THE WRONG OF CONSTRUCTIVE EXPROPRIATION

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This article discusses the cause of action of constructive expropriation recently restated in Annapolis Group Inc. v. Halifax Regional Municipality. *It argues that this cause of action came into existence through a series of Supreme Court of Canada decisions that deviated from principle, precedent, and respect for legislative supremacy, culminating vividly in* Annapolis *itself. The result, it argues, is a common law chimera — a cause of action that seems unique in private law. This raises a puzzle: taxonomically, what is constructive expropriation in law? This article argues that constructive expropriation is best seen as a tort, even though it sits uneasily beside its more established tort brethren. Framing the post-*Annapolis *constructive expropriation cause of action as a tort reveals the incoherencies between constructive expropriation and other doctrines of private law. Drawing on the jurisprudential history of constructive expropriation before the Supreme Court, this article argues that the courts are ill-equipped to make constructive expropriation more coherent on their own. It therefore argues that legislative intervention is warranted, either to restructure the cause of action or to abolish it altogether.*

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I. INTRODUCTION

Constructive expropriation is a cause of action unique to and unique within Canadian common law. It gives a person a right to seek compensation when their property is "constructively" taken — which is to say, when their property is not in fact taken. It appears to apply to instances where a regulatory scheme reduces the value of a property (normally real property, but not necessarily only real property) almost entirely. After four Supreme Court of Canada decisions addressing it (*Manitoba Fisheries Ltd v. The Queen*,[1] *R. v. Tener*,[2] *Canadian Pacific Railway Co. v. Vancouver (City)*,[3] and now *Annapolis Group Inc. v.*

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1 [1979] 1 SCR 101 [*Manitoba Fisheries*].
2 [1985] 1 SCR 533 [*Tener*].
3 2006 SCC 5 [*CPR*].

Halifax Regional Municipality[4]), one might think the cause of action would serve a well-defined and well-understood role and that rough edges of the doctrine would be mostly smoothed out.

Such thoughts would be wrong. As I explain in this article, if the *Annapolis* majority reasons are taken seriously, constructive expropriation is incoherent with established doctrines of private law and could significantly impact regulation in a wide array of scenarios.

The article proceeds as follows. In Part II, I begin by laying out the history of the cause of action in Canadian law. As I explain, the Supreme Court has repeatedly ignored statutory text, context, and purpose in this space, and the Supreme Court's treatment of constructive expropriation has not been consistent with the wider common law or the common law legal method. These developments culminate with *Annapolis*, where the cause of action was restated, and which I consider in Part III. Taking the cause of action as it now stands, I attempt, in Part IV, to characterize constructive expropriation as a cause of action. This is a legal taxonomy question. My answer, after rejecting public law and unjust enrichment, is that constructive expropriation is best seen as a tort. Building on this characterization in Part V, I evaluate the post-*Annapolis* constructive expropriation cause of action as a tort and find it incoherent. Finally, in Part VI, I consider what ought to be done. Drawing on the jurisprudential history of constructive expropriation before the Supreme Court, I argue that the courts are ill-equipped to make the action for constructive expropriation more coherent on their own. Although *CPR* had offered a way out for the courts from the challenges of *Manitoba Fisheries* and *Tener*, *Annapolis* slammed that window shut. I therefore argue that legislative intervention is warranted, either to restructure the cause of action or to abolish it altogether.

II. THE INVENTION OF CONSTRUCTIVE EXPROPRIATION

The story of constructive expropriation emerges through the stories of four Supreme Court cases, with a prologue from the House of Lords and an interlude from the Nova Scotia Court of Appeal. In framing the story this way, I emphasize the development of the action through Canadian common law reasoning.[5]

Attorney-General v. De Keyser's Royal Hotel, Limited forms the prologue.[6] It concerned the English War Office's occupation of that hotel as lodgings for officers late in the First World War. The primary issue the House of Lords had to address was whether the War Office had occupied the hotel pursuant to the exercise of a royal prerogative, or if it had done so pursuant to a statutory power. The question mattered, because the royal prerogative had,

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4 2022 SCC 36 [*Annapolis*].

5 A consequence of this methodology is that I do not treat constructive expropriation as a northerly cousin of the constitutional actions that exist in the United States and Australia. The major decisions discussed herein generally do not refer to this foreign law, even for comparative purposes (*Mariner Real Estate Ltd v Nova Scotia (AG)*, 1999 NSCA 98 at paras 37–41 [*Mariner*] is an exception, but it does so only to note such constitutional law is "fundamentally different" (*ibid* at para 40)).

6 [1920] AC 507 (HL (Eng)) [*De Keyser's Royal Hotel*].

at least in the eyes of one member of the panel, allowed a taking without compensation at a time of emergency.[7]

The statutory scheme had two parts. One part allowed the War Office to take possession of land or buildings. This part is expressed in the *Defence of The Realm Consolidation Act* and its accompanying regulations.[8] The *DORCA* granted the United Kingdom government the power to "issue regulations for securing the public safety and the defence of the realm," and for these regulations to "suspen[d] any restrictions on the acquisition or user of land, or the exercise of the power of making byelaws, or any other power under the Defence Acts, 1842 to 1875."[9] The DORCA regulations then allowed naval and military authorities to "take possession of any land" or "buildings" where necessary for those purposes.[10] The second part of the scheme was a right to compensation, and some procedural protections, both of which were contained in section XV of the *Defence Act 1842*.[11]

Lords Dunedin, Atkinson, Moulton, Sumner, and Parmoor each gave reasons, but all agreed the War Office had occupied the hotel pursuant to the statute, not the prerogative, and so the hotel was entitled to compensation. As Lord Dunedin explained, "if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules."[12] Further, the Lords interpreted the *DORCA* as allowing the authorities to dispense with the procedural protections of the *Defence Act 1842* (which would have restricted the taking of land), but not the right to compensation. In so doing, Lord Atkinson explained that "a statute is not to be construed so as to take away the property of a subject without compensation."[13]

In Canadian law, *De Keyser's Royal Hotel* originally stood as authority for the canon of statutory construction expressed by Lord Atkinson.[14] It meant clauses that might appear to allow takings without compensation would be construed narrowly to not authorize the taking, and that compensation-granting clauses would be construed broadly.[15] As Paul Warchuk says, "[t]hat all changed in *Manitoba Fisheries*."[16]

Manitoba Fisheries concerned the effect of establishing a federal Crown corporation (the Freshwater Fish Marketing Corporation, or FFMC) on the operations of a Manitoba fish exporting business.[17] The FFMC's empowering legislation, the *Freshwater Fish Marketing Act*, gave it a monopoly — the "exclusive right to market and trade in fish in interprovincial

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7 *Ibid* at 552 (Lord Moulton). Lord Parmoor disagreed (*ibid* at 573), and 44 years later, Lord Parmoor's position was accepted by a majority of the Lords: *Burmah Oil Co Ltd v Lord Advocate*, [1965] AC 75 (HL (Eng)). Lord Parmoor's position has also since been adopted in a Supreme Court minority opinion: *Calder v British Columbia (AG)*, [1973] SCR 313 at 352.

8 (UK), 1914, 5 Geo 5, c 8 [*DORCA*].

9 *Ibid*, ss 1(1), 1(2).

10 *Ibid*, Regulation 2.

11 (UK), 1842, 5 & 6 Vict, c 94.

12 *De Keyser's Royal Hotel*, *supra* note 6 at 526. See also *ibid* at 554 (Lord Moulton).

13 *Ibid* at 542.

14 Paul A Warchuk, "Rethinking Compensation for Expropriation" (2015) 48:2 UBC L Rev 655 at 676–78.

15 *Ibid* at 676.

16 *Ibid* at 678.

17 *Manitoba Fisheries*, *supra* note 1; Jim Phillips & Jeremy Martin, "*Manitoba Fisheries v The Queen*: The Origins of Canada's De Facto Expropriation Doctrine" in Eric Tucker, James Muir & Bruce Ziff, eds, *Property on Trial: Canadian Cases in Context* (Toronto: The Osgoode Society for Canadian Legal History by Irwin Law, 2012) 259 at 260.

and export trade" in "participating province[s]"[18] — unless Cabinet gave an exemption.[19] The FFMC could also issue licences to others, permitting them to exercise those rights.[20] The *FFMA* did not provide for a right to compensation; according to the federal Minister responsible, "the provinces ha[d] accepted the responsibility for compensation for redundancy resulting from the operations of the [FFMC]."[21] This responsibility was to be implemented through provincial legislation.

The Manitoba provincial legislation expanded the FFMC's monopoly to intraprovincial trade and gave the provincial minister the option of offering to purchase "real or personal property that … can no longer be used," which was intended to exclude compensation for loss of business.[22] Manitoba's participation in the scheme had originally been agreed to by a Conservative government, but that government had been replaced by a newly-elected New Democratic Party (NDP) government when the details of the compensation scheme were set out in legislation.[23] Jim Philips and Jeremy Martin explain that the NDP government "presumably … did not see the [local fishery] companies as deserving of much consideration, not only legally but morally. They were perceived as responsible for the social malaise among the northern fishing communities, and as having done well out of the system for years."[24]

The combination of the federal monopoly, its extension to intraprovincial trade, and the FFMC not issuing an exemption or licence made it impossible for various Manitoba fisheries companies to continue in their business. The most major of these companies banded together to seek compensation for this loss of business, with one of them (Manitoba Fisheries Ltd.) serving as a test case plaintiff.[25] The foundation of the plaintiff's argument was that it had lost the "goodwill" from its business due to the legislative monopoly granted by the *FFMA*, and that this goodwill had been acquired by the FFMC.[26]

Manitoba Fisheries Ltd. lost at trial. The trial judge accepted that the companies had previously had goodwill, but found the legislation did "not purport to take any property from anyone … with or without compensation" or to "deprive anyone … of the enjoyment of his property."[27] The Court focused on the effect of the legislation in part because "the plaintiff concede[d] that in order to found its claim for compensation it must establish a statutory right."[28]

The companies lost again on their initial appeal to the Federal Court of Appeal. The Court of Appeal agreed that the *FFMA* had not caused the FFMC to "purchase, confiscate or in any

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18 SC 1969 (1st Sess), c 21, ss 23(1), 21(1) [*FFMA*].
19 *Ibid*, s 22(b).
20 *Ibid*, s 21(2).
21 Phillips & Martin, *supra* note 17 at 268.
22 *Ibid* at 270.
23 *Ibid* at 269–70. Note that by the time the Supreme Court hearing came around, the Manitoba Conservatives had regained power, but they too had become uninterested in offering compensation: *ibid* at 286.
24 *Ibid* at 271. See also *ibid* at 273, recounting a minister's view that the fisheries companies had "fucked the Indians for fifty years," and now they were getting theirs.
25 *Ibid* at 261.
26 *Ibid* at 278.
27 *Manitoba Fisheries Ltd v The Queen*, [1977] 2 FC 457 at 461, 464, 470 [*Manitoba Fisheries* FC].
28 *Ibid* at 462 [footnotes omitted].

other way acquire possession, in fact or in law, of any of the physical or intangible assets belonging to the appellant. There was no 'taking', 'taking away' or 'taking over' of any such assets in any realistic interpretation of those words."[29]

Both this finding and the result were reversed by the Supreme Court. Justice Ritchie, writing for a seven-member bench,[30] adopted Lord Chief Justice MacDermott's reasoning in *Ulster Transport Authority v. James Brown & Sons, Ltd.* that "a device for diverting a definite part of [a] business … from the respondents and others to the appellants" constituted a taking of the goodwill of the business.[31] Having found there was a taking, Justice Ritchie found this taking "was unauthorized having regard to the recognized rule that 'unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation'" from *De Keyser's Royal Hotel*.[32]

These jurisprudential developments are remarkable.

First, the Supreme Court needed to define FMCC "taking" something from Manitoba Fisheries Ltd. as including the situation where what Manitoba Fisheries Ltd. lost was different what FMCC gained. The word "take" is normally used either as a synonym for "deprive," as in "take a life" (such that a gain is irrelevant),[33] or for "gain possession of," such that what is lost *is* what is gained.[34] In the Supreme Court's view, a taking occurred when that which is lost was *not* that which is gained. Even if Manitoba Fisheries Ltd. lost its goodwill, FMCC did not necessarily gain it or anything else (except perhaps the expectation of future profits) from Manitoba Fisheries Ltd. directly.

In an open economy, the imposition of a state monopoly will not necessarily mean that all businesses who dealt with the prior private owners will transfer their custom to the new monopoly. Contracting parties can choose whether to stay with the FFMC or to substitute fish from elsewhere for freshwater fish from Manitoba. Their decisions will be based on both the product (the fish), and on their counterparty: does the fish processor process orders quickly and accurately? Are deliveries made on time? Is the product fresh? Are the staff reasonable? At the time the monopoly was imposed, those questions will be unknown for FMCC (at least as regards its Manitoba operations). FMCC would seem to lack the reputation and relationships Manitoba Fisheries Ltd. had. In creating its new answers, the FMCC will develop its own relationships and reputation: that is, its own goodwill.

Second, the Supreme Court needed to be "innovative" to define goodwill as a kind of property.[35] While this move is understandable — goodwill has a multitude of meanings,

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29 *Manitoba Fisheries Ltd v The Queen* (1977), [1978] 1 FC 485 (CA) at 492 [*Manitoba Fisheries* FCA].

30 *Manitoba Fisheries*, *supra* note 1 (Ritchie, Spence, Pigeon, Dickson, Beetz, Estey, & Pratte JJ).

