

Canadian Common Law and Civil Law Approaches to Constructive Takings: A Comparative Economic Perspective

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This paper examines the common law and civil law approaches to the question of constructive takings, also known as disguised or *de facto* expropriation. The paper begins by illuminating the doctrinal differences between the common law and the civil law rules of constructive takings. Québec civil law will generally find that a "disguised expropriation" has taken place in cases where regulations prevent an owner from engaging in all profitable uses of his or her property. The common law rules are more restrictive. A common law *de facto* expropriation will only be found where the owner has been deprived of all "reasonable" uses of his or her property, with reasonable being defined to include some unprofitable uses. Further, in the common law, the public authority must also acquire a "beneficial interest" in the property through its regulations in order for a claim of *de facto* expropriation to succeed. These doctrinal differences are compared through the lens of economic efficiency. After an overview of the economic literature on expropriation, the author identifies four criteria that are of particular relevance in assessing the economic efficiency of the rules of constructive takings: risk, incentives, administrative costs and fiscal illusion. Applying these criteria to the doctrinal differences between the two systems, the author finds that the rules of Québec civil law likely provide a more economically efficient approach. That said, the result does depend to some extent on institutional circumstances, and requires empirical confirmation on some points.

Dans cet article, on explore les différentes manières, en common law et en droit civil, d'aborder la question des appropriations par interprétation, que l'on connaît également sous le nom d'expropriation déguisée ou de fait. Le texte débute par une explication claire des différences doctrinales entre les règles de common law et de droit civil en matière d'appropriation de fait. En droit civil québécois, on considérera qu'il s'agit d'une « expropriation déguisée » dans les cas où les règlements empêchent un propriétaire de profiter de tous les usages payants de son bien. Les règles de common law sont plus restrictives. En effet, on ne conclura à une expropriation de fait en common law que si le propriétaire a été privé de tous les usages « raisonnables » de son bien, la définition du terme « raisonnable » comprenant certains usages non lucratifs. En outre, en common law, l'administration publique doit également acquérir un « intérêt bénéficiaire » à l'égard du bien par le biais de règlements pour qu'une revendication d'expropriation de fait obtienne gain de cause. On compare alors ces différences doctrinales à la lumière de l'efficacité économique. Après avoir passé en revue la littérature économique sur l'expropriation, l'auteur dégage quatre critères ayant une pertinence particulière pour évaluer l'efficacité économique des règles relatives à l'appropriation par interprétation : le risque, les mesures incitatives, les frais d'administration et l'illusion budgétaire. En appliquant ces critères aux différences doctrinales entre les deux systèmes, l'auteur conclut que les règles du droit civil québécois présentent une approche plus efficiente sur le plan économique. Cela dit, le résultat dépend dans une certaine mesure des conditions institutionnelles et exige une confirmation empirique sur certains points.

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I. INTRODUCTION

In Canada, there are no explicit constitutional protections for property rights. Those quasi-constitutional instruments that protect property rights either offer minimal protection from legislation,¹ or have been interpreted narrowly.² However, both the common law and Québec civil law provide a presumption in favour of compensation where property has been expropriated, unless legislation explicitly derogates from this presumption.³ Furthermore, there are statutes all across Canada that provide for compensation for the expropriation of land.⁴ But not all expropriation is done explicitly, with a transfer of title from the owner to the state. Both legal systems have recognized that by less direct methods the government can achieve the same end, and they both provide a means for checking these “disguised” or “*de facto*” forms of expropriation.

The common law and civil law approaches to constructive takings differ to a surprising extent, however. The Québec Court of Appeal has struck down zoning rules that leave a broad range of uses to the owner, including the construction of schools, churches and administrative buildings, on the basis that none of these uses

1 *Charter of human rights and freedoms*, RSQ c C-12 s 6 (“[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law”).

2 *Canadian Bill of Rights*, SC 1960, c 44, s 1 (a), reprinted in RSC 1985, App III, as interpreted narrowly in *Authorsen v Canada* (AG), 2003 SCC 39, [2003] 2 SCR 40. The *Alberta Bill of Rights*, RSA 2000, c A-14, s 1(a) has the same wording. The *Alberta Personal Property Bill of Rights*, RSA 2000, c A-31 has not significantly influenced any proceedings to date. All three instruments are cited in 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 at 344-45.

3 For the civil law, see art.952 CCQ (“[n]o owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in consideration of a just and prior indemnity”). For the common law, see, *inter alia*, *AG v De Keyser’s Royal Hotel, Limited*, [1920] AC 508 at 542, [1920] 122 LT 691 at 698 (HL), Atkinson LJ (“unless the words of the statute clearly so demand, the statute is not to be construed so as to take away the property of a subject without compensation”), applied in *Manitoba Fisheries Ltd v Canada*, [1979] 1 SCR 101, 88 DLR (3d) 462 [*Manitoba Fisheries* cited to SCR].

4 Ziff, *supra* note 2 at 347.

is profitable.⁵ On the other hand, the Supreme Court recently indicated not only that a lack of profitable uses was not enough to demonstrate common law *de facto* expropriation, but also that the state would have to acquire a “beneficial interest” in the property in order for the expropriation to merit compensation.⁶ This particular requirement does not exist at all under the civil law doctrine of disguised expropriation. These are important differences, which mean that the civil law is much more welcoming of claims for constructive takings.

Take the crude example of a piece of land with profitable uses p_1 , p_2 and p_3 , and unprofitable uses r and u , where r is a reasonable use and u is an unreasonable use. In this paper, a profitable use is understood to be a use for which the benefits outweigh the costs in terms of market value, such that the present value of an asset restricted to that use remains positive.⁷ The land in question is held by a single private owner and is subject to regulation by a body whose authority is delegated from the legislature without any explicit legislative authorization for uncompensated expropriation. Under both the common law and the civil law, the body could most likely prohibit use p_1 without offering any compensation and not run afoul of the respective doctrines of constructive expropriation. If, on the other hand, the body prohibited only the profitable uses p_1 , p_2 and p_3 , then it would very likely fall under the civil law doctrine of disguised expropriation. But given that the reasonable (though unprofitable) use r is still available to the owner, the common law doctrine of *de facto* expropriation would not appear to apply. If p_1 , p_2 , p_3 and r were prohibited, leaving only unreasonable uses, then the civil law doctrine of disguised expropriation would apply, but the application of the common law doctrine would still be in doubt, as it would depend on whether the prohibition led to the acquisition of a “beneficial interest” by the state. This example is a very rough illustration of the differences between the two doctrines, and there are nuances that it overlooks. Despite these limitations, it is enough to give us a sense of the extent of the gap between these two functionally similar sets of rules.

