

THE COHERENCE OF CONSTRUCTIVE TAKINGS: A RESPONSE TO PETER WILLS

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In a recent article, Peter Wills advances provocative claims regarding the Supreme Court of Canada's elucidation of constructive takings doctrine in Annapolis Group Inc. v. Halifax Regional Municipality (Annapolis). This article responds to four key claims in Wills' critique. First, it argues that the Annapolis judgment adheres to, and indeed exemplifies, the traditional method of common law adjudication. Second, it contends that a claim for compensation for a constructive taking is properly classified as a private law action, specifically, a tort. Third, it rebuts Wills' allegation that the action is untenable and incoherent when evaluated as a species of tort. Fourth, it concludes that Wills fails to substantiate his criticisms of constructive takings doctrine and that legislative intervention to abolish the action would not make the common law more coherent. In truth, the critique is founded upon a mechanical, Benthamite model of the common law, whereas the Annapolis judgment is faithful to the classical approach to common law adjudication and its robust, juridical conception of coherence.

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I. INTRODUCTION

In a recent article, Peter Wills advances provocative claims regarding the law of compensation for constructive takings, following the Supreme Court of Canada's judgment in *Annapolis Group Inc. v. Halifax Regional Municipality*.¹ He contends:

[I]f the *Annapolis* majority reasons are taken seriously, constructive expropriation is incoherent with established doctrines of private law.

...

[T]he Supreme Court's treatment of constructive expropriation has not been consistent with the wider common law or the common law legal method.

...

I evaluate the post-*Annapolis* constructive expropriation cause of action as a tort and find it incoherent.... I argue that the courts are ill-equipped to make the action for constructive expropriation more coherent on their own.²

It is widely accepted that, for many years, the Canadian law of expropriation and compensation was confused and incoherent.³ Prior to *Annapolis*, Canadian courts struggled to identify the normative foundations of this doctrine and to articulate a clear framework for compensation for constructive takings. Like other commentators, Wills observes that the "rough edges of the doctrine" had long resisted "smooth[ing] out."⁴ Marked by an unstable path of development, such "jagged" doctrines exhibit inconsistencies with underlying legal principles and are apt to be overruled or reformed.⁵ This very impetus crystallized in *Annapolis*, in which the Supreme Court sought to rationalize and clarify the law of takings, in part by adopting the concept of an "advantage" to elucidate the element of "beneficial interest."⁶

Where Wills advances beyond other commentators is his zealous recriminations of the Supreme Court for having "repeatedly ignored" legislative intent and contravening the common law method.⁷ Given the scope and provocative implications of his panoply of claims, it is worthwhile to consider them carefully and whether they are, in fact, true. Most

¹ 2022 SCC 36 [*Annapolis*]. Throughout this article, I will refer to the doctrine as a "constructive taking," the term used by the majority in *Annapolis*. However, I take this term to be equivalent in substance to the language of "*de facto* expropriation," "regulatory taking," or "constructive expropriation" (*ibid* at para 17).

² P Wills, "The Wrong of Constructive Expropriation" (2024) 61:4 *Alta L Rev* 807 at 808. Contrary to Wills' suggestion that the majority in *Annapolis* considered "a common law cause of action it called constructive expropriation" (Wills, *ibid* at 823), it is notable that the majority refers to "constructive takings" throughout its judgment and the term "constructive expropriation" appears only once (*Annapolis*, *ibid* at para 12).

³ See e.g. Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40:1 *UBC L Rev* 315 at 334, 341–42 [Brown, "Constructive Taking"]; Russell Brown, "Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience" (2009) 1:3 *Intl J in Built Envt* 179 at 189 [Brown, "Legal Incoherence"]; Malcolm Lavoie, "Property Rights, Takings, and the Rule of Law: Assessing *Annapolis Group v. Halifax Regional Municipality*" (2024) 4 *SCLR* (3d) 177 at 183–90; Karen Horsman & Gareth Morley, *Government Liability: Law and Practice* (Toronto: Thomson Reuters Canada, 2024), § 5.5.

⁴ Wills, *supra* note 2 at 808.

⁵ Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge, Mass: Harvard University Press, 1988) at 74.

⁶ *Annapolis*, *supra* note 1 at paras 25, 41.

⁷ Wills, *supra* note 2 at 808.

importantly, it is instructive to examine the unstated presuppositions that sustain these assertions.⁸

There are four main claims in Wills' article. First, he declares that the doctrine of constructive takings is a "chaotic and unprincipled" judicial "[i]nvention," that "[t]he Supreme Court has repeatedly misconstrued [various] statutory schemes," and that this jurisprudence amounts to "judicia[l] activis[m]" and "palm tree justice."⁹ This ostensible activist judging culminates, in his account, in a "particularly egregious" judgment in *Annapolis* that "torqu[es] the common law" and even "threatens the Supreme Court's institutional legitimacy."¹⁰ Second, this alleged litany of errors has created a "devilish" puzzle, namely, the taxonomic status of a constructive takings action.¹¹ He argues it is a chimera that could reasonably fall within public or private law, wrongs or non-wrongs, and unjust enrichment, equity, or tort.¹² Third, Wills eventually concludes it is best characterised as a tort, but nonetheless insists that as a species of tort, "constructive expropriation is incoherent" and "aberrant."¹³ Fourth, "the courts are ill-equipped to make the action for constructive expropriation more coherent" and therefore, he urges, the doctrine should be legislatively restructured or abolished altogether.¹⁴

In this reply, I explain that each of these contentions is, with respect, fundamentally wrong. First, I argue that despite Wills' woes with *Annapolis* and the historical trajectory of takings law, the majority judgment adheres to — and indeed exemplifies — the traditional method of common law adjudication. Under this method, adjudication consists in finding and declaring the law in light of underlying juridical principles, which run through and are illustrated by the decided cases (Part II). Though he condemns the law of takings as "incoherent," Wills never clearly articulates the notion of coherence upon which he relies.¹⁵ By contrast, I contend that the doctrinal development in *Annapolis* satisfies a robust, juridical conception of legal coherence. Second, contrary to Wills' perception of a taxonomical crisis, I argue that a constructive taking can without pretence be classified as a civil wrong, that is, a tort (Part III). Such a classification emerges plainly from the law's self-understanding as exhibited in the case law, as well as an analogy to cognate actions in medieval common law. Third, I rebut his allegation that constructive taking is untenable and incoherent as a species of tort (Part IV). Finally, I conclude that he has failed to substantiate his key criticisms of *Annapolis* and his proposal for legislative intervention to quash the doctrine is misguided (Part V).

As I will show, Wills' contentions are rooted in deeper, yet highly tendentious, assumptions about the nature of common law adjudication. The burden of this reply is to

⁸ As Michael Oakeshott writes, every theoretical inquiry "begins with certain presuppositions," but a philosophical jurisprudence (that is, a genuinely intellectual inquiry into law) must involve the "self-conscious and self-critical" process of identifying and resolving "the presuppositions and reservations contained" in the theorist's understanding of legal concepts: Michael Oakeshott, "The Concept of a Philosophical Jurisprudence" in Luke O'Sullivan, ed, *The Concept of a Philosophical Jurisprudence: Essays and Reviews 1926–1951*, vol 3 (Exeter: Imprint Academic, 2007) 154 at 157, 171.

⁹ Wills, *supra* note 2 at 808, 814, 822, 843.

¹⁰ *Ibid* at 826, 841–42.

¹¹ *Ibid* at 827.

¹² *Ibid*.

¹³ *Ibid* at 808, 827, 838.

¹⁴ *Ibid* at 808.

¹⁵ *Ibid*.

excavate and critically analyze those jurisprudential assumptions. Ultimately, I will demonstrate, they yield a misleading assessment of the constructive takings doctrine and the Supreme Court's judgment in *Annapolis*.

II. CONSTRUCTIVE TAKINGS AND THE COMMON LAW

In this section, I discuss Wills' criticisms of the development of the law of takings. According to Wills, the "story of constructive expropriation" is one of the judicial "invention" of the cause of action for a constructive taking, which originates in "precedential" and "theoretical" errors.¹⁶ For him, this strand of jurisprudence amounts to a "pattern ... of undermining statutory intent by torquing the common law."¹⁷ The result is said to be the unleashing of "a chaotic and unprincipled genie" from the judicial bottle, inflicting "harms ... to elementary principles like parliamentary supremacy, judicial restraint, and the incremental development of the common law."¹⁸

In truth, these criticisms are not only overwrought but are founded on Wills' own misapprehensions of the jurisprudence, as well as oversights of elementary legal principles. In recounting the history of takings law,¹⁹ Wills focuses on "the stories of four Supreme Court cases,"²⁰ namely, *Manitoba Fisheries Ltd. v. The Queen*,²¹ *R. v. Tener*,²² *Canadian Pacific Railway Co. v. Vancouver (City)*,²³ and *Annapolis*.²⁴ Accordingly, I first discuss his account of the three antecedent cases, before turning to his critiques of the more recent judgment in *Annapolis*. From this analysis, it emerges that Wills' criticisms of *Annapolis* are the result of a tacit, albeit undefended, commitment to a mechanical model of adjudication that bears little resemblance to the classical common law method.

A. DEVELOPMENT OF THE LAW OF TAKINGS

1. GENESIS: *MANITOBA FISHERIES*

At the core of Wills' objection to the development of constructive takings doctrine is the landmark decision in *Manitoba Fisheries*, which (in a "legal realist" vein) he associates with "palm tree justice."²⁵ In that case, the Supreme Court awarded compensation to the plaintiff fish marketing company, which had been deprived of its goodwill after the passage of federal legislation that invested a monopoly in fish exports in a Crown corporation, and the Crown corporation refused to grant a licence to the plaintiff authorizing it to continue operating.²⁶

¹⁶ *Ibid* at 808, 812.

¹⁷ *Ibid* at 826.

¹⁸ *Ibid* at 822.

¹⁹ See generally Paul A Warchuk, "Rethinking Compensation for Expropriation" (2015) 48:2 UBC L Rev 655 at 671–84.

²⁰ Wills, *supra* note 2 at 808.

²¹ [1979] 1 SCR 101 [*Manitoba Fisheries*].

²² [1985] 1 SCR 533 [*Tener*].

²³ 2006 SCC 5 [*CPR*].

²⁴ *Annapolis*, *supra* note 1.

²⁵ Wills, *supra* note 2 at 814. But see 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* (London: Hart, 2008) 77 at 78, 91 (contrasting Birks' commitment to taxonomy with a commitment to "legal realism"), cited in Wills, *supra* note 2 at 842, n 284.

²⁶ *Manitoba Fisheries*, *supra* note 21 at 106–107.

Significantly, the Supreme Court granted compensation for the plaintiff's lost goodwill in the absence of any express statutory provision for such compensation.²⁷ In other words, compensation was granted even though "there was no federal statute that could reasonably have been interpreted as affirmatively requiring compensation by the federal government."²⁸

Wills mounts several critiques of what he calls the Supreme Court's "remarkable" reasoning in *Manitoba Fisheries*.²⁹ Before examining these critiques, it is useful to set out some relevant background. It is a matter of controversy whether *Manitoba Fisheries* is properly construed as a case of actual taking (or "*de jure* expropriation"), or constructive taking (or "*de facto* expropriation").³⁰ Whereas the former "denotes the actual forcible appropriation by a public authority of a proprietary interest," the latter denotes a situation "where no 'taking' actually occurs (and therefore no gain is realized by the public authority) but is fictitiously deemed by reason of the effect of a publicly imposed restriction."³¹ It is necessary to maintain in view the distinction between actual and constructive takings, in order to properly evaluate the development of the law in this area.

This controversy is precipitated by the fact that the Supreme Court's judgment contains elements consistent with either theory of recovery. Writing for the Supreme Court, Justice Ritchie stated that:

Once it is accepted that the loss of the goodwill of the [plaintiff]'s business which was brought about by the Act and by the setting up of the Corporation was a loss of property and that *the same goodwill was by statutory compulsion acquired by the federal authority*, it seems to me to follow that the [plaintiff] was deprived of property which was acquired by the Crown.³²

The reference to "the same goodwill" would seem to imply that compensation was awarded for an actual taking, since Justice Ritchie considered that through the statutory monopoly, the government had acquired exactly what the plaintiff lost.³³

At the same time, the judgment focuses squarely on the plaintiff's losses, rather than the nature of the government's gain. Throughout his reasons, Justice Ritchie stressed that the Crown effectively "[put] the [plaintiff] out of business," "that they lost this goodwill as a result of the creation of the Corporation by the federal government," that the plaintiff's "asset" in its connections with "suppliers and customers" was "completely extinguished," and that its goodwill was "lost."³⁴ As he concluded, the "*Act* and the Corporation created thereunder had the effect of depriving the [plaintiff] of its goodwill as a going concern," and "the goodwill so taken away constitutes property of the [plaintiff] for the loss of which no

²⁷ *Ibid* at 118.

²⁸ Lavoie, *supra* note 3 at 184.

²⁹ Wills, *supra* note 2 at 811.

³⁰ RJ Bauman, "Exotic Expropriations: Government Action and Compensation" (1994) 52:4 Advocate 561 at 563; 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 at 81–82 [Phillips, "Invention of Advantage"]; Lavoie, *supra* note 3 at 184.

³¹ Brown, "Constructive Taking," *supra* note 3 at 315–16, 334. See also *St John's (City) v Lynch*, 2024 SCC 17 at para 27 [*Lynch*].

³² *Manitoba Fisheries*, *supra* note 21 at 110 [emphasis added].

³³ *Ibid*.

³⁴ *Ibid* at 105–107.

compensation whatever has been paid.”³⁵ Hence, the tenor of the judgment appears consistent with the theory that a constructive, rather than actual, taking had occurred.

In fact, *Manitoba Fisheries* has been interpreted as a case of a constructive taking, as opposed to an actual taking. It is generally accepted that, whatever Justice Ritchie himself believed,³⁶ the plaintiff’s loss and the Crown’s gain did not precisely correspond. In *Tener*, Justice Wilson observed that *Manitoba Fisheries* stood against the idea that “expropriation” should be understood “in some technical, legalistic sense,” suggesting it involved a *de facto* expropriation.³⁷ The Privy Council expressed the same view in *Société United Docks v. Government of Mauritius*,³⁸ an expropriation appeal from Mauritius decided a year before *Tener*. Discussing the Commonwealth authorities, their Lordships stated that *Manitoba Fisheries* granted “compensation at common law” because “[i]t was held that the [Crown] corporation *had not taken or acquired the business of the company but that the Act had deprived the company of its business*.”³⁹ In another expropriation appeal from Bermuda, the Privy Council reinforced this interpretation, holding that *Manitoba Fisheries* illustrated the principle that whether “a deprivation of property [has occurred] depends of course on the substance of the matter rather than upon the form in which the law is drafted.”⁴⁰ Speaking for the Board, Lord Hoffmann explained that “[t]he Supreme Court of Canada held that [the plaintiffs] had been deprived of their property, namely, the goodwill of the business, *even though that goodwill had not been directly transferred to the [Crown] corporation*.”⁴¹

In addition, there is strong reason to doubt that *Manitoba Fisheries* involved an actual taking, given the nature of goodwill as an asset. According to Lord Macnaghten’s canonical definition, goodwill is “the attractive force which brings in custom.”⁴² It reflects “the benefit and advantage of the good name, reputation, and connection of a business.”⁴³ Here, although the Crown corporation’s customers “were in substance the same” as the plaintiffs’ customers,⁴⁴ it cannot be said that the Crown acquired the same “attractive force.” The reason that those customers traded with the Crown corporation was not due to the attractive force of the business; they were not induced by *Manitoba Fisheries*’ good name, reputation, or customer connection to trade with the Crown. Rather, owing to the statutory monopoly, “they no longer had a free choice as to where their business was to be placed and were indeed compelled to do business only with the Corporation.”⁴⁵ Unsurprisingly, courts and commentators have concluded that *Manitoba Fisheries* did not involve compensation for an

³⁵ *Ibid* at 118.

³⁶ As Phillips stresses, “[w]hat matters is what the Supreme Court did, not what it said it did.” Phillips, “Invention of Advantage”, *supra* note 30 at 81.

³⁷ *Tener*, *supra* note 22 at 552, Wilson J.

³⁸ [1985] 1 AC 585 (PC) [*United Docks*].