31 *Manitoba Fisheries*, *supra* note 1 at 111, quoting *Ulster Transport Authority v James Brown & Sons, Ltd*, [1953] NI 79 at 116 [*Ulster Transport*]. *Ulster Transport* had concerned the effect on a furniture moving business of an expansion of a legislative monopoly to include furniture moving.

32 *Manitoba Fisheries*, *ibid* at 118, quoting *De Keyser's Royal Hotel*, *supra* note 6 at 542.

33 With thanks to Eric Andrews for pointing out this meaning.

34 Online: *Oxford English Dictionary* [perma.cc/86NT-TDYE] sub verbo "take" (meanings 1(a)–1(c), 1(d)).

35 Bryan P Schwartz & Melanie R Bueckert, "Regulatory Takings in Canada" (2006) 5:3 Wash U Global Studies L Rev 477 at 490.

some of which come close to property[36]— it is a category error to treat goodwill as property, precedentially and theoretically. As a precedential matter, other areas of law have come to realize that goodwill could be practically addressed without conceiving of it as property — rather, goodwill could be understood as reputation, or as an accounting idea to value a collection of properties.[37] Moreover, the action in *Manitoba Fisheries* arose *because* "real or personal property" in the Manitoba statute was universally understood not to include goodwill.[38] As a theoretical matter, goodwill does not exhibit the indicia that property theory uses to define property. There is no right to exclude related to goodwill: torts do not protect goodwill; there is no trespass on goodwill; one cannot convert goodwill.[39] Torts may protect someone with goodwill from others using a mark or copyright that the goodwill is built on, but those torts protect the underlying property, not goodwill qua goodwill. Nor can goodwill be transferred, except by transferring the entire business with which it is associated.[40] Constructive expropriation may be the only area of law where legal results depend on treating goodwill as property.

Treating goodwill as property obscured what the Supreme Court was doing in substance: providing a remedy for pure economic loss. The fisheries' actual property had not been taken without compensation: the *FFMA* did not take the fisheries' marks, factories, shares, or other true properties. Rather, it caused the value of those properties to decrease. That is pure economic loss.

Courts were then and are now quite reluctant to provide a remedy for pure economic loss in general. As Justices Brown and Martin recently wrote (with the support of Justices Moldaver, Côté, and Rowe):

> [T]here is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss. For example, economic loss caused by ordinary marketplace competition is not, without something more, actionable in negligence. Such loss falls outside the scope of a plaintiff's legal rights — the loss is *damnum absque injuria* and unrecoverable. Indeed, the essential goal of competition is to attract more business, which may mean taking business away from others. Absent a contractual or statutory entitlement, there is no right to a customer or to the quality of a bargain, let alone to a market share.[41]

Manitoba Fisheries meant that pure economic loss was recoverable (albeit under the guise of "goodwill") if the loss was caused by a government through the exercise of legislative powers, but not if it was caused by a competitor.

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36 Nicholas Gangemi, *Is Goodwill Property?: An Examination of the Characteristics and Nature of Goodwill with the Possibility of Challenging the General Accepted Principle that Goodwill is Property* (DPhil Thesis, UNSW Sydney School of Taxation & Business Law, 2020) [unpublished], ch 2.

37 See the discussion of areas in Australian law including passing off (*ibid* at 239), bankruptcy (*ibid* at 248), mortgages and security (*ibid* at 251), transfers of a business (*ibid* at 252), restraints of trade (*ibid* at 252), partnerships (*ibid* at 254), taxation (*ibid* at 254), and employment law (*ibid* at 255).

38 Phillips & Martin, *supra* note 17 at 270–71.

39 Gangemi, *supra* note 36 at 256.

40 *Ibid* at 268.

41 *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at para 19 [citations omitted] [*Maple Leaf*].

Third, as many authors have noted, the Supreme Court took Lord Atkinson's words from *De Keyser's Royal Hotel* grossly out of context.[42] *De Keyser's Royal Hotel* concerned whether one statute (the *DORCA*) allowed the government to override the compensation provisions of a second statute (the *Defence Act 1842*). It held that the language in the *DORCA* was not sufficiently clear as to remove the right to compensation in the *Defence Act 1842*.[43] *Manitoba Fisheries* instead held that a statute which clearly did not include a right to compensation should have one read in. As Warchuk describes, this jurisprudential move was "revolutionary."[44]

Fourth, and relatedly, the Supreme Court arguably held liable the public authority that was less responsible for the companies' losses. Parliament may have imposed the monopoly on interprovincial and international trade, the FFMC may have gained some value associated with the companies' loss, and the FFMC may not have given them a licence, but Canada did not "take"[45] much less "take without compensation" on its own. The business' properties might have continued to have value for their intraprovincial uses but for Manitoba's statute, and there was only a taking *without compensation* because of Manitoba's omission. Parliament's intent was not for Canada to compensate the companies; that was meant to be the provinces' responsibility.[46]

Fifth, the Supreme Court undermined a policy choice implemented in legislation. This flies against the fundamental principle of separation of powers. As the Supreme Court noted in one of its *Canadian Charter of Rights and Freedoms* (*Charter*) damages decisions, "it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation."[47] Similarly, in tort law there is a rule that "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors."[48] True policy decisions are generally "made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations."[49] As Chief Justice McLachlin later reiterated, such decisions "are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith."[50] As Philips and Martin ably recount, there were a string of policy choices: first, by Parliament to create a monopolistic Crown corporation, then by Manitoba to become a participating province, and finally by Manitoba in how it set the terms

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42 David Phillip Jones, "No Expropriation without Compensation: A Comment on Manitoba Fisheries Limited v. The Queen," Case Comment, (1978) 24:4 McGill LJ 627 at 633–34; Sheilah L Martin, "Case Comment on *Tener* v. *The Queen* (1981) 23 B.C.L.R. 309 (B.C.S.C.); (1982) 34 B.C.L.R. 285 (B.C.C.A.)" (1982) 3 Newsletter Can Institute Resources L; Barry Barton, Note on *The Queen in Right of British Columbia v. Tener*, (1987) 66 Can Bar Rev 145 at 149; Warchuk, *supra* note 14 at 680. See also Eric CE Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Scarborough, Ont: Carswell, 1992) at 35.

43 *De Keyser's Royal Hotel*, *supra* note 6, at 542, Lord Atkinson.

44 Warchuk, *supra* note 14 at 680.

45 As Justice Ritchie emphasizes in *Manitoba Fisheries*, *supra* note 1 at 118.

46 Phillips & Martin, *supra* note 17 at 268; *Manitoba Fisheries* FC, *supra* note 27 at 469, adopted in *Manitoba Fisheries* FCA, *supra* note 29 at 492.

47 *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 at para 78 [*Mackin*], quoting René Dussault & Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed, translated by Donald Breen (Toronto: Carswell, 1990) vol 5 at 177.

48 *Just v British Columbia*, [1989] 2 SCR 1228 at 1240–41 [*Just*].

49 *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 87 [*Imperial Tobacco*].

50 *Ibid* at para 74.

of compensation.[51] One might think the decisions not to grant the companies a licence or exemption were closer to operational decisions, but it appears those provisions simply were not used for anyone.[52]

With these concerns in mind, it is no surprise *Manitoba Fisheries* has been cited as an example of "palm tree justice."[53] The legal realist's explanation — that right-wing judges favoured the interests of capital to defeat a left-wing policy and were willing to be judicially activist to do so — has significant force.[54]

Nor is it a surprise that *Manitoba Fisheries* has led to judicial tumult. When a decision is incoherent, one can expect there to be multiple different ways of resolving the incoherency by emphasizing some aspects of the judgment and de-emphasizing others. The immediate consequences were that the lower courts, unable to overrule an incoherent decision because it had been rendered by the Supreme Court, set about limiting the decision to its facts.[55] And as we will see, the Supreme Court has also repeatedly changed its mind about what *Manitoba Fisheries* stands for.

Despite the lower court resistance toward and academic scepticism of *Manitoba Fisheries*,[56] the Supreme Court did not retreat at its next opportunity to address the issue, but rather muddied the water further. That opportunity was *Tener*, a case arising from British Columbia.[57]

Tener concerned mineral claims owned by the Teners in the British Columbia interior that over time became impossible to exploit due to environmental protections. The Teners' predecessors in title had acquired the mineral claims from a Crown grant in 1934.[58] The Crown grant gave the owners a right to "all minerals … under" the defined parcel of land, and "the use and possession of the surface of [their] claim."[59] These rights were "specifically made subject 'to the laws for the time being in force respecting mineral claims.'"[60] Five years later, in 1939, the land the mineral claims related to became part of Wells Gray Provincial Park. The designation of the land as a park did not immediately restrict the Teners' ability to exploit the claim. This changed in 1965, when new provincial legislation began to require a permit to extract minerals from parks.[61] In 1973, an amendment to the *Park Act* upgraded Wells Gray Provincial Park from a "Class B" park to a "Class A" park.[62] This reclassification subjected it to a more restrictive regime, wherein permits for exploitation of resources could only be issued where doing so was "in the opinion of the Minister … necessary to the

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51 Phillips & Martin, *supra* note 17 at 266–73.
52 *Manitoba Fisheries* FC, *supra* note 27 at 465.
53 Phillips & Martin, *supra* note 17 at 291.
54 *Ibid*.
55 *Ibid* at 291; Martin, *supra* note 42; RJ Bauman, "Exotic Expropriations: Government Action and Compensation" (1994) 52:4 Advocate 561 at 568 (describing Justice Southin's "distaste" for *Manitoba Fisheries*, *supra* note 1). One might call this a Canadian example of "Narrowing Supreme Court Precedent from Below": Richard M Re, "Narrowing Supreme Court Precedent from Below" (2016) 104:4 Geo LJ 921 [Re, "Narrowing Precedent"].
56 Jones, *supra* note 42.
57 *Tener*, *supra* note 2.
58 *Ibid* at 536–37.
59 *Tener v British Columbia*, [1980] BCJ No 1896 (SC) at para 4 [*Tener* BCSC].
60 *Ibid* at para 39.
61 *Tener*, *supra* note 2 at 537.
62 RSBC 1979, c 309; *Tener*, *ibid*.

preservation or maintenance of the recreational values of the park."[63] The Teners applied for such a permit but were denied by the Director of the Parks Branch.[64]

The Teners sued, seeking "compensation in respect of the initial acquisition cost of the claims of $100,000, plus interest; compensation in respect of expenditures made on the claims throughout the years, with interest; and damages for loss of opportunity and loss of profit," estimated at some millions of dollars.[65] They advanced three theories by special case: a right under the *Lands Clauses Act*,[66] which would later become the *Expropriation Act*;[67] a right under the *Ministry of Transportation and Highways Act*[68] because of an expropriation under the *Park Act*; and a right at common law.[69]

At first instance, Justice Rae found the Teners failed under all three theories. He noted the Teners had conceded that they had no right to damages at common law.[70] He saw there being no "suggestion of any expropriation whatever of land … other than the above refusal of a permit."[71] He saw the *Park Act* legislative scheme as having two "separate and distinct" parts: one, a scheme providing compensation for land expropriated, "properly so called"; the other "regulatory" and "without compensation for what, if anything, may flow from … withholding" a permit.[72] He saw the *Lands Clauses Act* claim as requiring either a compulsory taking,[73] or the "execution of a works" that injuriously affected the value of the land.[74] In the cases Justice Rae referred to, an "execution of [a] works" described a construction project.[75] There being no construction project here, he thought this claim too must fail.[76] The Teners appealed.

The Court split 2–1 on appeal. Justice Lambert (writing with the support of Justice Anderson) thought the Teners could succeed on an injurious affection theory under the *Land Clauses Act*, but not on the other theories. Like Justice Rae, Justice Lambert found there was no expropriation proper to trigger a right to compensation under the *Park Act* and that there was no common law right.[77] Unlike Justice Rae, however, he saw the protection of the park as a "works" that was executed by the refusal of the permit.[78] Justice MacDonald dissented, largely agreeing with the reasons of Justice Rae. In his view, if there had been an injurious affection, it occurred in 1939 with the creation of the park, not in 1978 with the denial of a permit.[79] British Columbia then appealed.

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63 *Tener*, *ibid* at 555.
64 *Ibid* at 537–38.
65 *Tener v British Columbia*, [1982] BCJ No 288 (CA) at para 13 [*Tener* BCCA].
66 RSBC 1960, c 209.
67 RSBC 1979, c 117 [*BCEA*].
68 *Ministry of Transportation and Highways Act*, RSBC 1979, c 280 [*MTHA*], previously the *Department of Public Works Act*, RSBC 1960, c 109.
69 *Tener* BCCA, *supra* note 65 at para 14.
70 *Tener* BCSC, *supra* note 59 at para 25.
71 *Ibid* at para 36.
72 *Ibid* at para 38.
73 *Ibid* at para 48.
74 *Ibid* at paras 53–55, citing the *Lands Clauses Act*, *supra* note 66, s 69.
75 *Tener* BCSC, *supra* note 59 at paras 53–58.
76 *Ibid* at para 59.
77 *Tener* BCCA, *supra* note 65 at paras 15, 40.
78 *Ibid* at para 47.
79 *Ibid* at para 69.

