Expropriation without Compensation:

De facto and *de jure* expropriation in Canada after *Canadian Pacific Railway v City of Vancouver*

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In 2006, the Supreme Court of Canada handed down its decision[1] on the longstanding dispute between Canadian Pacific Railway ("CPR") and the City of Vancouver concerning the Arbutus Corridor, a ten-kilometre, fifty- to sixty-six foot-wide stretch of land situated in Vancouver and owned in fee simple by CPR. The details surrounding the dispute were widely publicized in the media: anticipating the imminent closure of the Arbutus Corridor railway (which had been in operation since 1902), the City passed the 2000 Arbutus Corridor Official Development Plan ("ODP"), restricting the use of that land to rail, transit, cycling, or a "greenway" consisting of parks and trails for public use. Overnight and without ever paying CPR a penny, the City was able to significantly constrain the available uses to which CPR (or a potential purchaser) could put the Arbutus Corridor. CPR's plans to sell the land for residential use and benefit from Vancouver's competitive real-estate market were stymied, and the law offered CPR no support — at least, according to *Canada Pacific Railway v City of Vancouver* ("*CPR*").[2]

It cannot be denied that *CPR* equates to a fundamental shift in the law on expropriation by the Crown in Canada, departing from the carefully-crafted common-law approach as put forward by all of the leading cases up until that decision. Indeed, it represents the height of judicial deference to the Crown's prerogative to use land, including land that it does not own, in furtherance of the so-called 'public good'. Setting aside the question of how it could be in the public interest to strip one's bundle of rights in land to little more than its bare title without due compensation, we must inquire as to the state of the law on expropriation in Canada.

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[1] *Canadian Pacific Railway v Vancouver (City of)*, 2006 SCC 5, [2006] 1 SCR 227 [*CPR*].

[2] See Douglas C Harris, "A Railway, a City, and the Public Regulation of Private Property: *CPR v City of Vancouver*" in Eric Tucker, James Muir & Bruce Ziff, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law, 2012) 455.

In this article, I argue that the Supreme Court of Canada's 2006 decision has, in at least three critical ways, rendered incomprehensible the law on this issue. Specifically, it has failed to clarify the ambiguities of the black box of 'all reasonable uses' (an element of the test for *de facto* expropriation); it has created internal incoherence with the law on *de jure* expropriation; and it has exposed external incoherence with the law on expropriation of land in Canada owned by non-Canadians. As a result, the law has been cast into uncertainty (something the law prefers to avoid). Moreover, whatever may be found to remain of the common law in this area offers little protection for the property rights of legal persons *contra* the state. This is particularly unsettling given that the Crown, as an impersonal entity, is not benevolent, but rational and hence liable to exploit whatever legal avenues are left open to it for accomplishing its goals with minimum hassle and expense. For these reasons, the Supreme Court of Canada should take the opportunity to restore the common law to its pre-*CPR* state when next it is presented with a case of expropriation by the Crown. Given the now-considerable imbalance of property rights in favour of the state, the relationship between property and other rights in a democracy, and the many pressures placed on land in an increasingly populated and environmentally-conscious country, it is inevitable that such a case will soon arise.

TERMINOLOGY

A number of terms exist to describe the effective taking of land via regulation by the Crown. Among these are 'regulatory taking', '*de facto* taking', 'constructive expropriation', and '*de facto* expropriation'. Each term places the emphasis on a different aspect of the activity described. For example, whereas 'regulatory' draws attention to the *means* of the expropriation (that is, by regulations like the ODP), 'constructive' and '*de facto*' highlight the nature of the

expropriation — that it is expropriation not in law but in fact. In this article, I use '*de facto*' in order to contrast *de facto* expropriation with *de jure* expropriation (which does not have as many alternative names). I also use the language of expropriation instead of taking, because I believe the former better captures the totality and finality of the action. One who 'takes' property may do so physically yet leave its attendant rights with the owner, but one who 'expropriates' property has taken all of the rights attached thereto, whether or not he has physically occupied or taken possession of the property. It follows that one who has suffered an 'expropriation', provided it was legal, has no right to the property's return; in that sense, the act is final, and it is only at the option of the expropriator that the property may be returned to its original owner.

Throughout the article, I refer to the Crown and the state interchangeably.

THE LAW IN CANADA ON EXPROPRIATION BY THE CROWN

In Canada, the Crown may expropriate land or an interest in land in two ways. First, it may expropriate *de jure*, in accordance with the strict requirements set out by statute at both the federal[3] and provincial[4] levels. Federally, the Crown must give adequate notice to interested parties and, should there be any objection to its proposed expropriation, the registrar must hold a public consultation which may or may not result in changes to the terms of the expropriation.[5] In all such cases, full and just compensation is due to the owner of the property.[6] A property owner's right to full and just compensation has long existed in Canada's common law; it finds its

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[3] See *Expropriation Act*, RSC 1985, c E-21 [*CEA*].

[4] See e.g. *Expropriation Act*, RSBC 1996, c 125.

[5] See *CEA*, *supra* note 3, ss 5(1), 5(2), 8(1), and 10(1).

