New provisions governing disguised expropriation in the Act respecting land use planning and development: Impact of the declaratory effect and transitional provisions

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On December 6, 2023, an amendment to the *Act to amend the Act respecting municipal taxation and other legislative provisions*[1](“**Bill 39**”)was adopted during a clause-by-clause consideration of Bill 39 in parliamentary committee. Two days later, the Bill received assent. This amendment introduced new provisions to circumscribe the circumstances in which a municipality’s use of one of its powers may be considered disguised expropriation,[2] particularly when the power exercised is provided for in the *Act respecting land use planning and development*[3] (the “**Act**”).

Legislative framework for disguised expropriation

Certain provisions have been codified in the new section 245 of the Act, in line with case law on disguised expropriation.[4] The Act now expressly states that a planning by-law may restrict the exercise of a right of ownership, without giving rise to an indemnity, unless the restrictions are so severe as to prevent any reasonable use of an immovable.[5]

It has now been established by law that a municipality’s act affecting the use of an immovable creates no obligation to indemnify under article 952 of the *Civil Code of Québec*[6] (“C.C.Q.”).

To enable municipalities to exercise their role in protecting the environment, as well as the health and safety of people and property, a presumption is now applied in their favour to the effect that the infringement of a right of ownership is justified solely insofar as it results from an act that meets one of the conditions listed in paragraph 3 of section 245 of the Act. The presumption thus applies when the expropriator demonstrates that the purpose of the act is to:

protect wetlands and bodies of water;

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protect another environment of high ecological value; or

that the act is necessary to ensure human health or safety or the safety of property.[7]

Declaratory effect

A noteworthy change is that the new section 245 of the Act is declaratory, meaning that it has a retroactive effect.

Generally, the principle of interpretation is that new laws have no retroactive effect, as set out in the *Interpretation Act*.[8] The intention behind making section 245 of the Act declaratory was to give the provision retroactive effect from the date that it came into force.

It is important to note that this declaratory effect is absolute, such that the courts are bound to comply with it, as if the section had always existed and had such effect. It cannot therefore be associated with the general rule that legislation is prospective, meaning that it only has an effect in the future.[9] In enacting declaratory legislation, the legislature assumes the role of a court and dictates the interpretation of its own law, such that it becomes akin to binding precedents[10]. As a result, such legislation may overrule a court decision in the same way that a Supreme Court decision would take precedence over a previous line of lower court judgments on a given question of law.[11]

That being said, the declaratory effect of the Act's new section 245 will only apply to disputes instituted since its coming into force and before December 8, 2023, as well as to cases taken under advisement by a trial judge, and cases that are pending and under advisement before the Court of Appeal of Quebec. It will therefore not be possible to apply to have a judgment that has acquired the effect of *res judicata* amended by invoking this declaratory effect. Incidentally, as recently as January 2024, the Court of Appeal had decided to allow a municipality appealing a decision raising issues related to the content of Bill 39, to add further arguments to the existing appeal brief.[12] According to the appellant municipality, the "new law" would have the effect of sealing the fate of the case in question.[13]

On June 18, 2024, following its hearing of this same case on the merits, the Court of Appeal found that "[TRANSLATION] it was not able, on the basis of the case on appeal as constituted, to render an abstract decision on an issue that was not truly debated at trial."[14] Consequently, the Court of Appeal overturned the findings at trial for the sole purpose of allowing the trial judge to decide the case in light of the parameters set by new section 245.[15] It would therefore seem that the referral of appeal cases back to the trial stage is the route preferred by the Court of Appeal in accordance with the declaratory effect of the new legislative provisions.

Various other amendments

Other provisions also include amendments related to the conditions described above. Technically speaking, the provisions of Bill 39 relating to expropriation came into force as soon as it received assent. However, the transitional provisions created certain exceptions.

Firstly, as of June 8, 2024,[16] municipalities will be required to send a notice to the owner of an immovable concerned by an act referred to in one of the three presumptions. Such notice must be sent within three months of the date of entry into force of the act.[17]

Secondly, the owner of an immovable who has suffered an infringement of their right of ownership that prevents all reasonable use of the immovable may now bring a proceeding before the Superior Court for the payment of an indemnity under article 952 of the C.C.Q. Such a proceeding is prescribed three years after the date of coming into force of the act. This period began to run on December 8, 2023, for regulations in force on that date, without extending periods that had already

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begun to run.

Finally, it is important to note that it is now possible for a municipality that has been found guilty of disguised expropriation to acquire the immovable concerned. The municipality can therefore decide to acquire the immovable or put a stop to the infringement of the right of ownership.[18] Under the transitional provisions, in any dispute where the judge has not taken the matter under advisement by December 7, 2023, the Court must consider these rules concerning the possibility for a municipality to put an stop to an infringement of the right of ownership.[19]

Conclusion

The sections added to the Act under Bill 39 provide a framework for interpreting and applying the principle of disguised expropriation. The declaratory effect was clearly intended to accommodate municipal authorities wishing to benefit from the principles of this new legislation in pending cases.

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1. B. 39, 1st Sess., 43rd Legis., Quebec, 2023.
2. The Ministère des Affaires municipales et de l'Habitation opted instead for the term "expropriation de fait" (de facto expropriation) in the Muni-Express on the adoption of Bill 39 (see the *Act to amend the Act respecting municipal taxation and other legislative provisions* – Muni-Express (gouv.qc.ca))
3. CQLR, c. A-19.1.
4. *Municipalité de Saint-Colomban c. Boutique de golf Gilles Gareau inc.*, 2019 QCCA 1402; *Dupras c. Ville de Mascouche*, 2022 QCCA 350.
5. Minister's comments in support of the amendments to section 245 of the Act.
6. CCQ-1991.
7. New section 245, para. 3 of the Act.
8. CQLR, c. I-16, s. 50
9. *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46.
10. *Id.*, para. 27.
11. *Id*.
12. *Ville de Saint-Bruno-de-Montarville c. Sommet Prestige Canada inc.*, 2024 QCCA 25, para. 5.
13. *Id.*, para. 1.
14. *Ville de Saint-Bruno-de-Montarville c. Sommet Prestige Canada inc.*, 2024 QCCA 804, para. 30.
15. *Id.*, paras. 30 and 31.
16. Bill 39, section 87, para. 1.
17. New section 245.1 of the Act.
18. New section 245.3 of the Act.
19. Bill 39, section 87, para. 2.

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