It is the purpose of this paper to examine these differences using a set of economic efficiency criteria as a comparator. Economic criteria are not the only relevant factors in takings law, but they are significant. If a taking cannot be justified on the basis that it constitutes an improvement in efficiency, then it is likely nothing

5 *Donnacona (Ville de) c Gagné-Lambert*, [1976] RJQ 503 (CA) [*Donnacona*]. See also *Aubry v Trois-Rivières Ouest (Ville de)*, [1978] 4 MPLR 62, 1978 CarswellQue 72 (CA) [*Aubry*]; *Vincent c Longueuil (Ville de)*, [1972] RJQ 821 (CS) [*Vincent*]; *Ivanhoe Corp c Val d'Or (Ville de)*, [1973] RJQ 904 (CS) [*Ivanhoe*]; *Montréal (Ville de) c Benjamin*, [2004] JQ no 12943, 2004 CarswellQue 9263 (CA) [*Benjamin*]; and Daniel Chénard, “La Cour d’appel du Québec et l’expropriation déguisée: le prix à payer” in *Développements récents en droit municipal*, vol 247 (Cowansville, Que: Yvon Blais, 2006) 97 at 107-09 and 125-30.

6 *Canadian Pacific Railway v Vancouver (City of)*, 2006 SCC 5 at para 30, [2006] 1 SCR 227 [*CPR v Vancouver*].

7 For example, if the only use permitted for a particular piece of land was to build a skating rink on it, and there was no way to operate a skating rink there profitably, nor anyone willing to buy a rink for more than the cost of construction, there would be no permitted profitable uses for that land.

more than a particularly disruptive form of wealth transfer.⁸ An economically inefficient taking is generally very difficult to justify.

The second part of this paper will review the economic literature on takings. Ultimately, I will argue that four factors are of particular importance in assessing the economic efficiency of constructive takings law: risk, incentives, administrative costs and fiscal illusion. Risk and incentives are considered together, as there are significant trade-offs between them. The risk of expropriation is a source of inefficiency in the economy, but compensating for expropriation distorts incentives by failing to discourage private investment in properties with potential public uses.⁹ Next, the administrative costs of a risk-mitigation framework based either on public compensation or on private insurance are a serious concern.¹⁰ Finally, fiscal illusion refers to the possible tendency for electors and governments to undervalue costs that are less evident. If the costs of a measure are hidden, as in the case of a constructive taking, then the relative benefits will be exaggerated and inefficient policies may result.

In the third and fourth parts of the paper, I will review the law of *de facto* takings in Canadian common law and the law of disguised expropriation in Québec civil law. After highlighting the differences, I will, in the fifth part of the paper, engage in an economic assessment of the two approaches according to the four criteria set out earlier. I will argue that the civil law offers a more plausible balance of the four competing factors, although this depends on assumptions as to the relative weight afforded risk and administrative costs.

Given the important differences that persist between the two systems, this area of law is ripe for a comparative perspective on how these systems carry out this important economic function. The comparative perspective may also be useful if the Supreme Court ever does thoroughly examine the Québec doctrine of disguised expropriation, which it has never done. Given the tendency in Canadian law to settle on similar rules for the two systems when doctrinal controversies emerge (sometimes over the objections of the Québec Court of Appeal),¹¹ the

8 Efficiency in this regard is understood in terms of Kaldor-Hicks efficiency. A Kaldor-Hicks efficiency improvement is brought about by a policy where the gains to winners outweigh the losses to losers. More precisely, a Pareto improvement could be brought about under such a policy by providing compensation from those that are made better off by the policy to those that are made worse off, such that no agent is made worse off than before the policy. A simple Pareto improvement is an allocation that makes at least one agent better off without making any agent worse off. For a good introduction to these concepts and their limitations, see Richard A Posner, *Economic Analysis of Law*, 4th ed (Boston: Little, Brown and Company, 1992) at 13-16.

9 Louis Kaplow, "An Economic Analysis of Legal Transitions" (1986) 99:3 Harv L Rev 509 at 522.

10 This is especially so for constructive takings, the value of which may be difficult and costly to discern.

11 See e.g. *St Lawrence Cement v Barrette*, 2008 SCC 64, [2008] 3 SCR 392 (in which the Supreme Court adopted something approximating the common law approach to liability for neighbourhood annoyances, breaking down part of the civil law distinction between real and personal rights). See also *Matamajaw Salmon Club v Duchaine*, [1921] 2 AC 426, 59 DLR 391 (PC) (in which the Privy Council allowed for the creation of real rights not enumerated in the *Civil Code of Lower Canada*, overturning judgments that had attempted to place the right in question in a traditional civil law category).

question of eliminating this particular area of civil law distinctiveness may arise. A greater understanding of the efficiency considerations involved in doing so may thus be useful. The results may also be useful as the courts flesh out the general (and somewhat vague¹²) requirements for common law *de facto* takings that were set out in *CPR v Vancouver*, particularly with regards to the emphasis placed upon the "beneficial interest" requirement. Finally, the comparative perspective itself may help to foster a deeper understanding of how the two systems work.

II. ECONOMIC THEORY

A. A Brief Overview of Takings Literature

The purpose of this section is to provide a succinct overview of economic approaches to takings as they relate to the question of constructive takings. The modern theoretical literature on the economic efficiency of takings begins with Guido Calabresi and A Douglas Melamed's seminal piece.¹³ In that article, the two authors focused on the difference between property rules and liability rules. Under the former, entitlements are protected by a requirement that consent for violations be given by the entitlement holder, whereas under the latter, entitlements are protected only by a requirement that an objectively determined value be paid for the destruction of the entitlement.¹⁴ In this framework, expropriation with compensation is a conversion of a property rule into a liability rule by the state. The economic choice to expropriate is determined primarily by considering the transaction costs associated with achieving efficient results under property rules, and the risk of under- or overvaluing the entitlement that goes along with liability rules.¹⁵ In other words, the ordinary way of thinking about property is that interference with an object of property requires the consent of the owner. This allows for the market in goods to set an accurate value on the object. However, special circumstances may arise (like when an intransigent owner will not agree to sell land that is needed for a communal project, such as the construction of a road). In this situation, it may be better to move from a "property rule," which requires the consent of the owner, to a "liability rule," under which the rights of the owner can be violated as long as compensation is paid.

Constructive expropriation, though, raises a slightly different question. Here we are dealing with government regulation that deprives the owner of the value of her or his asset without any compensation at all. The choice is not between

12 Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40:1 UBC L Rev 315 at 322-23.

13 Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85:6 Harv L Rev 1089.

14 *Ibid* at 1092.

15 *Ibid* at 1118-20, 1126.

a property rule and a liability rule; instead, the choice is between either converting a property rule into a liability rule, thus compensating the dispossessed owner, or simply dissolving the property rule without any compensation at all. This choice pits the inefficiencies of liability rules against the inefficiencies of uncompensated expropriation. The theoretical literature that is most relevant to this analysis deals with the question of whether, and when, to compensate for expropriations. There are several ways to approach this question. In the rest of this section, I will try to cover these approaches using the leading examples of different theoretical frameworks. In doing so, I overlook some prominent articles that overlap in their methodology with other articles covered.