³⁹ *Ibid* at 602 [emphasis added].

⁴⁰ *Grape Bay Limited v Attorney General Bermuda*, [1999] UKPC 43 at para 28 [*Grape Bay*].

⁴¹ *Ibid* [emphasis added].

⁴² *Muller & Co’s Margarine Ltd v Inland Revenue Commissioners*, [1901] AC 217 at 224 (HL), Lord Macnaghten [*Muller’s Margarine*]. “No one, judge or jurist, has yet improved on Lord Macnaghten’s description of goodwill”: *Scandecor Development AB v Scandecor Marketing AB*, [1999] FSR 26 at 41 (CA (Eng)).

⁴³ *Muller’s Margarine*, *ibid* at 223–24.

⁴⁴ *Manitoba Fisheries*, *supra* note 21 at 104.

⁴⁵ *Ibid* at 106.

actual taking, but for the loss of a proprietary interest that was acquired “in effect” (but not in form) by the government.⁴⁶

With this background in mind, we may now turn to Wills’ woes with *Manitoba Fisheries*. To appreciate why they are misdirected, it is necessary to unpack each of his contentions. First, Wills objects to the conception of “takings” adopted in *Manitoba Fisheries*, according to which the government’s gain need not be correlative to the plaintiff’s loss. Specifically, he contends that “the Supreme Court *needed to define* [the Crown] ‘taking’ something from Manitoba Fisheries Ltd. as including the situation where what Manitoba Fisheries Ltd. lost *was different* [from] what [the Crown] gained.”⁴⁷ Therefore, he suggests, the Supreme Court erred by finding that “a taking occurred when that which is lost was *not* that which is gained.”⁴⁸

As discussed above, Wills rightly observes that the government monopoly in *Manitoba Fisheries* extinguished the plaintiffs’ goodwill, without investing that goodwill in the Crown corporation. But crucially, he fails to discern the correct implication of this fact, which is that a *de facto* or constructive taking need not involve a correlative gain and loss. Rather, he claims that the Supreme Court “*needed to define*” a “taking” in a non-correlative manner in order to bring it within the category of *de jure* takings and thereby justify the award of compensation.⁴⁹ In other words, he dogmatically assumes that the Supreme Court was precluded from finding an expropriation in the absence of a correlative loss and gain.⁵⁰ This mistaken interpretation of *Manitoba Fisheries* provides the foundation for his central thesis that “constructive taking” is an unprincipled jurisprudential innovation.

Significantly, Wills overlooks the fact that even prior to *Manitoba Fisheries*, the common law recognized that expropriations could occur where the Crown does not gain exactly what the subject lost. In *Burmah Oil Co. Ltd. v. Lord Advocate*, the House of Lords held that a right to compensation arose from the demolition of the pursuer company’s properties in Burma by British military forces, conducted pursuant to the war prerogative.⁵¹ In affirming that the destruction of property amounted to a government “taking” attracting compensation, Lord Reid observed that “it was rightly not argued that the fact that property is taken for destruction and not for use can make any difference.”⁵² Put simply, their Lordships accepted the plaintiff’s loss need not correlate with the government’s gain for the purposes of an expropriation claim.⁵³ Contrary to Wills’ and others’ contentions,⁵⁴ then, *Manitoba Fisheries*

⁴⁶ *Nova Scotia (Attorney General) v. Mariner Real Estate Ltd.*, 1999 NSCA 98 at para 98. See e.g. Thomas Allen, “Commonwealth Constitutions and the Right Not to Be Deprived of Property” (1993) 42:3 ICLQ 523 at 545–46 [Allen, “Commonwealth Constitutions”]; Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 364–65; Lavoie, *supra* note 3 at 185.

⁴⁷ Wills, *supra* note 2 at 811 [emphasis added].

⁴⁸ *Ibid* [emphasis in original].

⁴⁹ *Ibid* [emphasis added].

⁵⁰ Although Wills acknowledges that the word “take” might be synonymous with “deprive,” so that a “gain is irrelevant,” he fails to follow through on the implications of this point (*ibid*).

⁵¹ [1965] AC 75 (HL) [*Burmah Oil*].

⁵² *Ibid* at 103.

⁵³ Notably, all other members of the panel accepted that a “taking” was not limited to a situation where the Crown gained what the plaintiff lost. See *ibid* at 118 (Lord Radcliffe), 142 (Lord Hodson), 147 (Lord Pearce), 169 (Lord Upjohn).

⁵⁴ Wills, *supra* note 2 at 811; Phillips, “Invention of Advantage”, *supra* note 30 at 81–82.

was hardly innovative in finding an expropriation where there was no correlative acquisition by the Crown.

Wills' second contention is that the Supreme Court erred by "defin[ing] goodwill as a kind of property" because "it is a category error to treat goodwill as property, precedentially and theoretically."⁵⁵ This assertion would astound intellectual property lawyers, who are well familiar with the action in passing off.⁵⁶ Since the landmark judgment in *A.G. Spalding & Bros. v. A.W. Gamage Ltd.*, it has been recognized that goodwill is "a right of property" that is protected under the tort of passing off.⁵⁷ As the House of Lords has repeatedly affirmed, it "is very difficult ... to say that goodwill is not property," for it is "bought and sold every day" and a trader "may vindicate his exclusive right to it if necessary by process of law."⁵⁸ Consistent with this orthodox view,⁵⁹ the Supreme Court of Canada's jurisprudence endorses the proposition that goodwill is a property right.⁶⁰ As a matter of positive law, it "is now beyond argument that the plaintiff's right which the law of passing off protects is a proprietary right in the goodwill or reputation of his business."⁶¹ The existence of the passing off action starkly belies Wills' claim that "torts do not protect goodwill."⁶²

To bolster his argument, Wills adds that "goodwill does not exhibit the indicia that property theory uses to define property."⁶³ Admittedly, goodwill has been described as "a strange form of property" because it cannot be transferred in gross.⁶⁴ But if Wills' argument were sound, it would prove too much. For it would imply that other forms of intellectual

⁵⁵ Wills, *supra* note 2 at 811–12.

⁵⁶ See generally Mitchell McInnes, "Passing Off" in Erika Chamberlain & Stephen GA Pitel, eds, *Fridman's the Law of Torts in Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2020) 1029 at 1032, 1035–42.

⁵⁷ [1915] 32 RPC 273 at 284 (HL) (Lord Parker) [*Spalding v Gamage*]. See Hazel Carty, "*Spalding v Gamage* (1915)" in Jose Bellido, ed, *Landmark Cases in Intellectual Property Law* (Oxford: Hart, 2017) 181 at 197.

⁵⁸ *Muller's Margarine*, *supra* note 42 at 223; *Erven Warnick BV v Townend & Sons (Hull) Ltd*, [1979] AC 731 at 741, 752–54 (HL); *Reckitt & Colman Products Ltd v Borden*, [1990] 1 WLR 491 at 510 (HL). See also *Potter v Inland Revenue Commissioners* (1854), 10 Ex 147 at 154 (Martin B) ("[i]f goodwill be not property, it is difficult to say what it is").

⁵⁹ Ian Tregoning, "What's in a Name? Goodwill in Early Passing-Off Cases" (2008) 34:1 Monash L Rev 75 at 79–80; Hazel Carty, *An Analysis of the Economic Torts*, 2nd ed (Oxford: Oxford University Press, 2010) at 226–28, 249, n 194. See generally Christopher Wadlow, *Wadlow on the Law of Passing-Off*, 6th ed (London: Sweet & Maxwell, 2021) at 87–95 (paragraphs 3-6 to 3-9 and 3-15 to 3-38).

⁶⁰ *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 at para 39; *Ciba-Geigy Canada Ltd v Apotex Inc*, [1992] 3 SCR 120 at 133–34; *Consumers Distributing Co Ltd v Seiko Time Canada Ltd*, [1984] 1 SCR 583 at 598, 606.

⁶¹ *ConAgra Inc v McCain Foods (Aust) Pty Ltd* (1992), 23 IPR 193 at 231 (FCA (Austl)).

⁶² Wills, *supra* note 2 at 812. Wills' assertion that "those torts protect the underlying property, not goodwill qua goodwill" is inconsistent with case law rejecting the theory that goodwill can be identified solely with the physical assets of the business. In a sophisticated judgment, the High Court of Australia expressly affirmed that "[g]oodwill is an item of property and an asset in its own right" and that "goodwill is an indivisible item of property which is distinct from and does not inhere in the assets of a business" (*Federal Commissioner of Taxation v Murry*, [1998] HCA 42 at paras 30–53). In other words, it is futile "[t]o analyze goodwill and split it up into its component parts, to pare it down ... until nothing is left but a dry residuum" (*Muller's Margarine*, *supra* note 42 at 224, Lord Macnaghten).

⁶³ Wills, *ibid*. It is worth noting that this very objection to the proprietary status of goodwill was raised, centuries ago, by Justice Yates (dissenting) in *Millar v Taylor* (1769), 4 Burr 2303 at 2369 (KB (Eng)). However, his position was ultimately rejected by the majority of the court, with Justice Aston remarking that "it was not necessary, that every species of property should be liable to all the same circumstances, incidents or remedies" (*ibid* at 2345).

⁶⁴ AH Slater, "The Nature of Goodwill" (1995) 24:1 Austl Tax Rev 31 at 33.

property, such as trademarks, are not really “property” because they cannot be assigned or transferred in gross, either.⁶⁵ Nor is it correct to think, as Wills suggests, that constructive takings is “the *only* area of law where legal results depend on treating goodwill as property.”⁶⁶ To the contrary, the best explanation for “why the alternative remedy of an account of profits is available” in passing off is “that the juridical basis of the action is invasion of property” in goodwill.⁶⁷

Third, Wills criticizes *Manitoba Fisheries* for taking “Lord Atkinson’s words from *De Keyser’s Royal Hotel* grossly out of context” by transforming a canon of statutory construction into a substantive doctrine.⁶⁸ Granted, the Supreme Court did award compensation in the absence of any statutory provision providing for compensation for expropriation. However, Wills wrongly infers that this means that the Supreme Court must have “read in” a right to compensation into a statute.⁶⁹ In fact, a more coherent explanation for the plaintiff’s recovery is that it was not founded upon statute, but upon a *common law* right to compensation.⁷⁰ Wills may deny that any such right subsisted at common law,⁷¹ but as I will point out later, the common law historically granted remedies to persons who were unjustly dispossessed of their property by the acts of a superior landlord.⁷² An extra-statutory basis for the right to compensation can also be discerned in *Burmah Oil*, where Lord Reid observed that “[n]owadays compensation is made by reason of exact provisions, *but it ought always to be made.*”⁷³ For this reason, *Manitoba Fisheries* can plausibly be cognized as an instance of a general category of private wrong, and the Supreme Court’s judgment as giving effect to the private rights of the plaintiff.

Fourth, Wills wrongly contends that compensation was due from Manitoba, not the federal Crown. He argues that “there was only a taking *without compensation* because of Manitoba’s omission.”⁷⁴ The “omission” he refers to is ostensibly Manitoba’s failure to abide by its agreement with the federal government, “whereby the Province undertook to make the necessary arrangements with owners such as the [plaintiff] to provide compensation for any plant or equipment made redundant by reason of the operations of the Corporation.”⁷⁵ Even

⁶⁵ *General Electric Co (of USA) v General Electric Co Ltd*, [1972] 1 WLR 729 at 742 (HL).

⁶⁶ Wills, *supra* note 2 at 812 [emphasis added].

⁶⁷ *easyGroup Ltd v Easy Live (Services) Ltd*, [2023] EWCA Civ 1508 at para 49 (CA (Eng)).

⁶⁸ Wills, *supra* note 2 at 813, discussing *Attorney-General v De Keyser’s Royal Hotel*, [1920] AC 508 (HL) [*De Keyser*]. See generally David Phillip Jones, “No Expropriation Without Compensation: A Comment on *Manitoba Fisheries Limited v. The Queen*” (1987) 24 McGill LJ 627 at 633–34; Warchuk, *supra* note 19 at 680.

⁶⁹ Wills, *ibid*.

⁷⁰ Barry Barton, “*The Queen in Right of British Columbia v. Tener*,” Case Comment (1987) 66 Can Bar Rev 145 at 149; Allen, “Commonwealth Constitutions,” *supra* note 46 at 524–25; Warchuk, *supra* note 19 at 684 (“this power should be referred to as a common law right, rather than a statutory presumption”); Lavoie, *supra* note 3 at 184 (“the simplest explanation for the result in *Manitoba Fisheries* is that there is a common law right to compensation”).

⁷¹ Cf Douglas C Harris, “Tending Gardens, Ploughing Fields, and the Unexamined Drift to Constructive Takings at Common Law” (2023) 61:1 Alta L Rev 89 at 91–92.

⁷² See Part III.A, below.

⁷³ *Burmah Oil*, *supra* note 51 at 106 [emphasis added]. See also *BC Medical Assn v R in Right of BC*, 1984 CanLII 262 at paras 16–18 (BCCA), ploughing fields, and the Unexamined Drift to Constructive Takings at Common Law” (2023) 61:1 Alta L Rev 89 at 91–92.

⁷⁴ Wills, *supra* note 2 at 813 [emphasis in original].

⁷⁵ *Manitoba Fisheries*, *supra* note 21 at 116.

setting aside that the agreement itself did not expressly cover loss of goodwill,⁷⁶ Wills' criticism fails because he conflates a factual (that is, but for) cause of the "taking without compensation"⁷⁷ with the duty holder (that is, the actor legally responsible for breach of the relevant right). Although the province's refusal to pay compensation contributed to the plaintiff's losses, in law it was "the *federal* authority which undoubtedly brought ... about" the "taking" of Manitoba Fisheries' goodwill, through its implementation of federal legislation and refusal to grant the plaintiff an exemption from the statutory monopoly.⁷⁸ With respect to the plaintiff, the agreement between the provincial and federal Crowns was *res inter alios acta*: the plaintiffs' rights against the federal government could not be extinguished by an agreement between the federal Crown and a stranger.

Fifth, Wills alleges that "the Supreme Court undermined a policy choice implemented in legislation."⁷⁹ However, this criticism assumes that the "policy" of effecting an *uncompensated* expropriation was, in fact, adopted in the legislation. The courts are reticent to infer such a policy, precisely due to the protection the common law traditionally accords to private property.⁸⁰ Wills refers to a putative "policy choice" by "Manitoba in how it set the terms of compensation" to exclude goodwill.⁸¹ Yet, this particular *provincial* policy was never expressly reflected in the *federal* legislation. Had the federal government intended to pursue a policy of uncompensated expropriation, it could have indicated this intention explicitly in the statute; but it did not do so. Wills also cites case law on the policy-operational distinction in the duty of care analysis in negligence,⁸² but this distinction is inapposite to expropriation, where the plaintiff's compensation claim is based upon a pre-existing common law right that was not displaced by the expropriating statute.⁸³ In the result, the preceding criticisms each fail to substantiate Wills' claim that *Manitoba Fisheries* is merely "an example of 'palm tree justice.'"⁸⁴

2. CONSOLIDATION: *TENER* AND *CPR*

Proceeding further, Wills criticizes the two subsequent Supreme Court judgments in *Tener* and *CPR*. In *Tener*, the Supreme Court awarded compensation for a constructive taking of

⁷⁶ As Justice Ritchie noted, a letter from the Federal Minister of Fisheries came "very close to an acknowledgement of the propriety of awarding compensation for the loss of goodwill," implying that the agreement did not cover such loss (*ibid*). See also Bauman, *supra* note 30 at 563.

⁷⁷ Wills, *supra* note 2 at 813.

⁷⁸ *Manitoba Fisheries*, *supra* note 21 at 105 [emphasis added]. On this point, Justice Ritchie adopted as "accurate" the trial judge's statement that "any claim [the plaintiffs] may have must be made against the Defendant, not the Government of Manitoba. It was a statute of the Parliament of Canada that took away their business and prohibited them from engaging in the fish exporting business" (*ibid* at 117). Wills argues that the plaintiff's business might not have lost its total value had a provincial statute not also extended the inter-provincial prohibition to intra-provincial trade (*supra* note 2 at 810, 813). However, he neglects the fact that it was the refusal of the Crown corporation, a *federal* entity, to grant a licence to Manitoba Fisheries that ultimately effected the taking itself.