[6] *Ibid*, ss 16(1) and 25(1).

roots in the rule of statutory interpretation that, absent clear and explicit statutory language to the contrary, a statute is not to be construed so as to take away an individual's property without appropriate compensation.[7] This right is codified in Canada's *Expropriation Act*. Indeed, under the *Expropriation Act*, compensation is assessed not only with regard to the value of the land at the time of the expropriation, but also with regard to any decline in the value of the land due to the expropriation.[8]

The second manner in which the Crown may expropriate land is *de facto*. For decades, it seems to have been understood by the courts that the purpose of recognizing this second means of expropriation by the Crown was to protect property rights from state interference, and not to make it easier for the state to expropriate land from its citizens by providing the state with an alternative method of doing so. In other words, the courts recognized that the Crown may attempt to effectively expropriate land without triggering due-process requirements set out by statute. To prevent the Crown from circumventing the protections provided by statute, courts (not having the ability to extend the scope of activity covered by statute) chose to recognize *de facto* expropriation as a form of expropriation which, like its *de jure* counterpart, engages the property owner's right to full and just compensation.

While cognizant of the reality that the Crown has considerable authority to regulate land use, the Supreme Court of Canada in *Mariner Real Estate v Nova Scotia (AG)* ("*Mariner Real Estate*") nonetheless confirmed that there is a role, albeit a limited one, for the courts in this area:

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[7] See e.g. *Manitoba Fisheries Ltd v The Queen* (1978), [1979] 1 SCR 101 at 109–10, 80 DLR (3d) 462 [*Manitoba Fisheries*]; *British Columbia (Forests) v Teal Cedar Products Ltd*, 2013 SCC 51, [2013] 3 SCR 301. For a discussion of whether the principle is a common-law right or a rule of statutory interpretation, see *Alberta v Nilsson*, 2002 ABCA 283, 320 AR 88 [*Nilsson*].

[8] See *CEA*, *supra* note 3, ss 16(1) and 25(1).

> In modern Canada, extensive land use regulation is the norm and it should not be assumed that ownership carries with it any exception from such regulation.[9]

And further:

> 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.[10]

Accordingly, the common-law elements of *de facto* expropriation are as follows: (1) the regulation has removed all reasonable private uses of the land; and (2) there has been a corresponding gain by the expropriating authority.[11]

It could be argued that this test sets too high a threshold for establishing expropriation; yet the Supreme Court of Canada in *CPR*, through its interpretation of the test, has raised the bar even higher. As mentioned, if *de facto* expropriation is made out, the presumption in favour of full and just compensation comes into play. But this common-law guarantee is meaningless if it is virtually impossible to meet the threshold required by the *CPR* test. The ramifications of *CPR* — both for state regulation and private-property rights — are immediately apparent and are cause for trepidation. If the Supreme Court of Canada neglects to temper its *CPR* ruling in future cases, then the erosion of private-property rights will surely continue.

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[9] *Mariner Real Estate v Nova Scotia (AG)* (1999), 1999 NSCA 98 at para 49, 178 NSR (2d) 294 [*Mariner Real Estate*].

[10] *Ibid* at para 41.

[11] This test is sometimes phrased as involving a "confiscation" of land by the Crown, thereby implicating both elements of the test: *ibid* at para 49.

PROBLEM ONE : THE BLACK BOX OF 'ALL REASONABLE USES'

One of the principal sources of Canadian *de facto* expropriation law's incomprehensibility is the treatment in the jurisprudence of the requirement that the regulation eliminate 'all reasonable (private) uses' of the property. Indeed, the case law is inconsistent on what this means. Regulation having the following effects has been held not to eliminate 'all reasonable uses': (a) a change in zoning;[12] (b) a decrease in land's value;[13] (c) injurious affection;[14] (d) a development freeze;[15] (e) the withholding of a license to do a particular act on or with the use of the land where no license has yet been granted;[16] and (f) a change in allowable production quotas.[17] But in stark contrast to this list is the Supreme Court of Canada's decision in *Manitoba Fisheries Ltd v The Queen* ("*Manitoba Fisheries*") that the confiscation of an intangible legal interest is compensable.[18] To add to the difficulty of assessing this part of the test, *Mariner Real Estate* indicates that a decrease in the value of land, injurious affection, or a development freeze may be *evidence* that all reasonable uses have been taken.[19] Generally

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[12] See e.g. *64933 Manitoba Ltd v Manitoba*, 2002 MBCA 96, 214 DLR (4th) 37 [*Manitoba Numbered Company*]; *Mariner Real Estate*, *supra* note 9.

[13] See e.g. *Mariner Real Estate*, *supra* note 9; *The Queen (BC) v Tener*, [1985] 1 SCR 533, 17 DLR (4th) 1 [*Tener* citing to SCR].

[14] See e.g. *Nilsson*, *supra* note 7.

[15] See e.g. *ibid*; *Mariner Real Estate*, *supra* note 9.

[16] See e.g. *Genesis Land Development Corp v Alberta*, 2009 ABQB 221, 2009 CarswellAlta 546 [*Genesis Land Development*]; *Manitoba Numbered Company*, *supra* note 12; *Mariner Real Estate*, *supra* note 9.

[17] See e.g. *Taylor v Dairy Farmers of Nova Scotia*, 2010 NSSC 436, 2010 CarswellNS 769 [*Taylor*].

[18] *Supra* note 7.

[19] *Supra* note 9 at para 81.

speaking, all that can be gleaned from a comparison of these cases is that a finding of confiscation of all reasonable uses will be rare and that what comprises all reasonable uses is contextually dependant. Notably, the 'private' aspect of the requirement has received barely any attention from the courts. This may be because the courts have assumed that private owners will only put their property to private uses. In any case, it would seem to have no import for the modern test.