Models of the trade-offs involved can be usefully divided into those that view the government as an external factor and those that internalize government action. The former models tend to view the government as pursuing either efficiency-neutral or benevolent objectives, regardless of the rules in place. In this sense, the government is external to the analysis: it is an outside influence whose actions with respect to expropriation are unaffected by the incentives of the system. The latter models view the government as a self-interested body whose actions need to be optimized by creating the best incentive structure for it. Another way of thinking about this distinction is that in models in which the government is external, the decision to expropriate (or, for our purposes, regulate in a manner equivalent to expropriation) is not part of the analysis. The government is assumed to make its decision to expropriate in an efficient manner, such that the only relevant question is what effect the decision to *compensate* for the expropriation will have on the incentives of market actors. On the other hand, in models in which the government's response to incentives is considered as part of the analysis, the decision to expropriate and the decision to compensate are considered together. For example, a requirement that compensation be given for a particular expropriation is seen as affecting the government's decision to go ahead with it, because the government is sensitive to the costs it will have to bear.

In models where the government is external, it is not seen as an actor that responds to incentives and whose behaviour needs to be optimized by structuring the rules in a particular way. It is instead viewed as a benevolent policymaker that will not engage in expropriations that are socially inefficient. The primary trade-offs are thus rooted in the behaviour of market actors, rather than the government. Accordingly, the question for one writer is how to induce market actors to invest the socially optimal amount in their properties, rather than over-invest.¹⁶ Owners may over-invest if compensation for expropriation is guaranteed, thereby removing the incentive to take into account the potential for social uses when making

16 Benjamin E Hermalin, "An Economic Analysis of Takings" (1995) 11:1 *JL Econ & Org* 64 at 65-66 (Hermalin goes on to discuss second-best solutions where the government is not benevolent, but this does not drive the analysis).

private investment decisions.¹⁷ For example, if compensation for expropriation is guaranteed, then owners of land that is likely going to be used to build a freeway will have no incentive to take this potential use into account, and may invest substantial amounts in capital that will have to be destroyed. However, if compensation is not guaranteed, then market actors may invest at inefficiently high levels in order to sway the cost-benefit calculus of the planner against expropriation.¹⁸ This is because a benevolent planner will consider both private and social costs and benefits. The same landowner in a potential freeway route may over-invest in order to dissuade the planner from zoning the land for use as a freeway route. The simple act of improving the land in ways that would have to be undone in order to build a freeway may be enough to sway the calculations of a planner who is looking to the costs to society as a whole of using that freeway route. The trade-off in this framework, then, is between the over-investment that goes along with full compensation and the over-investment that goes along with a lack of compensation.

The most comprehensive and readily applicable example of this approach is seen in an article by Louis Kaplow,¹⁹ which continues to be used as a framework for the optimal compensation of regulatory takings.²⁰ In Kaplow's paper, the central question of economic transitions, including regulatory takings, is seen as a trade-off between the problem of risk in the market and the problem of incentives.²¹ The prospect of uncompensated expropriation introduces risk into the economy, which is generally considered to be bad, given that agents tend to be risk-averse.²² The risk of uncompensated expropriation is thus a source of inefficiency in an economy. The explanation for why risk is normally bad is highly intuitive. Consider two salary options. In one case, you are paid \$20 000 per year. In another case, at the end of every year, a coin is flipped to determine whether you are paid \$0 or \$40 000 for your year of work. In either case your expected payout is \$20 000, but most people are not indifferent to these two options. There may be many reasons for this but, for our purposes, the most interesting one is that the things you buy with your first \$20 000 are worth more to you than the things you buy with your second \$20 000. An even chance of getting an extra \$20 000 is simply not worth the risk of going without food and shelter for a year. This is the concept of diminishing marginal utility, and it accurately describes the motives of most market actors. The chance that the government will take away the value of an asset constitutes an economically undesirable risk, even after actors take into account lower expected values for

17 *Ibid* at 70.

18 *Ibid* (in the case of constructive takings, owners may over-invest in order to sway the cost-benefit analysis of the planner against actions equivalent to a taking that would require compensation).

19 *Supra* note 9.

20 See e.g. David Cohen & Brian Radnoff, "Regulation, Takings, Compensation, and the Environment: An Economic Perspective" in Chris Tollefson, ed, *The Wealth of Forests: Markets, Regulation, and Sustainable Forestry* (Vancouver: UBC Press, 1998) at 299.

21 *Supra* note 9 at 527.

22 *Ibid*.

assets that may be expropriated. The promise of compensation for expropriations alleviates the risk.

But compensating expropriated properties has an undesirable effect on incentives because it encourages owners to ignore the prospect of expropriation.²³ Regardless of the wisdom of the expropriation itself, this leads to wasted investment. Consider the earlier example of landowners in a potential freeway route. If they are promised compensation for zoning regulations that may affect the value of their land, then the landowners will be free to build on the land, secure in the knowledge that if zoning one day renders the land unusable, they will be fully compensated. Wasted investment is a distinct possibility under this incentive structure.

Risk can be mitigated through either diversification or insurance, though both of these mechanisms have limits.²⁴ Diversification has obvious practical limitations for certain kinds of ownership, such as individual home ownership or the ownership of the assets of a small company. Private insurance markets are usually well suited to dealing with the risk-incentives trade-off and the problems it creates, like moral hazard and adverse selection.²⁵ Furthermore, as noted above, blanket compensation without risk-related premiums or conditions will always lead to over-investment in risky properties.²⁶ Consequently, it is only in rare circumstances that government compensation would make sense as a policy, according to the model presented by Kaplow.²⁷ In his analysis, the risk-incentives trade-off is best left to market actors.

Models that internalize government action tend to present a different set of trade-offs. In these models, the government pursues ends other than social efficiency, and needs to be constrained in order to prevent it from pursuing these ends without properly considering the private costs of its actions. A government may seek to maximize the utility of an electoral majority at the expense of a dispossessed minority;²⁸ similarly, it may work to benefit powerful interest groups;²⁹ or it may underestimate the costs of an action unless those costs are included in the government budget (a kind of "fiscal illusion").³⁰ This mode of analysis views the primary trade-offs as those between the inefficiencies of "market failure" on the one hand and the inefficiencies of "government failure" on the other.³¹ Markets may

23 *Ibid.*

24 *Ibid* at 528.

25 *Ibid* at 541-42. The former refers to the tendency of insured parties to undervalue risks, while the latter refers to the tendency of those with higher than normal risk to opt in to insurance plans at greater rates than those with lower risk (*ibid*).

26 *Ibid* at 542.

27 *Ibid.*

28 See James Geoffrey Durham, "Efficient Just Compensation as a Limit on Eminent Domain" (1985) 69 Minn L Rev 1277 at 1296.

29 See Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass: Harvard University Press, 1985) at 263-64.

30 See Thomas J Miceli & Kathleen Segerson, "Regulatory Takings: When Should Compensation Be Paid?" (1994) 23:2 J Legal Stud 749 at 754-56.