⁷⁹ Wills, *supra* note 2 at 813.

⁸⁰ See *Harrison v Carswell*, [1976] 2 SCR 200 at 219; *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32 at para 20 [Dell]; *Manitoba Fisheries*, *supra* note 21 at 118, citing *De Keyser*, *supra* note 68 at 542. See also William Blackstone, *Commentaries on the Laws of England: Book I: Of the Rights of Persons*, ed by David Lemmings (Oxford: Oxford University Press, 2016) at 94.

⁸¹ Wills, *supra* note 2 at 813–14.

⁸² *Ibid* at 813, citing *Just v British Columbia*, [1989] 2 SCR 1228.

⁸³ See generally Warchuk, *supra* note 19 at 686, 690–91.

⁸⁴ Wills, *supra* note 2 at 814 [footnotes omitted].

the plaintiffs' mineral rights located in a provincial park.⁸⁵ British Columbia conceded that if there was a "taking" of lands under the *Park Act*, "compensation for the taking must be found in the *Ministry of Highways and Public Works Act*," which provided "for compensation to be paid to the owner upon a compulsory taking."⁸⁶ Wills disputes the premise that there was a "taking" of lands, arguing that the statutory prerequisites for authorizing the Lieutenant-Governor-in-Council to "expropriate land"⁸⁷ had not been met.⁸⁸ Accordingly, he objects, "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)."⁸⁹

Once again, this criticism fails to distinguish between actual takings and constructive takings. Wills is correct that no actual taking occurred, if no "expropriation" was authorized by the relevant statute. Yet in a case of constructive taking, there is *ex hypothesi* no formal act of taking; rather, the taking is *deemed* to have occurred. Indeed, the fact that "there was no acquisition of title to the holder's property" by the British Columbia government explains why *Tener* has consistently been recognized as a case of constructive or *de facto* taking.⁹⁰ Although Wills laments the fact that the reasons in *Tener* focused more upon the "effect" of regulation than "any formal statutory machinery,"⁹¹ he neglects that this is precisely the point of the constructive takings doctrine: to give effect to a right to compensation for an act that is in *effect* expropriation, even if not in form.⁹² To insist otherwise is to approach expropriation cases in the "technical, legalistic sense" disapproved by Justice Wilson.⁹³

As Paul Warchuk explains, the reasoning in *Manitoba Fisheries* implies the existence of a "standalone" common law right to compensation⁹⁴ — a right that would extend, as *Tener* also indicated, to constructive takings. In *Manitoba Fisheries*, compensation was awarded in the absence of any statutory provision, a result best explained by the application of such a common law right.⁹⁵ Meanwhile, though *Tener* concerned a statutory right to compensation, the Supreme Court in that case evinced its readiness to find a *de facto* expropriation where no *de jure* expropriation occurred. In so doing, the Supreme Court implicitly acknowledged that expropriations could occur even where not overtly pursued, which is to say, that constructive takings are a legally cognizable category of wrong, capable of attracting a remedy. Taken together, these cases can be read as disclosing a principle of expropriation in

⁸⁵ *Tener*, *supra* note 22.

⁸⁶ *Ibid* at 560–61, 565.

⁸⁷ *Ibid* at 542–43, quoting the *Park Act*, 1965, RSBC 1979, c 309, s 11(c).

⁸⁸ Wills, *supra* note 2 at 815–16.

⁸⁹ *Ibid* at 818.

⁹⁰ Brown, "Constructive Taking," *supra* note 3 at 329. See also *Leeds v Alberta (Environment)*, 1989 ABCA 208 at para 20; *Casamiro Resource Corp v British Columbia (Attorney-General)* (1991), 80 DLR (4th) 1 at 10 (BCCA) [Casamiro BCCA]; *Mariner*, *supra* note 46 at para 83; 64933 *Manitoba Ltd v Manitoba*, 2002 MBCA 96 at para 1; *Reference re Impact Assessment Act*, 2022 ABCA 165 at para 375; *Annapolis*, *supra* note 1 at para 107, Kasirer & Jamal JJ, dissenting. See also Thomas Allen, "Deprivation of Property" (1993) 109 Law Q Rev 202 at 205.

⁹¹ Wills, *supra* note 2 at 819, quoting Bauman, *supra* note 30 at 570.

⁹² *Grape Bay*, *supra* note 40 at para 28. See also *Dell*, *supra* note 80 at para 21.

⁹³ *Tener*, *supra* note 22 at 552. See also *Dell*, *supra* note 80 at para 37.

⁹⁴ Warchuk, *supra* note 19 at 684.

⁹⁵ *Ibid* at 684–85; Lavoie, *supra* note 3 at 184.

“positive form,” namely, “that there is a substantive common law right to compensation which may be ousted only by express statutory provision.”⁹⁶

In *CPR*, the Supreme Court gave its most explicit recognition to this principle.⁹⁷ The Supreme Court’s reasoning is “indicative of a common-law right,”⁹⁸ with Chief Justice McLachlin referring to a category of “*de facto* taking[s] requiring compensation at common law.”⁹⁹ The judgment refers to “an inference of *de facto* taking at common law,” considers the applicability of a “common law *de facto* taking remedy,” and cites the “principles of common law” calling for compensation.¹⁰⁰ While Wills describes this language as an outright “change” in the law,¹⁰¹ that characterization is overstated. Given the preceding backdrop, the Supreme Court’s judgment is better viewed as a consolidation of the jurisprudence, consonant with the principles inherent in the case law. Put simply, it merely developed and made explicit what was latent in *Manitoba Fisheries* and *Tener*.

That said, in other respects *CPR* can be regarded as a retrograde step. The judgment precipitated significant confusion as to the threshold for a *de facto* or constructive taking claim. According to Chief Justice McLachlin, there were two requirements for such a claim: “(1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.”¹⁰² She derived the requirement of “an acquisition of a beneficial interest” from the *Mariner* decision of the Nova Scotia Court of Appeal, in which Justice Cromwell (as he then was) held that “for there to be a taking, there must be, in effect ... an acquisition of an interest in land” by the expropriating authority.¹⁰³ Otherwise, no claim for compensation would lie.

The *Mariner* approach, apparently endorsed in *CPR*, was controversial and arguably unworkable. The loose phrasing of “beneficial interest,” alongside the notion that this interest must be positively acquired by the Crown, has been criticized because it collapses the distinction between actual and constructive takings.¹⁰⁴ It ignores the distinctive characteristic of a *de facto* expropriation, which is that unlike an actual taking, the same interest is *not* formally taken up by the Crown. Crucially, in proposing that an interest in land must be acquired by the Crown, Justice Cromwell inadequately accounted for the facts of *Manitoba Fisheries* and *Tener* — where compensation was awarded even though no such acquisition occurred (that is, the Crown’s gains in both cases were *not* correlative to the plaintiffs’ losses, as discussed above) — and swept aside the reasoning of other courts which concluded that a correlative acquisition was unnecessary to ground a constructive taking.¹⁰⁵ Rather than attempt to “resolve” or “minimize” this inconsistency,¹⁰⁶ Justice Cromwell merely asserted, without elaborating, that the contrary proposition was “clearly wrong.”¹⁰⁷ Possibly reflecting

⁹⁶ Allen, “Commonwealth Constitutions,” *supra* note 46 at 524–25.

⁹⁷ *CPR*, *supra* note 23.

⁹⁸ Warchuk, *supra* note 19 at 690.

⁹⁹ *CPR*, *supra* note 23 at para 30.

¹⁰⁰ *Ibid* at paras 37, 63.

¹⁰¹ Wills, *supra* note 2 at 821.

¹⁰² *CPR*, *supra* note 23 at para 30.

¹⁰³ *Mariner*, *supra* note 46 at para 99.

¹⁰⁴ Brown, “Constructive Taking,” *supra* note 3 at 321.

¹⁰⁵ *Casamiro Resource Corp v British Columbia (Attorney General)* (1990), 43 LCR 246 at 248 (BCSC) [*Casamiro BCSC*], *aff’d Casamiro BCCA*, *supra* note 90.

¹⁰⁶ Wills, *supra* note 2 at 820.

¹⁰⁷ *Mariner*, *supra* note 46 at para 98, citing *Casamiro BCSC*, *supra* note 105.

a prejudice against the takings doctrine itself, Wills nevertheless lauds *Mariner* as “a *tour de force* of provincial appellate court jurisprudence.”¹⁰⁸

In truth, *CPR* sent mixed signals. While rightly affirming the principle, latent in the precedents, of a common law right to compensation, it formulated a flawed test for a constructive takings claim. Consider the very phrasing of “beneficial interest” at the first step. What this formulation means is unclear.¹⁰⁹ Strictly speaking, a “beneficial interest” is the equitable interest held by the beneficiary of a trust.¹¹⁰ Taken on its own terms, this formulation would make it impossible for an absolute owner of land to ever establish a constructive taking. Under orthodox principles of property law, an absolute owner “does not enjoy an equitable interest in that property,” because the “legal title carries with it all rights” and “there is no separate equitable title” unless “there is a separation of the legal and equitable estates.”¹¹¹ Unless the expropriating law makes provision to separate the two estates prior to the taking up, an absolute owner would, quite literally, be unable to establish the loss of any *beneficial* interest. No such division of estates occurred either in *Manitoba Fisheries*, where the Crown corporation refused to permit the plaintiff to continue carrying on its business, or in *Tener*, where the plaintiffs were denied the relevant permits to exploit their mineral rights.

Thus, far from “aid[ing] correctness” or quelling “a chaotic and unprincipled genie” of takings law,¹¹² the *CPR* judgment gave rise to a fresh incoherency. To insist on the acquisition of a “beneficial interest,” as Chief Justice McLachlin did, suggests that the Crown must receive what a given plaintiff lost. That situation describes not a constructive taking, but an actual taking. It is this very incoherence — a judgment that affirms the existence of constructive takings claims while postulating a confused test that undercuts it — that later confronted the Supreme Court in *Annapolis*.

B. ANNAPOLIS AND LEGAL COHERENCE

In a tightly reasoned judgment, the majority of the Supreme Court in *Annapolis* sought to “clarify” and “illuminate” the constructive takings doctrine in its post-*CPR* state.¹¹³ Starting from the relatively uncontroversial premise that there exists a categorical “distinction between constructive (*de facto*) and *de jure* takings,” Justices Côté and Brown considered that *CPR* must be interpreted in a manner faithful to this distinction and “in harmony with the jurisprudence upon which it was decided,” namely, *Manitoba Fisheries* and *Tener*.¹¹⁴ As the judgment explained, the phrase “beneficial interest” in the *CPR* test could not seriously be

¹⁰⁸ Wills, *supra* note 2 at 820.

¹⁰⁹ It is telling that even a prominent critic of the *Annapolis* judgment accepts that the *CPR* formulation was “confusing,” “unclear on its face what it means,” and “a not well-expressed summary of the law established by the two prior Supreme Court precedents”: Phillips, “Invention of Advantage”, *supra* note 30 at 86–87; Jim Phillips, “Property Rights and the Public Interest: Why *Annapolis Group v Halifax Regional Municipality* is Wrongly Decided” (2025) 48:1 Dal LJ 1 at 14 [Phillips, “Property Rights”].

¹¹⁰ Daphne A Dukelow, ed, *The Dictionary of Canadian Law*, 4th ed (Toronto: Carswell, 2011), sub verbo “beneficial interest”; Daniel Greenberg, ed, *Jowitt’s Dictionary of English Law*, 3rd ed, vol 1 (London: Sweet & Maxwell, 2010), sub verbo “beneficial interest.”

¹¹¹ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, [1996] AC 669 at 706 (HL). See also Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, 2nd ed (Toronto: LexisNexis, 2022) at 66, n 300, 1848, n 394.

¹¹² Wills, *supra* note 2 at 822.

¹¹³ *Annapolis*, *supra* note 1 at paras 1, 41.

¹¹⁴ *Ibid* at paras 4, 39–40.

taken “in the technical sense that it carries in the domain of equity.”¹¹⁵ Accordingly, it held that a “beneficial interest” must be construed as an “advantage” accruing to the state, which “may take various forms,” including “denial of access,” “indefinite occupation,” deprivation of economic value, or “confining the uses of private land to public purposes.”¹¹⁶ Based on this clarified test, the majority allowed the plaintiff to proceed to trial on its takings claim against Halifax, alleging that the latter dedicated the plaintiff’s lands to sole use as a public park.¹¹⁷

It is this clarification of the “beneficial interest” element that has principally drawn the ire of some commentators.¹¹⁸ Citing the dissent, Wills claims it is “evident” that “*Annapolis* overturned *CPR*” because the “exposition of the test” differs between the two cases.¹¹⁹ However, he fails to grapple with the key problem of incoherence that *CPR* precipitated, which, to reiterate, is that the “beneficial interest” element (if taken on its own terms) denudes the very category of a constructive taking. As opposed to an actual taking, the very essence of a constructive taking is that the state does *not* receive the precise legal entitlement that the plaintiff lost. Instead, it is a taking “in effect” or “equivalent to expropriation.”¹²⁰

It is telling that the dissenters in *Annapolis*, likely glimpsing this problem, themselves equivocate between referring to a “beneficial interest” and using the more capacious term “*proprietary* interest.”¹²¹ One is hard-pressed to see how the precedents could have been decided as they were if the Supreme Court had applied the brute concept of a “beneficial interest.” As discussed earlier, it is untenable to view the *Manitoba Fisheries* case as involving the acquisition of any equitable interest by the Crown, unless the “taking” of goodwill is interpreted metaphorically. Nor does the *Annapolis* dissent explain how the British Columbia government could have obtained an equitable interest in *Tener*. Instead, the dissent glosses over this question by employing the concept of “a *corresponding* deprivation of a *proprietary* interest” in place of a “beneficial” interest.¹²²

Once it is accepted that the “beneficial interest” element in *CPR* calls for some explanation,¹²³ it follows that the Supreme Court in *Annapolis* needed to elaborate its meaning in a reasoned manner. The majority did so, not by adhering literally to the phraseology, but by taking *CPR* as itself being an intelligent attempt to cohere with the previous cases, with underlying juridical principles concerning “a common law right to compensation,” and with the normative structure of Canadian takings law — which

¹¹⁵ *Ibid* at para 25.

¹¹⁶ *Ibid* at para 45.

¹¹⁷ *Ibid* at para 58.

¹¹⁸ See e.g. Phillips, “Invention of Advantage”, *supra* note 30 at 84–85; Phillips, “Property Rights”, *supra* note 109 at 23–28; Wills, *supra* note 2 at 824–25. These commentators, however, entirely ignore the judicial treatment of *Manitoba Fisheries* by the Privy Council, discussed in the text accompanying note 38.

¹¹⁹ Wills, *supra* note 2 at 825–26, citing *Annapolis*, *supra* note 1 at paras 100–10, Kasirer & Jamal JJ, dissenting.

¹²⁰ *Casamiro BCCA*, *supra* note 90 at 10; *Mariner*, *supra* note 46 at para 99. See also Brown, “Legal Incoherence”, *supra* note 3 at 189.

¹²¹ *Annapolis*, *supra* note 1 at paras 100–104, 109–10, 122, 135, 142, 152 (“beneficial interest”), 104, 137–39, 140–41 (“proprietary interest”) [emphasis added].

¹²² *Ibid* at paras 104–107, Kasirer & Jamal JJ, dissenting [emphasis added].

¹²³ *Ibid* at para 40.

presupposes the distinction between actual and constructive takings.¹²⁴ As such, it reasoned that to interpret *CPR* as continuous with the overall jurisprudence, it is necessary to clarify its conclusion on the requisite nature of the acquisition by the Crown. Read literally, the notion of “beneficial interest” was unworkable, as it would countenance a claim only where a separation of legal and equitable title occurred.

For the *Annapolis* majority, the operative conception of legal “coherence” is one that looks to the substance of the court’s *reasons*, not just its conclusions.¹²⁵ Consistent with the presuppositions of the classical doctrinal method, it treats the decided cases, including *CPR*, not merely as positing black-letter rules, but as embodying (imperfectly, and to varying degrees) underlying “imperatives of justice and fairness.”¹²⁶ As Justices Côté and Brown alluded, the cases were manifestations of a broader principle of legal justice, which “requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment.”¹²⁷ This principle justifies “remedies” for “situations where cases do not neatly fit within the expropriation legislative framework.”¹²⁸ Thus, the majority read the case law and doctrine on *de facto* expropriation as the constituents of a coherent conception of corrective justice.