Since, I contend, there are no unifying criteria for assessing 'all reasonable uses', and since we know that the analysis must be contextual, I propose the following framework which I believe to be most consistent with the case law prior to *CPR*, and which I anticipate would reduce the uncertainty caused by courts' vacillation on this element of the *de facto* expropriation test.

First, what is reasonable is limited by what is legal: one cannot have a legitimate interest in using property in a manner to which he is not legally entitled. This criterion comports with common sense and the case law.[20] Consider that one does not have a legal interest in a particular property value (thus, a zoning change, a decrease in the value of land, and injurious affection are not presumptively compensable). Similarly, one does not have a legal interest in doing an activity pursuant to a license which he does not have. In *Mariner Real Estate*, the Supreme Court of Canada confirmed that illegal uses are not reasonable:

> While *de facto* expropriation is concerned with whether the "rights" of ownership have been taken away, those rights are defined only by reference to lawful uses of land which may, by law, be severely restricted. In short, the bundle of rights associated with ownership carries

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[20] See *Mariner Real Estate*, *supra* note 9 at para 39.

with it the possibility of stringent land use regulation.[21]

However, the legal-interest criterion does not provide a conclusive answer with regard to quotas or development freezes. In each of these instances, the property owner (whether the property be land or a license to produce a particular quota of milk, as in *Taylor v Dairy Farmers of Nova Scotia*[22]) does, in fact, have a legal interest which is the subject of expropriation by the Crown. Why then is no compensation afforded for these types of infringements? To answer this question, we must look to *Rock Resources Inc v British Columbia* ("*Rock Resources*").[23] In that case, the Government of British Columbia unilaterally prohibited mineral extraction on a large tract of land by way of regulation. Previously, the Government had sold to Rock Resources the rights to mine the land. Although the new regulations removed this right, the Government paid no compensation. It argued that Rock Resources still had the ability to use the land for some other purpose; but the British Columbia Court of Appeal rightly recognized that Rock Resources retained no *reasonable* use of the land in the context. Indeed, what could Rock Resources, a mineral-extraction company, reasonably be expected to do other than conduct mining operations on the land? The Court ruled that all reasonable uses had consequently been extinguished and that *de facto* expropriation had been accomplished, engaging Rock Resources' right to full and just compensation at common law (absent express statutory language to the contrary).

Thus, we see that context also serves to define the category of 'all reasonable uses'. Context encompasses both historical uses and reasonable future uses based on the property's

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[21] *Supra* note 9 at para 39.

[22] *Supra* note 17.

[23] See *Rock Resources Inc v British Columbia*, 2003 BCCA 324, 229 DLR (4th) 115 [*Rock Resources*].

present potential. Were a court to only take historical uses into account, the category of reasonable uses would be unduly restricted. On the other hand, were a court to ignore the ways in which a particular parcel of land had been used in the past, it would necessarily have to rely solely on its own speculation as to what future uses might be reasonable. A court without much knowledge of the land in issue might exclude a use that would in fact be quite reasonable, or it may deem reasonable a wide range of uses that, in reality, could not be realized on the land. Therefore, it is prudent for a court to consider the land's historical uses in extrapolating what uses might be reasonable in the future. The narrower the category of 'all reasonable uses', the less the Crown needs to infringe on property rights in order to trigger the common-law right to full and just compensation.

Ironically, this second criterion, context, remains more controversial than the first, despite (or perhaps because of) the fact that it has received more attention in courts' decisions. Two cases aptly demonstrate the different perspectives taken of the criterion of context.

First, in *Mariner Real Estate*, Nova Scotia's *Beaches Act* imposed strict building requirements on land owned by the respondents such that they could not build the single-family residences they wished to build on their beach lots.[24] The Supreme Court of Canada expounded upon the context in which the respondents sought the necessary building permits:

> The respondents in this case proved at trial that they would not be allowed to build the proposed single family residences. With respect to three of the Mosher's [one of the respondents'] lots, there was not even an application to build; as mentioned, *residential development on two of these lots was probably quite impossible apart from the designation* [made by the *Beaches Act*]. *Some reasonable or traditional uses of this dune property may be*

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[24] *Supra* note 9 at para 2.

> *allowed by permit*. … The respondents had the burden of proving that virtually all incidents of ownership (having regard to reasonable uses of the land in question) have, in effect, been taken away. Neither the respondents nor the Province appear to have explored the possibility that development specifically designed in a way consistent with protection of the dunes might occur. The respondents, while asserting that all reasonable uses of the land are precluded by the operation of the Act and Regulations, have not shown that they would be denied the required permits *with respect to such other reasonable and traditional uses of the lands*.[25] [Emphasis added]

From this, it is clear that other reasonable uses of the property remained despite the *Beaches Act*. Indeed, many of the respondents had originally bought and used the land for other purposes, which continued to be available; the only respondent who had bought the land for the purpose of building residences on it knew that the land was, at that time, under evaluation to determine whether it should be protected by the *Beaches Act*, which would prevent construction.[26] What is most important to note about the *Mariner Real Estate* decision, though, is that the Court had regard to both the historical and the reasonable future uses of the property as assessed on the basis of the land's present potential.