31 See e.g. Durham, *supra* note 28; Miceli & Segerson, *ibid*.

fail to yield efficient outcomes for a variety of reasons, including transaction costs and externalities. Where transaction costs are high, the property market may fail in that otherwise socially beneficial transactions will not proceed because the costs of reaching a deal are too high. Externalities refer to cases where legal actions have an effect on non-consenting third parties. One example is a buyer whose refusal to sell her or his land prevents many landowners from having access to a road. However, these inefficiencies must be balanced against the prospect of government failure due to electoral calculations, interest group pressure or fiscal illusion. A guarantee of compensation for expropriations may help in this regard by forcing governments to pay the costs of their actions. This may act as a deterrent to inefficient government action.

Miceli & Segerson provide us with a good example of a model that internalizes government action.³² In their formal model, the government suffers from fiscal illusion in that it fails to account for the private costs of its actions unless it is forced to pay compensation for those costs. At the same time, market actors are susceptible to moral hazard problems if they are guaranteed compensation for takings. As I demonstrated earlier, they may tend to over-invest if they are insulated from risk by a guarantee of compensated expropriations.³³ Consequently, neither zero compensation nor full compensation for expropriation is efficient under this model. If zero compensation is paid for expropriation, then the government will pursue public benefits that are outweighed by their costs as long as those costs are borne by private actors, rather than the government. If full compensation is paid, then private actors will invest in properties even when it is likely that those properties will be expropriated and destroyed. The example of zoning private land as parkland on which no buildings are allowed is illustrative. It may be that the park's costs are greater than its benefits, but that a government insensitive to private costs would go ahead with the zoning if it did not have to pay compensation to landowners. In the alternative, it may be that the park's benefits are greater than its costs, but that private landowners may nevertheless build on land that has a chance of being zoned as parkland in the future, secure in the knowledge that if zoning goes ahead, then they will be fully compensated. Clearly, neither of these outcomes is efficient.

Efficient solutions are those that encourage market actors, including the government, to consider social costs rather than private or government costs. Two rules satisfy this criterion. The first rule would offer compensation for a taking only if the land is being used efficiently when the impugned regulation comes into effect.³⁴ The second rule would offer compensation for a taking only if the

32 *Ibid.*

33 *Ibid* at 750.

34 *Ibid* at 760.

government imposed the impugned regulation *inefficiently*.³⁵ Either rule would arrive at a socially optimal solution under the Miceli & Segerson model.³⁶

The administrative costs of a compensation regime, whether it is based private insurance for the risk of expropriation or on the provision of government compensation, may also be a significant factor.³⁷ This will be a particularly relevant consideration where the expropriated value is small relative to individual wealth,³⁸ or where the expropriated value is difficult to determine.³⁹ The administrative costs of either publicly administered compensation or private expropriation insurance may be particularly relevant for cases of constructive takings, where the value of losses is difficult to determine because they are either partial, or relate to hypothetical future uses that are costly to ascertain.⁴⁰

B. Framework for Analysis

The framework used in this paper will emphasize four factors from the takings literature that are particularly relevant to the question of constructive expropriation: risk, incentives, administrative costs and fiscal illusion. The first two factors represent the core trade-off relating to the behaviour of market actors, excluding the government. The risk of regulatory change is a real economic cost that must be borne in the absence of compensation.⁴¹ But full compensation can lead to perverse incentives for market actors who may consequently ignore the risks of expropriation.⁴² The risk-incentives trade-off tries to capture the concerns of those writers who have viewed the government's role as exogenous. In considering these factors, the incentives faced by the government are set aside, and the costs due to the risk and perverse incentives of market actors are examined. Everything else being equal, more generous compensation will have a perverse effect on incentives, while less generous compensation will increase the risk of expropriation faced by market actors.

The third factor, administrative costs, is often overlooked in general writing on takings and legal transitions but is particularly relevant in cases of constructive takings. Both the determination of whether an expropriation has taken place and

35 *Ibid* at 761.

36 Another factor that may be considered from this perspective is the problem of "demoralization costs," which represent the disutility suffered by agents that is caused by the realization that no compensation will be offered. See Frank I Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80:6 Harv L Rev 1165 at 1214.

37 Lawrence Blume & Daniel L Rubinfeld, "Compensation for Takings: An Economic Analysis" (1984) 72:4 Cal L Rev 569 at 599-606.

38 *Ibid* at 607-08.

39 Jon H Goldstein & William D Watson, "Property Rights, Regulatory Taking, and Compensation: Implications for Environmental Protection" (1997) 15:4 Contemporary Economic Policy 32 at 37.

40 *Ibid*.

41 Kaplow, *supra* note 9 at 522.

42 *Ibid*.

the determination of the value of the expropriated asset are often complex in cases of constructive takings. Regulations that reduce the value of assets are ubiquitous and unavoidable. The regulatory apparatus of the state quite often makes decisions that affect the value of property. A commitment to full compensation every time it negatively affects the value of an asset would require an immense administrative effort. Furthermore, compensation criteria based on the diminution of value would require a great deal of information to determine. It would, therefore, be costly. Those compensation rules that are clear and do not require costly information to administer are best in that they facilitate settlement. Administrative costs also tend to increase as compensation rules apply to more cases, though a complete lack of government compensation may transfer the administration costs to private insurance. Given the potential complexity of the rules that may otherwise be proposed,⁴³ administrative costs are particularly relevant to cases of constructive expropriation.

The fourth factor, fiscal illusion, is potentially problematic for our analysis but likely also relevant in many cases of constructive takings. Fiscal illusion occurs where voters undervalue costs that do not appear in the government budget, while at the same time overvaluing benefits that the government can take credit for, such as the creation of new parks. The costs of a policy may outweigh its benefits, but as long as those costs do not accrue to the government, the policy may go ahead anyway in order to enable the government to claim benefits while privatizing costs. Costs in the government budget must be paid for through taxes, which voters are mostly aware of, but they may not be aware of the risk of constructive takings as a means of paying for government projects. Thus the argument depends on voters operating with imperfect information about the costs of government action, which has been borne out in empirical studies of fiscal illusion.⁴⁴ The problem of voter uncertainty about the costs of government action is likely to be exacerbated where the cost is apportioned surreptitiously via the regulatory burden, rather than through tax revenues. This means that the government will tend to over-regulate unless it is forced to bear the cost of its policies. For example, if taxes must be increased in order to pay for the creation of more parks, then the cost-benefit analysis involved will be evident to most voters. On the other hand, if green space is increased through rules preventing the development of land, then many voters will be aware of the benefits, but not of the costs in terms of the risk of the disguised expropriation of their own assets.

So, efficient constructive expropriation law ought to minimize total costs due to the problems of risk, incentives, administrative costs and fiscal illusion. The Canadian common law and civil law approaches to the question will be assessed according to these four criteria. It is to be expected that specific institutional

43 See e.g. Hermalin, *supra* note 16.

44 See Geoffrey K Turnbull, "The Overspending and Flypaper Effects of Fiscal Illusion: Theory and Empirical Evidence" (1998) 44 J Urban Econ 1.

circumstances will make some of the factors more important than others. However, even if these factors underdetermine the efficient solution to the question of disguised expropriation, they are nevertheless able to serve as grounds for comparing the manner in which the two systems carry out the same economic function, and may hint at the general structure of an efficient solution.