The Supreme Court found for the Teners on the *Park Act* theory that all four judges below had found inapplicable, with Justice Estey writing for the majority and Justice Wilson writing a concurrence.[80]

Reviewing the statutory scheme shows the oddity of this theory. The only reference to "expropriation" in the *Park Act* comes in section 11, which read as follows:

> 11. … the minister, on behalf of [the Province], with the approval of the Lieutenant Governor in Council, may
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> (a) purchase or otherwise acquire, accept and take possession of land, improvements on land, timber, timber rights and other rights;
>
> (b) grant, convey or transfer to any person, in exchange for land, improvements, or timber acquired under paragraph (a) above, other land, timber or rights of … the Province;
>
> (c) expropriate land, and the provisions of the *Ministry of Transportation, Communications and Highways Act* shall apply, with the necessary changes and so far as applicable, in event of expropriation.[81]

The right to compensation emerges from sections 18, 19, and 40 of the *MTHA*. Section 18(1) allows the Lieutenant Governor in Council (LGiC) to "acquire and take possession of land," 30 days after either the LGiC forms a contract with the owner[82] or the LGiC offers to pay an "estimate of the reasonable value of [the land], with notice that the value will be submitted to arbitration under this Act."[83] For the *Park Act* scheme to apply, therefore, the Court had to find that an "expropriation" had occurred when the LGiC had not made an offer to pay or a contract with the owner (as required by section 19 of the *MTHA*) and the LGiC had not approved the expropriation. Neither opinion at the Supreme Court explains how an "expropriation" can occur when these conditions precedent had not been met.

Both sets of reasons assume that if an event is properly understood as causing the Crown to acquire a property interest from the Teners, then it constitutes an "acquisition by the Crown … from which compensation must flow."[84] Neither opinion advances reasons for saying that compensation must flow, but rather rests this part of the analysis on *Manitoba Fisheries* and its misreading of *Der Keyser's Royal Hotel*.[85] The further irony is that, while *Manitoba Fisheries* could plausibly be seen as a court concocting a common law remedy in the absence of a statutory right, *Tener* cannot — the common law theory had been abandoned. The focus of both sets of reasons was thus instead on whether denying the permit can be seen as an act of expropriation.[86]

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80 *Tener*, *supra* note 2 at 548, 552.
81 *Park Act*, *supra* note 62, s 11.
82 *MTHA*, *supra* note 68, ss 18(1–2), 19.
83 *Ibid*, s 19.
84 *Tener*, *supra* note 2 at 563–64. Seemingly without seeing a contradiction, Justice Estey also did acknowledge that the question of whether compensation would flow was, as a general matter, "to be resolved according to the applicable statutes": *ibid* at 557.
85 *Ibid* at 551–52, 563–65.
86 *Ibid* at 550, 563–64.

The next problem both sets of reasons face is defining the denial of the permit as the operative event. They both do so by construing the statute as only *allowing* the Director to deny the permit.[87] They appear not to have considered that the Director could not have granted the permit while acting within his statutory authority. As averted to above, for the Director to have had discretion, it must have been reasonable for the Director to see the Tener's exploitation of their mineral claims as "necessary to the preservation or maintenance of the recreational values of the park."[88] Such a contention is facially implausible and therefore the proper analysis ought to have been that denial of the permit was preordained. The "expropriation" that occurred would then be due to the statute itself, not due to an administrative action.

When the operative event is legislative, not administrative, compensation ought not to have been payable. The *MTHA* applies only to acquisitions by the LGiC, not to all acquisitions by the Crown in right of the province. The *MTHA* delegates the LGiC a power to expropriate, wherein exercising that power puts a duty on the province to provide *ex post* compensation. It does not purport to provide a right to compensation if a property is acquired directly through legislation. Even in *Manitoba Fisheries* and *De Keyser's Royal Hotel*, compensation was given for executive, not legislative, action.

Two counter-arguments for the rightness of *Tener* merit consideration.

One such argument would rely on the more modern case of *Canada (Attorney General) v. Telezone Inc.* and say that persons can sue in private law without challenging the underlying administrative action.[89] In *Telezone*, the eponymous telecom company had applied for a licence to provide a cell phone network as part of a tender process but its application was denied. Rather than challenge the ministerial order granting others (and denying Telezone) the licence directly, Telezone sued for damages for breach of the tendering contract, unjust enrichment, and negligence. The Supreme Court allowed the action to proceed in its private law form without Telezone making a direct public law challenge to the ministerial order.

Telezone thus supports plaintiffs having an election to challenge the public law decision directly or to allow that decision to remain in place and sue in private law.[90] But it would be a mistake to say *Telezone* gives a right to sue in private law: it stands only for the proposition that provided such a right exists independently, it can be sued on without launching a public law action first.

As applied to *Tener*, *Telezone* might have permitted a suit for negligence, but not the application of the statutory expropriation scheme. Put differently, *Telezone* allows for the possibility that a public authority might exercise its powers negligently (in the private law sense) without exceeding its powers (in the public law sense). If *Tener* involved an expropriation, however, then the Director of Parks must have exceeded its powers, precisely because the expropriation statute requires Cabinet approval of expropriations. Where an

87 *Ibid* at 551–52.
88 *Park Act*, *supra* note 62, s 9(1)(a).
89 2010 SCC 62 [*TeleZone*].
90 *Ibid* at paras 79–80.

expropriation statute provides "for certain formalities to be followed … the statute must be strictly complied with, and a court cannot say that compliance with such conditions precedent can be dispensed with."[91] As it stands, the Supreme Court's approach to *Tener* treats the denial of the permit as simultaneously both expropriation (for the purposes of compensation), and not expropriation (for the purposes of the authority of the expropriating body).

The second counterargument would say that *Manitoba Fisheries* not only was correctly decided but stood for a broader principle of statutory interpretation. Justice La Forest's reasons in *New Brunswick v. Estabrooks Pontiac Buick Ltd.* explain this principle.[92] As he put it, the English constitutional tradition "placed a high premium on individual liberty and private property" such that, originally, statutes providing for confiscation without compensation might be found invalid, and today there is an interpretive presumption against them.[93] This presumption "ensure[s] … that a law that appears to transgress our basic political understandings should be clearly expressed so as to invite the debate which is the life-blood of parliamentary democracy."[94] In his view, by requiring a clear statement courts "are working along with the Legislature to ensure the preservation of our fundamental political values."[95] The argument for *Manitoba Fisheries* and *Tener* essentially would be that protection of private property has a quasi-constitutional character[96] such that if there is no explicit statutory right to compensation one should be implied.

Such an argument would take *Estabrooks* further than it permits. As Justice La Forest explained, "courts must [apply clear statement rules] with great caution to ensure that its application conforms to changing social values and affords the Legislature the widest possible scope in the performance of its task of adjusting private rights to meet evolving social realities" and "courts should not … place themselves in the position of frustrating regulatory schemes or measures obviously intended to reallocate rights and resources."[97]

The schemes in *Manitoba Fisheries* (as discussed above) and *Tener* plainly had such intentions. The government in *Tener* was unabashedly socialist,[98] and implemented the legislative scheme to "[right] the wrongs" of the previous administration.[99] Although the government does not appear to have specifically indicated that it intended not to harm the interests of the property owners enriched by the prior administration without compensation, it was sufficiently implicit that an opposition Social Credit member saw fit to interject that the government should "[b]uy it out!" in relation to mining rights in another provincial park.[100] The presumption in *De Keyser's Royal Hotel* makes rather more sense for giving best

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91 *The King v Lee* (1917), 16 Ex CR 424 at 428, aff'd (1919), 59 SCR 652; see also Todd, *supra* note 42 at 29–33.

92 (1982), 144 DLR (3d) 21 (NBCA) [*Estabrooks*].

93 *Ibid* at 28–29.

94 *Ibid* at 29.

95 *Ibid* at 32.

96 See Thomas A Cromwell, Siena Anstis & Thomas Touchie, "Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation" (2017) 95:2 Can Bar Rev 297 at 302–303.

97 *Estabrooks*, *supra* note 92 at n 31.

98 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 30-2, (22 February 1973) at 637 (Hon D Barrett).

99 *Ibid* at 632 (Hon R Williams).

100 *Ibid* at 633 (JR Chabot).

effect to the will of a liberal legislature before the rise of the welfare state than it does for giving best effect to the will of a socialist legislature.

The final problem the *Tener* reasons faced was showing that an "expropriation" had occurred.

Justice Wilson's approach was to say the mineral claims gave the holder a profit à prendre.[101] By denying the rightsholders the right to take the minerals, the Crown had totally denied their interest and effectively removed an encumbrance from the land.[102] In her view, this denial would cause the profit à prendre to merge back into the Crown's title, thereby giving the Crown a corresponding benefit.[103] This rationale, however, is inconsistent with both the text of the mineral claim, which granted "all minerals" to the claim-holder, not merely a right to take the minerals, as well as the text of the *Mineral Act*, which deemed the holder's interest to be a "chattel interest."[104] A profit à prendre is a not a chattel interest.

Justice Estey's majority opinion is in some respects more convincing.[105] He opined that denying access to the lands "amounts to a recovery by the Crown of a part of the right granted."[106] With regard to the surface and access rights, he might have been correct if the grant had not been made subject to the laws that were then in force "respecting mineral claims."[107] Justice Estey does suggest the grant could be read narrowly such that it covered only laws relating to mineral claims qua mineral claims.[108] The difficulty with that suggestion is that the *Park Act* was plainly intended to relate to mineral claims qua mineral claims. He distinguished the situation here from general zoning regulation by opining that the denial of the permit "took value from the [Teners] and added value to the park."[109]

Overall, the Supreme Court's approach in *Tener* involved, as Robert Bauman noted in the aftermath, an "imaginative and fluid concept of 'taking'" that was more concerned with the "effect of … regulation than whether any formal statutory machinery [had] been invoked by the state."[110]

Paying attention to that machinery would have led to a different outcome. If denying the permit constituted an expropriation of property, then denying the permit would have exceeded the authority of the Director of the Parks Branch. The correct remedy then ought to have lain in administrative law: to quash the denial of the permit and remit the matter to

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101 *Tener*, *supra* note 2 at 541.
102 *Ibid* at 551–52.
103 *Ibid*.
104 *Ibid* at 553; *Mineral Act*, SBC 1977, c 54, s 21(2), included in *Tener*, *ibid* (Factum of the Respondent at 47).
105 Justice Estey's view the Teners' claims would have value if a removal permit were issued in the future (*Tener*, *ibid* at 563–64) contradicts the merger theory.
106 *Ibid*.
107 *Ibid* at 553.
108 *Ibid* at 562–63.
109 *Ibid* at 564–65.
110 Bauman, *supra* note 55 at 570.

the Minister and Cabinet to decide whether in fact to deny the permit, knowing that compensation would then be payable as an expropriation.[111]

After *Tener*, the Supreme Court did not engage with constructive expropriation for more than 20 years. The most prominent decision from this period was *Mariner*.[112]

Mariner concerned privately-owned land that had been designated as a beach under Nova Scotia's *Beaches Act*,[113] and thereby became subject to restrictions on development without permission.[114] The landowners applied for permission to build single-family homes, the Minister denied them this permission, and the landowners sued, saying their land had been expropriated and that they were therefore entitled to compensation.[115] The landowners were successful at trial, but lost on appeal at the Nova Scotia Court of Appeal.

Justice Cromwell's reasons for Court of Appeal are a *tour de force* of provincial appellate court jurisprudence. Faced with the challenging precedents of *Manitoba Fisheries* and *Tener*, he found ways to resolve or minimize the incoherencies in them, without suggesting that those cases were wrongly decided. As he explained matters, the proper role for the courts was to analyze whether the provisions of the Nova Scotia *Expropriation Act* were triggered, not to "pass judgment on the way the Legislature apportions the burdens … [of] regulation[s]."[116] He saw these provisions as requiring an "exacting" test before expropriation could be triggered on a de facto basis.[117] This test had two parts: (1) that there was a loss of actual property; and (2) that that property had been acquired by the public authority.[118]

As he interpreted the *NSEA*, a loss of actual property was required to trigger its provisions, not merely a loss of economic value.[119] In so doing, Justice Cromwell emphasized the aspects of *Manitoba Fisheries* and *Tener* that found a property had actually been acquired, while glossing over the oddity of that finding on the facts of those cases.[120] For example, he recast Justice Estey's consideration of the deprivation of economic value as relating to the amount of compensation payable given de facto expropriation (as he called it, rather than "constructive expropriation") had been made out, rather than relating to whether de facto expropriation had been made out.[121] *Manitoba Fisheries* and *Tener* could have been read expansively to say loss of economic value sufficed for expropriation, but Justice Cromwell read them narrowly instead. Rather than focus on deprivation of economic value, in his view de facto expropriation would be triggered only if the public authority removes "all

111 In the aftermath, the government apparently amended the legislation to restore the Teners' access to their mineral claims rather than pay compensation (Barton, *supra* note 42 at 158), so this point was ultimately moot.
112 *Mariner*, *supra* note 5.
113 RSNS 1989, c 32.
114 *Mariner*, *supra* note 5 at paras 1–2.
115 *Ibid*.
116 *Ibid* at para 41, citing *Expropriation Act*, RSNS 1989, c 156 [*NSEA*].
117 *Mariner*, *ibid* at para 47.
118 *Ibid* at paras 47–48, 62, 72, 106–107.
119 *Ibid* at paras 55–79.
120 *Ibid* at paras 65–67.
121 *Ibid* at para 65.

reasonable private uses of the [property]"[122] or "virtually all of the rights associated with the property holder's interest."[123]

Justice Cromwell took a similar approach to the second half of de facto expropriation: that a property be acquired by the government. *Manitoba Fisheries* and *Tener* could have been read broadly, such that any enhancement of the public interest — which almost by definition will occur from a regulation — sufficed for expropriation. Again, however, Justice Cromwell read those cases narrowly. As he explained *Manitoba Fisheries* and *Tener*, they each involved the government in fact (if not in law) acquiring the relevant property rights.[124] He discounted the idea that merely enhancing the value of public property could constitute such an acquisition.[125]

As applied to the facts, he reasoned that the traditional use of the lands was for recreation and that the landowners had not shown this use was prohibited.[126] Even if it had been, he did not find the Province had acquired any property interest.[127]

The Supreme Court unanimously adopted *Mariner* in *CPR*.[128] *CPR* concerned the designation of a former railway corridor as a public thoroughfare for transportation and "greenways."[129] Canadian Pacific Railway owned the thoroughfare. The rail operations having ceased, Canadian Pacific Railway now wanted to develop the thoroughfare. Canadian Pacific Railway sought, alternatively, an administrative law remedy (declaring the designation ultra vires), damages for common law de facto expropriation, and damages under the statutory expropriation scheme.