The notion of coherence here is a stringent one, which understands “law as a rationally ordered body of rights and principles” and which seeks to present judicial decisions as embodiments of that “ordered structure of principles.”¹²⁹ On this view, coherence in legal reasoning does not consist in slavishly following the rules “laid down” in a precedent as if it were a form of judicial legislation. Instead, it consists in reconstructing the rational order of the law, and the conception of legal justice underlying it, that is implicit in the decided cases taken as a whole.¹³⁰ Viewed in this way, the doctrines of takings law are the interrelated and mutually supporting components of a coherent whole, unified by an underlying principle against dispossession of property without compensation.

This principle of justice manifests in the distinction between actual and constructive takings, which structures the particular doctrines and enables the principle to be intelligently applied in different circumstances. Because it collapses the distinction, the *CPR* judgment leaves the law “in a state of internal incoherence.”¹³¹ Specifically, one aspect of the doctrine (the formulation of the test in *CPR*) is at odds with another (the distinction between actual and constructive takings), rather than operating as interlocking and harmonious elements of the underlying principle.¹³² From this perspective, it is entirely legitimate for the Supreme

¹²⁴ *Ibid* at paras 39–41, 44.

¹²⁵ *Ibid* at para 40.

¹²⁶ *Ibid* at para 44. See generally NE Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester: Manchester University Press, 1984) at 22–24, 29–30 [Simmonds, *Decline of Juridical Reason*].

¹²⁷ *Annapolis*, *ibid* at para 21, quoting *De Keyser*, *supra* note 68 at 576.

¹²⁸ *Ibid* at para 44. See generally Warchuk, *supra* note 19 at 686–90.

¹²⁹ Simmonds, *Decline of Juridical Reason*, *supra* note 126 at 25, 88. See generally Ernest J Weinrib, *The Idea of Private Law*, revised ed (Oxford: Oxford University Press, 2012) at 29–36.

¹³⁰ Simmonds, *ibid* at 116.

¹³¹ Brown, “Legal Incoherence,” *supra* note 3 at 189–90, 192.

¹³² See *Annapolis*, *supra* note 1 at paras 39–40.

Court to interpret *CPR* against the broader backdrop of decided cases and juridical principle, and thereby restate the legal test for a constructive taking in a more “coherent” manner.

By contrast, Wills offers no explicit account of his conception of coherence, despite bemoaning the alleged lack of coherence in *Annapolis*. Nonetheless, the tenor of his remarks suggests he regards “coherence” merely as consistency with some “rule” that a court announced in a prior decision. For instance, he writes that *CPR* “made [a] choice” to adopt “*Mariner’s* restrictive readings of *Manitoba Fisheries* and *Tener*.”¹³³ Because Wills regards *Annapolis* as departing from an earlier “choice” by restating the test for a constructive taking, he alleges that it is incoherent. It is, in other words, adherence to the rules chosen or posited in prior cases, and not the effort to relate the precedents to a “systematic and ordered exposition of legal doctrine,”¹³⁴ that is said to make a judicial decision “coherent.”

This thin conception of coherence as consistency with judicially posited rules merits a couple of critical observations. First, Wills evinces a strong attachment to the verbal formulae used in *CPR*; it appears that for him, the text of a court’s reasons does not merely articulate, reflect, or capture the substance of some underlying doctrine, but the text *just is* identified with the legal test or doctrine itself. Recall that Wills objects to the change “between *Annapolis’* exposition of the test for constructive expropriation and that of *CPR*.”¹³⁵ Yet, this quasi-textualist approach to case law is manifestly inconsistent with the Supreme Court’s own caution, rooted in the traditional common law approach, “that each phrase in a judgment of this Court” should not “be treated as if enacted in a statute.”¹³⁶ Under the traditional method, it is understood “that it is not the function of ... judges to frame definitions or to lay down hard and fast rules,” and that judicial formulations are “intended to be illustrative or explanatory and not to be definitive.”¹³⁷ By fixating on Chief Justice McLachlin’s specific phraseology in *CPR*, Wills tacitly assumes that the Supreme Court is entitled to legislate tests in a manner foreign to the common law tradition.

Second, and relatedly, this outlook makes sense of Wills’ assertion that the *Annapolis* majority “overturn[ed] *CPR’s* holding on this issue” and “fudge[d] stare decisis.”¹³⁸ Ironically, it is rigid adherence to a legal “test” that is itself inimical to the common law method. If a formulaic test is to be strictly followed, then it seems “to leave no room for the doctrine of precedent at all.”¹³⁹ Taken to its logical conclusion, that view implies that the *Annapolis* court did not need to be consistent with the reasoning or outcomes in *Manitoba Fisheries* or *Tener*. Rather, it could have simply applied the *CPR* test without any reference to those precedents, even though that test would likely have reached different outcomes due to the absence of a beneficial interest on the facts. Conversely, it is the consideration of those

¹³³ Wills, *supra* note 2 at 826 [emphasis added].

¹³⁴ Simmonds, *Decline of Juridical Reason*, *supra* note 126 at 1.

¹³⁵ Wills, *supra* note 2 at 825 [emphasis added].

¹³⁶ *R v Henry*, 2005 SCC 76 at para 57 [*Henry*] (see also para 53).

¹³⁷ *Cassell & Co Ltd v Broome*, [1972] AC 1027 at 1085 (HL). See also *Quinn v Leathem*, [1901] AC 495 at 506 (HL) (the expressions used in each case “are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case”); *Home Office v Dorset Yacht Co Ltd*, [1970] AC 1004 at 1027, 1034 (HL); AWB Simpson, “The Common Law and Legal Theory” in AWB Simpson, ed, *Oxford Essays in Jurisprudence: Second Series* (Oxford: Clarendon Press, 1973) 77 at 94.

¹³⁸ Wills, *supra* note 2 at 826, 842.

¹³⁹ James Goudkamp & Donal Nolan, “*Robinson v. Chief Constable of West Yorkshire Police*: Taking Duty Back to Basics” (2023) 16:1 J Tort L 125 at 139.

very cases that led the majority, in *Annapolis*, to conclude that the lower courts had misapplied *CPR*, which, after all, itself purported to rely upon those authorities.¹⁴⁰

Other, more specific objections Wills raises can be dispensed with swiftly. He contends that the majority's elaboration of contextual factors is "[c]onfusing," because it allegedly incorporates factors that are not "effects-based,"¹⁴¹ despite postulating that a constructive taking emerges from "the effect of the regulatory activity."¹⁴² What Wills considers problematic are the factors of "[t]he public authority's intention" and "whether it targets a specific owner or more generally advances an important public policy objective,"¹⁴³ which he says relate to intent, not effects. This objection misses the mark, for it mistakenly assumes that a court's assessment of regulatory effects can be conducted *in abstracto*. The use of those factors is not to demonstrate intention *per se*, but to sustain inferences about expropriatory effect, which "can be supported by evidence that such an effect was intended."¹⁴⁴ This is simply the application of a well-settled principle prevalent in other areas of the law, which holds that a court will more readily impute responsibility for the effects of one's misconduct where there is a wrongful intention.¹⁴⁵ Wills also wrongly accuses the majority of making an "error of language" in setting out the contextual factors, when in reality, it was he who misread the reasons.¹⁴⁶

Next, Wills accuses the majority of having "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)," because it ruled that encouraging the use of the plaintiff's lands as a park amounted to taking an "advantage."¹⁴⁷ This argument is enthymematic. The unstated premise is that the common law right to compensation can only be triggered by an exercise of public, not private, powers. Yet there is little reason to think the premise is true, provided that one keeps in view the distinction between *de jure* and *de facto* takings that Wills frequently elides. Although actual takings must be authorized by law, constructive takings can occur through the deployment of a public authority's private or "natural person" powers.¹⁴⁸ Because a *de facto* expropriation

¹⁴⁰ See *Annapolis*, *supra* note 1 at para 27.

¹⁴¹ Wills, *supra* note 2 at 824. See also Phillips, "Property Rights", *supra* note 109 at 32.

¹⁴² *Annapolis*, *supra* note 1 at para 19 [emphasis in original].

¹⁴³ *Ibid* at paras 45, 52.

¹⁴⁴ *Ibid* at para 53.

¹⁴⁵ See e.g. *Triple Five Corporation v Walt Disney Productions*, 1994 ABCA 120 at paras 69–72; *Office Cleaning Services, Ld v Westminster Window and General Cleaners, Ld* (1946), 63 RPC 39 at 42 (HL); *Parker-Knoll Limited v Knoll International Limited*, [1962] RPC 265 at 290 (HL); *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*, [1997] AC 254 at 280 (HL). See also Alan Brudner, "Owning Outcomes: On Intervening Causes, Thin Skulls, and Fault-Undifferentiated Crimes" (1998) 11:1 Can JL & Jur 89 at 103–104.

¹⁴⁶ Wills, *supra* note 2 at 824, n 160. In *Annapolis*, the majority explains that "notice to the owner of the restrictions at the time the property was acquired [by the owner]" is a relevant consideration in assessing whether a regulation effects a constructive taking (*supra* note 1 at para 45). Wills claims that the majority made a typographical error and that it should have read "at the time the interest" was acquired, not "property" (Wills, *ibid* at 824, n 160). But he has simply misunderstood that the majority was referring to when the owner acquired its property, not the Crown; for, if an owner acquired the property subject to pre-existing regulatory burdens, for example, then a regulatory measure might be less likely to effect a taking. See Lavoie, *supra* note 3 at 193.

¹⁴⁷ Wills, *supra* note 2 at 825. See *Annapolis*, *supra* note 1 at para 64.

¹⁴⁸ On the Crown's "natural person" powers, see generally *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission*, 2019 ABCA 468 at paras 66ff.

amounts to the taking of property,¹⁴⁹ what matters is whether the defendant has so imposed its agenda onto the land that the plaintiff has suffered some substantial deprivation.¹⁵⁰ It is not necessary that the defendant must rely on purely public powers to this end.

Emblematic of Wills' misapprehension of the nature of constructive takings is his objection that *Annapolis* "undermin[ed] statutory intent" because it found a constructive taking, even though "[n]othing in the [Nova Scotia *Expropriation Act*] indicates constructive expropriation was *contemplated*."¹⁵¹ He adds that there cannot be compensation "for an event that was either not an [actual] expropriation or that was an expropriation and therefore is legally void."¹⁵² But since a *de facto* taking is by definition never *expressly* contemplated, it is unclear why a statute would need to "contemplate" or specifically authorize such a taking before compensation can be awarded.¹⁵³ Nor is it evident why it could not trigger a *common law* right to compensation, as confirmed by *CPR*. As Professor Russell Brown (as he then was) explained, "[t]he essential point of the constructive taking, then, is that the taking is just that: *constructive*."¹⁵⁴ To reiterate, a constructive taking is necessarily fictitious; it is conduct that is legally deemed to be a taking, much as the language of "constructive trust" signals the imposition of a trust *ipso jure*.¹⁵⁵ Hence the very notion of a "constructive expropriation" conducted pursuant to statute is as oxymoronic as an "express constructive trust."

C. THE NATURE OF COMMON LAW ADJUDICATION

Given that the distinction between *de facto* and *de jure* expropriations underlies the normative structure of Canadian takings law, judicial decision-making in this area is susceptible to appear "chaotic," "unprincipled," "incoherent," and "torqu[ed]" if one fails to grasp the distinction.¹⁵⁶ Beyond the doctrinal arguments, it is possible to further unravel Wills' central claim that constructive takings is an unprincipled judicial "invention."¹⁵⁷ More fundamentally, what emerges from his treatment of the topic is a rigid, mechanical model of adjudication.

¹⁴⁹ *De Keyser*, *supra* note 68 at 524; *Sisters of the Charity of Rockingham v The King*, [1922] 2 AC 315 at 322 (PC); *Burmah Oil*, *supra* note 51 at 167.

¹⁵⁰ *Annapolis*, *supra* note 1 at para 19; Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275 at 289–92.

¹⁵¹ Wills, *supra* note 2 at 826 [emphasis added].

¹⁵² *Ibid* at 827. Wills assumes, here, that compensation can flow only from a statutory provision.

¹⁵³ *Cf Casamiro BCCA*, *supra* note 90 at 10 ("[t]he fact that the Lieutenant Governor in Council does not call his act an expropriation and has not followed the procedures laid down in the *Expropriation Act*, does not deprive the owner of the rights given to the owner"). Wills relies upon a case, *The King v Lee*, 1917 CanLII 461 (CA EXC), that is inapposite because it sets out procedural requirements for a *de jure* expropriation conducted pursuant to statute, rather than a *de facto* expropriation.

¹⁵⁴ Brown, "Constructive Taking," *supra* note 3 at 333 [emphasis in original].

¹⁵⁵ See Peter Birks, *An Introduction to the Law of Restitution*, revised ed (Oxford: Clarendon Press, 1989) at 89–90.

¹⁵⁶ Wills, *supra* note 2 at 822, 826–27. *Cf* Blackstone, *Of the Rights of Persons*, *supra* note 80 at 28 (if a lawyer "be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him").

¹⁵⁷ Wills, *ibid* at 808.

To illustrate, consider the basis for his conclusion that *Annapolis* contravened *stare decisis*:

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*. 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*.¹⁵⁸

Three features of these comments are salient, for our purposes. First, Wills seems to conceive of judicial decisions as “choices” to exposit *rules* to cover certain “*underdetermined*” areas of the common law. Second, these chosen rules are said to *constitute* or “resolve” the law going forward, in a manner that suggests an authoritativeness reminiscent of legislative acts. Third, the judicial function is to be construed as following the “choices” made in earlier cases, so that “ensuring fidelity to” the law is *equated with* deciding “consistent[ly] with” those prior choices. The conjunction of these three beliefs sustains his conclusion that *Annapolis* is not faithful to precedent and to “the common law legal method.”¹⁵⁹

It is important to appreciate that these beliefs express underlying jurisprudential commitments, that is, contestable assumptions about the nature of law and adjudication. Consciously or not, Wills’ outlook resembles a mechanistic, Benthamite view of the common law, and indeed, replicates that view’s attendant distortions of judicial activity. According to Bentham, the law is nothing more than posited, black-letter rules that are the expression of some human will.¹⁶⁰ Under this view, the common law is an assemblage of customs or rules that are positively “legalized” by a judicial act.¹⁶¹ Prior to being legalized, that is, announced or “published by the authority of the Judges” in some concrete case, a rule or principle of the common law has no existence.¹⁶² When a judge pronounces a decision, the Benthamite conception denies that he is merely applying some pre-existing principle, immanent in the common law, to a new circumstance. Rather, the judge “is to determine according to what is his private judgment” what would be “expedient now that [certain precedents] have gone

¹⁵⁸ *Ibid* at 826 [emphasis added, footnotes omitted].

¹⁵⁹ *Ibid* at 808.

¹⁶⁰ Jeremy Bentham, *Of Laws in General*, ed by HLA Hart (London: Athlone Press, 1970) at 152 [Bentham, *Of Laws in General*]; Jeremy Bentham, *A Comment on the Commentaries and a Fragment on Government*, ed by JH Burns & HLA Hart (Oxford: Clarendon Press, 2009) at 39–41 [Bentham, *Comment on Commentaries*]. See also Simmonds, *Decline of Juridical Reason*, *supra* note 126 at 73.

¹⁶¹ Bentham, *Comment on Commentaries*, *ibid* at 183, 192.