III. CANADIAN COMMON LAW

The Canadian common law of expropriation operates under the presumption that, unless legislation explicitly provides otherwise, the state ought to compensate owners when it takes their property.⁴⁵ It has been claimed that before 1978, this was only applied by Canadian courts to cases of explicit physical expropriation or physical damage inflicted by the Crown.⁴⁶ It has since been extended under the doctrine of constructive expropriation to include some cases in which legal title was not actually taken from the owners. Before *CPR v Vancouver*, the most prominent examples of this at the Supreme Court were *Manitoba Fisheries* and *British Columbia v Tener*.⁴⁷ In the former case, the creation of a state monopoly in certain fisheries was found to require compensation for the taking of “goodwill” towards a private business.⁴⁸ The physical assets of the fishing company were not seized, but were rendered useless, and, at the same time, the state acquired a valuable monopoly. In *Tener*, mineral extraction permits were rendered useless by the government’s refusal to grant permission to enter a provincial park that had come to include the area covered by the permits.⁴⁹ In that case, the Court was careful to point out that in denying permission to enter the provincial park to extract the minerals, the state had acquired the benefit of the unspoiled park.⁵⁰ A series of cases since then has reinforced the presumption in favour of compensation in cases where rightful access to minerals was denied.⁵¹

The common law of *de facto* expropriation was most recently examined by the Supreme Court in *CPR v Vancouver*.⁵² In that case, the City of Vancouver had required CPR to keep a transportation corridor intact for use by rail or walkways, thereby preventing CPR from engaging in any profitable use of the land, as the

45 Raymond E Young, “Canadian Law of Constructive Expropriation” (2005) 68:2 Sask L Rev 345 at 345-46.

46 Cohen & Radnoff, *supra* note 20 at 302.

47 *Manitoba Fisheries*, *supra* note 3; *British Columbia v Tener*, [1985] 1 SCR 533, 17 DLR (4th) 1 [*Tener* cited to SCR].

48 *Manitoba Fisheries*, *supra* note 3 at 118.

49 *Tener*, *supra* note 47 at 563.

50 *Ibid* at 564-65.

51 *Rock Resources v British Columbia*, [2003] 229 DLR (4th) 115, 15 BCLR (4th) 20 (CA) [*Rock Resources*]; *Casamiro Resource Corp v British Columbia* (AG), [1991] 80 DLR (4th) 1, 55 BCLR (2d) 346 (CA) [*Casamiro*], cited in Young, *supra* note 45.

52 *Supra* note 6.

Court acknowledged.⁵³ This apparently served the development plan of the City by keeping the corridor intact for future transportation uses.⁵⁴ The Court set out a two-pronged test for *de facto* expropriation requiring “(1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.”⁵⁵ The Court found that neither of these requirements was satisfied, though the case was ultimately decided on the basis that, in the *Vancouver Charter*, there was an explicit legislative exemption from compensation stemming from zoning decisions.⁵⁶

As I have noted, neither step of the test was satisfied in *CPR v Vancouver*. “Reasonable” uses remained under the second part of the test, though none of these uses was profitable.⁵⁷ Furthermore, in what Russell Brown regards as a revolution in Canadian takings law, the first part of the test was not satisfied.⁵⁸ Although the Court did not say so explicitly, Brown thinks that we are left to assume that it meant a “beneficial interest” in the equitable and proprietary sense; that is, rights to the use and enjoyment of the land.⁵⁹ Since the City of Vancouver did not acquire such rights, but only constrained CPR to uses that furthered the City’s aims, this was not enough to constitute an acquisition of a beneficial interest. If Brown’s interpretation is correct, then the Supreme Court has moved decisively away from its holding in *Tener*, where compensation was awarded even though the government did not take on rights to use and enjoy the mineral resources at issue. In that case, the government merely subtracted value from the mineral resources and added it to the provincial park.⁶⁰

If, on the other hand, the Supreme Court has not radically changed Canadian takings law with its *CPR v Vancouver* ruling, then the difference between the facts in that case and those in earlier cases must lie in the directness of the benefit realized by the public authority. The City of Vancouver received a benefit from the development plan, but only a hypothetical, future benefit (in that it may one day put the transportation corridor to some beneficial use). In *Tener* and *Manitoba Fisheries*, the public authorities benefited in very real and direct ways: in the former case, the state gained a more valuable park, and in the latter case, it gained a profitable monopoly. Similarly, in *Rock Resources* and *Casamiro*, the benefit to the public authority was unspoiled parkland, which is a more direct benefit than a hypothetical, future transportation corridor.⁶¹ A *de facto* expropriation was found in both cases. However, in *Nilsson*, where restrictions on the development of a

53 *Ibid* at para 8.

54 *Ibid* at paras 4-8.

55 *Ibid* at para 30.

56 *Ibid* at para 36.

57 *Ibid* at paras 8, 34; Brown, *supra* note 12 at 321.

58 *CPR v Vancouver*, *supra* note 6 at para 32.

59 Brown, *supra* note 12 at 323.

60 *Ibid* at 330.

61 *Rock Resources*, *supra* note 51; *Casamiro*, *supra* note 51.

transportation corridor were at issue, the Court found that there had not been a *de facto* expropriation, though it did find that there had been an abuse of public office.⁶² The beneficial interest requirement in *CPR v Vancouver* could thus be understood in terms of the directness of the benefit realized by the public authority, which would be more consistent with past case law than Brown's interpretation. Even if *CPR v Vancouver* represents this less severe distinction relating to the nature of the benefit realized by the public authority, it is still a significant limit on compensation, and one, as we shall see, that does not exist in Québec civil law.

IV. QUÉBEC CIVIL LAW

Article 952 of the Québec Civil Code reads: "No owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in consideration of a just and prior indemnity."⁶³ Its predecessor, article 407 of the Civil Code of Lower Canada (CCLC), which was in force until 1994, was essentially the same: "No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid."⁶⁴ Both provisions have their origins in article 545 of the French Civil Code, which is exactly the same as the French version of article 407 of the CCLC.⁶⁵ Article 952 and its predecessor have been given broad application under the doctrines of disguised expropriation ("expropriation déguisée") and quasi-expropriation.⁶⁶ The Supreme Court has never ruled decisively on the doctrine of disguised expropriation, though it has ruled on the related subject of discrimination and abuse of power in Québec municipal zoning.⁶⁷ The relevant jurisprudence on this subject is thus found at the Québec Court of Appeal and the Québec Superior Court.

In *Sula c Duvernay (Cit  de)*, the Court of Appeal declared null a bylaw that zoned privately-held land as parkland, precluding any development thereon.⁶⁸ According to the Court, a zoning decision that precludes any use of the land is not a zoning decision but an expropriation, and must come with compensation.⁶⁹ Despite an isolated and heavily criticized decision from 1975 at the Superior Court level, it has become accepted in Québec that a zoning law that regulates land use to preclude any development is void, and must instead be carried out as a compensable expropriation.⁷⁰

62 *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283, (2003) 220 DLR (4th) 474.