In contrast, the Supreme Court of Canada in *CPR* purports to apply a *Mariner Real Estate*–type analysis, but in fact takes a markedly different view of the criterion of context:

> [T]he by-law does not remove all reasonable uses of the property. This requirement must be assessed "*not only in relation to the land's potential highest and best use*, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put" [citation to *Mariner Real Estate* deleted; emphasis added]. The by-law does not prevent

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[25] *Ibid* at para 89.

[26] *Ibid* at paras 21, 24, and 27–29.

> CPR from using its land to operate a railway, the only use to which the land has ever been put during the history of the City. … Finally, the by-law does not preclude CPR from leasing the land for use in conformity with the by-law and from developing public/private partnerships. The by-law acknowledges the special nature of the land as the only such intact corridor existing in Vancouver, and expands upon the only use the land has known in recent history.[27]

It is clear from the above passage that the Supreme Court of Canada acknowledged the role that potential future uses of the land play in the analysis; but, with respect, it does lip-service only. The emphasis is clearly placed on the fact that CPR has only ever run a railway across the Arbutus Corridor, to the exclusion of the fact that CPR's reason for wishing to sell the land in the first place — the impetus for the ODP — was that a railway is no longer a suitable use of the land. For the Supreme Court of Canada to then argue that 'all reasonable uses' have not been eliminated because CPR can still run a railway is to ignore the context which makes this use entirely *unreasonable*. Indeed, the Court notes earlier in its decision that "CPR has no desire to operate a railway there."[28] Furthermore, to contend that CPR may engage in a lessor-lessee relationship with the City is to significantly undermine CPR's fee-simple interest in the land, which it had held for over a century before Vancouver passed its ODP. Through its regulation, the City of Vancouver has effectively attempted a forced sale (or a forced lease). The City's uproar over CPR's resumption of railway operations in 2014 (probably as a bargaining tactic) is telling;[29] after all, the ODP explicitly set aside the Arbutus Corridor for use as a "greenway" or

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[27] *Supra* note 1 at para 34.

[28] *Ibid* at para 28.

[29] See Jeff Lee, "Trains may run again down Vancouver's Arbutus Corridor", *Vancouver Sun* (9 May 2014) online: Vancouver Sun <http://www.vancouversun.com>.

as a route for transportation, including rail.[30] If the City only meant to preserve the corridor for future use by the city (and in particular, for one of these specified uses), as it claims, then it should have no objection to CPR's actions, least of all a legal one.

By comparing the analyses in these two cases, the Court's misdirection in *CPR* becomes apparent: whereas in both cases the traditional or historical use of the property in question was *legally* permissible going forward, in *Mariner Real Estate* this use also remained *reasonable* — in *CPR*, it did not. Compensation does not necessarily arise because land's historical uses have become unreasonable, since reasonable future uses may be available. Neither is a claim for compensation automatically barred for land whose historical uses remain legal but have become unreasonable as a result of the expropriating legislation or any other factor.

To summarize, 'all reasonable uses' includes all those uses to which a property owner might reasonably put his property in light of its present potential and the legal interests held by him. The property's historical uses matter only to the extent that they inform present potential, but should not themselves be a limiting factor. This framework is harmonious with the jurisprudence prior to *CPR* and would add clarity and consistency going forward.

Two final points demand attention. First is the confusion that may potentially arise from the phrase 'all reasonable uses of the land'. While the test has often been expressed in these terms, *Manitoba Fisheries* confirms that an intangible legal interest (i.e., something other than land) may correctly be considered property and hence be the potential subject of expropriation by the Crown.[31] Accordingly, the test could be rephrased as 'all reasonable uses of the legal

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[30] See City of Vancouver, by-law No 8249, *Arbutus Corridor Official Development Plan* (25 July 2000), s 2.1.

[31] *Supra* note 7 at 108.

interest'. To draw on the common analogy, what the test drives at then is whether all sticks of the bundle of rights have been taken away. In some cases, the stick and the bundle will be one and the same, as in *Rock Resources* where the property in issue — mining rights to a particular tract of land — had only one reasonable use prior to the legislation, and none afterward.[32]

Second, and following from this analogy, there is substantial authority to suggest that the test should be further rephrased as '*virtually* all reasonable uses of the legal interest'.[33] The logic behind this version of the test, which unfortunately seems to have been abandoned by *CPR*, is compelling: if the law on *de facto* expropriation is concerned with protecting an individual's *bundle* of rights, is it fair to require that *all* reasonable uses be confiscated before the right to full and just compensation is engaged, even in a society like Canada where we recognize the role of the Crown in regulating land for various purposes? Does an individual with but a single stick (or even two or three) remaining in his bundle still *have* a bundle of rights? In other words, at what point does a bundle cease to be a bundle? In most cases (excluding those like *Rock Resources*), something will be taken and something will remain. A fairer 'all reasonable uses' analysis would involve some aspect of proportionality instead of a strict requirement that *all* reasonable uses be extinguished. Unfortunately, as long as *CPR* is the law in Canada, the courts must be content to call a stick a bundle.

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[32] *Supra* note 23.

[33] See e.g. *Genesis Land Development*, *supra* note 16 at para 120; *Manitoba Fisheries*, *supra* note 7 at 118; *Manitoba Numbered Company*, *supra* note 12 at paras 13 and 19; *Mariner Real Estate*, *supra* note 9, throughout; *Nilsson*, *supra* note 7 at para 20; *Taylor*, *supra* note 17 at para 75. *Contra CPR*, *supra* note 1 at para 30.