¹⁶² *Ibid* at 193.

before.”¹⁶³ Hence, judicial decisions appear as the product of the judge’s will, rather than the reason of the law itself: “It is the Judges ... that *make* the common law.”¹⁶⁴

On the Benthamite view, the common law is “not a body of general rules,” but “only a body of particular decisions.”¹⁶⁵ Judicial decisions are treated not as evidence of the law, but as constitutive of the law itself. Phrased in Wills’ terms, the common law judge is to make a “choice” as to how to fill in some “underdetermined” gap in the law, as disclosed by the facts of a new case. The judge is somewhat constrained by precedent, in that his present law-making “choice” must incorporate those earlier choices in the determination of what would *now* be “expedient.” But he reviews those earlier decisions not for guidance as to the underlying legal principles that, in some sense, *already* govern the instant case, but because he must make *new* law in order to fill the gap presented by the instant case. While this might require the judge to “resolve” tensions in the law precipitated by previous decisions, the ultimate goal is to create new law in the most expedient fashion. To respect precedent on this view is simply to plausibly derive new law from the “choices” or “the pattern of the old law.”¹⁶⁶

By relating Wills’ beliefs to Jeremy Bentham’s outlook, we can illuminate how his underlying assumptions are incompatible with a classical conception of the common law method. First, take the belief that judicial decisions implicate creative “choices” over “underdetermined” points of law.¹⁶⁷ Wills suggests that prior to the *CPR* appeal, there was some gap in the law (though he does not clearly specify what such a gap consisted in). He says it was open to the Supreme Court in *CPR*, therefore, to exercise “choice” as to what test for a constructive taking to adopt, and even whether to expand or “narrow” the precedents of *Manitoba Fisheries* and *Tener*.¹⁶⁸ Because the law was “underdetermined” in that area, Wills seems to be saying, the Supreme Court in *CPR* had a free “choice,” unguided by the law itself, as to how to fill in that gap.

While the perception that judges “make” law to fill gaps is now commonplace,¹⁶⁹ we should pause to observe that this notion results from the influence of legal positivism and is inimical to classical common law adjudication. Traditionally, it was denied that judicial activity consisted in law-making. As Sir William Blackstone famously wrote, the common law judge is “not delegated to pronounce a new law, but to maintain and expound the old

¹⁶³ According to Bentham, the judge must take into account the need for “expediency, the uncertainty that would result from the departing from those [earlier] decisions, and the mischief, the inexpediency that would result from that uncertainty” (*ibid* at 196).

¹⁶⁴ Jeremy Bentham, *Truth versus Ashhurst: Or, Law as it is, Contrasted with What it is Said to Be* (London: T Moses, 1823) at 11 [emphasis added]. See also Peter Wesley-Smith, “Theories of Adjudication and the Status of *Stare Decisis*” in Laurence Goldstein, ed, *Precedent in Law* (Oxford: Clarendon Press, 1987) 73 at 74.

¹⁶⁵ Simmonds, *Decline of Juridical Reason*, *supra* note 126 at 74. See Bentham, *Of Laws in General*, *supra* note 160 at 188.

¹⁶⁶ Gerald J Postema, “Bentham as a Common Law Revisionist” in *Bentham and the Common Law Tradition*, 2nd ed (Oxford: Oxford University Press, 2019) 186 at 188.

¹⁶⁷ Wills, *supra* note 2 at 826.

¹⁶⁸ *Ibid* at 822.

¹⁶⁹ See e.g. Lord Reid, “The Judge as Law Maker” (1972) 12:2 J Society Pub Teachers L 22. But see JM Finnis, “The Fairy Tale’s Moral” (1999) 115 Law Q Rev 170; Allan Beever, “The Declaratory Theory of Law” (2013) 33:3 Oxford J Leg Stud 421 at 430–39; Lucas Clover Alcolea, “What Exactly is the Common Law?” (12 September 2024), online (blog): [perma.cc/X45Q-9XLH]; Lucas Clover Alcolea, “Why is There ‘But One Common Law in Australia?’” Austl LJ [forthcoming in 2025].

one.”¹⁷⁰ According to the declaratory theory, “the province of the judge [is] to expound the law only.”¹⁷¹ It holds that there “is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to [new] circumstances.”¹⁷² Though occasionally doubted,¹⁷³ the declaratory theory remains foundational to the common law’s self-understanding and official narrative on judicial power.¹⁷⁴ Among other things, it underpins an essential feature of common law adjudication, namely, its retrospectivity. That feature is so closely associated with proper judicial method that prospective overruling has, in English law, been deemed “outside the constitutional limits of the judicial function” for “amount[ing] to the judicial usurpation of the legislative function.”¹⁷⁵ For this reason, the traditional Blackstonian outlook cannot lightly be dismissed as a mere contrivance.

It follows that the classical method rejects the existence of “underdetermined” gaps in the law. Even while acknowledging that a case of first impression “is in some sense new, as many others are which continually occur,” common law judges maintained that “we have no right to consider it, because it is new, *as one for which the law has not provided at all*.”¹⁷⁶ Contrary to the Benthamite model, they abjured any right, merely “because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient.”¹⁷⁷ Whenever a case presents novel circumstances, it is not perceived as a gap susceptible to be filled by judicial will or “choice.” Rather, the common law method assumed that ascertainable legal principles govern the decision, so that novel cases are treated as ones where the established principles simply “have not *yet* been judicially *applied*.”¹⁷⁸ It held that in principle, “the common law has a ready made solution for every problem,” and the task of judges is not to freely “choose” but “as legal technicians, to *find*” the solution.¹⁷⁹ As a result, “[i]t is *the case*, not the judge, that extends the law.”¹⁸⁰

Second, the common law method rejects the view that judicial decisions constitute, or definitively “resolve,” the law going forward. Instead, it “distinguish[es] sharply between the law and various *formulations* of its rules” and maintains that “no particular formulation of the law is final.”¹⁸¹ A judge’s role being to find and declare and not to make law, it followed that “*the law*, and the *opinion of the judge* are not always convertible terms, or one and the

¹⁷⁰ Blackstone, *Of the Rights of Persons*, *supra* note 80 at 52. See also Matthew Hale, *History of the Common Law of England* (London: E Nutt, 1716) at 67; Francis Bacon, “Of Judicature” in Samuel Harvey Reynolds, ed, *The Essays or Counsels, Civil and Moral of Francis Bacon* (Oxford: Clarendon Press, 1890) 365 at 365.

¹⁷¹ *Egerton v Brownlow* (1853), 4 HL Cas 1 at 123 (Ct Exch (Eng)) (Parke B).

¹⁷² *Willis & Co v Baddeley*, [1892] 2 QB 324 at 326 (CA (Eng)) (Lord Esher MR).

¹⁷³ See e.g. *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 85.

¹⁷⁴ Mikołaj Barczentewicz, “Precedent and Law-Making Powers” in Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis, eds, *Philosophical Foundations of Precedent* (Oxford: Oxford University Press, 2023) 380 at 387–91.

¹⁷⁵ *In re Spectrum Plus Ltd*, [2005] 2 AC 680 at para 28 (HL). See also *Edward v Edward*, 1987 CanLII 982 at 9–10, 13–14 (SKCA).

¹⁷⁶ *Mirehouse v Rennell* (1833), 1 Cl & F 527 at 546 (KB (Eng)) (Parke J) [emphasis added].

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid* [emphasis added]. See also Owen Dixon, “Concerning Judicial Method” (1956) 29:9 Austl LJ 468 at 470.

¹⁷⁹ *Parker v British Airways Board*, [1982] QB 1004 at 1008 (CA (Eng)) [emphasis added] [*Parker*].

¹⁸⁰ Gerald J Postema, “Elements of Classical Common Law Theory” in *Bentham and the Common Law Tradition*, 2nd ed (Oxford: Oxford University Press, 2019) 3 at 11 [emphasis in original].

¹⁸¹ *Ibid* at 9–10 [emphasis in original].

same thing.”¹⁸² At best, judicial decisions are merely the most authoritative *evidence* of the common law.¹⁸³ This view accords with the point, raised earlier, that particular formulations of a test or doctrine found in case law cannot be treated as final, “as if enacted in a statute.”¹⁸⁴ The judge is “not bound to any past articulation of that law ... and always free to test it against his tradition-shaped judgment of its reasonableness.”¹⁸⁵ Otherwise, one would be forced to conclude, *ad absurdum*, that the law is being altered every time a court applies some precedent without reciting exactly the same formula. Yet this phenomenon is difficult to explain on the Benthamite view of judicial decisions as constituting, rather than declaring, rules of the common law.¹⁸⁶

Third, on the classical common law view, fidelity to law is not synonymous with rehearsing the rule-choices made by previous judges. If Wills were correct about the nature of judicial activity, then judging would be reduced to deciding according to cases rather than deciding according to law.¹⁸⁷ He claims that the *Annapolis* majority erred by departing from what *CPR* determined “as a matter of precedent,” presumably referring to the scope of the constructive takings doctrine.¹⁸⁸ From the preceding discussion, however, we know that judicial method is not reducible to slavishly following cases. In *Jones v. Randall*, Lord Mansfield, one of the greatest exponents of the common law, eloquently repudiated that view:

*The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, arts and circumstances accruing, we must go to the time of [Richard I] to find a case, and see what is law. Precedent indeed may serve to fix principles, which for certainty’s sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law in itself; much less the whole of the law.*¹⁸⁹

In complaining that *Annapolis* “rewr[ote] the *CPR* test,”¹⁹⁰ Wills takes for granted that the *CPR* judgment absolutely settled and represents the whole of the law of takings. Even leaving aside the deficiencies of *CPR* itself,¹⁹¹ this approach embodies the very sort of “strange

¹⁸² Blackstone, *Of the Rights of Persons*, *supra* note 80 at 53 [emphasis in original]. See also *Australian Agricultural Co v Federated Engine-Drivers & Firemen’s Association of Australasia* (1913), 17 CLR 261 at 275 (HCA (Austl)).

¹⁸³ *Ibid* at 52–53. See also Postema, “Bentham as a Common Law Revisionist”, *supra* note 166 at 189.

¹⁸⁴ Henry, *supra* note 136 at para 57. See also Simmonds, *Decline of Juridical Reason*, *supra* note 126 at 118; Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 161 [Simmonds, *Moral Idea*].

¹⁸⁵ Postema, “Bentham as a Common Law Revisionist”, *supra* note 166 at 189–90. It follows that although a judgment may set out “a general analytical framework,” it is the underlying principles that are binding rather than the formulation in and of itself; the contrary view would countenance the “rigid and acontextual application” of legal tests and frameworks. Compare Henry, *supra* note 136 at para 53 with *R v KRJ*, 2016 SCC 31 at para 135, Brown J, dissenting.

¹⁸⁶ Simmonds, *Moral Idea*, *supra* note 184 at 161–62.

¹⁸⁷ On the significance of this distinction, see generally Michael Oakshott, *On Human Conduct* (Oxford: Clarendon Press, 1975) at 136ff; JA Rudinsky, “Michael Oakshott’s Declaratory Theory of Adjudication” (2016) 2:1 J Political Thought 40 at 42. See also Wesley-Smith, *supra* note 164 at 79.

¹⁸⁸ Wills, *supra* note 2 at 826.

¹⁸⁹ *Jones v Randall* (1774), Lofft 383 at 385 (KB (Eng)) [emphasis added]. See also *Delta Acceptance Corporation Ltd v Redman* (1966), 55 DLR (2d) 481 at 495–96 (ONCA), Laskin JA, dissenting.

¹⁹⁰ Wills, *supra* note 2 at 842.

¹⁹¹ It is notable that Chief Justice McLachlin only referred to *Tener*, a key precedent, in a cursory fashion. She cited *Tener*, without a pinpoint, in setting out the test for “a *de facto* taking requiring compensation at common law” (*CPR*, *supra* note 23 at para 30) and in a “see also” citation to support the proposition that “it is not necessary to establish a forced transfer of property. Acquisition of beneficial interest related to the property suffices” (*ibid* at para 32).

science” that classical common lawyers disavowed. The *Annapolis* majority, by contrast, did not fixate upon the test laid down in *CPR*, but appraised “the foregoing jurisprudence — upon which the *CPR* test was expressly stated as resting” — in order to bring out the underlying principles.¹⁹²

In this regard, *Annapolis* discloses a judicial method that exemplifies the traditional common law approach. On this approach, the judicial development or elaboration of the law is not premised upon “the proximity of a judicial decision to pre-existing case law.”¹⁹³ Rather, the legitimacy of common law decision-making is tethered to its mode of justification. As the declaratory theory underscores, judicial responsibility consists in declaring and applying norms to past disputes that “can fairly be said to have been all along a legally appropriate standard.”¹⁹⁴ This task requires judicial reasoning to be faithful to the doctrines, principles, and conceptual structures that comprise an “internally coherent ensemble of justificatory considerations” that are immanent to the law.¹⁹⁵ As Lord Mansfield once observed, “the law does not consist in particular cases; but in general principles, which run through the cases, and govern the decision of them.”¹⁹⁶ Properly understood, the common law method consists in declaring the law in the light of these general, underlying juridical principles which are illustrated by the precedents.

From this standpoint, it can be appreciated that *Annapolis* truthfully did not “change the doctrine of constructive takings, but simply appl[ie]d it to the facts of the present dispute.”¹⁹⁷ In analyzing the jurisprudence, the majority was concerned to interpret and give effect to the general principles of “justice and fairness” animating this part of the law.¹⁹⁸ This approach is illustrated by their consideration of the “beneficial interest” element, where Justices Côté and Brown carefully “consider[ed] the authorities upon which *CPR* relied.”¹⁹⁹ Rather than treating each case as positing an isolated, discrete rule-choice, they focused on the principle running through the cases. As they discerned, both *Manitoba Fisheries* and *Ulster Transport* (upon which it relied) had “ascribed significance to the *effects* on the property holder” of a regulation.²⁰⁰ The thread of principle was likewise manifest in the opinions in *Tener*.²⁰¹ And though Chief Justice McLachlin formulated the *CPR* test as requiring a “beneficial interest,” Justices Côté and Brown’s approach to this issue was consonant with the traditional common law method. They appealed to general principles from the seamless web of common law, including “the domain of equity,” in order to parse that formulation and concluded it could

¹⁹² *Annapolis*, *supra* note 1 at para 38.

¹⁹³ Ernest J Weinrib, *Reciprocal Freedom: Private Law and Public Right* (Oxford: Oxford University Press, 2022) at 140. As Weinrib points out, taken to its logical conclusions, such a view would entail that landmark cases like *Donoghue v Stevenson*, [1932] AC 562 (HL), would be wrongly decided. This observation ought to enkindle doubt as to the correctness of Wills’ conception of the role of precedent in a common law system.

¹⁹⁴ Finnis, *supra* note 169 at 175.

¹⁹⁵ Ernest J Weinrib, “Correlativity and Personality” in *Corrective Justice* (Oxford: Oxford University Press, 2012) 9 at 13. See also Postema, “Elements of Classical Common Law Theory”, *supra* note 180 at 35.

¹⁹⁶ *Rust v Cooper* (1777), 2 Cowp 629 at 632 (KB (Eng)). See also *Fisher v Prince* (1762), 3 Burr 1363 at 1364 (KB (Eng)), Lord Mansfield.

¹⁹⁷ *Annapolis*, *supra* note 1 at para 25.

¹⁹⁸ *Ibid* at paras 27, 44.

¹⁹⁹ *Ibid* at para 27.

²⁰⁰ *Ibid* at para 31[emphasis in original], citing *Ulster Transport Authority v James Brown & Sons, Ltd*, [1953] NI 79 at 116 (CA).

²⁰¹ *Annapolis*, *ibid* at paras 34, 36.

not carry a literal, equitable meaning.²⁰² Taking this wider view, they found the cases pointed to a more capacious notion of “advantage” that ultimately coheres with the categorical distinction between *de facto* and *de jure* expropriation.²⁰³

In light of the general principle disclosed by the precedents, it was possible to reconcile *Mariner* — a lower court decision — with the current of the jurisprudence by observing that it “does not stray from focussing on both the *effect* of the taking and the *advantage* acquired by the government.”²⁰⁴ Rather than discard *Mariner*, the majority pointed out that it, too, “illustrates” a related proposition, namely that “regulation alone will not satisfy the test for a constructive taking.”²⁰⁵ Similarly, the majority’s invocation of civil law authorities aimed not to “destabiliz[e]” the common law using civilian techniques,²⁰⁶ but “for illustrative purposes” given the “conceptual similarities” between the two systems.²⁰⁷ Since both traditions embrace the general “imperatives of justice and fairness” animating compensation for takings, it was appropriate to examine cases of “disguised expropriation” in civil law without disregarding “the distinct features of the respective doctrines from either legal tradition.”²⁰⁸ In criticizing the *Annapolis* majority’s reliance on civil law, Wills conflates the artificial injection of doctrinal concepts into a foreign legal tradition, on the one hand, with the usage of cases as illustrations of an abstract principle common to both traditions, on the other.²⁰⁹

All of the above, I have argued, is consonant with classic common law methodology. It is often not possible to reconcile all aspects of an earlier decision with the general thrust of the jurisprudence, as Wills himself acknowledges.²¹⁰ Nonetheless, the *Annapolis* majority’s elucidation (or restatement, depending on how one views it) of the *CPR* test can be regarded as a good faith attempt to relate the case to the broader principles of Canadian takings law. Wills’ criticisms are premised not on the common law method, but on its degeneration into “mechanical jurisprudence”: a condition where judges treat precedents as establishing firm rules, which are taken “at hand in a fixed and final form,” and where “cases [are] to be fitted to the rules” without recourse to underlying principle.²¹¹ Thus, when he asserts that *Annapolis* is not “consistent with the wider common law or the common law legal method,”²¹² he is, in truth, referring to a caricature of the judicial method.

