "aim to illuminate"[18] latent principles previously obscured in darkness: "our

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5 *Ibid* at 357–58, 376–77.
6 [1979] 1 SCR 101 [*Manitoba Fisheries*].
7 [1985] 1 SCR 533 [*Tener*].
8 2006 SCC 5 [*CPR*].
9 Ziff, "Of Gardens and Fields," *supra* note 1 at 369.
10 2022 SCC 36 [*Annapolis Group*].
11 *Ibid* at paras 5–6.
12 *Ibid* at para 9.
13 *Ibid* at paras 4, 14.
14 *Ibid* at paras 85.
15 "Constructive takings" had been in circulation for some time, but it was newly adopted by the Supreme Court. Justice Brown had explained his preference for it in earlier scholarly commentary on *CPR*. See Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40:1 UBC L Rev 315.
16 *Annapolis Group*, *supra* note 10 at para 4.
17 *Ibid* at para 25.
18 *Ibid* at para 41.

approach is firmly rooted in the common law."[19] On the other hand, Justices Kasirer and Jamal took comparable trouble to demonstrate just how deeply the decision for the majority was ploughing the field. The "reformulation"[20] of the test involved an "unwarranted departure"[21] from established precedent; "our colleagues have changed the law"[22] in a manner that "significantly expands the potential liability of public authorities when regulating land use in the public interest,"[23] and that "risks radically changing the complexion of municipal planning law."[24]

The pointed disagreement is not surprising given the apparent ideological divisions on the Supreme Court[25] and the subject matter of the litigation. Kevin Gray has described the doctrine of regulatory takings, as it is known in the United States, as involving "neither more nor less than working out a modern civic morality of property" because it requires defining "the social limits of ownership" and "the correct political balance between individual and community interests."[26] For an ideologically divided Supreme Court, the balance between individual and community, or private and public realms, is hotly contested terrain. The majority and dissent were not just debating the correct interpretation of precedent; they were clashing over the appropriate balance between individual and community interests in the field of property law.

As Jim Phillips has demonstrated elsewhere in this volume, the majority in *Annapolis Group* has done significantly more than simply bring clarity to earlier decisions; it has created a new test along with the new label of constructive takings.[27] In the first part of the two-part test, a claimant needs now only to demonstrate that the regulating authority has acquired an "advantage," not, as had been the case, a property interest.[28] This "invention of advantage," argues Phillips, goes beyond Ziff's ploughing metaphor, such is the fundamental change it effects.[29] However, my focus is on the prior assertion that the basis for a claim to compensation, whatever the nature of the test, lies in the common law. The majority refers repeatedly to the doctrine of constructive takings "at common law,"[30] but the dissenting justices also lead off with a reading of *CPR* that appears to accept the same.[31] Indeed, the majority and dissent in *Annapolis Group* work from an assumption that there is a basis at common law for a claim to compensation where land use regulation effects the taking of land.[32] There is no recognition or discussion in either set of reasons of what had been the established state of the law: that claims to compensation for the taking of land as a result of

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19 *Ibid* at para 77.
20 *Ibid* at paras 85, 115.
21 *Ibid* at para 86.
22 *Ibid* at para 149.
23 *Ibid* at para 85.
24 *Ibid* at para 91.
25 Sean Fine, "Canada's Supreme Court Is Off-Balance as 'Large and Liberal' Consensus on the *Charter* Falls Apart," *The Globe and Mail* (15 January 2022), online: [perma.cc/9N3F-SDEJ].
26 Kevin Gray, "Can Environmental Regulation Constitute a Taking of Property at Common Law?" (2007) 24 Env & Planning LJ 161 at 161.
27 Jim Phillips, "The Invention of Advantage: *Annapolis Group v. Halifax Regional Municipality* and Canadian De Facto Expropriation Law" (2023) 61:1 Alta L Rev 79.
28 *Annapolis Group*, *supra* note 10 at para 4.
29 Phillips, *supra* note 27.
30 *Annapolis Group*, *supra* note 10 at paras 25, 46, 52.
31 *Ibid* at para 82.
32 *Ibid* at paras 25, 82.

land use regulation require a statutory foundation.[33] This substantial shift in the law deserved the Supreme Court's attention in *Annapolis Group*, but also in *CPR*. The result is a fundamental change in Canadian property law without analysis or reflection of its consequences. This is a significant failing, whatever one thinks about the correctness or the desirability of the decision in *Annapolis Group v. Halifax*.