The Supreme Court denied all three. Its reasons essentially adopt the two-part test from *Mariner*, albeit with one change: it treated de facto expropriation as a common law cause of action,[130] not (as *Mariner* had) as the result of properly interpreting a statute. In adopting *Mariner*, it accepted the exacting two-part test: that virtually all uses of the land were prohibited, and that the authority had effectively gained the property.

Applying this test to the facts before it, the Supreme Court found Canadian Pacific Railway had not lost all reasonable uses of its land. Canadian Pacific Railway could continue to use the land as it always had — as a railway corridor.[131] Moreover, Canadian Pacific Railway retained the right to exclude trespassers, should it wish to exercise that right.[132] Since Canadian Pacific Railway retained that right, the City could not be said to have gained a de facto park.[133]

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122 *Ibid* at para 48 [emphasis in original], citing Bauman, *supra* note 55 at 574.
123 *Mariner*, *ibid*, citing *Alberta (Minister of Public Works, Supply and Services) v Nilsson*, 1999 ABQB 440 at para 48.
124 *Mariner*, *ibid* at paras 94–97.
125 *Ibid* at para 93.
126 *Ibid* at paras 88–90.
127 *Ibid* at para 92.
128 *CPR*, *supra* note 3.
129 *Ibid* at para 4.
130 *Ibid* at para 30.
131 *Ibid* at para 34.
132 *Ibid* at para 33.
133 *Ibid*.

Overall, *Mariner*, and through it, *CPR*, appear to have attempted to place a chaotic and unprincipled genie back in its bottle while respecting stare decisis. It exemplifies what has sometimes been called "narrowing" a precedent.[134] As Richard Re explains, narrowing can be used legitimately when it promotes values of correctness, practicality, candour, fidelity to the existing law, and fit with the rest of the law.[135] *CPR* does well on three of those values. If, as has often been hinted at, *Manitoba Fisheries* and *Tener* were wrongly decided, it aids correctness, but it does so while still accommodating the results in those two cases. By reading those cases narrowly, it mitigates the harms those cases do to elementary principles like parliamentary supremacy, judicial restraint, and the incremental development of the common law. Where *CPR* fails is in treating *Manitoba Fisheries* and *Tener* as applications of common law. Neither is, by their own terms, by their references to *Der Keyser's Royal Hotel*, and by *Tener*'s procedural posture wherein a common law cause of action was conceded not to exist.

It is unfortunate the Supreme Court did not refer to the then-new edition of Professor Eric Todd's book on expropriation that had been published between *Tener* and *CPR*. It opined that a common law right to compensation for administrative or legislative action that did not sound in an existing tort had "never been suggested" to exist.[136] What did instead exist was a right for damages for a tort (particularly, trespass) to, in appropriate circumstances, be assessed as though an expropriation had occurred — a so-called "de facto" expropriation.[137] If Todd's view had been accepted, *Manitoba Fisheries* and *Tener* could have been cabined as cases of statutory interpretation, and then later consigned to the wastebasket of judgments that failed to survive the modern rule of statutory interpretation pronounced in *Rizzo & Rizzo Shoes Ltd. (Re)*.[138]

Russell Brown, writing first as a professor, thought *CPR* erred in the other direction. In his professorial view, *CPR* "[threw] into confusion the state of the law in Canada on constructive takings," collapsing the distinction between a constructive taking and actual appropriation, and thereby brought "the very recognition … of the constructive taking … into question."[139] In his view, constructive expropriation had (prior to *CPR*) focused on and ought to focus on the loss to the plaintiff.[140] All that need be shown on the "gain" side of the ledger was an "advantage," which need not accrue to the public authority, but could accrue to the "public *generally*."[141] In Professor Brown's view, one of the bugs buzzing in the core of the constructive takings doctrine — that nothing is actually taken but the courts treat it as such — was, in fact, a feature.[142] He saw the cause of action as reflecting a "deep social consensus favouring a measure of protection of individual property rights."[143] These views came to the fore when Professor Brown became Justice Brown and the Supreme Court heard *Annapolis*.

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134 Richard M Re, 'Narrowing Precedent in the Supreme Court' (2014) 114:7 Colum L Rev 1861.
135 *Ibid* at 1875–85; see also Re, "Narrowing Precedent," *supra* note 55 at 926, 938.
136 Todd, *supra* note 42 at 35.
137 *Ibid* at 29, 35.
138 [1998] 1 SCR 27.
139 Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling Case Comment" (2007) 40:1 UBC L Rev 315 at 321.
140 *Ibid* at 326.
141 *Ibid* [emphasis in original].
142 *Ibid* at 332.
143 *Ibid* at 333, citing S Sharon Byrd & Joachim Hruschka, "The Natural Law Duty to Recognize Private Property Ownership: Kant's Theory of Property in his *Doctrine of Right*" (2006) 56 UTLJ 217 at 218.

III. *ANNAPOLIS*

The facts of *Annapolis* recall those of *CPR*. Like Canadian Pacific Railway, Annapolis Group Inc (Annapolis) owned lands (the Lands) in a municipality (albeit Halifax rather than Vancouver).[144] Like Canadian Pacific Railway, Annapolis had acquired the Lands some years earlier (over time from the 1950s) but was not actively using the land at the time of alleged taking[145] — indeed, unlike Canadian Pacific Railway,[146] Annapolis had never used the Lands. Like Canadian Pacific Railway, Annapolis now wished to develop the Lands, but the municipality did not allow this and instead members of the public (allegedly) used the Lands as though they were a public park.[147]

Specifically, in 2006, the Halifax municipal government: designated some of the Lands as possible future regional parks; zoned some of the Lands as "Urban Settlement" (wherein development could occur); and zoned other parts of the Lands as "Urban Reserve" (wherein development might be permitted after the 25-year planning horizon of the current municipal plan).[148] These designations did not themselves permit serviced development; rather, a further resolution and amendment to the land-use bylaw would need to occur.[149] Soon after, Annapolis attempted to develop the Lands.[150] Ultimately, in 2016, Halifax council refused the necessary resolution, and thereby prompted Annapolis to sue for, among other things, constructive expropriation. Halifax moved for partial summary judgment on that issue.

The application judge dismissed the application, essentially because he saw constructive expropriation as an unavoidably fact-specific cause of action that could not be settled on summary judgment.[151]

On initial appeal, the Nova Scotia Court of Appeal reversed, holding that the alleged facts did not disclose any taking, because Halifax had "acquired nothing and Annapolis [had] lost nothing."[152] Annapolis, it emphasized, could put the Lands to the same uses it had been "for many years."[153] At most, it saw Annapolis as plausibly having a case for trespass.[154] Annapolis then appealed to the Supreme Court.

The five-justice majority opinion (authored by Justices Côté and Brown with Chief Justice Wagner and Justices Moldaver and Rowe concurring) reaffirmed[155] (in its own view), or significantly expanded[156] (in the view of the four-justice dissent authored by Justices Kasirer and Jamal), a common law cause of action it called constructive expropriation. Echoing the views of Professor Brown, the majority found only two requirements for a person to make

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144 *Annapolis*, *supra* note 4 at para 5.
145 The dissent describes the lands as "vacant and treed": *ibid* at para 90.
146 The CPR rail line started in operation in 1902 and the last train ran in June 2001: see *CPR v Vancouver (City)*, 2004 BCCA 192 at paras 1–13.
147 *CPR*, *supra* note 3 at para 33; *Annapolis*, *supra* note 4 at para 64.
148 *Annapolis*, *ibid* at para 6.
149 *Ibid*.
150 *Ibid* at para 8.
151 *Annapolis Group Inc v Halifax Regional Municipality*, 2019 NSSC 341 at para 43.
152 *Halifax Regional Municipality v Annapolis Group Inc*, 2021 NSCA 3 at para 89.
153 *Ibid* at para 92.
154 *Ibid* at para 89.
155 *Annapolis*, *supra* note 4 at paras 41, 44.
156 *Ibid* at paras 84–85.

out the cause of action against a public authority: (1) that "the public authority has acquired a *beneficial interest* in the [person's] property or flowing from it (i.e. an advantage)" and (2) that action by the authority "has removed all reasonable uses of the property."[157] The majority further explained that "substance and not form" is to prevail.[158] Confusingly, having set out what it purported to be "the test,"[159] the majority then noted a non-exhaustive list of contextual factors that courts ought to consider:

- Whether the government action "targets a specific owner or more generally advances a [specific] policy objective";
- When the property owner was notified of how its use was restricted when the interest was acquired;[160]
- Whether the use restrictions are consistent with the "owner's reasonable expectations";
- The nature of the property and its historic or current uses; and
- The "substance" of the alleged advantage, as measured not by reference to any advantage the public authority *has gained*, but by what the property owner has lost (such as "denial of access to the property," the "depriv[ation] of all economic value").[161]

Additionally, the majority held that the intent of the public authority can be "evidence" that the property owner has "lost all reasonable uses of th[e property]."[162]

It is difficult to make a coherent combination from this smorgasbord of factors, especially since the majority repeatedly calls the test for constructive expropriation "effects-based."[163] Why a public authority took an action, or how many others such an action effects, does not affect the injured party. Nor does whether and when the owner was notified of the action, except insofar as it prevents the owner from finding an alternate reasonable use. If one takes the "reasonable uses" part of the "test" seriously, then the reasonable *expectations* of the owner ought to be immaterial, unless "reasonable uses" is assessed subjectively, with reference to what the owner wanted or expected.[164] These factors might make sense in a judicial review of the reasonableness of a decision, but not for the "effects based" cause of action for constructive expropriation.

The majority supported its restated test by recasting the jurisprudential record. It focused on the substance of *Manitoba Fisheries*' finding that loss of goodwill could ground the cause

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157 *Ibid* at para 44 [emphasis in original].
158 *Ibid* at para 45.
159 *Ibid*.
160 The majority says when the "property" was acquired: *ibid*. This would appear to be a simple error of language, since they had written earlier that only an "interest" must be acquired, not a "property" (*ibid* at para 44).
161 *Ibid* at para 45.
162 *Ibid* at para 53.
163 *Ibid* at paras 45, 54, 68.
164 *Ibid* at para 45.

of action, rather than the label ("property") placed on it by Justice Ritchie.[165] It also reversed course from *Mariner*, placing greater emphasis on Justice Estey's theory of an "advantage" gained by the park than Justice Wilson's theory of a merger of the profit á prendre.[166] More, it embraced *Manitoba Fisheries*' interpretation of *De Keyser Royal Hotel* as creating a common law rule,[167] despite the repeated criticism that *Manitoba Fisheries* had taken Lord Atkinson's words in that case out of context.[168]

These changes allowed the majority to find that summary judgment should not be granted. In its view, Halifax could acquire a "beneficial interest" in the Lands by promoting their use as a park, because "[p]reserving a park in its natural state [could] constitute an advantage accruing to the state."[169] In so doing, the majority conflated Halifax's exercise of public authority powers (traditionally the basis for the constructive expropriation cause of action) and its exercise of private person powers (the encouragement of trespass). Encouraging others to trespass might expose Halifax to liability on another basis,[170] including for the tort of trespass via procurement.[171]

The majority adopted the view that any "reasonable" use of the land would require a permit from Halifax, and so the denial of that permit amounted to removing the use.[172] This ignores, as the dissent pointed out, the primary use to which Annapolis put the Lands in the period between when it first acquired them (most in 1956) and when it sought to develop the Lands — that use being a place to park capital in the hope of future returns.[173] In the majority's view, it was important that Annapolis could have developed the lands — but unimportant that it did not do so in the period when there were no zoning controls.[174]

That *Annapolis* overturned *CPR* seems — the majority's assertions to the contrary notwithstanding[175] — evident. The dissent ably explains the difference between *Annapolis*' exposition of the test for constructive expropriation and that of *CPR*,[176] and I will not repeat what it says here. Considering how the facts in *CPR* would be treated by the *Annapolis* test should eliminate any remaining doubts. The facts in *CPR* are very similar to those in *Annapolis*, but the result was the opposite. The Supreme Court in *CPR* found there had not been a taking and there remained reasonable uses of the land.[177] The majority in *Annapolis* found there was a taking. The only basis on which the *Annapolis* majority distinguishes its facts from those of *CPR* is that in *CPR* there was a statutory override rendering the city

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165 *Ibid* at para 29.
166 *Ibid* at paras 34–35.
167 *Ibid* at paras 21, 23–24.
168 See the text accompanying note 42.
169 *Annapolis*, *supra* note 4 at para 64.
170 As the dissent noted: *ibid* at para 138.
171 *Fitzpatrick v Orwin*, 2012 ONSC 3492 at paras 118–25; aff'd 2014 ONCA 124. Of course, joint liability would require proving that another person had in fact trespassed.
172 *Annapolis*, *supra* note 4 at para 72.
173 *Ibid* at para 145, Kasirer and Jamal JJ.
174 *Ibid* at paras 74–75.
175 *Ibid* at paras 1 (suggesting it was "clarify[ing]" the test), 41, 44 (suggesting that its reasons help *CPR* be "properly understood").
176 *Ibid* at paras 100–10, Kasirer and Jamal JJ; see also Jim Phillips, "The Invention of Advantage: *Annapolis Group v. Halifax Regional Municipality* and Canadian De Facto Expropriation Law" (2023) 61:1 Alta L Rev 79.
177 *CPR*, *supra* note 3 at paras 31–34.

immune for the taking,[178] but that override did not affect *CPR*'s analysis of whether a taking had occurred.[179]

The explanation the *Annapolis* majority gives for its treatment of *CPR* is curious. It sees its interpretation of *CPR* as ensuring fidelity to *Manitoba Fisheries* and *Tener*.[180] The difficulty with this analysis is that *Annapolis* is consistent with aspects of *Manitoba Fisheries*, aspects of *Tener*, and aspects of *CPR*, but not the explanations of *Manitoba Fisheries* and *Tener* that *CPR* adopted. As I discussed previously, *Manitoba Fisheries* and *Tener* have multiple incoherencies and there were, thus, multiple ways that the tensions in them could be resolved. *CPR* chose one way. Todd had suggested a way that was more restrictive of claims. Brown had suggested a third way that was more permissive of claims. At the time of *CPR*, it was underdetermined (as a matter of precedent), which of these three ways was appropriate. *CPR*, though, made that choice when it adopted *Mariner*'s restrictive readings of *Manitoba Fisheries* and *Tener*. As a matter of precedent, *CPR* ought to have been respected in *Annapolis*.