PROBLEM TWO : THE CONFLATION OF *DE FACTO* AND *DE JURE* EXPROPRIATION, OR "INTERNAL INCOHERENCE"

The second source of confusion in relation to the test for *de facto* expropriation lies in *CPR*'s effective conflation of that test with the essence of *de jure* expropriation, resulting in what Russell Brown calls "internal incoherence".[34] By requiring that *all* reasonable uses, instead of *virtually* all reasonable uses, be taken (as discussed above), and by requiring that the Crown gain a corresponding proprietary interest (the second requirement), the threshold for making out *de facto* expropriation has been raised to such a degree that there is no distinction between the tests except in name and in the fact that, where the Crown undertakes a *de jure* expropriation, it says so. This defeats the purpose of recognizing *de facto* expropriation. As the British Columbia Court of Appeal stated in *Casamiro Resource Corp v British Columbia (AG)* ("*Casamiro*"):

> 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*.[35]

The Court followed this passage with the important assertion that whether the Crown has gained something from the expropriation is a question of mixed law and fact.[36] Brown forcefully echoes this when he says:

> The essential point of the constructive taking, then, is that the taking is just that: *constructive*. As such, it inherently contemplates that no gain, or at least no gain of an equitable or

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[34] See Russell Brown, "Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience" (2009) 1:3 International Journal of Law in the Built Environment 179 at 186 [Brown, "Legal Incoherence"].

[35] See *Casamiro Resource Corp v British Columbia (AG)* (1991), 80 DLR (4th) 1, 1991 CanLII 211 (BCCA) at 18 [*Casamiro*].

[36] *Ibid* at 19.

> otherwise *in rem* quality, need be conferred upon the [Crown] in order for a taking to have occurred. The finding of a taking in the circumstances of regulated land use is not drawn from the facts but is judicially imposed upon the facts, based upon a threshold denoting the stripping away from the property owner of all reasonable uses of land.[37]

In light of the disconnect between *CPR* and the foregoing case law, it is useful to understand what the thrust of the jurisprudence was prior to 2006. To that end, four questions should be asked. First, is it actually a requirement that something must be gained? Second, if so, what must be gained? Third, by whom must it be gained? And fourth, how must it be gained? I address these in turn.

The case law is overwhelmingly supportive of the notion that something must be gained in order for *de facto* expropriation to occur.[38] The possible exception to this is *Casamiro* where, after searching the facts for a definable gain by the Government of British Columbia at Casamiro Resource's expense, Southin JA concluded that, notwithstanding the absence of a gain, Casamiro Resource's loss was evident and militated in favour of recognizing *de facto* expropriation.[39] While this case might be interpreted as negating the requirement for a 'corresponding gain', the better interpretation is that the emphasis should be on the loss rather than the gain, but that the requirement still exists. There is no disjuncture with *CPR* on this point.

What, then, must be gained? This question, more than any other, sets *CPR* in stark relief against its predecessors. The general answer comes from *The Queen (BC) v Tener* ("*Tener*"),

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[37] See Brown, "Legal Incoherence", *supra* note 34 at 191.

[38] For a discussion of this requirement, see *Manitoba Fisheries*, *supra* note 7; *Mariner Real Estate*, *supra* note 9; *Nilsson*, *supra* note 7; *Rock Resources*, *supra* note 23; *Tener*, *supra* note 13.

[39] *Supra* note 35 at 17–18.

where Estey J spoke of the Crown's gain in terms of non-monetary "value"[40] and where, in a judgment concurring in the result, Wilson J opined that "the respondents' loss [was] the appellants' gain".[41] In other words, what is gained may be intangible and abstract; it seems that almost anything will suffice. *Manitoba Fisheries* lends the clearest support for the notion that an intangible gain — in that case, good will in a business enterprise — may satisfy the requirement.[42] The relative lack of judicial discussion on the 'gain' component of the test is evidence of a low threshold.

From *Tener*, one may conclude not only that the threshold for 'gain' is quite low, but also that this gain may be displaced into the future. In that case, the Government of British Columbia's legislation eliminated Tener's ability to access minerals on a tract of land. This *profit à prendre* was deemed to have reverted back to the Government, presumably because it had the power to reverse its legislation and subsequently resume mineral extraction itself in the future, or to sell the rights to another company.[43] In the meantime, these rights lay dormant. That such a gain could be so temporally removed from the time when the expropriating act was done and yet satisfy the test for *de facto* expropriation cannot be reconciled with the result in *CPR*. While Chief Justice McLachlin acknowledged that "[a]cquisition of [a] beneficial interest related to the property suffices" to make out the second requirement of the test, she did not explain why the City of Vancouver's "assurance that the land will be used or developed in accordance with its

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[40] *Supra* note 13 at 563–64.

[41] *Ibid* at 552.

[42] *Supra* note 7.

[43] *Supra* note 13 at 563.

vision" does not constitute such an interest.[44] The implication is that only a proprietary interest (i.e., a legal interest in property) may satisfy the test. Prior to *CPR*, then, the test for *de facto* expropriation demanded that the property owner *lose* a legal interest, but not that the Crown *acquire* one. Post-*CPR*, not only must the Crown acquire a *legal* interest, but it would seem that such an interest must be actual ownership of the land itself.