In this article, I set out the earlier consensus that compensation for land use regulation amounting to expropriation required a statutory foundation. I then examine the shift, even slippage, as the Supreme Court drifted toward accepting the existence of a claim to compensation at common law without acknowledging or grappling with this change. Finally, I suggest two important consequences of this change: first, it opened space for and even facilitated the move by the majority in *Annapolis Group* to abandon the requirement that a claimant demonstrate the regulating authority had acquired a property interest; second, and more profoundly, it invites courts to become much more involved in the balancing of private and public interests in land than has been the tradition in Canada. Whether or not the Supreme Court has created a backdoor to a form of constitutional protection for property in the absence of a property rights provision in the *Canadian Charter of Rights and Freedoms*,[34] it seems highly probable that the courts will become more active participants in adjudicating conflicts over land use regulation with doctrine it has created. As a result, while the majority in *Annapolis Group* may have re-written the test for constructive takings, the majority and dissent, in confirming a common law basis for these claims, have also upended the established roles of legislatures and courts when it comes to balancing public and private interests in property law.

II. A NECESSARY STATUTORY FOUNDATION

The *Law of Expropriation and Compensation in Canada*, as it was described by Eric C.E. Todd across the two editions of his influential text, sets out the terms under which governments may take private property, including the grounds on which owners have a right to compensation.[35] In this body of law, several things are clear. First, unlike many other jurisdictions, there is no constitutional basis for a claim to compensation in Canada. Much debated in negotiations between the provinces and federal government, the final version of the *Charter* did not include protection for private property.[36] Second, the provinces and federal government have established statutory bases, as in Nova Scotia's *Expropriation Act*,[37] for compensation when land is expropriated. Compensation is commonly set at market value.[38]

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33 See the discussion in Part II, below.

34 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

35 Eric CE Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Scarborough, Ont: Carswell, 1992) [Todd, *Expropriation and Compensation*]. See also Eric CE Todd, *The Law of Expropriation and Compensation in Canada* (Toronto: Carswell, 1976).

36 Alexandro Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24:2 Can J Political Science 309; Bruce Ziff, "'Taking' Liberties: Protections for Private Property in Canada," in Elizabeth Cooke, ed, *Modern Studies in Property Law*, vol 3 (Oxford: Hart, 2005) 341.

37 RSNS 1989, c 156, s 24.

38 *Ibid*, ss 25–27.

What about the common law as the basis for a claim that regulation of land might amount to a taking for which compensation would be owing? In this, Todd wrote, the law was also clear that the only basis for compensation lay in statute:

> Today the principal restrictions on land use arise from the planning and zoning provisions of public authorities. By the imposition, removal or alteration of land use controls a public authority may dramatically increase, or decrease, the value of land by changing the permitted uses which may be made of it. In such a case, in the absence of express statutory provision to the contrary an owner is not entitled to compensation or any other remedy notwithstanding that subdivision approval or rezoning is refused or development is blocked or frozen pursuant to statutory planning powers in order, for example, to facilitate the future acquisition of the land for public purposes.[39]

Some years later, then Nova Scotia Court of Appeal Justice Thomas Cromwell wrote what became a frequently cited statement on the law of de facto expropriation in his decision for the Court in *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*,[40] a dispute involving land use regulation that restricted the use of ocean-front property. Two basic principles constrained the right to compensation for regulation that might amount to a taking of land in Canada:

> 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. In other words, the only questions the Court is entitled to consider are whether the regulatory action was lawful and whether the *Expropriation Act* entitles the owner to compensation for the resulting restrictions.[41]

It is the second of the principles — that the basis for compensation must be found in statute — that lay at the core of de facto expropriation, as it was then known, in Canada.[42] This does not mean the common law was silent on the issue. Where expropriation was authorized by statute, common law courts had developed a presumption that land owners were entitled to compensation for the taking of land unless the statute provided otherwise in express terms.[43] However, the courts had reversed this presumption for statutes that authorized the regulation of land use: no compensation would be owing for land use regulation, no matter the effect on the value of land, unless the statute provided expressly for compensation.[44] In short, there was no basis at common law for a land owner's claim to compensation from the effects of land use regulation. Such a claim for compensation had to be founded in statute.