As the dissent, again ably, describes, there was no basis as a matter of stare decisis for *Annapolis* to overturn *CPR*'s holding on this issue.[181] This is unfortunate, because as Justices Côté, Brown, and Rowe (concurring, with the support of Chief Justice Wagner) described in *R. v. Kirkpatrick*:

> *Stare decisis* … upholds the institutional legitimacy of courts, which hinges on public confidence that judges decide cases on a principled basis, rather than simply based on their own views. The public should have confidence that the law will not change simply because the composition of the panel or the court hearing a legal issue changes.[182]

The majority also returned to the pattern of *Manitoba Fisheries* and *Tener* of undermining statutory intent by torquing the common law. The Nova Scotia legislature set its mind to how it wished expropriation to be governed when it passed the *NSEA* in 1973. Among other effects, the *NSEA* was intended to replace a variable and confusing process with a systematic one, where multiple levels of approvals are required to expropriate a property.[183] Nothing in the *NSEA* indicates constructive expropriation was contemplated.[184] Indeed, much the same as in *Tener*, the Nova Scotia legislative scheme makes sense only in the absence of a common law right to constructive expropriation. Under the scheme, multiple parts of the public service must act deliberately to expropriate before the public can be made to bear the cost of a de jure expropriation. Constructive expropriation undermines the scheme because it allows a single part of the public service (acting reasonably) to saddle the public with the

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178 *Annapolis*, *supra* note 4 at paras 22, 78.
179 *CPR*, *supra* note 3 at para 37.
180 *Annapolis*, *supra* note 4 para 31.
181 *Ibid* at paras 111–18.
182 2022 SCC 33 at para 188 [*Kirkpatrick*].
183 Nova Scotia, *House of Assembly: Debates and Proceedings (Hansard)*, 50-4, (30 March 1973) at 1754–55 (Hon LL Pace). I made this observation previously in Peter Wills, "(Un)constructive Expropriation Law" (2 November 2022) at para 44, online (blog): *CourtingTrouble* [perma.cc/6ZAB-4K72].
184 Admittedly, Justice Cromwell's analysis of de facto expropriation in *Mariner* purported to be an interpretation of the same *NSEA*. He, though, was bound by *Tener*: *Mariner*, *supra* note 5 at paras 59–62.

cost of an expropriation. More, the statute renders "null and void" "[a]ny expropriation of land without the approval of the approving authority."[185] If Halifax's refusal of permission for *Annapolis* to develop its land should be seen as expropriation (as the majority sees as possible), then the statutory scheme renders the refusal void such that no taking has occurred. It is incoherent to say there is a common law right to compensation for an event that was either not an expropriation or that was an expropriation and therefore is legally void.

IV. CHARACTERIZING CONSTRUCTIVE EXPROPRIATION

At the beginning of this article, I suggested that it was unclear what constructive expropriation *was* in law: where it fit within the broader scheme. That it was a cause of action was plain enough, but what kind of cause? This is a taxonomic question. In this section, I first address why this question is worth answering, then attempt to answer it. As I explain, the classification of constructive expropriation is devilish at every stage. One could reasonably question whether the action exists in public law or private, whether it reflects a wrong or something else, and whether it constitutes a tort, unjust enrichment, or an equitable cause. I conclude the action best fits in tort.

The primary reason to care about the taxonomic question is that there is communicative and informational efficiency to be gained from its answer. Knowing that an action lies in unjust enrichment or tort helps the legal community draw on their existing knowledge structures of those categories. These structures help define the space of relevant analogies.[186] Such structures make it easier for counsel to intuit connections, to advise clients helpfully, and to predict litigation outcomes accurately. This predictability, Peter Birks once argued, has beneficial consequences, for "law which is intellectually disorderly plays into the hands of the rich and powerful, whether the power and wealth be private or public" because the cost of litigation drives the risk-averse toward settlement.[187] It also cabins legal imaginations so that considerations foreign to a doctrinal category are seen as "irrelevant or, at best marginal."[188]

These knowledge structures also enrich the vocabulary of law.[189] Legislatures sometimes provide differently for contract versus tort, or for specific categories of tort. Such differences can arise in limitations statutes,[190] Crown liability statutes,[191] municipal corporation statutes,[192] and conflict of laws statutes.[193] A reasonable starting presumption is that if a legislature incorporates a juridical term (such as "tort") into a statute, the legislature means

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185 *NSEA*, *supra* note 116, s 7(2).

186 Emily Sherwin, "Legal Taxonomy" (2009) 15:1 Leg Theory 25 at 43.

187 Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26:1 UWA L Rev 1 at 97. Admittedly, this argument may have had more force when the difference between access to legal services was less acute. Legal clarity does little to reallocate power if even clear victories are uneconomical to litigate.

188 David Cohen & Allan C Hutchinson, "Of Persons and Property: The Politics of Legal Taxonomy" (1990) 13:1 Dal LJ 20 at 39.

189 Sherwin, *supra* note 186 at 40.

190 *Limitations Act*, SNL 1995, c L-16.1, ss 5–6 [*NL Limitations Act*]

191 See e.g. *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 3 [*Canada CLPA*]; *Proceedings against the Crown Act*, RSNS 1989, c 360, ss 3–4 [*PATCA*]; *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, s 9.

192 See e.g. *The Municipal Financing Corporation Act*, RSS 1978, c M-28, ss 4–5 [*MFCA*].

193 See e.g. *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 10 [*CJPTA*].

to apply the common law meaning. Contracting parties, too, can use legal categories to structure their obligations, especially in the context of liability insurance.

At a more theoretical level, having a taxonomic structure aids courts and commentators in recognizing missteps and inconsistencies and helps "facilitate coherent legal development."[194] For example, taxonomy allows individual terms (such as "reasonableness") to refer consistently to the same concept when they are used within one category (such as "tort") but to a distinct concept when they are used in a different category (such as "administrative law"). In Birks's view, it also helps defend the citadel of the commonwealth legal system from realist attacks and prevents the politicisation of the judiciary.[195]

There are those who would disagree. Paul Craig, for example, cautions that an exercise in legal taxonomy can "[take] on a life of its own" and disguise a normative contest.[196] What Birks sees as a virtue becomes in Craig's eyes a vice. Cabining legal imagination can also lead to dissonance, where fact patterns that look similar at one level of abstraction result in different outcomes based on formal (and seemingly purely formal) differences. David Cohen and Allan Hutchinson note precisely this problem in relation to *Tener* when comparing it to a case the Supreme Court had rendered a month previously, *Lapierre v. Quebec (Attorney General)*.[197] Like *Tener*, *Lapierre* concerned harm suffered by one person due to a government scheme that benefited the public generally. *Tener* was understood as a "property" case and compensation was granted.[198] *Lapierre* was understood as "tort" case (it concerned an adverse reaction to a childhood measles vaccine that caused "permanent almost total disablement") and so compensation was unavailable.[199]

The comparison of *Tener* and *Lapierre* underlines the value of answering the taxonomic question. If taxonomy and doctrine have such power to shape outcomes, then the question of how to conceive of constructive expropriation should be of more than academic interest. By situating constructive expropriation within a taxonomy, it can be compared to other members of its family, and questions asked about whether constructive expropriation is consistent with the other causes of action, and, where it is not consistent, whether it should be. Such an inconsistency can be addressed in at least five ways: (1) justifying the difference; (2) changing constructive expropriation; (3) changing the other causes in the category; (4) changing constructive expropriation *and* other causes in a category; and (5) changing the taxonomy.

All of that said, characterizing constructive expropriation requires a taxonomy of law. I apply here the most famous such taxonomy of English or Commonwealth law — that advanced by Birks. His taxonomy is structured as follows:

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194 Jason NE Varuhas, "Taxonomy and Public Law" in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark, eds, *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart, 2018) 39 at 48.

195 Birks, *supra* note 187 at 98–99.

196 Paul P Craig, "Taxonomy and Public Law: A Response" (2019) Public Law 281 at 301–302.

197 Cohen & Hutchinson, *supra* note 188 at 33; *Lapierre v Quebec (Attorney General)*, [1985] 1 SCR 241 [*Lapierre*].

198 Cohen & Hutchinson, *ibid* at 33.

199 *Ibid*; *Lapierre*, *supra* note 197 at 244.

> The law is either public or private. Private law concerns the persons who bear rights, the rights which they bear, and the actions by which they protect those rights. The rights which people bear, whether in personam or in rem, derive from the following events: wrongs, consent, unjust enrichment, and others.[200]

The "wrongs" category includes four sub-categories:

> The four are torts, equitable wrongs, breaches of statutory duty not amounting to a tort, and breaches of contract. Torts are breaches of duties directly imposed by the common law. In the other cases the primary duty is imposed by equity (meaning by the law descended from the Court of Chancery), by statute, or by the parties' own contract.[201]

Unjust enrichment, meanwhile, includes circumstances where

> [t]he defendant is enriched at the expense of the claimant and there is in addition a reason, not being a manifestation of consent or a wrong, why that enrichment should be given up to the claimant. There are acquisitive wrongs and hence there are cases of wrongful enrichment, but an unjust enrichment is never a wrong. If the claimant relies on the facts in their character as a wrong, his cause of action arises in the law of wrongs.[202]

The "other" category in private law includes liability to pay taxes, salvage, and uninvited interventions in the affairs of others (*negotorium gestio*).[203]

The first question, then, is whether constructive expropriation is public or private.[204] In Birks's taxonomy, private law is discrete from public law, which deals with "constitutional law, human rights, administrative law, and criminal law."[205] This distinction came late to the common law and is of contested value,[206] but "we all know roughly what we are talking about and this is normally enough for us."[207]

In Canada, Justice Stratas has suggested that whether a matter falls into public or private law depends on balancing multiple factors, including whether it is "a private, commercial matter, or is it of broader import to members of the public," the "nature of the decision maker and its responsibilities," the extent to which a decision "is authorized by or emanates directly from a public source of law," the decision-making body's "relationship to other statutory schemes or other parts of government," the "extent to which a decision maker is an agent of

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200 Birks, *supra* note 187 at 8.

201 Peter Birks, *Unjust Enrichment*, 2d ed (Oxford: Oxford University Press, 2005) at 21.

202 *Ibid* at 22.

203 *Ibid*.

204 That in foreign countries a constructive expropriation cause of action is constitutionally mandated (see discussion in *Mariner*, *supra* note 5 at paras 37–41) and so would plainly be a part of public law is entirely irrelevant.

205 "Introduction" in Andrew Burrows, ed, *English Private Law* (Oxford: Oxford University Press, 2013) ix at ix.

206 See e.g. Carol Harlow, "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43:3 Mod L Rev 241 at 241; JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford: Oxford University Press, 2000).

207 Harlow, *ibid* at 241.

government or is directed … by a public entity," the "suitability of public law remedies," the "existence of compulsory power," and the existence of a "serious public dimension."[208]

As applied to constructive expropriation, the defendant-focused factors point in favour of a public law characterization. Constructive expropriation can be levelled only against public authorities. Constructive expropriation does not provide a cause of action against a non-public person who eliminates substantially all value of a property and in so doing enriches themselves, if that is all they do. If Person A owns a patent, and Person B comes along and makes it worthless by inventing a better product, A has no cause of action against B. Nor do bricks and mortar retailers have any right of action against Amazon, even if Amazon acquired all their goodwill. Constructive expropriation can only be triggered by the exercise of a distinctly public power.[209]

Now, legislatures conceivably might delegate regulatory powers to a private entity; they have, after all, delegated the power to (non-constructively) expropriate.[210] If a legislature did, and the power was used, then any cause of action for constructive expropriation would seemingly arise against the delegate (as it does today against municipalities), not against the delegating legislature. The identity of the defendant thus presently, but only contingently, points to constructive expropriation being part of public law.

The plaintiff-focused factors point toward private law. The plaintiffs in the constructive expropriation cases, from *Manitoba Fisheries* through *Annapolis*, had been seeking to protect commercial interests. And the remedy that constructive expropriation offers them is money, which in modern times, is largely the province of private law. Public law is chary with its use of monetary remedies.