III. CONSTRUCTIVE TAKING AS A CIVIL WRONG

Having addressed Wills’ criticisms of *Annapolis*, I turn now to his taxonomic claims. Besides his doctrinal objections, Wills aims to unsettle the law of constructive takings by casting doubt upon its appropriate legal classification. Ostensibly applying a Birksean

²⁰² *Ibid* at para 25.

²⁰³ *Ibid* at paras 38–41.

²⁰⁴ *Ibid* at paras 42–43 [emphasis in original].

²⁰⁵ *Ibid* at para 43 (see also para 71). The majority’s respectful treatment of precedent may be usefully contrasted with Wills’ own approach, which favours unceremoniously consigning *Manitoba Fisheries* and *Tener* “to the wastebasket of judgments that failed to survive the modern rule of statutory interpretation pronounced in *Rizzo & Rizzo Shoes Ltd. (Re)*” (Wills, *supra* note 2 at 822).

²⁰⁶ *CM Callow Inc v Zollinger*, 2020 SCC 45 at paras 158–62 [Callow].

²⁰⁷ *Annapolis*, *supra* note 1 at paras 46–50.

²⁰⁸ *Ibid* at paras 44, 46, 56.

²⁰⁹ Wills, *supra* note 2 at 841–42. See especially *Callow*, *supra* note 206 at paras 161, 166.

²¹⁰ Wills, *ibid* at 826.

²¹¹ Roscoe Pound, “Mechanical Jurisprudence” (1908) 8:8 *Colum L Rev* 605 at 607.

²¹² Wills, *supra* note 2 at 808.

scheme,²¹³ his central claim is that the “cause of action for constructive expropriation” is a confused chimera of public and private law.²¹⁴ Wills develops this claim via the factors outlined in *Air Canada v. Toronto Port Authority* by Justice Stratas,²¹⁵ writing that “the defendant-focused factors point in favour of a public law characterization” while “[t]he plaintiff-focused factors point toward private law.”²¹⁶ Finding an apparent ambiguity, Wills engages in tortuous deliberation over whether the cause of action should be classified as public or private, administrative or human rights law, or unjust enrichment, tort or equity. In what follows, I rebut his claim that constructive takings cannot comfortably fall within private law, before arguing that it is properly classified as a tort. Rather than unravelling a “devilish” puzzle,²¹⁷ his conjectures largely amount to kicking up sand and then complaining that one cannot see.

A. CONSTRUCTIVE TAKING AS PRIVATE LAW

It bears observing at the outset that Wills’ reliance on the *Air Canada* factors to determine “whether a matter [that is, doctrine] falls into public or private law” is highly inapt.²¹⁸ Contrary to Wills’ description, those factors were developed to “shed light on the public-private distinction for the purposes of judicial review,”²¹⁹ not to classify a cause of action for the purposes of doctrinal legal theory. As Justice Stratas stated, they are meant to guide a court’s analysis of whether a respondent to an application for judicial review is a “federal board, commission or other tribunal” under the *Federal Courts Act*.²²⁰ Hence the factors relate to whether an entity and its actions are so sufficiently public that it falls within the Federal Courts’ limited statutory jurisdiction.²²¹ This is why *Air Canada* refers, *inter alia*, to the “suitability of public law remedies” and the respondent’s “relationship to other statutory schemes.”²²² It is a category mistake to bring those factors to bear on doctrinal legal taxonomy, where the object of inquiry is not a *party* against whom a proceeding is brought, but a *doctrine* that is to be subsumed under a category pertinent to legal thinking. Relating an entity to the *scope of judicial review* is manifestly different from classifying a cause of action within legal categories, with attendant implications for *doctrinal development*.

Neglecting this crucial difference, Wills is drawn to some misleading conclusions. Rather than inquire into the normative unity of a given legal category,²²³ he focuses upon the empirical incidents of the cause of action, splitting these into “defendant-focused” and “plaintiff-focused” factors.²²⁴ This fixation on the empirical propels him to some hesitant, and internally inconsistent, remarks. Initially, Wills argues that the fact that “[c]onstructive expropriation can be levelled only against public authorities” favours “a public law

²¹³ See generally Peter Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26:1 UWA L Rev 1; Peter Birks, *Unjust Enrichment*, 2nd ed (Oxford: Oxford University Press, 2005) at 20–46.

²¹⁴ Wills, *supra* note 2 at 827, 830.

²¹⁵ 2011 FCA 347 at para 60 [*Air Canada*].

²¹⁶ Wills, *supra* note 2 at 830.

²¹⁷ *Ibid* at 827.

²¹⁸ *Ibid* at 829.

²¹⁹ *Air Canada*, *supra* note 215 at para 59 [emphasis added].

²²⁰ *Ibid* at paras 44–48; *Federal Courts Act*, RSC 1985, c F-7, s 18(1).

²²¹ *Air Canada*, *ibid* at para 60.

²²² *Ibid*.

²²³ See generally Ernest J Weinrib, “The Juridical Classification of Obligations” in Peter Birks, ed, *The Classification of Obligations* (Oxford: Clarendon Press, 1997) 37.

²²⁴ Wills, *supra* note 2 at 830.

characterization.”²²⁵ Later, however, he acknowledges that there are “tort[s]” (which, in his view, fall within private law) that are actionable only against public authorities, such as misfeasance in a public office and malicious prosecution.²²⁶ Conversely, he suggests that the availability of monetary relief indicates that constructive taking is not a public, but a private wrong.²²⁷ This, too, is oversimplistic, insofar as there are public law actions that provide monetary relief. The most notable example is the “*Kingstreet* action,” which is “a public law remedy” for the recovery of unconstitutional taxes.²²⁸ It contradicts Wills’ sweeping assertion that public law actions do not implicate whether, “given the decision has occurred, ... the public authority should give the plaintiff money.”²²⁹

Wills eventually settles on private law as a “better home ... taxonomically” for the constructive takings doctrine.²³⁰ Before advancing our inquiry further, let us reconsider his contention that the doctrine is a chimera of public and private law. A key part of his argument is that since the law of takings “does not provide a cause of action against a non-public person,” it cannot be private law.²³¹ Yet, by framing the issue in this manner, he overlooks the possibility that a constructive takings claim is merely a species of a more general category of wrongdoing. After all, a “cause of action” is “only a set of facts that provides the basis for an action in court.”²³² It can be defined at a higher or lower level of abstraction, so that, for instance, both “unjust enrichment” and “restitution of a mistaken payment” may be considered causes of action even though the former might encompass the latter in Canadian law.²³³ If the action in constructive taking falls within a broader category of private wrong, then it could be concluded, without pretence, that it falls within private law.

What is this more general category of private wrong? The most obvious candidate is ejectment and cognate actions, by which a person dispossessed of his interests in land can recover them.²³⁴ Conceptually, the constructive taking action can be understood as a species of these possessory actions. Ejectment is undoubtedly a private law action, applying as between subject and subject. Indeed, “its principles remain the basis of present actions for the recovery of land.”²³⁵ It is instructive to consider the historical origins of ejectment itself. Its precursor was the assize of novel disseisin, an action in medieval common law that enabled

²²⁵ *Ibid.*

²²⁶ *Ibid* at 832. *Quaere* whether misfeasance in a public office and malicious prosecution are truly private law torts. Cf Donal Nolan, “A Public Law Tort: Understanding Misfeasance in a Public Office” in Kit Barker et al, eds, *Private Law and Power* (London: Hart, 2016) 177; *Willers v Joyce*, [2016] UKSC 43 at para 50.

²²⁷ Wills, *ibid* at 830–31.

²²⁸ *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 at para 40 [*Kingstreet*].

²²⁹ Wills, *supra* note 2 at 831.

²³⁰ *Ibid* at 832.

²³¹ *Ibid* at 830.

²³² *Markevich v Canada*, 2003 SCC 9 at para 27, citing *Letang v Cooper*, [1964] 2 All ER 929 at 934 (CA (Eng)).

²³³ Lionel Smith, “Defences and the Disunity of Unjust Enrichment” in Andrew Dyson, James Goudkamp & Frederick Wilmut-Smith, eds, *Defences in Unjust Enrichment* (Oxford: Hart, 2016) 27 at 32–33, 37; Professors Lionel Smith & Samuel Beswick, *Unjust Enrichment: Principle or Cause of Action?*, course reading (Continuing Legal Education Society of British Columbia, 2021), online (pdf): [perma.cc/P5BX-UK2W].

²³⁴ James Goudkamp & Donal Nolan, eds, *Winfield and Jolowicz on Tort*, 20th ed (London: Sweet & Maxwell, 2020) at 416 (para 14-030).

²³⁵ *Mabo v Queensland (No 2)* (1992), 175 CLR 1 at 208 (HC Austl), Toohey J [*Mabo (No 2)*], citing *Bristow v Cormican* (1878), 3 App Cas 641 at 661 (HL).

the plaintiff to recover lands of which he had been dispossessed (“disseised”).²³⁶ Significantly for our purposes, novel disseisin “was consciously directed against lords who disseised their tenants.”²³⁷ It “was constantly used by tenants against their lords,” who were alleged to have “disseised them wrongfully and without judgment at law.”²³⁸ In such cases, S. F. C. Milsom argued, the superior landlord was “made to answer for an abuse of his power.”²³⁹ Thus, the action “could often vindicate the rights of tenants against their lords,” by preventing the superior landlord from evicting the inferior landholder “wrongfully and without a judgment,” that is, without following the appropriate legal procedure by obtaining judgment in a medieval court.²⁴⁰

While the assize of novel disseisin has been overtaken by the action of ejectment,²⁴¹ it is possible to analogize a *de facto* expropriation with an inferior landholder’s effective dispossession by a superior landlord, as in novel disseisin. Recall that at common law, the Crown holds radical or ultimate title to all lands.²⁴² The radical title “is a postulate of the doctrine of tenure and a concomitant of sovereignty,” for “the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others.”²⁴³ As sovereign, the Crown is entitled to regulate the use of lands within its territorial jurisdiction. Setting aside the war (or defence) prerogative,²⁴⁴ it is generally recognized that the Crown cannot compel the dispossession of its subjects absent statutory authority. In the landmark case of *De Keyser*, the House of Lords stated that the conduct of the Crown, in occupying the suppliant’s hotel, “closely” resembled “that of [a] disseisor” and that it was “not easy to see what the distinction is between disseisin and an indefinite use and occupation” by the Crown.²⁴⁵ As Lord Parmoor observed, “[s]ince Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown,” and crucially, this prerogative cannot “be extended to a case of disseisin” without payment of compensation.²⁴⁶

To elaborate upon the analogy with disseisin, it may be noted that the constructive takings doctrine is engaged when an owner is deprived “of the use and enjoyment of its property in a substantial and unreasonable way.”²⁴⁷ When this threshold is reached, it is tantamount to the Crown “confiscat[ing] the property.”²⁴⁸ The notion that such an interference with use and enjoyment amounts to disseisin, that is, a kind of dispossession, finds support elsewhere in the common law. Most notably, the tort of private nuisance redresses “substantial and

²³⁶ Donald W. Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973) at 3.

²³⁷ *Ibid* at 30.

²³⁸ *Ibid*.

²³⁹ SFC Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976) at 11.

²⁴⁰ Sutherland, *supra* note 236 at 48–50, 77–78, 97; Milsom, *ibid* at 22.

²⁴¹ Martin Dixon, Janet Bignell & Nick Hopkins, eds, *Megarry & Wade: The Law of Real Property*, 10th ed (London: Sweet & Maxwell, 2024) at 1500 (para A-026).

²⁴² *Quebec (AG) v Dominion of Canada (AG)*, [1921] 1 AC 401 at 406 (PC); *Amodu Tijani v The Secretary, Southern Nigeria*, [1921] 2 AC 399 at 403 (PC).

²⁴³ *Mabo (No 2)*, *supra* note 235 at 48, Brennan J.

²⁴⁴ *Burmah Oil*, *supra* note 51 at 105–107, 115, 145, 155.

²⁴⁵ *De Keyser*, *supra* note 68 at 535 (Lord Atkinson), 569 (Lord Parmoor).

²⁴⁶ *Ibid* at 569.

²⁴⁷ *Annapolis*, *supra* note 1 at para 19.

²⁴⁸ *Ibid*.

unreasonable” interferences with the plaintiff’s use and enjoyment of land.²⁴⁹ It is revealing that the action in nuisance itself originated as a species of the assize of novel disseisin, “as a remedy against lords,” for a nuisance was, in medieval times, conceived “as analogous to disseisin.”²⁵⁰ Equally, at common law, an adverse possessor is deemed to have dispossessed the true owner when he acts inconsistently with the owner’s use and enjoyment of the land.²⁵¹

As these parallels indicate, “the right to use and enjoy” the land is considered to be “an inherent facet of a right of exclusive possession.”²⁵² They reinforce the underlying point that a *de facto* expropriation is analogous to a dispossession of the occupier, for it deprives the owner of its authority to define the uses of the land.²⁵³ Accordingly, the cause of action for a constructive taking is intelligibly conceived as akin to an inferior landholder’s claim of novel disseisin. The actions are structurally similar: they each seek redress for a private wrong, arising from the powers of the superior landlord, which consists in the superior’s dispossession of the plaintiff. The action in constructive taking, then, falls comfortably within a broader category of possessory actions in private law.

An apparent difficulty with this analogy is that historically, “[n]o ejectment can be maintained against the Crown,” because a court, acting on authority of the Crown itself, “could not issue any process to turn the Crown out of possession.”²⁵⁴ Moreover, it might be objected that ejectment grants possession, whereas a constructive taking claim provides monetary relief.²⁵⁵ To be sure, constructive taking evinces certain dissimilarities with ejectment and its historical antecedents. Still, even though ejectment could not be brought against the Crown, it was possible to seek relief through related remedies such as *monstrans de droit*, “a method of obtaining or recovering possession of real or personal property from the Crown.”²⁵⁶ In *Tobin v. The Queen*,²⁵⁷ Chief Justice Erle explained the nature of these common law remedies:

[W]hatever was the form of procedure, the substance seems always to have been the trial of the right of the subject as against the right of the Crown to property or an interest in property which had been seized for the Crown; and, if the subject succeeded, the judgment only enabled him to recover possession of that specified property, or the value thereof if it had been converted to the King’s use. The form for trying this question

²⁴⁹ *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at para 19 [emphasis omitted]. See also Horsman & Morley, *supra* note 3, § 5.2.

²⁵⁰ John Baker, *Introduction to English Legal History*, 5th ed (Oxford: Oxford University Press, 2019) at 452; John Baker, “Nuisance” in John Baker, ed, *The Oxford History of the Laws of England: Volume VI: 1483–1558* (Oxford: Oxford University Press, 2003) 775 at 775; David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 2001) at 98–99. See also *Hammerton v Earl of Dysart*, [1916] 1 AC 57 at 84 (HL); *Sedleigh-Denfield v O’Callaghan*, [1940] AC 880 at 902 (HL).

²⁵¹ See generally *Leigh v Jack* (1879), 5 Ex D 264 at 273–74 (CA (Eng)); *Keefer v Arillotta* (1977), 13 OR (2d) 680 at 691 (ONCA), Wilson JA. But see *JA Pye (Oxford) Ltd v Graham*, [2002] UKHL 30 at para 35 (discussing the effects of post-1833 statutory reforms).

²⁵² *Fearn v Board of Trustees of the Tate Gallery*, [2023] UKSC 4 at para 157, Lord Sales (dissenting, but not on this point).