63 Art 952 CCQ.

64 Art 407 CCLC.

65 Art 545 C civ.

66 Ch nard, *supra* note 5 at 101-09.

67 *Sillery (Cit  de) v Sun Oil*, [1964] SCR 552, 45 DLR (2d) 541.

68 *Sula c Duvernay (Cit  de)*, [1970] RJQ 234 (CA) (a rule that is declared null in Québec civil law is deemed never to have been valid).

69 *Ibid* at 236.

70 Ch nard, *supra* note 5 at 106-07. See e.g. *Benjamin*, *supra* note 5 at para 61.

The gray areas of the Québec doctrine of disguised expropriation are visible in less egregious restrictions on land use. In *Donnacona (Ville de) c Gagné-Lambert*, the Québec Court of Appeal upheld a Superior Court judgment in which an “institutional” zoning regulation was struck down as a disguised expropriation.⁷¹ This regulation restricted uses of land to public or semi-public uses, such as schools, churches and parks.⁷² The Superior Court, with whom the Court of Appeal agreed in its reasons, found that the doctrine of disguised expropriation applies where regulations have rendered private property valueless.⁷³ Such “institutional” zoning regulations have been struck down for violating the doctrine on several other occasions since then, most recently in *Montréal (Ville de) c Benjamin*.⁷⁴ The primary criterion appears to be whether the land still retains value. According to one Québec writer, it is possible to imagine “institutional” zoning regulations that would be broad enough to survive examination for disguised expropriation, but they would have to be broad enough that the property could still be sold for positive value and the owner could still otherwise benefit from the property.⁷⁵ Similarly, where a rule renders impossible what it purports to regulate—like zoning land that has no profitable agricultural uses as agricultural land—it too will be struck down under the doctrine.⁷⁶ Whereas Canadian common law has found “reasonable” uses of the land to exist where there are no profitable uses of the land, in Québec civil law, the validity of regulations is much more closely related to the land’s profitable uses. In order to avoid nullity under the doctrine of disguised expropriation, the land must retain some resale value and the owner must be able to otherwise profit from it.

As I have noted, the normal recourse is an application for a declaration of nullity, which forces the public authority to engage in an explicit, fully compensated expropriation if it still wants to go ahead with the project. That said, in exceptional circumstances, where a declaration of nullity is no longer a practical option, due either to the passage of time or to procedural rules, courts have been willing to award compensation instead. This occurred in the Québec Court of Appeal’s most recent disguised expropriation case.⁷⁷ It happens most often in cases where property other than real property is at issue. Personal rights and other rights, like the right to carry on a business, have been the subject of successful suits, where the result was an award of compensation, rather than a declaration of nullity.⁷⁸ And so, the Québec doctrine of disguised expropriation looks primarily to the effect on the owner. If the

71 *Donnacona*, *supra* note 5.

72 *Ibid* at 504.

73 *Ibid* at 505.

74 *Supra* note 5. See also *Aubry*, *supra* note 5; *Vincent*, *supra* note 5; *Ivanhoe*, *supra* note 5, cited in Chénard, *supra* note 5.

75 Chénard, *supra* note 5 at 107-08.

76 *Lynch c Aylmer (City of)*, [1989] RDI 768, [1989] JQ no 32405 (CS), cited in Chénard, *supra* note 5.

77 *Benjamin*, *supra* note 5.

78 Chénard, *supra* note 5 at 109-14.

property right is rendered completely or nearly valueless by the rule, then it will most likely be declared null, or compensation will be awarded.⁷⁹

There are thus two main differences with the common law. First, there is no examination of a “beneficial interest” flowing to the public authority. The lack of such a beneficial interest is seen as irrelevant if the object of property has been rendered valueless. Second, in considering whether there has been an expropriation, remaining uses of the property are generally considered inadequate if they are unprofitable. This stands in contrast to the rules of the common law, under which CPR was still considered to retain the right to “reasonable” uses of its land despite the fact that none of those uses was profitable.⁸⁰ Both Québec doctrinal writers⁸¹ and judges⁸² seem to find the Supreme Court’s common law judgments on *de facto* expropriation highly persuasive, perhaps because of the public law aspect of expropriation, but there has so far been little evidence of convergence between the two systems on this question. Important differences persist, and it is to an examination of the economic effects of these differences that I now turn.

V. ECONOMIC EFFICIENCY AS COMPARATOR

This section analyzes the differences between the common law and civil law approaches to constructive takings according to the four economic efficiency criteria set out earlier in the paper: risk, incentives, administrative costs and fiscal illusion.

A. Risk and Incentives

The first two efficiency criteria to consider are the allocation of risk in the economy and the impact that it has on incentives. This is the central trade-off in the analysis of legal transitions presented by Kaplow, who also pointed out that due to the interactions between them, they must be considered together.⁸³ As I have noted, risk is economically undesirable, and the threat of expropriation imposes risk on all property holders. Expropriation risk can be eliminated by fully compensating expropriated owners, but doing so blunts the incentive to avoid investments in assets that the state is likely to expropriate (for reasons of social efficiency or other reasons). The civil law compensates for constructive takings in a broader range of cases than the common law. In the civil law, if the actions of a public authority deprive an owner of all the economic value of an asset, then the owner will almost certainly be compensated. The outcome is much more uncertain in the common law, which relies on factors not economically relevant to the owner, such as whether

79 *Ibid* at 114-18.

80 *CPR v Vancouver*, *supra* note 6 at para 8.

81 Chénard, *supra* note 5 at 124-25, 35-37.

82 See e.g. *Wallot c Québec (Ville de)*, 2010 QCCS 1370 at paras 147, 180-81, [2010] RJQ 1246.

83 *Supra* note 9 at 528.

the state has acquired a beneficial interest and whether the uses left to the owner are considered reasonable. The risk of uncompensated expropriation is thus lower under Québec civil law.

On the other hand, there are more problematic incentives that go along with the civil law approach. There is less incentive for parties to avoid purchasing assets that a public authority will likely need. Inefficient over-investment in such assets is the likely outcome. For example, consider a developer planning to build a warehouse on land that she or he knows may soon be zoned for future use as a hospital. There is little disincentive for the developer to go ahead with the project under Québec civil law since she or he knows that the land cannot be so zoned by a public authority without engaging in an explicit, fully compensated expropriation that reflects the value of the warehouse. In Canadian common law, there is a greater incentive to be wary of investments like this; regulatory takings are a risk that must be factored into investment decisions to a greater extent than in the civil law.

In terms of balancing risks and incentives, much depends on institutional circumstances. Kaplow has observed that unless there are exceptional reasons why free market insurance cannot function, it should be used instead of government compensation in making the risk-incentives trade-off.⁸⁴ This is due primarily to the moral hazard problems involved in offering unconditional compensation without a risk-related insurance premium.⁸⁵ Yet there are serious problems that impede the operation of a market in expropriation insurance. Most obviously, expropriations are the result of a conscious decision by a public authority, unlike most other insurable events. Public actors are subject to persuasion by interested parties and the incentives to combat expropriation would be severely blunted by expropriation insurance. Furthermore, information and monitoring costs for insurance companies would be very high. Municipalities would be sorely tempted to target insured properties for expropriation, which would further complicate matters. This may help to explain why expropriation insurance is so rare. If expropriation risk is a serious problem, then the market has proven largely ineffective at managing it.