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39 Todd, *Expropriation and Compensation*, *supra* note 35 at 122–23 [footnotes omitted].

40 (1999), 177 DLR (4th) 696 [*Mariner*].

41 *Ibid* at 712.

42 See the review of the case law in Eran Kaplinsky & David R Percy, "The Impairment of Subsurface Resource Rights by Government as a 'Taking' of Property: A Canadian Perspective" in B Hoops et al, eds, *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* (The Hague, The Netherlands: Eleven International, 2015) 223 at 224.

43 Gray, *supra* note 26 at 165–66.

44 *Ibid* at 166. On the different presumptions, see also Eran S Kaplinsky, "Property Rights and the Canadian City" in Sandeep Agrawal, ed, *Rights and the City: Problems, Progress, and Practice* (Edmonton: University of Alberta Press, 2022) 187 at 201.

However, even before these statements of law from Professor Todd and Justice Cromwell, there were stirrings toward a common law foundation for compensation.[45] The clearest of these was the decision in *Manitoba Fisheries* where the Supreme Court ordered the federal Crown to compensate several fish processing and marketing companies for their loss of goodwill when federal legislation compelled buyers to do business with a newly formed Crown corporation.[46] Notwithstanding the absence of a statutory foundation compelling compensation for the loss of personal property, and therefore, as one early commentator noted, the dubious nature of the legal basis for upholding the claim,[47] the Supreme Court ordered the federal government to pay fair market value to the businesses for the taking of their goodwill.[48] The decision was an outlier,[49] and, initially at least, apparently of little consequence,[50] although it looms large in the reasons of the majority in *Annapolis Group*. Justice Cromwell had dismissed the decision of little relevance in *Mariner* because it did not involve land use regulation or the interpretation of expropriation legislation.[51] Where land use regulation was at issue, the precedent was overwhelmingly clear that there was no right to compensation unless expressly provided by statute.

The dispute in *Tener*, the only other decision in which the Supreme Court has awarded compensation for what would come to be labelled de facto expropriation, did involve land use regulation.[52] The claimants sought compensation for mineral rights within the boundaries of Wells Gray Provincial Park following the province of British Columbia's decision to prohibit all mining activities within the park and its refusal to grant requested mining exploration permits.[53] In concurring reasons, Justice Wilson and Justice Estey ruled that the province owed the claimants compensation under expropriation legislation.[54] In Justice Wilson's analysis, the claimants held a profit à prendre (the right to enter the property of someone else to extract the minerals), the province had taken this right in refusing to permit access, and a provincial statute required compensation for such a taking of property.[55] In this formulation, the order for compensation might well be understood as flowing from the direct expropriation of a property interest: in refusing to grant a permit, the province had taken back the profit à prendre it had granted. Justice Estey, writing for the majority, concluded somewhat differently that the claimants still held a property interest — the mineral deposit — but that the denial of access "amounts to a recovery by the Crown of a part of the right [it] granted" and warrants compensation even though some element of the property interest

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45 Paul A Warchuk, "Rethinking Compensation for Expropriation" (2015) 48:2 UBC L Rev; Malcolm Lavoie, "Property Rights, Takings, and the Rule of Law: Assessing *Annapolis Group v. Halifax Regional Municipality*" SCLR [forthcoming in 2023].

46 On the background to the decision see Jim Phillips & Jeremy Martin, "*Manitoba Fisheries v The Queen*: The Origins of Canada's De Facto Expropriation Doctrine" in Eric Tucker, James Muir & Bruce Ziff, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law for The Osgoode Society for Legal History, 2012) 259.

47 David Phillip Jones, "No Expropriation Without Compensation: A Comment on Manitoba Fisheries Limited v. The Queen" (1978) 24:4 McGill LJ 627 at 634. Kaplinsky & Percy, *supra* note 42 at 230, describe the reading of Manitoba Fisheries for establishing a common law basis to compensation as "an unorthodox position."

48 *Manitoba Fisheries*, *supra* note 6 at 118.

49 Warchuk, *supra* note 45 at 678.

50 Phillips & Martin, *supra* note 46 at 290.

51 *Mariner*, *supra* note 40 at 722.