It was not always that way. The history of Anglo-Canadian administrative law evidences a movement away from common law collateral attack and toward systematized statutory remedies. In the medieval period, the "regular and, very often, the only remedy available" for addressing a defective judgment was to sue the person who rendered or enforced it.[211] Collateral attack was thus the norm. Eventually, however, the collateral attack option was overtaken by the two writs: (1) mandamus, which was to be used "upon all Occasions where the Law has established no Specific Remedy, and where in Justice and good Government

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208 *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 60 [emphasis omitted]. This was applied in, *inter alia*, *Cyr v Batchewana First Nation of Ojibways*, 2022 FCA 90; *Alie-Kirkpatrick v Saskatoon (City)*, 2019 SKCA 92; but note *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 21; and see *Strauss v North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207 at para 42.

209 An interesting contrast emerges when considering a broader meaning of 'regulation.' Recent literature on digital platforms emphasizes how these private actors regulate markets through their software and terms of service (see e.g. Martin Kenney, Dafna Bearson & John Zysman, "The Platform Economy Matures: Measuring Pervasiveness and Exploring Power" (2021) 19:4 Socio-Economic Rev 1451), but the rights of action against misuse of that power come, if at all, solely through (statutory) competition law, not through the common law: Lina M Khan, "The Separation of Platforms and Commerce" (2019) 119:4 Colum L Rev 973 (discussing the United States antitrust regime).

210 See Abraham Bell, "Private Takings" (2009) 76:2 U Chicago L Rev 517; Emma JL Waring, "Private-to-Private Takings and the Stability of Property" (2013) 24:2 King's LJ 237.

211 Amnon Rubinstein, "On the Origins of Judicial Review" (1964) 2:1 UBC L Rev 1 at 1; Edith G Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Cambridge, Mass: Harvard University Press, 1963) at 14–15.

there *ought* to be one";[212] and (2) certiorari, by which an order could be quashed if it were made without jurisdiction (as that term was understood by the courts).[213] Today, even these writs have been captured by the general rules of judicial review in some of the provinces.[214]

This development has meant that there is now no general right to recompense for wrongful administrative action in public law. Even if legislative action deprives a person of their life, health, or security of the person, they get no monetary remedy (indeed, they have no remedy at all), provided the deprivation accorded with the principles of fundamental justice.[215] Even administrative actions with particularly severe consequences — *Canada (Minister of Citizenship and Immigration) v. Vavilov* offers the example of the "potential foreign hardship a deported person would face"[216] — would not, generally, attract a monetary remedy. Most damningly, the Supreme Court recently and summarily rejected the possibility of a public law right to a monetary remedy for administrative action.[217]

Similarly, the violation of human rights protected by the *Charter* attracts a monetary remedy only in limited circumstances. There is no monetary remedy for executive conduct done in accordance with a putatively valid law (that is later found to violate the *Charter*), unless the conduct is "clearly wrong, in bad faith or an abuse of power."[218] And where *Charter* damages *are* awarded, the quantum is often "modest" and "disappointing."[219] Moreover, as *Annapolis* admitted, there is no constitutional protection of property.[220]

There is significant dissonance between public law and constructive expropriation. Public law compels public authorities to follow the rules past legislatures have laid down. Its focus is on what decision the public authority should have made or not made. Constructive expropriation does not follow that structure. It does not decide whether a public authority should have made the decision it did, but instead, given the decision has occurred, it decides whether the public authority should give the plaintiff money. Constructive expropriation does not purport to give a right to reverse the decision or to mandate a different decision by the authority. Constructive expropriation does not purport to be a tool to ensure compliance with past legislative enactments. The statutory scheme does not need to provide for a right to compensation to ground constructive expropriation. Indeed, as a matter of public law, the public authority may lack the power to offer compensation *sua sponte*[221] — that is, absent a distinct cause of action for constructive expropriation — so it cannot be said the public

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212 Henderson, *ibid* at 142, quoting Lord Mansfield in *R v Barker* (1762), 3 Burr 1265 at 1267.

213 *Ibid* at 158–59.

214 See e.g. *Judicial Review Procedure Act*, RSBC 1996, c 241, ss 2(2), 12; *Judicial Review Procedure Act*, RSO 1990, c J.1, s 7.

215 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

216 2019 SCC 65 at para 134, citing *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3.

217 *Nelson (City) v Marchi*, 2021 SCC 41 at paras 40–41 (rejecting Justice Stratas' reasons in *Paradis Honey Ltd v Canada*, 2015 FCA 89 at para 143).

218 *Conseil scolaire francophone de la Colombie Britannique v British Columbia*, 2020 SCC 13 at para 164 [*CSF*], quoting *Vancouver (City) v Ward*, 2010 SCC 27 at para 39; *Mackin*, *supra* note 47 at para 79.

219 Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law*, 1st ed (Cambridge: Cambridge University Press, 2021) at 257, 258, n 120.

220 *Annapolis*, *supra* note 4 at para 24.

221 Largesse cannot be unilaterally dispensed by government absent authority: *Auckland Harbour Board v R*, [1924] AC 318 at 326 (UK PC) ("no money can be taken out of the Consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself").

authority failed to fulfil a statutory duty by not giving that compensation. *Tener* excepted, the major constructive expropriation actions were given effect despite the absence of a compensation scheme, not as a manifestation of such a scheme.

One could set constructive expropriation within this tradition, but it would be a throwback, out of step with the modern developments. A better home for it, taxonomically, would seem to be private law.

Private law, after all, has continued to include both causes of action that lie between subjects and sometimes include the Crown and causes that lie against public authorities alone.[222] In tort, the latter include misfeasance in public office and malicious prosecution and there are also specific rules for addressing negligence claims against government entities.[223] In equity as well there are specific fiduciary duties held only by public authorities, such as that regarding reserves under the *Indian Act*.[224] And of course, rights can generally be created by statute or contract.

Within private law, the most plausible candidates to house constructive expropriation are unjust enrichment, tort, and equity.

The analogy to unjust enrichment is plain: the test for constructive expropriation involves both a nominal enrichment (by the acquisition of an interest by the public authority), and a corresponding deprivation (by the claimant). Indeed, unjust enrichment formed part of the foundation of the claimant's argument in *Manitoba Fisheries*.[225]

The disanalogy is that constructive expropriation would appear to give a cause of action despite the presence of a juristic reason for the enrichment. Constructive expropriation cases involve the lawful disposition of value or property (more on that distinction anon), and as the Supreme Court has explained, a "[d]isposition of law is well established as a category of juristic reason."[226] An apparent disposition is effective unless it is invalid, inapplicable, or inoperative.[227] In the constructive expropriation cases, there is no argument that the disposition of law is invalid. If there had been, constructive expropriation would not have been novel or even so important: it would have been a request for judicial review, seeking to force a public authority to make a decision (mandamus) or to quash a decision the authority had made (certiorari), such that the enrichment had not occurred for a juristic reason. This difference is significant: the absence of a juristic reason is what makes a morally neutral enrichment unjust.[228] Without that requirement, constructive expropriation cannot fit within the unjust enrichment category.

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222 John Murphy has suggested that this shows an error in taxonomy, and in fact torts exist both in private law and in public law: "Hybrid Torts and Explanatory Tort Theory" (2018) 64:1 McGill LJ 1 at 36–37. If one accepted his suggestion, then possibly constructive expropriation could be housed alongside these other public law tort actions.

223 *Imperial Tobacco*, *supra* note 49 at para 76.

224 RSC 1985, c I-5; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 86(2–3).

225 *Manitoba Fisheries*, *supra* note 1 (Factum of the Appellant at 8).

226 *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 49 [*Garland*].

227 *Ibid* at para 51.

228 *Peter v Beblow*, [1993] 1 SCR 980 at 990; *Garland*, *ibid* at para 39.

Tort is more promising. As mentioned above, certain torts can be levelled only against public authorities. Like other torts, constructive expropriation emerged from a process of common law reasoning, not directly from statute. Like other torts, there is the fundamental tie of causation that unites the claimant and the defendant: the defendant must cause the claimant's loss. Like at least some other torts,[229] liability is strict and effects-based: it does not turn on the wrongfulness or lack thereof of the defendant's conduct, at least in the sense that the defendant need not have been negligent or reckless or intentionally have brought about the consequence. The tort analogy is also strengthened by the relative primacy of the claimant's loss over the defendant's gain — compensation is determined with reference to the former, not the latter.[230] And, as discussed above, it is less than clear that the public authority *itself* has gained; rather, the public authority appears to be deemed to have gained as a synecdoche for the public it represents.[231]

The tort analogy, however, also has its challenges. As Percy Winfield once described it, "[t]ortious liability arises from the breach of a duty primarily fixed by the law: such duty is towards persons generally and its breach is redressible by an action for unliquidated damages."[232] Despite the extraordinary breadth of this definition, it does not necessarily encompass constructive expropriation because the constructive expropriation cause of action does not obviously redress a breach of a duty. The constructive taking itself is not objectionable, only the omission of paying compensation. Perhaps the best way to structure constructive expropriation as a tort is to say that the public authority assumed responsibility to de jure expropriate the property when it removed all reasonable uses of the property.

One might instead consider constructive expropriation as a cause of action in equity. After all, equity was where "solutions to hard cases" could be found when the common law courts had no fair answer.[233] If the previous characterizations have been unconvincing, perhaps something is to be found here. Three strands of equitable obligations exist: (1) those related to fiduciary obligations; (2) those related to abuses of power; and (3) those related to breaches of confidence.[234] Of these, the abuse of power doctrine would seem most relevant.[235] After all, the power to regulate is a discretionary power.

Multiple problems, however, arise. Equity's methods for handling discretionary powers are not unlike those in administrative law. The focus of the enquiry is on "*how* [a] decision was reached, not *what* was decided."[236] In constructive expropriation, by contrast, the methods or reasons for a decision are entirely immaterial. The normal equitable remedies are

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229 Such as that in *Rylands v Fletcher*, [1861–73] All ER Rep 1, or in the case of vicarious liability or a non-delegable duty.

230 *Manitoba Fisheries*, *supra* note 1 at 118.

231 This synecdoche, notably, does not apply in the case of a loss. An executive that, in an act of largesse, gave away a park to a private developer would not be required to compensate users of the park who thereby lost their rights of entry to the park. Reversing that largesse, of course, would create a right to compensation. In this respect, constructive expropriation operates like a one-way privatization valve.

232 Birks, *supra* note 187 at 26, quoting Percy H Winfield, The Province of the Law of Tort (Tagore Law Lectures Delivered in 1930) (Cambridge: Cambridge University Press, 1931).

233 Sarah Worthington, *Equity*, 2d ed (Oxford: Oxford University Press, 2006) at xiii.

234 *Ibid* at 117–18.

235 *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at paras 41–45 forecloses the fiduciary analogy.

236 Worthington, *supra* note 233 at 134 [emphasis in original].

also non-monetary,[237] and equity aims to return the defendant to the position it was in before the breach, not to correct the harm to the claimant.[238]

Now, this last point can perhaps be finessed: as I mentioned when discussing tort, the wrong of constructive expropriation appears to be that a legal, de jure expropriation was not undertaken. In that regard, constructive expropriation's provision of monetary compensation can be seen as a method of restoring the public authority to its position before it wrongfully failed to de jure expropriate the property. Since equity "regards as done that which ought to be done,"[239] one could conceive of constructive expropriation as an equitable action that has three distinct components. First, a constructive expropriation would be a case where de jure expropriation ought to have been done. Second, equity would convert that "ought to have been done" into having been done, thereby causing an equitable de jure expropriation. Third, the equitable de jure expropriation would trigger a statutory right to compensation.

Viewed with sufficient theoretical distance, this account of constructive expropriation might be compelling. But that distance is too great: it forgets that the statutory scheme in *Manitoba Fisheries* did the taking at the federal level and left the necessity of compensation at the provincial level. Parliament did not permit the federal government to take with compensation.

With all that said, constructive expropriation appears to be a private law cause of action, and within private law it appears to be best considered a tort, although it has picked up aspects of equity. This description suffices for present purposes. Equitable wrongs and torts are distinguished by whether they were first developed by the Courts of Chancery or the Courts of King's Bench, Common Pleas or of the Exchequer, and those courts have now merged. Even if the divisions continue to have merit for assessing causes of action that existed prior to the merger, it is something of a mug's game to distinguish a cause of action that first emerged post-merger between being a tort and being an equitable wrong. In the next section, I explore the consequences of this classification. That constructive expropriation could be classed as a tort does not make it a good tort, or one that ought to exist.

V. CONSTRUCTIVE EXPROPRIATION AS A TORT

Treating constructive expropriation as a tort has practical, theoretical, and normative implications.

As a practical matter, calling constructive expropriation a "tort" affects, at a minimum, the characterization of an action for choice of law and jurisdictional purposes,[240] and the limitations period in Newfoundland and Labrador.[241] It may also raise questions as to the

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237 An exception exists for breach of confidence: *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142 at 179–80.

238 Worthington, *supra* note 233 at 118.

239 *Ibid* at 242; *Lottman v Stanford*, 1978 CanLII 69 (Ont CA) at para 12, Wilson JA; *Buschau v Rogers Communications Inc*, 2001 BCCA 16 at para 68, leave to appeal refused, [2001] SCCA No 107.