If the insurance market cannot be left to make the risk-incentives trade-off on its own, then what kinds of expropriations should be compensated? The expropriations that are most serious from a risk perspective are those that consist of a large proportion of individual wealth.⁸⁶ Under normal circumstances, the greater the proportion of the value of the asset expropriated, the greater the proportion of individual wealth expropriated. Indeed, the proportion of the value of the asset that has been expropriated may be the best proxy available for the relative seriousness of the expropriation, since an examination of the proportion of individual wealth expropriated would be highly distortional, encouraging diffuse ownership of

84 *Ibid* at 551.

85 *Ibid* at 537-42.

86 Blume & Rubinfeld, *supra* note 37 at 607-08.

assets that may be expropriated. This consideration may help to explain the bias in both systems in favour of compensating for “full” expropriations, and not for partial ones.⁸⁷ From a risk-mitigation point of view, if any expropriations are worth compensating for, then it is “full” expropriations.

In considering the trade-off between the risk effect and the incentives effect, there are three possible categories of institutional circumstances. Under the first, the incentives effect predominates, such that it is never worthwhile to mitigate risk through compensation.⁸⁸ At the other end of the spectrum are those institutional circumstances where the reverse is true, and compensation is always efficient.⁸⁹ It is only in the intermediate circumstances that a rule is needed to differentiate inefficient compensation from efficient compensation. In these intermediate circumstances, the incentives effect outweighs the risk effect only in some cases. As the size of the expropriation increases, the costs due to risk will tend to rise at a faster rate than the costs due to incentives. This is because of agents’ risk aversion, which means that large individual losses cause a disproportionate loss in utility. At the same time, the incentives effect of compensation for the expropriation of a given unit of value does not rise with the total size of the expropriation bundle.⁹⁰ Consequently, in these intermediate circumstances, the risk effect will tend to predominate where the expropriation is large in relation to individual wealth. Under such circumstances, the efficient solution to the risk-incentives trade-off is a rule that compensates for larger expropriations but does not compensate for smaller expropriations.

From this perspective, the civil law approach makes sense under these intermediate institutional circumstances. Roughly speaking, it requires compensation every time an owner is deprived of an amount approximating the full value of an asset; otherwise, it does not require compensation at all.⁹¹ Based on the analysis in the previous paragraph, expropriations of the full value of an asset are the most serious expropriations from a risk-mitigation perspective. Compensation for lesser expropriations may not be worth the costs it would have in distorting incentives. The common law, on the other hand, makes use of criteria that are irrelevant from a risk-incentives perspective, such as the “reasonableness” of the (potentially unprofitable) uses left to the owner and the question of whether a beneficial interest flows to the state. There is thus a certain coherence from the risk-incentives perspective in Québec civil law that is absent in Canadian common law.

87 Much to the chagrin of Richard A Epstein. Epstein, *supra* note 29 at 57-62.

88 Under such circumstances, the perverse incentives that go along with a commitment to compensate would create more inefficiency than the deleterious effects of the risk of uncompensated expropriation.

89 Similarly, under such circumstances, the deleterious effects of the risk of uncompensated expropriation would outweigh the effects of the perverse incentives that go along with a commitment to compensate.

90 Where compensation is offered, an agent would be just as likely to ignore social costs of inefficient development regardless of the size of the development.

91 Chénard, *supra* note 5 at 101-14.

If risk is not a serious concern, then it may be that a system that does not compensate at all would be best since, at the very least, it would not distort incentives. In that case, even compensation for explicit expropriation ought to be done away with, and the common law, being closer to this approach, would be more efficient. This seems unlikely. The risk problem posed by expropriation has been a central concern in much of the economic literature on expropriation.⁹² The civil law approach requires compensation in the most serious cases of expropriation, whether disguised or explicit, while the common law approach does not compensate potentially serious constructive expropriations for reasons unrelated to risk or incentives. In that sense, the civil law appears to have achieved a more plausible balance between considerations of risk and incentives.

B. Administrative Costs

Given that private expropriation insurance does not tend to manifest itself for the reasons given above, the administrative costs most relevant to this discussion are public administrative costs for compensation regimes. These will tend to increase with the number of cases eligible for compensation, and with the complexity of the rules governing the process. Canadian common law awards compensation in a narrower range of cases than Québec civil law. This is because of its beneficial interest requirement and its broad definition of “reasonable” uses that may be left to the owner under a given set of regulations. Because common law rules are less generous than civil law rules in the types of regulations that give rise to compensation, they are less likely to lead to legal processes. The lower number of claims made under common law rules will thus lead to lower administrative costs. However, the common law rules are also more complex and probably less predictable than the civil law rules, which may cause unnecessary administrative costs in the claims that are made. The determination of when the state has acquired a “beneficial interest” in the property is still fraught with uncertainty, particularly since the Supreme Court did not elaborate on what it meant by “beneficial interest.”⁹³ That said, there is a general acceptance that the bar for constructive expropriation in the common law is very high, and so this uncertainty is unlikely to affect many cases. A case search reveals only 35 common law cases in the past ten years that mention constructive expropriation, or some variation on the name of that doctrine.⁹⁴ By contrast, in a much smaller jurisdiction there have been roughly 87 Québec civil law cases that mention “expropriation déguisée.”⁹⁵ This is only to be expected given that, as we

92 See e.g. Blume & Rubinfeld, *supra* note 37; Kaplow, *supra* note 9; Cohen & Radnoff, *supra* note 20.

93 Brown, *supra* note 12 at 322-23.

94 Including “de facto expropriation,” “de facto taking” and “constructive taking” (23 July 2010), online: LexisNexis Quicklaw <<http://www.lexisnexis.com/ca/legal>>.

95 *Ibid.*

have seen, the civil law doctrine covers more situations. That said, it also means that, even if the common law doctrine is slightly more uncertain in its application, it is still almost certainly cheaper to administer than the analogous civil law doctrine because it leads to fewer claims being made.

C. Fiscal Illusion

The final consideration refers to the problem of the government undervaluing those costs that it imposes on expropriated parties but that are not reflected in its budget. Compensation requirements combat this tendency by restricting the ability of government to inefficiently pursue benefits while imposing the costs on private parties. The common law doctrine at first appears to be tailored to this fear, especially since it only applies where a beneficial interest flows to the state. As a result, the state cannot acquire a beneficial interest by removing all reasonable uses of an asset without first paying for it. However, fiscal illusion could equally apply to government actions that impose serious costs but do not lead to the acquisition of a beneficial interest, as in *CPR v Vancouver*. The beneficial interest requirement only relates to the *type* of benefit that accrues to the state; that is, whether it has acquired a sufficiently direct interest in the asset. It is not necessarily linked to the relative visibility of costs and benefits to voters. As a result, this requirement is likely irrelevant from the perspective of fiscal illusion problems since the government could equally suffer from fiscal illusion relating to the costs of pursuing benefits that do not entail a beneficial interest. To the extent, then, that fiscal illusion is a problem, the common law's more targeted approach to compensation offers no obvious advantages. Simply compensating whenever the reduction in value caused by public action reaches a threshold proportion of the value of the property, as in the civil law, is likely more effective at constraining inefficient government actions due to fiscal illusion.

