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Energy transition ushers in compensation claims for shifting land use plans

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Energy transition has led to an inevitable shift in government land use plans. This process will continue to evolve as all levels of government implement policies that restrict or prohibit certain types of resource development in favour of environmental protection, the exercise of Indigenous rights and other policy goals.

These changes in direction will create conflicts between contemporary government land use priorities and existing property rights, including freehold and leasehold interests in resources. For proponents of resource extraction projects, such as mines and oil and gas developments, these shifting land use priorities can effectively sterilize resources and preclude development of a project. Years of planning and tens or hundreds of millions of dollars spent on project planning activities, including exploration programs, technical studies, and regulatory and permitting processes, may be put at risk.

Where a government has not legally expropriated an asset but through government policy has effectively rendered property rights meaningless, a proponent or investor may have a cause of action for damages under the law of constructive taking.

Proponents and investors can take proactive steps

Within their respective constitutional authority, Canadian governments are not constrained from pursuing the energy transition and making corresponding decisions about land use and resource exploitation. However, the parties who face sterilization of their property rights as a result of those decisions may, absent a legislative bar precluding such claims, be entitled to seek compensation for their loss of meaningful ability to use their property.

There are already several constructive taking claims related to coal mines and oil sands projects working their way through the Alberta courts. We expect to see more constructive taking claims in the coming years as land use plans and government policies across the country threaten to sterilize additional resources.

It is critical that companies contemplating these types of claims have a sophisticated litigation strategy unique to the context of litigation against government. Having a comprehensive understanding of the law of constructive taking is essential to obtaining a favourable result or resolution.

Constructive taking compensates property owners for effective property loss

A claim of constructive taking, which is also known as de facto expropriation, is a claim a property owner or rights holder makes against a government for compensation for loss of the beneficial interest in property. Historically, constructive taking claims often arose in the context of private land being set aside for national or provincial parks or nature preserves. Large infrastructure projects which involve contiguous stretches of land, such as irrigation canals, dams, highways, greenbelts and city ring-roads, have also given rise to bouts of constructive taking claims. However, the case law around constructive taking was inconsistent and unsettled. One major area not resolved until recently was the question of whether a claimant was required to prove a transfer of the property right itself to the government, or whether a claim for constructive taking could be made where a government merely took a benefit or advantage in the property.

The Supreme Court of Canada resolved this question in *Annapolis Group Inc. v. Halifax Regional Municipality* (2022), which we summarized in our Osler Update on the case. There, the Court clarified that a property owner was not required to show that a government entity had formally acquired a proprietary interest in order to establish a constructive taking. Rather, the claimant was only required to demonstrate that the government had obtained an advantage flowing from the property and had eliminated all reasonable or economic uses of the property.

The decision departs from the narrower application of the doctrine that had been applied by some courts. The Supreme Court's decision favours a broader scope for potential constructive taking claims that could compensate property owners where government has obtained an "advantage" flowing from the property at the expense of the property owners' ability to reasonably or economically use its property. An "advantage" flowing to the government may arise in many situations, including permanent or indefinite denial of access or occupation by government, deprivation by regulation of all but a notional use of the land, confining the use of private lands to public purposes or even the creation of a statutory monopoly that deprives a corporation of the entirety of its goodwill and customer base. The threshold for finding that an advantage has been secured considers substance, rather than form, and requires "something more 'beyond drastically limiting use or reducing the value of the owner's property.'"

This sets the stage for a rise in claims in the context of the energy transition as certain resources fall out of favour with governments of the day and resource owners lose their ability to develop their resources as a result of the advantage conferred on government by particular decisions.

The energy transition gives rise to new land use priorities

Several issues present circumstances that could result in the actual, effective or economic sterilization of mineral interests long after investors acquired those rights and incurred costs planning and developing resource projects. These include land use planning, considerations around reconciliation with Indigenous peoples and policy decisions about types of resources that are deemed to be inconsistent with the government's energy transition goals, such as thermal coal, oil sands and conventional oil and gas. In these circumstances, a constructive taking claim may be available.

Claims for constructive taking are not only available in connection with resources that have traditionally large emissions footprints. Claims could also be appropriate in any instance in

which government has, in effect, acquired an advantage. Government may acquire an advantage by dictating its preferred land use through direct government policy restrictions or prohibitions, or through refusals to grant permits, exemptions or licences. For example, where a policy decision is made to refuse all new exploration or development permits for an area, courts have found this to be a constructive taking of the benefits associated with any resources which would have required new permits to access. Indeed, no industry is immune from shifting government land use priorities, as most recently evidenced by the Alberta government's pause on approvals for all new renewable electricity generation projects. We wrote about this policy decision in our Osler Update.

Shifting priorities to accommodate Indigenous interests

In Canada, the desire to remedy historic injustices towards Indigenous peoples may result in shifting land priorities that go beyond purely environmental considerations. The increasing push for reconciliation with Indigenous peoples may drive governments to make sweeping changes to their regulatory regimes or land use planning systems. Sometimes, these changes must occur rapidly in response to court decisions that conclude that historical wrongs have been committed.

We recently saw an example of such changes in British Columbia following the British Columbia Supreme Court's decision in *Yahey v. British Columbia*. The rise of cumulative effects litigation, which we discussed in our 2022 Legal Year in Review, forces governments to look more closely at the way they assess new project approvals. In some circumstances, this could lead to changes in permitted land uses due to concerns about the cumulative effects of development on Indigenous rights in an area. As increasing amounts of land are used for industrial activities, including "green" energy projects, claims by Indigenous communities regarding the cumulative effects of development are likely to increase, elevating the risk that governments will address such issues by halting or limiting new development, sterilizing resources or other land uses as a result.

Regardless of the reason for the change in land use priorities, the law of constructive taking may provide a remedy for investors that find themselves holding the bag with property interests that no longer have any reasonable economic use.

Strategic approach required

The law of constructive taking is complex and requires a sophisticated litigation strategy adapted to the nuances of litigating high profile disputes against governments. As these claims become more prevalent to address increasing changes in land use, governments' approach to defending these claims will likely shift. Therefore, it is critical to engage regulatory and litigation counsel experienced with these claims early to consider all potential avenues for timely compensation and devise a strategy suited for the unique facts of the case.