240 See e.g. *CJPTA*, *supra* note 193, s 10.

241 *NL Limitations Act*, *supra* note 190, ss 5–6.

potential liability of the Crown of Canada and of Nova Scotia,[242] and of municipal corporations in Saskatchewan.[243]

This last point appears to have a subtle complication. In these liability-imposing statutes, liability attaches to the Crown for damages "for which, if it were a person it would be liable … in respect of … a tort committed by a servant of the Crown" or for "breach of duty attaching to the ownership, occupation, possession or control of property."[244]

If these sections do capture constructive expropriation, it is poorly at best. A servant or agent of a public authority cannot complete the tort of constructive expropriation. The servant does not acquire the beneficial interest, nor does the removal of all reasonable uses of the property flow from the public authority via a servant. A servant may trigger these actions, but they are the public authority's own actions. Constructive expropriation, if it is a tort, does not fit in the servant's tort pathway to vicarious liability.[245] The "ownership, occupation, possession or control" of property prong has hitherto been used to encompass actions that could equally be levelled against a private landowner, such as occupier's liability, nuisance, and negligence.[246] The bare meaning of the word "control" could plausibly include the power to regulate the use of the property, but that would seem to be pulling this statutory formula away from its understood purpose.

It also has theoretical implications. Theorists who propose universal theories[247] of tort law should add constructive expropriation — and the lack of it elsewhere in the common law — to the corpus of torts that they must explain.

Similarly, claims made about torts in general may need to be adjusted. In *Nevsun Resources Ltd. v. Araya*, Justices Brown and Rowe, supported on this point by Justices Moldaver and Côté but nonetheless dissenting, proposed a test for when a court should refrain from declaring the existence of a new tort.[248] In their words:

> Three clear rules for when the courts will not recognize a new nominate tort have emerged: (1) The courts will not recognize a new tort where there are adequate alternative remedies (see, for example, *Scalera*); (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another (*Saskatchewan Wheat Pool*, at pp. 224–25); and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial (*Wallace v. United Grain*

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242 See e.g. *Canada CLPA*, *supra* note 191, s 3; *PATCA*, *supra* note 191, ss 3–4.

243 See e.g. *MFCA*, *supra* note 192, ss 4–5.

244 *Canada CLPA*, *supra* note 191, ss 3, 10. See similarly *PATCA*, *supra* note 191, s 5(1). See analogously *MFCA*, *supra* note 192, s 5.

245 *Swinamer v Nova Scotia (Attorney General)*, [1994] 1 SCR 445 at 461 [*Swinamer*] admittedly casts doubt on the effectiveness of the legislative text at limiting Crown liability to torts committed by identified agents. Whether *Swinamer* has been overtaken by *Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 58 or stands only for allowing Crown liability for actions done by unidentified agents is open to question: Malcolm Rowe & Manish Oza, "Tort Claims Against Public Authorities" (2022) 60:1 Alta L Rev 1 at 15–16.

246 *144096 Canada Ltd (USA) v Canada (Attorney General)*, [2003] OJ No 147 (CA) at paras 18–19.

247 See e.g. Ernest J Weinrib, *The Idea of Private Law*, 1st ed (Oxford: Oxford University Press, 2012); Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007); William M Landes & Richard A Posner, *The Economic Structure of Tort Law* (Cambridge, Mass: Harvard University Press, 1987), all discussed as universal theories in James Goudkamp & John Murphy, "The Failure of Universal Theories of Tort Law" (2015) 21:2 Leg Theory 47.

248 2020 SCC 5 [*Nevsun*].

> *Growers Ltd.*, [1997] 3 S.C.R. 701, at paras 76–77). Put another way, for a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration.[249]

This test, although set out in a dissenting judgment, has been picked up by lower courts.[250] As this test is stated, it should apply to putative new nominate torts generally. Classing constructive expropriation as a tort — and if it is a tort, it is plainly a new nominate tort — raises the question of whether this test still accurately describes the process by which courts have identified new nominate torts.

All three of the rules identified in *Nevsun* depend, in some way, on the timing of a new tort's recognition: over time, alternative remedies may come into or fade from existence or become more or less adequate;[251] changes in society may make new wrongs possible or salient, or lead to a re-evaluation of what is wrongful;[252] and the extent of changes recognizing a new tort would wreak upon the common law depends on the state of the common law at that time. When considering constructive expropriation, however, no developments appear to be salient to the assessment of the first two rules in the period between *Manitoba Fisheries* and *Annapolis*. The relevant time is more important for assessing the third.

Regardless of what time it is considered, constructive expropriation breaks the first two rules. When a constructive expropriation is rightfully seen as a wrong, existing remedies suffice. Such times include when the expropriation is unreasonable, which judicial review can remedy. Now, judicial review is not a complete answer. At times, the remedies available in judicial review — quashing or directing an order, for example — will be insufficient recourse for an unreasonable action. In such times, further remedies are available via the torts of trespass and trespass to chattels, if the administrative action is invalid, not merely unreasonable. When it is valid, but unreasonable then public authority negligence and misfeasance in public office come to the fore. At other times, no remedy will be available from judicial review — such as in circumstances where the administrative action was reasonable (or indeed, correct), or where the constructive expropriation occurred due to direct legislative action. In those circumstances, saying that the governmental action constituted a wrong would put the courts in the position of judging legislation and "usurping the proper authority of elected representatives and their officials."[253] The courts can do that rightfully only when constitutionally permitted.[254]

Whether constructive expropriation breaks the third rule depends on when it came to exist as a tort. As we have seen, *Manitoba Fisheries* was ostensibly a case about statutory

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249 *Ibid* at para 237.

250 *ES v Shillington*, 2021 ABQB 739 at para 24; *SB v DH*, 2022 SKKB 216 at para 76 (both concerning the disclosure of intimate images without consent and treating this passage from *Nevsun* as though it were part of the majority's reasons); *Alberta Health Services v Johnston*, 2023 ABKB 209 (concerning harassment).

251 For example, if the statutory human rights regime had not occupied the field, a tort of discrimination might have been recognized in *Seneca College v Bhadauria*, [1981] 2 SCR 181 at 194–95. See also *Kirkpatrick*, *supra* note 182 at paras 233–41, Côté, Brown, Rowe JJ.

252 *Kirkpatrick*, *ibid* at paras 224–30, Côté, Brown, Rowe JJ.

253 *Kamloops v Nielsen*, [1984] 2 SCR 2 at 25–26.

254 See Rowe & Oza, *supra* note 245 at 25.

interpretation, and *Tener* was explicitly such a case. The Supreme Court had therefore not recognized a novel tort in either of those decisions. The change, at least at the Supreme Court level, came with *CPR*, where the Supreme Court described a "*de facto* taking requiring compensation at common law."[255]

CPR appears consistent with the third rule. By using *Mariner* as its guiding light, *CPR* set the cause of action within an existing tradition developed in the lower courts. And although the language in *CPR* was broad enough to permit a variety of meanings, the application in that case showed that it was intended to create a limited right and remedy. If anything, *CPR* made the law more determinate than it had been left in the aftermath of *Manitoba Fisheries* and *Tener*.

The same cannot be said of *Annapolis*. *Annapolis* does not pronounce a new nominate tort, so the appropriate focus is on the more general test for changing the common law. In *Friedmann Equity Developments Inc. v. Final Note Ltd.*, Justice Bastarache identified five conditions for changing the common law:

> A change in the common law must be necessary to keep the common law in step with the evolution of society, to clarify a legal principle, or to resolve an inconsistency. In addition, the change should be incremental, and its consequences must be capable of assessment.[256]

Annapolis does not satisfy these conditions. No evolution of society had occurred between *CPR* and *Annapolis* to warrant greater protection of private property from government action. Nor were the principles set out in *CPR* unclear or inconsistent. Moreover, and unlike *CPR*, the effects on the legal system of taking *Annapolis* seriously are likely to be substantial. As the dissent describes, *Annapolis* has significant ramifications and will "dramatically [expand] the potential liability of municipalities."[257] The two-part test articulated in *Annapolis* does not include any element that would cabin its effect to real property or zoning laws. Indeed, *Manitoba Fisheries* makes clear such a limit would be inappropriate.

Stated as broadly as *Annapolis* appears to allow, any regulatory action that makes a property not worth using by its present owner and which provides a public benefit can ground an action in constructive expropriation. Constructive expropriation might have implications for endangered species protection,[258] copyright law,[259] environmental protection[260] (would a coal mine owner have a claim if their mine is made to have uneconomical by carbon emission pricing?), data protection (would a data controller that collected data without bona fide consent have a claim if a rule came in limiting its use of such data?), products safety (if a regulation increased safety requirements, would a company that produced or owned unsafe products have a claim? What of the reverse, wherein a company that relied on a high-regulation environment had its operations undercut by

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255 *CPR*, *supra* note 3 at para 30. Note that *CPR* is not employing Todd's usage of "*de facto* taking" discussed above at 15.

256 2000 SCC 34 at para 42 [citations omitted].

257 *Annapolis*, *supra* note 4 at para 115.

258 *9255-2504 Québec Inc v Canada*, 2020 FC 161.

259 *Geophysical Service Inc v Canada*, 2018 FC 670.

260 *Northern Cross (Yukon) Ltd v Yukon (Energy, Mines and Resources)*, 2021 YKCA 6 (concerning fracking, but applying *Tener* over *CPR*).

regulatory easing?), and public health (was the goodwill of restaurants constructively expropriated by COVID-19 precautions?). Taking *Annapolis* seriously has far-reaching implications.

The strongest justification for seeing *Annapolis* as making no significant change to the law comes from its accordance with various Quebec civil law cases identified by the majority.[261] But such accordance is only so helpful. Importing civilian concepts to the common law has landed the common law in difficulty before,[262] and of course the Quebec cases are founded on statute. *CPR* was effective at closing a Pandora's Box, but the *Annapolis* majority has opened it again.

In sum, the descriptive claims made in *Nevsun* concerning when new torts are created may need to be revisited if constructive expropriation is indeed a tort. The firm lines the *Nevsun* dissent identifies may be unsustainable. Treating the *Nevsun* test instead as making normative claims — of when a tort should be recognized — would suggest that constructive expropriation is aberrant.

Calling constructive expropriation a tort may also have further normative implications, both for constructive expropriation and for the broader law. If consistency is a virtue, constructive expropriation sits uncomfortably next to its nearest neighbours, public authority negligence and misfeasance in public office. Both of those latter, well-established torts, have built-in limits that reflect the special role of public authorities. For negligence, both the policy-operational distinction and the concept of proximity in relation to the duty of care operate to restrict the scope of public authority liability.[263] As described above, "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors."[264] True policy decisions are generally "made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations."[265] As Chief Justice McLachlin later reiterated, such decisions "are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith."[266] And that last point — the bad faith requirement — describes the limit built-in to misfeasance in public office.

For constructive expropriation to be consistent with these other torts, either constructive expropriation should change, or the torts must. Given that the test put forth in *Annapolis* includes a multitude of factors that do not obviously relate to the "elements," lower courts would appear to have significant space to use those factors to prevent the most extreme version of *Annapolis* from coming to fruition. It may be that lower courts can, in a homeostatic response to the apparent breadth of *Annapolis*, begin imposing the same limiting ideas from elsewhere in tort law. A version of constructive expropriation more consistent with existing law might evolve to include the policy-operational distinction or a requirement

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261 *Annapolis*, *supra* note 4 at paras 46–50.

262 *CM Callow Inc v Zolliner*, 2020 SCC 45 at paras 162–63, Brown J [*Callow*], describing the impact of *Garland*, *supra* note 226 importing civilian concepts into unjust enrichment law as causing "instability."

263 For a recent discussion, see Rowe & Oza, *supra* note 245 at 20–26.

264 *Just*, *supra* note 48 at 1240.

265 *Imperial Tobacco*, *supra* note 49 at para 87.

266 *Ibid* at para 74.

of bad faith by the public authority's employees. Such a change would likely be irreconcilable with a robust reading of the existing jurisprudence (most notably *Manitoba Fisheries*), but incoherence must be settled somehow.

The alternative is for the other torts to change — misfeasance in public office and public authority negligence could significantly expand. Courts could take a far more active role in policing public authority conduct as it affects rights people hold that are not property rights. Tort could tread on the toes of judicial review and offer a monetary remedy for the person unreasonably deported, the taxpayer wrongly audited, the homeless person wrongly evicted from a park. Indeed, by analogy with constructive expropriation, it could do so even where the public authority took those actions reasonably. Taking constructive expropriation seriously as a guideline for how the law generally ought to evolve would create substantial tumult.

The same could be said for constructive expropriation's treatment of what amounts to pure economic loss. The courts have generally been chary of expanding the availability of damages for pure economic loss in tort. As Justices Brown and Martin explained for the majority in *Maple Leaf*, pure economic loss is available only for conduct in a proximate relationship that fits in at least one of three categories: "(1) negligent misrepresentation or performance of a service; (2) negligent supply of shoddy goods or structures; and (3) relational economic loss."[267] In the negligent misrepresentation and performance of a service context, a relationship is proximate when the defendant should reasonably foresee the plaintiff's reasonable reliance.[268]

Constructive expropriation, however, makes available damages for pure economic loss, without fitting in any of those categories or without having proximity in the aforementioned sense. Constructive expropriation is triggered by events where the property is not, in fact, taken: that is its very purpose.[269] As Professor Brown described it (adopting the words of Bruce Ziff), "[i]f property is a bundle of rights, then state action that removes the ability to exercise those rights leaves merely the twine of the bundle (bare title), but little else."[270] The difficulty with this description is that the bundle remained in *Annapolis*. The bundle consists of the right to exclude, the privilege of use, and the power to convey, and Annapolis maintained at least two of those. Annapolis even retained the privilege of use, at least in the manner it had hitherto *exercised* that privilege. It did not, in fact, lose its bundle of rights; rather, the value of its bundle decreased. When property is not (in fact) taken, what is (in fact) lost is economic value. The "constructive" nature of constructive expropriation

267 *Maple Leaf*, *supra* note 41 at para 21.
268 *Ibid* at paras 33–35.
269 Brown, *supra* note 139 at 332–34.
270 *Ibid* at 322, quoting Bruce Ziff, "'Taking' Liberties: Protections for Private Property in Canada" in Elizabeth Cooke, ed, *Modern Studies in Property Law* (Portland, Or: Hart, 2005) vol 3, 341 at 347.

transforms what law otherwise regards as a relatively unprotected interest (economic value) into a more protected interest (property).[271]

Reconciling constructive expropriation with other aspects of tort doctrine could involve identifying a new category of pure economic loss, embracing constructive expropriation's creative redefinition of certain kinds of economic loss as though they are "property" losses, or adjusting constructive expropriation to require some more overt act by the public authority to induce the plaintiff's reasonable reliance by engaging in economic activity within the regulatory domain of that authority.