Third, who must acquire the gain? The case law is surprisingly uniform on this point. It is settled law that the expropriating agent — that is, the Crown — must acquire the gain. However, Brown subscribes to the view that, if the 'gain' element of the test is truly a requirement (which he contests), then it need not attach to the Crown:

> "[*De facto* expropriation] inherently contemplates that no gain, or at least no gain of an equitable or otherwise *in rem* quality, need be conferred upon a public authority for [*de facto* expropriation] to have occurred."[45]

I depart from this view only slightly, but in a way that I believe abides with the jurisprudence. In short, while the gain must "be conferred upon" the Crown, the benefit may accrue to the general public. What results is akin to a trustee relationship where legal title and equitable title are held by separate parties. When we speak of the Crown, this is the only view that makes sense. The City of Vancouver is not a person. It is a placeholder for the people of Vancouver. It acts on their behalf and for their benefit. The Crown cannot enjoy a public park, as was recognized in *Tener*[46]

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[44] *Supra* note 1 at paras 31–32.

[45] Brown, "Legal Incoherence", *supra* note 34 at 191. See also Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40 UBC L Rev 315.

[46] *Supra* note 13 at 564–65.

and *Casamiro*,[47] for example; the benefits of a public park are enjoyed by the public. Thus, while *CPR* agrees that the Crown must gain, it does not apply the same logic that subsists in its predecessors to allow for that gain to be experienced by another party.

Finally, how does the Crown realize the gain? Here, the fact that the gain must 'correspond' to the taking (or the loss) is revealing. Based on the answers to the foregoing questions, a 'corresponding' gain does not indicate that what is gained must be the same as what was taken, in the sense that a legal interest is taken and gained, or even in the sense that a right to mine on a particular tract of land (for example) is both taken and gained. Rather, 'corresponding' means that the same regulation which effects the loss also brings about the Crown's gain. This stipulation ensures that, in determining whether *de facto* expropriation has been accomplished, the court's focus is on the regulation and the effects stemming from it, not on some unrelated loss or gain. Thus we see that, for all practical purposes, the Government of British Columbia in *Rock Resources* caused that company to lose its mining rights, while gaining the rights to a provincial park (the benefit of which accrued to the public of British Columbia).[48] This issue was never addressed in *CPR* because the Supreme Court of Canada did not recognize that the Crown had gained anything in the first place.

In summary, for the second branch of the *de facto* expropriation test to be met, the Crown must experience a gain which corresponds to the property owner's loss in that both result from the same piece of legislation. Furthermore, the Crown's gain may be intangible, displaced into the future, take the form of a legal or other interest, and the benefit of the gain may accrue to the public at large. In *CPR*, Chief Justice McLachlin explained:

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[47] *Supra* note 35 at 9.

[48] *Supra* note 23.

> The City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a "tak[ing]".[49]

If I have answered the above questions correctly, then "some assurance that the land will be used or developed in accordance with [the City's] vision" is certainly enough to constitute a gain that would support a claim for *de facto* expropriation.

Clearly, the high threshold set by *CPR* rids the law of any meaningful distinction between the tests for *de facto* and *de jure* expropriation, resulting in internal incoherence. As mentioned, the constraints placed on *CPR* will either force a sale or lease (at terms very unfavourable to CPR) or will confine CPR to uneconomical uses of the land. Accordingly, CPR would have been better off had the City of Vancouver initiated a *de jure* expropriation — conversely, it now makes more sense for the Crown to regulate legal interests out of existence than for it to actually purchase the property from which those interests are derived.

PROBLEM THREE : THE FOREIGN-INVESTOR ADVANTAGE, OR "EXTERNAL INCOHERENCE"

Canadian common law on *de facto* expropriation also suffers from "external incoherence", a term likewise borrowed from Brown.[50] In the present context, it decries the possibility that the rights of foreign investors in Canadian property are afforded more protection than are the rights of Canadian property owners of Canadian property. The source of this incoherence is Article 1110 of the North American Free Trade Agreement ("NAFTA"). That article provides:

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[49] *Supra* note 1 at para 32.

[50] See Brown, "Legal Incoherence", *supra* note 34 at 182.

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

   (a) for a public purpose;

   (b) on a non-discriminatory basis;

   (c) in accordance with due process of law and Article 1105(1); and

   (d) on payment of compensation in accordance with paragraphs 2 through 6.[51]

The language used here — "indirectly nationalize or expropriate" and "a measure tantamount to nationalization or expropriation" — clearly exists to ensure that compensation will be owed for both *de jure* and *de facto* expropriation by the expropriating country. The scope of Article 1110 is indeed wide: 'measure' "includes any law, regulation, procedure, requirement or practice", and the definition of 'investment' is so expansive that it cannot be included here.[52] Moreover, there is no allowance, as there is in Canadian common law, for express statutory language to extinguish the right to compensation. How Article 1110 has been treated in arbitration between the parties of NAFTA (Canada, the United States, and Mexico) has — or at least should have — bearing on expropriation law in Canada generally. This is particularly so given NAFTA's constitutional-like status as a document which cannot be amended without the consent of all signatories.

The NAFTA expropriation case that has received the most attention from Canadian legal

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[51] *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, 32 ILM 289.