D. Results

It has been argued that when the risk of expropriation is significant, and is not dealt with efficiently by market processes, the civil law approach offers a more plausible balance between considerations of risk and incentives. By targeting all of the most serious cases of expropriation, and ignoring less serious cases, it offers a coherent solution to the problem, whereas the common law privileges criteria, including the beneficial interest requirement, that are irrelevant from a risk-incentives perspective. It may be that risk is not a serious factor compared to the incentives effect of compensation, but this would lead to the unlikely conclusion that the government should not compensate for expropriation at all. The civil law approach is also more effective at dealing with fiscal illusion considerations, since it does not exclude cases on the basis of the *type* of benefit that accrues to the state, a consideration that does not appear to be relevant. The common law approach

does have lower administrative costs, which it achieves by imposing a higher bar for successful claims. As a result, there appears to be a trade-off between administrative costs and other considerations.

However, the administrative savings are achieved largely through the imposition of criteria that are not relevant from the point of view of any of the four factors. The beneficial interest requirement is, from an economic perspective, an arbitrary bar to claims. An improvement could be made if the common law found different means to reduce the cost of claims, perhaps by imposing a minimum value for claims, or by implementing a streamlined compensation system. But the civil law approach already targets compensation at the most serious cases from both a risk perspective and a fiscal illusion perspective. If there is to be compensation for constructive takings, then a compelling economic case can be made for the substantive rules provided by Québec civil law. It would be difficult to make such a case for the rules of Canadian common law. There are administrative costs to consider, but these are not substantial given the relatively small number of cases involved in both systems. Additionally, there are far more effective solutions to the concern about administrative costs than those provided by the Canadian common law of constructive takings. Except under circumstances of relatively high administrative costs, then, the Québec civil law doctrine of disguised expropriation provides more efficient solutions than its Canadian common law analogue, according to the criteria set out in this paper.⁹⁶

VI. CONCLUSION

This paper has argued that four economic efficiency criteria are most relevant to a consideration of constructive takings: risk, incentives, administrative costs and fiscal illusion. The common law approach to this question provides for lower administrative costs, but is implausible according to the other criteria. Its beneficial interest requirement, in particular, is irrelevant to the considerations

96 Distributional concerns may also be relevant. The main fear is that compensation to owners for actions done to further the public good will tend to exacerbate wealth inequality. Even if it is inefficient, a lack of compensation may thus be justified on the grounds that it will tend to impose the costs of government action on those with greater wealth. Yet a consideration of the alternative sources of government funding tends to undermine this claim. Municipalities, which have most often been the subject of constructive takings claims, derive much of their revenue from property taxes, which are usually assessed on the basis of the value of one's property. Similarly, progressive income taxes make up a large proportion of the funding sources for nearly all government bodies. If state initiatives must be paid for out of tax revenue, rather than for expropriated assets, then the incidence may still lie just as disproportionately on the wealthy. There will also be much less risk that an individual will have to pay an amount far out of proportion to her or his means or to her or his "fair" share of the government revenue burden than under an uncompensated takings regime. And so the distributional effects of uncompensated takings are ambiguous, and may lead to patently unfair burdens in some individual cases. There is thus no apparent justification for refusing to compensate for distributional reasons.

of risk, incentives and fiscal illusion, and only reduces administrative costs by presenting an (economically) arbitrary bar to claims. The idea of “reasonable” uses that are unprofitable similarly cannot find justification in economic arguments. The common law approach may be more efficient under circumstances in which the risk of expropriation is a relatively unimportant consideration, and administrative costs are high. This might be the case if regulatory changes occurred in a slow and highly predictable fashion while, at the same time, the total costs of hearing disputes, including judicial and extra-judicial costs (like lawyers’ fees), were high. However, even then, the common law criteria for compensation could be improved upon by moving towards considerations related to the predictability of regulatory changes and the total costs of hearing a dispute, or by doing away with compensation entirely. That said, it is unlikely that such circumstances apply. The risk of expropriation is a major concern in the economic literature on takings, and administrative costs, while significant, are unlikely to dwarf the other considerations.

The Québec civil law approach provides a more plausible balance between considerations of risk and incentives by focusing on the most serious cases of expropriation from a risk perspective, while leaving incentives in place to take account of less serious cases. If fiscal illusion is a problem, then the civil law approach is a better antidote than the common law approach since it does not discriminate among the types of benefits pursued by the state. While administrative costs are higher, the number of judicially determined cases is still relatively low, so these costs may not be significant.

The findings in this paper are largely suggestive, and require empirical analysis of the significance of the four factors. The findings are also dependent on less tangible institutional factors, such as the unwritten rules of behaviour of government and market actors. Even so, there are generalizations that can be made solely on the basis of a theoretical analysis of the rules. In most institutional circumstances, and under conditions where all four economic efficiency criteria are important, the civil law approach will tend towards more efficient outcomes. The common law could move towards the more efficient civil law model within its existing doctrinal framework by giving a broad interpretation to the beneficial interest requirement and by tying the reasonable use requirement more closely to the profitability of the use. The acquisition of a “beneficial interest” in the common law is a gray area that appears to be understood in terms of the directness of the benefit realized by the public authority. The acquisition of an unspoiled park apparently satisfies the requirement, while keeping a transportation corridor intact for future use does not.⁹⁷ If the common law maintains this

requirement, then an efficiency perspective suggests that ambiguities in its application should be resolved in favour of a broad understanding of the interests that the state can acquire. Furthermore, if the reasonable use requirement is maintained, then the profitability of the uses in question should be considered highly persuasive in assessing the uses available to an owner. A major source of efficiency in the civil law doctrine is its emphasis on whether profitable uses of an asset remain under the impugned regulatory framework. This emphasis on profitable uses should be incorporated into the common law as an objective indicator of whether the reasonable use requirement has been satisfied. Both of these changes could thus be effected within the framework set out in *CPR v Vancouver*.

The methodology of this paper is also worthy of note. Comparative legal studies may be conducted in a number of ways, some emphasizing very broad considerations like historical background and ideology.⁹⁸ This comparison has been conducted narrowly, with a set of economic efficiency criteria used as a comparator. As a result, this comparison can make no claim to comprehensive validity. There are surely factors beyond the scope of this paper that are relevant to a fuller comparative perspective on the law of constructive takings. Despite this limitation, it is hoped that by viewing the Canadian common law and Québec civil law of constructive takings in light of the other legal system's approach to the same economic function, a deeper understanding of the interests at stake and the alternatives available will be fostered. Both legal systems could benefit from this perspective, even leaving aside the recommendations that a pure efficiency approach can yield.

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See e.g. Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, 3d ed translated by Tony Weir (Oxford: Oxford University Press, 1998).