²⁵³ See Katz, *supra* note 150 at 291–93.

²⁵⁴ *Doe v Roe* (1841), 8 M & W 579 at 582 (Ct Exch (Eng)).

²⁵⁵ *Re Bagshaw and O’Connor*, 1918 CanLII 460 at 601 (ONSCAD).

²⁵⁶ *Davidson v Scottish Ministers*, [2005] UKHL 74 at para 79, Lord Rodger [*Davidson*]. See also William Blackstone, *Commentaries on the Laws of England: Book III: Of Private Wrongs*, ed by Thomas P Gallanis (Oxford: Oxford University Press, 2016) at 170.

²⁵⁷ (1864), 16 CB (NS) 310 (Ct CP (Eng)) [*Tobin*].

has gone through several changes. Traverse of office found, montrans de droit, and petition of right, were the forms in most frequent use.²⁵⁸

Through these remedies, a plaintiff could seek relief “where the land or goods or money of a subject have found their way into the possession of the Crown” and “obtain restitution, *or, if restitution cannot be given, compensation in money*.”²⁵⁹ Crucially, it has been held that these remedies were “concerned with enforcing the plaintiff’s *private law* rights,” that is, “the rights and duties of ordinary private persons in their relations with one another.”²⁶⁰ In other words, while the action is brought against the Crown, “[i]t is the private element that grounds the public.”²⁶¹

As the preceding discussion indicates, the action for a constructive taking does admit of a private law classification. The essence of the action is to protect the plaintiff’s private rights in its property, not the vindication of some public interest. Though the claim can be brought only against public authorities, this is not taxonomically decisive, for it can be seen as a species of the broader genus of possessory actions between superior and inferior landholders. This characterization explains why the prevailing standard for a constructive taking is “a substantial and unreasonable” deprivation of the use and enjoyment of the plaintiff’s property, similar to the requisite threshold for the other possessory actions discussed above.²⁶² And since the Crown cannot provide restitution *in specie* of a taking made for public purposes — for, where regulatory activity is the cause of the taking, that would be tantamount to surrendering its sovereign powers²⁶³ — it follows that the appropriate remedy for this action must be damages.

Conversely, the action’s grounding in the plaintiff’s private right distinguishes it from genuine public law actions like *Kingstreet* restitution, which aims to uphold the constitutional principle of “no taxation without representation.”²⁶⁴ Because tax collection is a “multilateral activity” that implicates issues of distributive justice, *Kingstreet* actions “do not belong to the realm of private law and corrective justice,” which explains why the conventional unjust enrichment framework is held not to apply.²⁶⁵ In contrast, the Canadian law of takings largely eschews public policy considerations. It is striking that, by comparison to the dissenters, the majority in *Annapolis* was unconcerned with policy considerations such as its potential ramifications for planning law.²⁶⁶ Prescinding from those polycentric or distributive issues,

²⁵⁸ *Ibid* at 357–58 [emphasis added].

²⁵⁹ *Feather v The Queen* (1865), 6 B & S 257 at 294 (QB (Eng)) [*Feather*] [emphasis added].

²⁶⁰ *Davidson*, *supra* note 256 at paras 77, 79 [emphasis added], quoting David M Walker, *Principles of Scottish Private Law*, 4th ed (Oxford: Clarendon Press, 1988) at 3.

²⁶¹ Allan Beever, “Our Most Fundamental Rights” in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (London: Hart, 2012) 63 at 68.

²⁶² *Annapolis*, *supra* note 1 at para 19.

²⁶³ Property taken for public purposes would, in Chief Justice Erle’s words, be deemed to have been “converted to the King’s use” (*Tobin*, *supra* note 258 at 358). See also Blackstone, *Of Private Wrongs*, *supra* note 256 at 171 (“the king, by reason of his legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in him”).

²⁶⁴ *Kingstreet*, *supra* note 228 at paras 14–15, 40.

²⁶⁵ Sagi Peari, “The Unjust Enrichment Apocalypse in Canada” (2023) 68:1 Can Bus LJ 120 at 144–45; Michael Pal, “The Supreme Court of Canada’s Approach to the Recovery of *Ultra Vires* Taxes: At the Border of Public and Private Law” (2008) 66:1 UT Fac L Rev 65 at 78–81, 98. See also Robert Stevens, *The Laws of Restitution* (Oxford: Oxford University Press, 2023) at 99.

²⁶⁶ *Annapolis*, *supra* note 1 at paras 115–18, Kasirer & Jamal JJ, dissenting.

the majority judgment was concerned to do justice as between the parties, a feature typically associated with private law adjudication.²⁶⁷ Quite apart from a chimera, then, the cause of action for constructive takings neatly exhibits the character of private law.

B. CONSTRUCTIVE TAKING AS A TORT

If constructive takings doctrine is private law, does it fall within “unjust enrichment, tort, [or] equity”?²⁶⁸ I will set aside Wills’ rationales for dismissing unjust enrichment and equity as appropriate categories, except to caution that his passing remark that it may be pointless to distinguish between torts and equitable wrongs is,²⁶⁹ in reality, a highly tendentious proposition.²⁷⁰ Instead, I interrogate his reasons for doubting “tort” as an appropriate classification. Wills adopts one conventional definition of a tort: “the breach of a duty primarily fixed by the law ... [and] redressible by an action for unliquidated damages.”²⁷¹ He argues, on this definition, that the main “challenge” is that the “cause of action does not obviously redress a breach of a duty.”²⁷² According to Wills, there is no breach of duty in a constructive taking, because “[t]he constructive taking itself is not objectionable, only the omission of paying compensation [is].”²⁷³

However, this cursory statement begs the question. It is unclear in what sense a constructive taking is itself “not objectionable.” If by this Wills means that a taking is not a breach of duty, the statement is merely tautological. Alternatively, Wills’ thinking might be that governments are entitled to effect takings, provided that they either pay compensation or expressly exclude liability for compensation. His perception that “only the omission of paying compensation” is objectionable might be accounted for by the fact that in all the constructive takings litigation, the government has paid no compensation (thus triggering the plaintiff’s claim). This fact makes it seem like the dispute concerns the duty to pay compensation. But this duty to pay is only triggered by the breach of an antecedent duty, which is correlative to an owner’s rights in its property.

As to the exclusion of liability, it is true that “governments have the power to immunize themselves from liability to pay compensation for a taking,” as *Annapolis* affirmed.²⁷⁴ A

²⁶⁷ Ross Grantham & Darryn Jensen, “The Proper Role of Policy in Private Law Adjudication” (2018) 68:2 UTLJ 188 at 198–207.

²⁶⁸ Wills, *supra* note 2 at 832.

²⁶⁹ *Ibid* at 834 (“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”).

²⁷⁰ Wills’ position reproduces what some Australian lawyers have termed the “fusion fallacy,” which is “the view that integration (*fusion*) of the doctrines and remedies of the common law and equity is permitted, either because of or notwithstanding the effect of the judicature legislation of the 1870s”: Trischa Mann & Audrey Blunden, eds, *Australian Law Dictionary* (Oxford: Oxford University Press, 2010), sub verbo “fusion fallacy”; JD Heydon, MJ Leeming & PG Turner, eds, *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies*, 5th ed (Chatswood, New South Wales: LexisNexis Butterworths, 2015) at 48. There is in fact a robust debate between “fusionists” and “traditionalists.” Compare Andrew Burrows, “We Do This at Common Law but That in Equity” (2002) 22:1 Oxford J Leg Stud 1 with Lionel Smith, “Common Law and Equity in R3RUE” (2011) 68:3 Washington & Lee L Rev 1185 at 1193–202.

²⁷¹ Wills, *supra* note 2 at 833, quoting Percy H Winfield, *The Province of the Law of Tort* (Cambridge: Cambridge University Press, 1931) at 32.

²⁷² Wills, *ibid*.

²⁷³ *Ibid*.

²⁷⁴ *Annapolis*, *supra* note 1 at para 22.

clearly expressed statutory intention may displace an owner's entitlement to compensation. However, the very need to expressly exclude liability presupposes that in general, there is an underlying duty, the breach of which gives rise to the liability. Thus, Wills mistakenly concludes that because the state has the power to exclude liability, it must mean that there was never a duty in the first place.

Contrary to Wills' assertion that a constructive taking claim "does not obviously redress a breach of a duty,"²⁷⁵ the cause of action does redress such a breach, namely, the breach of a duty not to dispossess an owner of its property. True, the liability arising from this act is defeasible, insofar as it might be overridden by a clearly expressed legislative intent. But the mere possibility that the legislature might make this choice does not negate the underlying obligation that subsists in the government to respect private property in ordinary circumstances. Wills' theory amounts to saying that because the legislature could always, in principle, exercise a power to authorize the government to take an owner's title *de jure*, that means the government is *never* under a duty not to commit trespass, conversion, or other torts. The wrong consists not in failing to make the expropriation *de jure* (as opposed to *de facto*), as Wills suggests elsewhere,²⁷⁶ but in "effectively confiscat[ing] the property."²⁷⁷

The existence of a duty not to commit an "effective appropriation of private property" can be discerned in the reasoning in *Annapolis*.²⁷⁸ The Supreme Court explains that the commission of a taking by the state normally "triggers" the common law right to compensation, which would seem to indicate that compensation responds to some act injuring the plaintiff's property rights.²⁷⁹ The judgment relies upon Lord Radcliffe's speech in *Belfast Corporation v. O.D. Cars Ltd.*, approved in *Manitoba Fisheries*, which referred to the need for "vigilance to see that the subject's rights to property were protected" from "expropriation of what was previously enjoyed in specie" as "an important guarantee of individual liberty."²⁸⁰ This proposition imputes an obligation in the government, to the effect that "the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded."²⁸¹ That is, a government that confiscates property infringes its "subject's rights" — commits a breach of the correlative duty — with respect to property.²⁸² The breach of this duty is what "triggers a presumptive right to

²⁷⁵ Wills, *supra* note 2 at 833.

²⁷⁶ *Ibid* at 834. By fastening upon the perceived need for a *de jure* expropriation to occur, Wills repeats the dogmatic assumption pervading his criticisms of *Annapolis* that compensation is justifiable only upon an actual taking.

²⁷⁷ *Annapolis*, *supra* note 1 at para 19. It is strange that Wills does not alight upon the intuitive explanation here. This oversight might, possibly, be attributable to his sympathies for legal realism, which tends to inculcate "the instinct that everything overt and obvious must be wrong and that the truth must be hidden and 'sophisticated'" (Allan Beever, "Harm in the Private Law" (2019) 93 SCLR (2d) 245 at 250, n 12). See also McInnes, "Taxonomic Lessons," *supra* note 25 at 78.

²⁷⁸ *Annapolis*, *supra* note 1 at para 18.

²⁷⁹ *Ibid* at para 21. See also *Lynch*, *supra* note 31 at para 28.

²⁸⁰ *Annapolis*, *ibid* at para 23, quoting *Belfast Corporation v OD Cars Ltd*, [1960] AC 490 at 523 (HL) [*Belfast*].

²⁸¹ *Ibid*.

²⁸² *Ibid*.

compensation.”²⁸³ As the Supreme Court’s remarks on section 26 of the *Canadian Charter of Rights and Freedoms* confirm, the basis of the duty lies in common law property rights.²⁸⁴

Seen in this light, it is evident that a constructive taking claim redresses the breach of a duty: the obligation not to effectively dispossess a subject of his private property.²⁸⁵ The state’s breach of that primary obligation gives rise to a secondary obligation to compensate, which generates the cause of action accruing in the plaintiff. And the state can perform its secondary obligation by paying the requisite compensation upon the plaintiff’s demand; or it could have extinguished the secondary obligation, along with the concomitant cause of action, by expressly excluding liability. The cause of action for a constructive taking sounds in tort, responding to the expropriating authority’s breach of its primary duty.²⁸⁶ Consistent with the general principle of tort law, the court awards fair market value to the owner, which places the plaintiff back in the position he would have occupied had the wrong not occurred.²⁸⁷

Still, it might be objected that it is inconsistent to conceive a regulatory act as simultaneously both lawful regulation and a constructive taking. If a regulation that effects a constructive taking is authorized by law, the reasoning goes, how could it be considered a breach of duty and give rise to liability? The response is that it is necessary to distinguish between the exercise of regulatory powers *up to the point of expropriation*, which *ex hypothesi* is legally authorized, and the effective expropriation of a subject’s property, which is not authorized absent express wording. Alluding to this very distinction, the majority in *Annapolis* contrasts “a valid regulation” with “a constructive taking.”²⁸⁸ Absent an explicit legislative intent, the government is not entitled to expropriate private property; when the regulation “effectively confiscates the property,” it has breached a duty and owes compensation as a result.²⁸⁹ The constructive taking is committed in the course of exercising a valid regulatory power, but the taking itself is not legally authorized and is wrongful, giving rise to liability against the Crown.²⁹⁰

Although an uncompensated taking might not have been legally authorized, it does not follow that it has no legal effect. Even acts in breach of a legal duty may have consequential legal effects. For example, title to property may pass under a contractual agreement that constitutes an illegal conspiracy;²⁹¹ the parties acted unlawfully, but that does not preclude the contract from taking effect for certain purposes. Likewise, a thief acts wrongfully vis-à-

²⁸³ *Ibid* at para 21.

²⁸⁴ *Ibid* at para 24.

²⁸⁵ *Belfast*, *supra* note 280 at 523.

²⁸⁶ Wills insists that “in *Manitoba Fisheries* ... the necessity of compensation [was] at the provincial level” (Wills, *supra* note 2 at 834), but as discussed earlier, the agreement between the federal and provincial Crowns was *res inter alios acta* (see text accompanying note 74). Because it is the expropriating authority that breaches its duty, it is the expropriating authority that is liable in tort.

²⁸⁷ *Irving Oil Co Ltd v The King*, [1946] SCR 551 at 556; *Dell*, *supra* note 80 at para 28; *Lynch*, *supra* note 31 at para 30. See also *Livingstone v Rawyards Coal Co* (1880), 5 App Cas 25 at 39 (HL).

²⁸⁸ *Annapolis*, *supra* note 1 at para 19.

²⁸⁹ *Ibid*.

²⁹⁰ Hogg, Monahan & Wright, *supra* note 46 at 172–73 (Crown subject to vicarious liability for *ultra vires* torts); Carleton Kemp Allen, *Law in the Making*, 7th ed (Oxford: Clarendon Press, 1964) at 577.

²⁹¹ See *Singh v Ali*, [1960] AC 167 at 176 (PC).

vis the owner of some chattel, but even a thief's title is good against the rest of the world.²⁹² The same principle applies in relation to the adverse possessor of land, who "has a perfectly good title against all the world but the rightful owner."²⁹³ Keeping this in mind, it is hardly aberrant that a regulatory act that amounts to an uncompensated expropriation, constituting a civil wrong to the claimant, may nevertheless impose legal effects for the rest of the world. As a result, in *Manitoba Fisheries*, for example, the Crown corporation could acquire and effectively carry on the plaintiff's business as its own, even though the taking constituted a breach of duty giving rise to liability.²⁹⁴

Perhaps one final objection can be raised against classifying the constructive takings doctrine as a tort. Common law courts, applying the maxim that "the King can do no wrong," have traditionally denied that damages awards against the Crown for seizure of property involved "any tortious conduct on the part of the Crown."²⁹⁵ In *Tobin*, Chief Justice Erle distinguished claims involving "property either wrongfully taken on behalf of the Crown, or wrongfully withheld" from "claims founded on wrong," the latter being inadmissible in a petition of right or *monstrans de droit*.²⁹⁶ On its face, this statement would appear to contradict the position that an uncompensated taking is a civil wrong, or a tort.

However, these judicial pronouncements are better viewed as attempts to circumvent the ancient procedural strictures on proceedings against the Crown, based on the legal fiction that the king could do no wrong.²⁹⁷ Properly understood, they do not contradict the juridical classification of constructive takings as a tort. In truth, it is only in the eighteenth and nineteenth centuries that courts began to exclude torts from the petition of right, even though it was unclear "why pure torts could not also be included" when breaches of contract by the Crown were admissible.²⁹⁸ Where the Crown could not be held liable in tort, its underlying duty not to commit torts against its subjects was unenforceable rather than non-existent.²⁹⁹ In the earlier medieval period, lawyers "did not shrink from declaring that the king, either by himself or through his servants, had committed a wrong."³⁰⁰ As Ludwik Ehrlich noted, the wrong "most corresponding with a modern tort" was "wrongful disseisin," and it was often "adjudged that disseisin by the king" could "result in a wrong."³⁰¹ Today, it is accepted that

²⁹² *Asher v Whitlock*, (1865) LR 1 QB 1 at 5 (QB (Eng)); *Bird v Fort Frances (Town)*, [1949] 2 DLR 791 (ON H Ct J). See also *The Winkfield*, [1902] P 42 at 55 (CA (Eng)); *Parker*, *supra* note 179 at 1009.