52 *Tener*, *supra* note 7.

53 *Ibid* at 537–38.

54 *Ibid* at 552–53.

55 *Ibid*.

remained intact.[56] On these reasons, the case more clearly engages the doctrine of de facto expropriation, but on either interpretation of the property interest, Justices Wilson and Estey founded the right to compensation in the statutory provisions compelling compensation for the taking of property, not in the common law.[57]

In short, there was little in either *Manitoba Fisheries*, which did not involve land use regulation, or *Tener* to disrupt the common law presumption that compensation to property owners for land use regulation emerged only from a statutory foundation. This was certainly Justice Cromwell's conclusion in *Mariner* after reviewing both decisions.[58] Malcolm Lavoie, who authored an intervener's submission in *Annapolis Group* in support of the claimant, acknowledges in commentary on the decision that "[t]here is some past authority for the view that any right to compensation must be based on an affirmative requirement to pay compensation under a statute."[59] This underplays what was the well-established consensus that compensation for land use regulation must be founded in expropriation legislation. Indeed, the Supreme Court had not coined or adopted a separate term that might indicate a common law basis distinct from statute. In *Tener*, Justices Wilson and Estey framed their analysis simply in terms of expropriation. Justice Cromwell would use "*de facto* expropriation" in *Mariner*, and that term would become common, but the Supreme Court had not yet named what it was doing beyond interpreting expropriation legislation.[60] This would change in *CPR*.

III. FROM DE FACTO EXPROPRIATION TO CONSTRUCTIVE TAKINGS

In *CPR*, a case involving the City of Vancouver's designation of a privately owned rail corridor as a transportation thoroughfare, the Supreme Court named the concept of indirect expropriation for the first time.[61] In doing so, it blended "de facto expropriation," the term that had become common in Canada in the intervening years since *Tener*, and "regulatory takings," as the doctrine was known in the United States, to coin "*de facto* taking."[62] It did so in brief reasons that are equivocal on the crucial question of whether there existed a claim for compensation at common law.

In writing for a unanimous Supreme Court, Chief Justice McLachlin began her analysis with: "CPR argues that at common law, a government act that deprives a landowner of all reasonable use of its land constitutes a *de facto* taking and imposes an obligation on the government to compensate the landowner."[63] One might then expect some focused analysis of this argument and an explicit acceptance or rejection of it, but neither appears in the

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56 *Ibid* at 563.

57 Justice Wilson posed the issue as follows (*ibid* at 539): "The central issue is whether a refusal by the Crown in Right of British Columbia to grant a park use permit so as to enable the respondents to exploit their mineral claims gives rise to a statutory right to compensation."

58 *Mariner*, *supra* note 40 at 716.

59 Lavoie, *supra* note 45.

60 *Mariner*, *supra* note 40 at 712–13.

61 *CPR*, *supra* note 8. On the history of the dispute between the CPR and the City see Douglas C Harris, "A Railway, a City, and the Public Regulation of Private Property: *CPR v City of Vancouver*" in Tucker, Muir & Ziff, *supra* note 46, 455.

62 *CPR*, *supra* note 8 at paras 28–30.

63 *Ibid* at para 29.

judgment. The statement of argument is followed immediately by the articulation of a two-part test for de facto taking, citing *Mariner*, *Tener*, and *Manitoba Fisheries*, as if there were a basis for the claim at common law:

> 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.[64]

The opening words presuppose a common law basis for the claim, but there is nothing more definite, and later in the judgment Chief Justice McLachlin appears to reiterate the somewhat hypothetical basis of a claim for compensation at common law given that the statute at issue expressly precluded compensation: "Even if the facts of this case could be seen to support an inference of *de facto* taking at common law, that inference has been conclusively negated by s. 569 of the *Vancouver Charter*."[65]

The lack of analysis or discussion in the decision about what may or may not be a significant change in the law is a serious shortcoming.[66] Lavoie recognizes that after *CPR* there was still "some lingering ambiguity as to whether the requirement to compensate had to be grounded in a statute or whether it was based on the common law,"[67] but other commentators read the decision as confirming a common law foundation for takings that result from land use regulation.[68] However, whether or not ambiguous, it is now clear after *Annapolis Group* that there is a basis at common law for compensation where land use regulation amounts to a taking of land.