But none of these changes reflect the option I would recommend. Instead, I suggest, in the next and final section of this article, a legislative response.

VI. THE APPROPRIATE LEGISLATIVE RESPONSE

Three broad options are available to the legislatures with respect to constructive expropriation: (1) to do nothing and leave matters in the hands of the courts; (2) to replace the common law of constructive expropriation with a statutory action; and (3) to abolish constructive expropriation altogether. In the section that follows, I encourage rejecting the first option, and suggest reasons abolishment may be preferable to amendment.

Doing nothing is often the correct option for legislatures faced with a misstep by the courts, but not so here. Legislatures can often leave common law problems for courts to solve because the appellate mechanism allows superior courts to fix missteps by lower courts. Here, though, the greatest mistakes came at the Supreme Court level. The Supreme Court fixing its own precedents is a more fraught exercise. Doing so with legitimacy requires the Supreme Court to issue a corrective in accordance with horizontal stare decisis. For a corrective to be stable, the legal community must expect horizontal stare decisis to bind future panels of the Supreme Court to that corrective.

Annapolis created a stark stare decisis problem. *Annapolis* is framed so absolutely in its actual test that any deviation from it — even to apply the factors *Annapolis* says are relevant but without explaining how — would appear to be overturning it. Although the Supreme Court could interpret *Annapolis* narrowly to restrict its application,[272] doing so would require not taking what *Annapolis* says seriously. Unless one or more of the remaining members of the *Annapolis* majority (Chief Justice Wagner, or Justices Côté or Rowe) change their minds, any judicial attempts to refine constructive expropriation could well be accused of depending on the "composition of the Court as it changes over time."[273]

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271 On this hierarchy of protected interests and the relative positions of property and pure economic loss, see John Murphy, "Tort's Hierarchy of Protected Interests" (2022) 81:2 Cambridge LJ 356 at 360–63 and the authorities cited therein. This hierarchy is not absolute. Murphy notes some circumstances where lower-ranked interests are protected more strongly than higher-ranked interests: those where the defendant is especially morally culpable or had previously done a distinct wrong, those that present particular evidential difficulties; and those where the re-ranking is justified by extralegal consequences, such as too much litigation or too great an aggregate economic loss: *ibid* at 380–82.

272 *Kirkpatrick*, *supra* note 182 at para 97.

273 *Ibid* at para 259, Côté, Brown, Rowe JJ.

Even if a future Supreme Court decision did overturn *Annapolis*, one should not expect a post-*Annapolis* decision to be stable. No matter how principled the reasons of such a corrective, the more the Supreme Court does to correct *Annapolis*, the more a future, sufficiently-motivated Supreme Court could plausibly say that the corrective did not respect the canon of *Manitoba Fisheries*, *Tener*, and *Annapolis*. The Supreme Court had an opportunity, after *Manitoba Fisheries* and *Tener*, to correct course. It did so in *CPR*, but reversed again in *Annapolis*, so that *CPR* seems like the aberration (even if it is the decision most consistent with the broader law). Correcting *Annapolis* now threatens to look less like a restoration of principle than like a round of stare decisis ping-pong.

The evidence from *Manitoba Fisheries*, *Tener*, and *Annapolis* shows that instances of constructive expropriation have given Supreme Court justices motivation to depart from fundamental principles to effect changes to the law.[274]

Annapolis is particularly egregious, because members of the marginal majority[275] disregarded even their "personal precedent" or "their own previously expressed legal views."[276] Consider how the majority treats stare decisis itself, to which Justices Côté, Brown, and Rowe (with the support of Chief Justice Wagner) wrote a paean in *Kirkpatrick*.[277] Or how the majority treats pure economic loss, explained in *Maple Leaf* (a judgment that Justices Brown wrote with Justice Martin, and which Justices Moldaver, Côté, and Rowe formed part of the marginal majority),[278] and ignored by constructive expropriation. Then there is the immunity for government policy decisions. In *CSF*, Justices Brown and Rowe wanted the government to have a conditional immunity for policies in the context of damages for constitutionally-protected rights, with that immunity conditioned on the policy not being "clearly wrong, in bad faith or an abuse of power."[279] In constructive expropriation, however, they apply no such immunities for the constitutionally-unprotected right to the enjoyment of property. Methodological principles — often the strongest of personal precedents[280] — were also set aside. The strongest "support" the *Annapolis* majority had for reaching its result on the application of common law constructive expropriation were two Quebec civil code cases[281] — a piece of judicial methodology that Justices Brown and Rowe criticized strongly

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274 By this I mean to observe that the reasoning cannot be described accurately as principled reasoning and so is better described as motivated reasoning. I do not intend to suggest what any justice's particular motivations may be.

275 The silent members of a majority often go unremarked. This is understandable when a majority is significant, as in unanimous decisions, 8–1 decisions, and the like. An individual member of a significant majority may provide comments but would seem to have little leverage to force changes by the authoring justice(s). When, however, a majority is a bare one, a marginal justice has significant leverage. A silent member of a marginal majority has the power to change judgments, and thus can rightly be seen as responsible for the contents of the majority judgment. To the extent a bare majority judgment has errors, they ought to be seen as ones of commission by the writers and omission by the silent members.

276 Richard Re, "Personal Precedent at the Supreme Court" (2023) 136:3 Harv Law Rev 824 at 826 [Re, "Personal Precedent"]. That judges are inconstant in their fealty to stare decisis and other principles is not a new observation and says little in itself: *Kirkpatrick*, *supra* note 182 at para 194, Côté, Brown, Rowe JJ, concurring), referring to Debra Parkes, "Precedent Revisited: *Carter v Canada (AG)* and the Contemporary Practice of Precedent" (2016) 10:1 McGill JL & Health S123 at S147. Regardless, cases like *Annapolis* should give pause to those who see greater judicial activism as necessarily leading to progressive outcomes in Canada.

277 *Kirkpatrick*, *ibid*.

278 *Maple Leaf*, *supra* note 41.

279 *CSF*, *supra* note 218 at paras 284–96.

280 Re, "Personal Precedent," *supra* note 276 at 847.

281 *Annapolis*, *supra* note 4 at paras 65–66.

in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*[282] (with the support of Justice Côté) and Justice Brown criticized in *Callow* (with the support of Justices Côté, Moldaver, and Rowe).[283]

Could a sufficiently rigorous application of principle overcome such motivations? It is not unreasonable to think *Annapolis* suffered "for want of taxonomy";[284] indeed, stronger reasons in *CPR* could conceivably have changed the votes in *Annapolis* in two distinct ways.

First, to the extent that one sees the *Annapolis* majority reasons as driven by legal views, attentiveness to taxonomy could have brought home the inconsistency of construction expropriation with the limits on pure economic loss and government policy immunities elsewhere in tort law. Appreciating the tension at the core of constructive expropriation might have peeled votes off the majority in favour of greater fidelity to *CPR*.

Second, to the extent one sees the *Annapolis* majority reasons as affected by the majority members' instincts as to the equities of the result on the alleged facts (pejoratively speaking, to the extent one sees the *Annapolis* majority as results-oriented and fact-specific), attentiveness to taxonomy could have redirected those instincts to a more appropriate legal channel. Recall that *Annapolis* was an appeal only of a motion for partial summary judgment, not an appeal of an order deciding the case as a whole. Even if the constructive expropriation action had failed at all levels, Annapolis might ultimately have succeeded on another action at trial. The procedural posture of the *Annapolis* appeal severed the connection between the equities of the ultimate result (whether Annapolis should receive a money remedy) and the equities of the individual issue before the court (whether the cause of action for constructive expropriation should be available). A stronger sense of taxonomy might have led some of the majority justices to think Annapolis should succeed on a different legal theory (such as trespass or misfeasance in public office) rather than constructive expropriation.

One should not rest too much hope on taxonomy when looking prospectively, post-*Annapolis*. The theory that judges were swayed by equities of the facts does not explain why the majority recast constructive expropriation law so aggressively or why the Nova Scotia Court of Appeal was alive to the trespass cause of action but the Supreme Court was not. A narrow, fact-specific decision was available without rewriting the *CPR* test. Moreover, a want of legal taxonomy does not explain a judge's decision on when to fudge stare decisis or to embrace civilian influences. It seems naive to think a taxonomically rigorous correction to *Annapolis* would have sufficiently greater authority that it could give stability to this area of law.

Annapolis threatens the Supreme Court's institutional legitimacy, not only because it is bad law, but also because the Supreme Court has no mechanism to get itself out of this mess of its own making. But whereas further amendments of the doctrine at the Supreme Court

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[282] 2021 SCC 7 at paras 138–40. They defend it here as cases are "useful for illustrative purposes only in *applying* the *CPR* test": *Annapolis*, *ibid* at paras 46, 50 [emphasis in original].

[283] *Callow*, *supra* note 262 at paras 155–75 (see also para 191, Côté J).

[284] Mitchell McInnes, "Taxonomic Lessons for the Supreme Court of Canada" in Charles Rickett & Ross Grantham, eds, *Structure and Justification in Private Law: Essays for Peter Birks* (Portland, Or: Hart, 2008) 77 at 77, 79.

level would almost inevitably seem to be "playing politics,"[285] legislative action is meant to be political. Legislative action is thus advisable to preserve the Supreme Court's institutional legitimacy.

What form that legislative action is a question of policy, and going into detail on that policy question is beyond the scope of this article. A rich academic literature exists on the optimal scope of compensation for constructive expropriation. This literature comes especially from the United States where the right has a constitutional foundation,[286] but it is a question of worldwide interest.[287] It cannot be done justice here.

Instead, I offer three observations that may be useful when considering the appropriate scope of constructive expropriation in the Canadian common law provinces.

First, any Canadian statutory right would not be constitutionally protected. This difference is important when assessing the relevance of US-focused literature on the incentives for investment in property that may become the subject of regulation. A broad constitutional regulatory takings doctrine reduces the political risks born by private investors.[288] Any constructive expropriation doctrine in Canada cannot reduce political risks in the same way. A Canadian statute can set a general or default rule for compensation, not an absolute rule.

Second, the relative benefits of constructive expropriation as a cause of action depend on the availability of alternative remedies. Public authority negligence, judicial review, misfeasance, and trespass all police some behaviours that may be covered by any constructive expropriation doctrine. Undesirable government conduct for which constructive expropriation might be contemplated will often involve policy decisions. In this context, constructive expropriation may serve more as an *ex post* gotcha for government than as an *ex ante* deterrent of such conduct.

Third, the drafting of any constructive expropriation statute should factor in the judicial history of constructive expropriations. Any statutory basis for constructive expropriation will give courts some discretion to exercise, and the history of constructive expropriation in Canada shows that courts may not exercise that discretion in accordance with the text, context, and purpose of the statute. After all, courts did not for the existing statutory scheme of normal, non-constructive expropriation. The Supreme Court has repeatedly misconstrued those statutory schemes in favour of giving compensation.

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285 As Douglas C Harris notes, *Annapolis* already involves ideological divisions and distinctly political choices: "Tending Gardens, Ploughing Fields, and the Unexamined Drift to Constructive Takings at Common Law" (2023) 61:1 Alta L Rev 89 at 91.

286 See e.g., Frank I Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80:6 Harv L Rev 1165; Louis Kaplow, "An Economic Analysis of Legal Transitions" (1986) 99:3 Harv L Rev 509. Malcolm Lavoie, "Canadian Common Law and Civil Law Approaches to Constructive Takings: A Comparative Economic Perspective" (2011) 42:2 Ottawa L Rev 229 uses Kaplow's analysis as a framework to compare the *CPR* version of constructive expropriation with the corresponding right in Quebec civil law.

287 See Rachelle Alterman, "The U.S. Regulatory Takings Debate Through an International Lens" (2010) 42:4 Urban L 331 for an overview of other jurisdictions.

288 On the risk and incentive function of compensation for takings, see Kaplow, *supra* note 286 at 528–35.

It may be possible for legislatures to draft a more coherent and appropriate constructive expropriation doctrine and to have the courts follow their lead. They will need to do so with clarity and directness to be sure of courts not circumventing their intent.

But this is not the only option. The legislatures could simply abolish the tort of constructive expropriation. Doing so would reassert legislative supremacy and restore a level of coherence to the common law. After *Annapolis*, this option should be seriously considered. *Annapolis* opens the door to all manner of claims for government policy decisions which might otherwise be immune from compensation. Legislatures may wish to abolish constructive expropriation altogether if they wish not to have their regulatory schemes undermined.