[52] *Ibid* at articles 201 and 1139 respectively.

scholars is probably *Metalclad Corp v United Mexican States* ("*Metalclad*").[53] In that case, Metalclad had received approval from the federal Government of Mexico to operate a landfill in the Municipality of Guadalcazar, and began to construct the landfill on that basis. Mid-construction, Guadalcazar informed Metalclad that it would require a municipal permit and must cease construction pending its issuance. More than a year later, Guadalcazar finally made its decision: permit denied. The Governor of San Luis Potosí, the state in which Guadalcazar is situated, further declared Metalclad's land to be a "natural area for the protection of rare cacti". The federal Government took no saving action. In its decision, the tribunal stated:

> These measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect [i.e., *de facto*] expropriation.[54]

Its belief in the far-ranging scope of Article 1110 is evident:

> Thus, expropriation in NAFTA includes not only open, deliberate and acknowledged takings of property ... but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or *reasonably-to-be-expected economic benefit* of the property ...[55] [Emphasis added]

Had Article 1110 been applied to the facts of *CPR*, the result may well have been different. However, *Metalclad*'s application may have since been narrowed by *Methanex Corp v United States of America* and *SD Myers Inc v Canada*. Neither case ruled that *de facto*

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[53] *The United Mexican States v Metalclad Corp*, 2001 BCSC 1529, 95 BCLR (3d) 169.

[54] *Ibid* at para 107.

[55] *Ibid* at para 103.

expropriation had occurred. The former distinguished itself from *Metalclad* by claiming that compensation is only due where the relevant government has made "specific commitments" to the investor, upon which it has subsequently reneged;[56] the latter simply remarked that "[r]egulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA".[57] Where this leaves the law is uncertain. Time will tell whether the law now parallels *CPR* or whether foreign investors continue to be afforded more protection than Canadians.

BEYOND INCOHERENCE : FURTHER POLICY REASONS IN FAVOUR OF A NEW REGIME OF *DE FACTO* EXPROPRIATION LAW

It is, I think, a guiding principle of law that incoherence in the law is to be avoided. Following from this presumption, the presence of incoherence (particularly internal) in Canadian expropriation law should by itself be enough to support a move toward a more-unified body of law on the subject, preferably with greater protections for private property. But there are at least four additional factors in favour of reform, those being the dismal state of the current safeguards against expropriation themselves; the uncertainty that stems from incoherence; the fact that the Crown is a rational entity; and the absurd ramifications of near-immunity for *de facto* expropriation by the Crown.

The drafters of the *Canadian Charter of Rights and Freedoms* made a deliberate decision to exclude an explicit right to private property from among the list of rights enshrined by it. While this was perhaps partly in recognition of the Crown's role in regulating property for the

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[56] *Methanex Corp v United States of America* (2005), 44 ILM 1345 (NAFTA) at para 7.

[57] *SD Myers Inc v Canada* (2001), 121 ILR 72 (NAFTA) at para 281.

'public good', it cannot be denied that the lack of constitutional status for private-property rights makes them vulnerable to erosion; and that, once eroded, rights are difficult to regain. This is due to the inertia of *stare decisis* as well as the difficulty of convincing Crown entities to put in place legislative mechanisms that, in this context, would increase the cost of private-property regulation. Thus, political and judicial forces are more likely to further erode private-property rights than to reverse the worrying trend represented by *CPR*.

The uncertainty that results from incoherence in the law also militates for reform. Mark Milke sums up the problem well:

> [I]nsecure property rights can constrain economic growth by reducing the gains from trade, increasing the risk of appropriation, keeping capital idle or unproductive, creating a need for property owners to waste resources defending against predation, and limiting the extent to which property can be used as collateral to finance productive investment ...[58]

In short, uncertainty inhibits productive, long-term investment by individuals and companies, and Crown regulations may unnecessarily leave property in an unproductive state.

In addition, expropriation law should be modified because the Crown is not, strictly speaking, benevolent. This is not to say that the Crown is *malevolent*, or even that it is indifferent to the 'public good'. However, I argue that the Crown's actions are better framed in terms of rationality and irrationality; in Canada, we assume that the Crown, like the legislature, acts rationally. If we adopt this perspective, the question must then be raised: why should we expect the Crown to expropriate land in a way that requires it to pay compensation when it can simply regulate property interests out of existence and pay nothing? Given their limited resources, municipalities, in particular, will tend to conserve resources for other uses by regulating instead

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[58] Mark Milke, *Stealth Confiscation: How Governments Regulate, Freeze, and Devalue Private Property—without Compensation* (Canada: Fraser Institute, 2012) at 59 [Milke].

of undertaking *de jure* expropriation. The Crown should not be faulted for taking full advantage of the legal avenues available to it. Therefore, in the absence of rigorous protections for private property, it is naïve to think that the City of Vancouver, for example, would ever respect CPR's fee-simple title when it has many thousands of voting, taxpaying citizens who would appreciate a nice greenway.

Lastly, when we follow *CPR* to its natural conclusion, we are confronted by absurdity, even injustice. Consider the following scenario. In the midst of a housing boom, an individual lists his large acreage for sale as residential land. The city wishes to purchase the land as cheaply as possible, contemplating a future housing development. It passes regulations restricting the future use of the land to agricultural purposes. Demand for such a property is low, and the price drops off to about twenty percent of its prior value. With no other option, the individual sells his acreage to the city at this lower price. A few years later, the city reverses the regulations and sells the land to a construction company to build high-end housing at five times the price that it paid to the individual — a tidy profit. Under the current law, the individual has no legal recourse, except a possible, tenuous claim of bad faith against the city.[59] Had an administrative change occurred between the time that the city bought and sold the property, this claim too would be unavailable.