Although the majority and dissent in *Annapolis Group* debate vigorously the appropriate test for constructive or de facto takings, there is no argument about the common law basis for such a claim, and no recognition in either set of reasons of the earlier consensus that a claim to de facto expropriation had to be founded in statute. The majority introduces the "presumptive right to compensation" at common law where takings are authorized by statute,[69] but does not mention the other well-established presumption at common law: that there was no compensation for loss as a result of land use regulation except under statute.[70] The dissenting Justices Kasirer and Jamal launch directly into the elements of the test and a critique of their colleagues' departure from precedent.[71] They do not engage with the presumptions at common law and do not appear to recognize the terrain that has been conceded without discussion or debate. Given this absence, Lavoie is correct that, following *Annapolis Group*, "it is simply no longer tenable to claim as a matter of positive law that the

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64 *Ibid* at para 30.
65 *Ibid* at para 37.
66 On this point, I share then academic Russell Brown's frustration with the lack of analysis in the decision, although his focus is on the elements of the test, not on the common law basis for the claim. See Brown, *supra* note 15 at 329, 341.
67 Lavoie, *supra* note 45.
68 Gray, *supra* note 26 at 167; Warchuk, *supra* note 44 at 690. I confess to have ignored this element of the judgment in earlier commentary on the case. See Harris, *supra* note 61.
69 *Annapolis Group*, *supra* note 10 at para 21.
70 Gray, *supra* note 26 at 166.
71 *Annapolis Group*, *supra* note 10 at paras 84–91.

requirement to compensate must be located in a statute."[72] This fundamental doctrinal change deserved consideration and analysis, and it warranted attention to its consequences.

IV. LEGISLATURES, COURTS, CONSTITUTIONS, AND PROPERTY

The principal implications of the doctrinal drift to a common law right to compensation for land use regulation that amounts to a taking of property are: first, the opportunity it creates, and which the majority in *Annapolis Group* seized, to increase the likelihood of successful claims by eliminating the need for a claimant to demonstrate that the regulating authority has acquired a property interest; and second, an enhanced role for courts in balancing private and public interests in the regulation of land use.

On the first, the law of expropriation and, by extension, the law of de facto expropriation emerge from a different legal tradition than the law of takings. Canadian expropriation legislation is cut from the same cloth as legislation that, elsewhere in the common law world, appears under the banner of compulsory acquisition or compulsory purchase.[73] Compensation flows from the compulsory acquisition of property, not just the regulation of it. This is a central tenet of expropriation law. On the other hand, the doctrine of takings requires no such acquisition. Property may be taken, by regulation, without a necessary and corresponding acquisition by the regulating authority. As A.J. van der Walt notes, "takings" includes the limiting or terminating of interests, but does not require the acquisition of those interests to compel compensation.[74] The Supreme Court did not acknowledge this distinction when it used "*de facto* taking" in *CPR* instead of "*de facto* expropriation."[75] As a result, the Supreme Court articulated a test for expropriation, but labelled it as takings, a confusion that helps to explain Gray's observation that the Supreme Court was "almost certainly in error," under takings law, to require the regulating authority to acquire a property interest in order to compel compensation.[76] The Supreme Court was still working within an expropriation framework, but using the language of takings. Once the language of takings was in place, then space opened, which the majority in *Annapolis Group* took, to abandon the requirement that the regulating authority acquire a property interest.

The departure from a statutory basis for compensation and the subsequent relaxation of the test have a further and more profound consequence: an enhanced role for judges in reviewing and evaluating the impact of public land use regulation on private property owners. The consensus in Canada had been that the role of the courts was a small one, and certainly much smaller than in the United States where the doctrine of regulatory takings had emerged from the judicial interpretation of a constitutional provision protecting private property. In her review of takings law in the United States, Australia, and Canada, Donna Christie argues that the decision not to constitutionalize private property rights in Canada

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72 Lavoie, *supra* note 45.

73 Todd, *Expropriation and Compensation*, *supra* note 35 at 1, opens both editions of his text (1976 and 1992) with: "In general terms 'expropriation' is the compulsory (i.e. against the wishes of the owner), acquisition of property."