Unfortunately, the facts of the above scenario are not that far-removed from reality. In *Alberta v Nilsson*, for example, the "Alberta government lied about the reason for the regulation

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[59] Estey J wrote in *Tener*, *supra* note 13 at 557, that "it has been said, at least in some courts of the United States, that a taker may not, through the device of zoning, depress the value of property as a prelude to compulsory taking of the property for a public purpose". She also cited two Canadian cases — a 1913 Ontario Court of Appeal case and a 1918 Supreme Court of Canada case — as support for this proposition: 558. However, assuming that this proposition still applies today, it would only apply at the stage of valuing compensation, i.e., once expropriation has already been found to have occurred. In the scenario here, a court may also consider that the individual 'willingly' sold the property.

of Nilsson's land [because] assigning his land as a future highway and utility corridor would have triggered expropriation statutes including much higher compensation".[60] In Ontario, the provincial Government passed regulations establishing a 750-metre-wide perimeter around "Provincially Significant Wetlands" as itself "provincially significant" and subject to the same protections as the wetlands. Farmers and homeowners living on the affected land were not even notified that their ability to use their land in accordance with their fee-simple title had been restricted.[61] In a separate incident, the Government of British Columbia attempted to avoid paying compensation for expropriation by regulating a parcel of land owned by a Coquitlam couple as a fish habitat, despite the fact that it boasted no running water and no fish. The couple had "planned to subdivide the land and use the proceeds to fund their retirement."[62] With this background, and with respect to the Justices of the Supreme Court of Canada, it is arguably not unreasonable to conclude that the facts of *CPR* played an inordinate role in the outcome of that case. Certainly, the image of a greedy corporation with deep pockets trying to shut down the community gardens running along the Arbutus Corridor may elicit pro-Crown sentiment; a Coquitlam couple deprived of their retirement, less so.

CONCLUSION

In Canada, Brown suggests, the courts have not felt compelled to intervene in regulatory takings because of Canada's political culture of deference to the 'public good' and the apparent

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[60] Milke, *supra* note 58 at vi.

[61] *Ibid* at viii.

[62] *Ibid* at vii.

policy nature of land-use decisions by the Crown.[63] Yet the combination of ambiguity in the common-law test for *de facto* expropriation, internal and external incoherence, and a number of policy arguments strongly suggests that courts should take up the role of arbiter between the individual and the state that wishes to deprive him or her of his or her private-property rights. Admittedly, courts will find their discretion in this area significantly narrowed in the wake of *CPR*. Unless the legislature itself undertakes to strengthen protections for private property in this country, which is unlikely, only a new ruling from the Supreme Court of Canada will revive the distinction between *de jure* and *de facto* expropriation, providing for compensation in each instance as is the practice in many other democracies around the world.[64]

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[63] Brown, "Legal Incoherence", *supra* note 34 at 179–81.

[64] For an in-depth discussion of how Canadian expropriation law compares to that of other Western countries, see Milke, *supra* note 58, citing a study by Rachelle Alterman.

LEGISLATION

City of Vancouver, by-law No 8249, *Arbutus Corridor Official Development Plan* (25 July 2000).

Expropriation Act, RSBC 1996, c 125.

Expropriation Act, RSC 1985, c E-21.

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, 32 ILM 289.

JURISPRUDENCE

64933 Manitoba Ltd v Manitoba, 2002 MBCA 96, 214 DLR (4th) 37.

Alberta v Nilsson, 2002 ABCA 283, 320 AR 88.

British Columbia (Forests) v Teal Cedar Products Ltd, 2013 SCC 51, [2013] 3 SCR 301.

Canadian Pacific Railway v Vancouver (City of), 2006 SCC 5, [2006] 1 SCR 227.

Casamiro Resource Corp v British Columbia (AG) (1991), 80 DLR (4th) 1, 1991 CanLII 211 (BCCA).

Genesis Land Development Corp v Alberta, 2009 ABQB 221, 2009 CarswellAlta 546.

Manitoba Fisheries Ltd v The Queen (1978), [1979] 1 SCR 101, 80 DLR (3d) 462.

Mariner Real Estate v Nova Scotia (AG), 1999 NSCA 98, 178 NSR (2d) 294.

Methanex Corp v United States of America (2005), 44 ILM 1345 (NAFTA).

Rock Resources Inc v British Columbia, 2003 BCCA 324, 229 DLR (4th) 115.

SD Myers Inc v Canada (2001), 121 ILR 72 (NAFTA).

Taylor v Dairy Farmers of Nova Scotia, 2010 NSSC 436, 2010 CarswellNS 769.

The Queen (BC) v Tener, [1985] 1 SCR 533, 17 DLR (4th) 1.

The United Mexican States v Metalclad Corp, 2001 BCSC 1529, 95 BCLR (3d) 169.

SECONDARY MATERIALS

Brown, Russell. "Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience" (2009) 1:3 International Journal of Law in the Built Environment 179.

_____. "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40 UBC L Rev 315.

Harris, Douglas C. "A Railway, a City, and the Public Regulation of Private Property: *CPR v City of Vancouver*" in Eric Tucker, James Muir & Bruce Ziff, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law, 2012) 455.

Lee, Jeff. "Trains may run again down Vancouver's Arbutus Corridor", *Vancouver Sun* (9 May 2014) online: Vancouver Sun <http://www.vancouversun.com>.

Milke, Mark. *Stealth Confiscation: How Governments Regulate, Freeze, and Devalue Private Property—without Compensation* (Canada: Fraser Institute, 2012).