74 AJ van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Cape Town: Juta, 1999) at 18.

75 *CPR*, *supra* note 8 at paras 28–30.

76 Gray, *supra* note 26 at 167, n 41.

was primarily a decision to leave the evaluation of "the private property/public interest conflict"[77] in the hands of legislators, not judges.[78] In a similar vein, Justice Cromwell, following a brief review of the constitutional frameworks in the United States and Australia in *Mariner*, noted:

> Canadian courts have no similar broad mandate to review and vary legislative judgments about the appropriate distribution of burdens and benefits flowing from environmental or other land use controls. In Canada, the courts' task is to determine whether the regulation in question entitles the respondents to compensation under the *Expropriation Act*, not to pass judgment on the way the Legislature apportions the burdens flowing from land use regulation.[79]

In endorsing a common law basis for compensation and in altering the test to require that a claimant need only establish the acquisition of an advantage, Justices Côté and Brown posit that it would be simple for the legislatures to undo these developments. They point twice to the provisions in the *Vancouver Charter*, at issue in *CPR*, that explicitly immunize the city from any claim for compensation based on zoning or other land use regulation, and suggest that Nova Scotia could do the same for Halifax.[80] Lavoie makes a similar point in support of their decision: "Common law protections can always be overridden by statute, after all."[81] This assertion places the onus on the wrong institution. If providing individual property owners with further protection from the negative effects of land use regulation were important public policy, then the burden lies with the legislatures to define the circumstances in which compensation must be paid, or so the courts consistently ruled until the decision in *Annapolis Group*. Canada, the United States, and Mexico provided that protection when they prohibited direct *and* indirect expropriation, except with compensation, in the investor protection provisions of the *North American Free Trade Agreement*,[82] and again in even more detailed provisions in the *Canada-US-Mexico Agreement* in 2020.[83] In an annex to *CUSMA*, the parties define indirect expropriation as that "in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure," and they set out the factors to consider in a dispute involving a claim of indirect expropriation.[84] Similarly, Parliament and the provincial legislatures could specify in expropriation or local government statutes that municipalities and other public authorities must compensate property owners for the expropriation and the constructive taking of land.

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77 Donna Christie, "A Tale of Three Takings: Takings Analysis in the Land Use Regulation of the United States, Australia, and Canada," (2007) 32:2 Brook J Intl L 343 at 373.

78 *Ibid* at 373, 375–76. See also Harris, *supra* note 61 at 472–77.

79 *Mariner*, *supra* note 40 at 713.

80 *Annapolis Group*, *supra* note 10 at paras 22, 78.

81 Lavoie, *supra* note 45.

82 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994), art 1110.

83 *Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States*, 30 November 2018, Can TS 2020 No 5 (entered into force 1 July 2020) [*CUSMA*]; *Protocol of Amendment to the Agreement Between Canada, the United States of America, and the United Mexican States*, 10 December 2019, Can TS 2020 No 6 (entered into force 1 July 2020), art 14.8.1.

84 *CUSMA*, *ibid*, Annex 14-B, art 3.

To claim that legislatures could undo the common law right to compensation within the Supreme Court's newly articulated constructive takings framework is to reverse institutional roles, and is a paradoxical move from two justices who have laid the charge of "judicial activism" against their colleagues.[85] Notwithstanding the assertions of Justices Côté and Brown that they were clarifying and illuminating in *Annapolis Group*, their decision is not, returning to Ziff's metaphor, a "tending [to] the garden" judgment.[86] It remains to be seen whether the decision has "opened the door to more robust protections for property rights in other domains," perhaps leading "to a more generous approach to procedural protections" before the confiscation of property, a reduced deference in administrative law to decisions that restrict property rights, and a strict approach by the courts to any development that might limit the rights of owners.[87] That all this is even on the table following the decision in *Annapolis Group* suggests that the dissenting justices, far from being alarmist in their assessment and critique of the impacts, may have underplayed the potential transformative effects. It also reveals just how deeply and profoundly Justices Côté and Brown have ploughed a new field in Canadian property law.

85 *Ontario (Attorney General) v G*, 2020 SCC 38 at para 254.
86 Ziff, "Of Gardens and Fields," *supra* note 1 at 357–58.
87 Lavoie, *supra* note 45.

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