²⁹³ *Perry v Clissold*, [1907] AC 73 at 79 (PC); *Hunter v Canary Wharf Ltd*, [1997] AC 655 at 703 (HL), Lord Hoffmann. See also *Mabo (No 2)*, *supra* note 235 at 210, Toohey J.

²⁹⁴ *Annapolis*, *supra* note 1 at paras 29–30.

²⁹⁵ *De Keyser*, *supra* note 68 at 580, Lord Parmoor. See also *ibid* at 523 (Lord Dunedin), 545–46 (Lord Atkinson). See e.g. *Feather*, *supra* note 259 at 295–96; *Windsor & Annapolis Railway Co v The Queen and the Western Counties Railway Co*, (1885), 10 SCR 335 at 354, 364–65, rev'd on other grounds (1886), 11 App Cas 607 (PC); *The King v Central Railway Signal Co*, [1933] SCR 555 at 563.

²⁹⁶ *Tobin*, *supra* note 258 at 355.

²⁹⁷ See *R v Eldorado Nuclear Ltd*, [1983] 2 SCR 551 at 563–64 [*Eldorado*]. See also *Conseil des Port Nationaux v Langelier*, [1969] SCR 60 at 65–66, 71 [*Langelier*]; *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 at 356–57.

²⁹⁸ Marie-France Fortin, *The King Can Do No Wrong: Constitutional Fundamentals, Common Law History, and Crown Liability* (Oxford: Oxford University Press, 2024) at 158.

²⁹⁹ Hogg, Monahan & Wright, *supra* note 46 at 5. See e.g. *Attorney-General v Tomline* (1880), 14 Ch D 58 at 70 (CA (Eng)).

³⁰⁰ Ludwik Ehrlich, "Proceedings against the Crown (1216–1377)" in Paul Vinogradoff, ed, *Oxford Studies in Social and Legal History*, vol 6 (Oxford: Clarendon Press, 1921) at 14.

³⁰¹ *Ibid* at 14–15. See also Fortin, *supra* note 298 at 76.

the Crown can commit torts against its subjects and be held liable for them.³⁰² What was classified as a “property” claim in *Tobin* “would now be thought of as contractual or tortious.”³⁰³ As a matter of principle, the action in constructive taking sounds in tort.

IV. THE COHERENCE OF CONSTRUCTIVE TAKINGS

After reluctantly accepting that constructive taking is a tort, Wills notes that it “does not make it a good tort, or one that ought to exist.”³⁰⁴ He advances a conceptual criticism of its coherence, arguing that it fails to satisfy various requirements for being a tort. To this effect, Wills invokes Justices Brown and Rowe’s dissenting reasons in *Nevsun Resources Ltd. v. Araya*, which purported to set out a “test” for recognising a new nominate tort.³⁰⁵ Wills, however, equivocates on this point. On the one hand, Wills suggests that because the constructive taking action “breaks” certain “rules” in the *Nevsun* dissent, it is “aberrant” as a tort.³⁰⁶ In this way, he interprets the *Nevsun* framework as furnishing a conceptual definition of a tort, and he treats its “rules” as a fulcrum on which to challenge the coherence of constructive takings doctrine. On the other hand, at times he subtly reverses the direction of his critique, by conceding that the *Annapolis* judgment highlights the inadequacy of “the descriptive claims made in *Nevsun* concerning when new torts are created.”³⁰⁷

Let us focus for now on the former line of critique, in which Wills relies upon the *Nevsun* framework as a fulcrum for his attack on *Annapolis*. Much like his reliance on the *Air Canada* factors,³⁰⁸ his deployment of the *Nevsun* “rules” is somewhat uncritical. As he rightly acknowledges, Justices Brown and Rowe postulated “a test for when a court should *refrain from* declaring the existence of a *new* tort.”³⁰⁹ But taken on its own terms, it is far from obvious that the *Nevsun* framework should even apply to the *Annapolis* judgment. As I have argued, there is good reason to view *Annapolis* as having merely elaborated upon a *pre-existing* cause of action, rather than declaring a new one. The cause of action for constructive takings has subsisted in the common law since *Manitoba Fisheries* — over four decades prior to *Nevsun*. Though Wills insists that compensation in *Manitoba Fisheries* was awarded on the basis of “statutory interpretation” and the Supreme Court “had therefore not recognized a novel tort,”³¹⁰ others have established that such a reading of those cases is implausible.³¹¹ Even if one accepts *arguendo* that the true legal innovation “came with *CPR*” and not *Manitoba Fisheries*,³¹² it can be objected on Wills’ own Benthamite understanding of the common law that the *Nevsun* “rules” had not been posited into existence at the time of the *CPR* judgment and therefore provide no analytical leverage.

This difficulty alone undercuts Wills’ attack on the constructive takings tort. More fundamentally, the *Nevsun* framework itself represents a significant departure from the

³⁰² See *Davidson*, *supra* note 256 at para 77; *Swinamer v Nova Scotia (Attorney General)*, [1994] 1 SCR 445 at 461. See also Fortin, *supra* note 298 at 191–92.

³⁰³ Hogg, Monahan & Wright, *supra* note 46 at 6.

³⁰⁴ Wills, *supra* note 2 at 834.

³⁰⁵ 2020 SCC 5 at para 235, Brown & Rowe JJ, dissenting [*Nevsun*].

³⁰⁶ Wills, *supra* note 2 at 836, 838.

³⁰⁷ *Ibid* at 838.

³⁰⁸ See the text accompanying note 218.

³⁰⁹ Wills, *supra* note 2 at 835 [emphasis added].

³¹⁰ *Ibid* at 836–37.

³¹¹ Warchuk, *supra* note 19 at 681–84.

³¹² Wills, *supra* note 2 at 837.

common law method. Recall that in classical common law adjudication, judges are not conceived as quasi-legislators licensed to posit legal rules based on expediency. Rather, their task is to declare and apply the principles that, in some sense, already govern the decision of the case.³¹³ From this perspective, the *Nevsun* “test for recognizing a new ... tort,”³¹⁴ if taken as establishing procedural steps or a “portal” for exercising a discretionary power to craft novel torts, is highly unusual.³¹⁵ That kind of free-standing, creative jurisdiction in judges has been held to be inimical to the common law.³¹⁶ Put simply, the *Nevsun* dissent presents a flawed standpoint from which to critique the coherence of constructive takings as a tort. To the extent that *Annapolis* signals a need to “revisi[t]” the claims made in *Nevsun*,³¹⁷ such a reappraisal would be well justified. It properly calls into question the approach of some courts that have purported to rely upon the *Nevsun* “rules” in order to licence the creation of new nominate torts.³¹⁸

To elaborate further, it is instructive to compare the *Nevsun* dissent with the beleaguered test from *Anns v. Merton London Borough Council* for a novel duty of care in negligence.³¹⁹ Wills suggests the *Nevsun* dissent provides a “test” that “appl[ies] to putative new nominate torts generally.”³²⁰ However, this interpretation tends to reduce the recognition and application of a cause of action to the product of judicial fiat. The *Anns* test has been criticized for undermining the coherence of negligence doctrine, by fragmenting the duty of care inquiry into a “miscellany of limiting case-specific [policy] factors,” which “requires judges to balance categorically different,” and incommensurable, considerations.³²¹ As a result, the recognition of a novel duty of care has the character of a “conclusory label,” rather than a search for coherence through “a normative framework whose elements are intrinsically related to each other.”³²² In a similar vein, the *Nevsun* dissent, on this reading, presupposes that tortious liability is the emanation of judicial will, the exercise of which is to be limited by various disparate considerations. The process of recognizing a new tort is conceived not as the coherent elaboration of some immanent rational order, latent in the common law.³²³ Instead, it is treated merely as a checklist of “rules” that prescind from any robust conception of legal coherence underlying a system of interpersonal justice.³²⁴

This reductive approach is evident in Wills’ specific claims about each of the putative *Nevsun* “rules.” Among the three *Nevsun* conditions, the most fundamental is the second requirement that “the tort must reflect *a wrong visited by one person upon another*.”³²⁵

³¹³ See the text accompanying note 170.

³¹⁴ *Nevsun*, *supra* note 305 at para 247, Brown & Rowe JJ, dissenting.

³¹⁵ For further discussion, see generally Kerry Sun & Stéphane Sérafin, “The Nominalism of the New Nominate Torts” (2024) 4 SCLR (3d) 119 at 136–39.

³¹⁶ See e.g. *Reed v Smith*, (1914) 17 DLR 92 at 97–98 (BCCA); *Chapman v Chapman*, [1954] AC 429 at 444 (HL), Lord Simonds LC.

³¹⁷ Wills, *supra* note 2 at 838.

³¹⁸ See e.g. *ES v Shillington*, 2021 ABQB 739 at para 24; *Alberta Health Services v Johnston*, 2023 ABKB 209 at paras 83–84.

³¹⁹ *Anns v Merton London Borough Council*, [1978] AC 728 (HL); *Cooper v Hobart*, 2001 SCC 79 at para 30. See generally Ernest J Weinrib, “The Disintegration of Duty” in *Corrective Justice* (Oxford: Oxford University Press, 2012) 38; Goudkamp & Nolan, *supra* note 139 at 139–41.

³²⁰ Wills, *supra* note 2 at 836.

³²¹ Weinrib, “The Disintegration of Duty”, *supra* note 319 at 61–63, 77.

³²² *Ibid* at 62, 69.

³²³ Simmonds, *Decline of Juridical Reason*, *supra* note 126 at 25.

³²⁴ Sun & Sérafin, *supra* note 315 at 137, 154–55.

³²⁵ *Nevsun*, *supra* note 305 at para 241, Brown & Rowe JJ, dissenting [emphasis added].

Properly understood, it expresses the idea that tort law is a coherent system of liability for interpersonal wrongs. Curiously, Wills says nothing about this requirement, other than asserting that the rule was broken.³²⁶ If a given tort does reflect an interpersonal wrong, then the nature of that wrong should naturally inform the assessment of whether “adequate alternative remedies” already exist (the first rule),³²⁷ while identifying its scope would help evaluate whether “the law remains stable, predictable and accessible” (the third rule).³²⁸

Because Wills fails to correctly identify the nature and scope of the wrong in constructive takings, he reaches several erroneous conclusions. As previously discussed, the wrong in constructive takings consists in the effective deprivation of a landowner’s possession of property.³²⁹ Such conduct “reflects wrongs being done by one person,” the Crown, “to another,” the claimant landowner.³³⁰ Similar to ejectment, as well as the torts of nuisance and trespass, a constructive taking claim can be classified as a private law, possessory action. By ignoring the conceptual similarities between expropriation and dispossession, Wills prematurely concludes that this tort does not satisfy the second *Nevsun* criterion.

Turning to the first criterion, Wills acknowledges that “judicial review is not a complete answer” and claims that remedies are available in trespass, negligence, or misfeasance for invalid (that is, unauthorized) regulatory acts.³³¹ However, he insists that no remedy should be available where the expropriation is legally authorized, because “saying that the governmental action constituted a wrong would ... usur[p] the proper authority of elected representatives and their officials.”³³² This argument trades on an ambiguity in the reference to “governmental action,” running together two distinct concepts: the exercise of the regulatory power itself (which is typically authorized and valid), and the effective confiscation of an owner’s property (which, absent a clear intention, is unauthorized).³³³ The legislature, of course, can always immunize the government from liability for such takings, as it can for other conduct that would otherwise attract liability in tort. Hence, it is wrong to assert that in the absence of any express immunity, a court is unduly interfering with legislative policy by applying the well-settled presumption that the legislature does not intend to countenance an uncompensated taking.³³⁴ Thus, if anything, an uncompensated taking falls within the “operational sphere” of government decision-making and properly engages private liability.³³⁵ Indeed, failing to provide relief would arguably amount to the judicial dilution of private rights, by reading in an immunity that the legislature never expressly adopted.³³⁶

³²⁶ Wills, *supra* note 2 at 836 (“constructive expropriation breaks the first two rules”).

³²⁷ *Nevsun*, *supra* note 305 at para 237, Brown & Rowe JJ, dissenting.

³²⁸ *Ibid* at para 242.

³²⁹ See the text accompanying note 234.

³³⁰ *Nevsun*, *supra* note 305 at para 248, Brown & Rowe JJ, dissenting.

³³¹ Wills, *supra* note 2 at 836.

³³² *Ibid*.

³³³ See the text accompanying note 288.

³³⁴ See the authorities cited at note 80.

³³⁵ *Kosoian v Société de transport de Montréal*, 2019 SCC 59 at para 108.

³³⁶ Bruce Feldthusen, “Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified” (2013) 92:2 Can Bar Rev 211 at 225–33. *Cf Gorrington v Calderdale Metropolitan Borough Council*, [2004] UKHL 15 at paras 38–39, Lord Hoffmann; *Robinson v Chief Constable of West Yorkshire Police*, [2018] UKSC 4 at para 41; Joost Blom, “Do We Really Need the *Anns* Test for Duty of Care in Negligence?” (2016) 53:4 Alta L Rev 895 at 903.

This point also furnishes a response to Wills' complaint that the takings doctrine "sits uncomfortably next to its nearest neighbours, public authority negligence and misfeasance in public office," because it lacks their "built-in limits that reflect the special role of public authorities," such as the policy-operational distinction in negligence.³³⁷ His view rests upon the assumption that, like those torts, a constructive taking action must implicate public law values, simply because it is brought against a public defendant. In truth, because an expropriation is essentially a dispossession inflicted against a property owner, the "nearest neighbours" are the torts of trespass or private nuisance, neither of which involve considerations of policy.

With respect to the third *Nevsun* criterion that "the change wrought to the legal system must not be indeterminate or substantial,"³³⁸ Wills contends that "*Annapolis* has significant ramifications" because it will expand the liability of municipalities.³³⁹ The focus on the magnitude or quantity of the change, however, is liable to mislead. As commentators have argued, the characterization of a given change as "incremental" or "complex" tends to be subjective and idiosyncratic.³⁴⁰ The elucidation in *Annapolis* of the elements of a constructive taking can, I have argued, be intelligibly construed as an incremental step, for it merely brought out what was latent in the prior jurisprudence. Moreover, this criterion is in tension with classic common law reasoning, in which judges approached doctrinal problems as the elaboration of a systematic and coherent set of norms, rather than fixating on the perceived magnitude of the pronouncement. Taken at face value, a prohibition on changes with "significant ramifications" would discredit landmark developments in the law, such as the "revolution[ary]" judgment in *Donoghue v. Stevenson*³⁴¹ and the abrogation of the "ancient" mistake of law bar for restitutionary claims.³⁴² Without more, the trite observation that *Annapolis* may have "far-reaching implications" offers little to substantiate the assertion that "constructive expropriation is aberrant" as a tort.³⁴³

Apart from the *Nevsun* framework, Wills casts further aspersions upon the constructive takings doctrine. It is inconsistent with "the limits on pure economic loss," he claims,³⁴⁴ because it grants relief despite falling outside the recognized categories for recovery of pure economic loss in *negligence*.³⁴⁵ This objection is founded on a plain misunderstanding of the general rule excluding recovery for pure economic loss in tort, which Wills erroneously accuses the *Annapolis* majority of having "ignored."³⁴⁶ As Jason Neyers and Andrew Botterell explain, the justification for the exclusionary rule has nothing to do with the

³³⁷ Wills, *supra* note 2 at 838.

³³⁸ *Nevsun*, *supra* note 305 at para 242, Brown & Rowe JJ, dissenting.

³³⁹ Wills, *supra* note 2 at 837, citing *Friedmann Equity Developments Inc v Final Note Ltd*, 2000 SCC 34 at para 42.

³⁴⁰ Paul M Perell, "Changing the Common Law and Why the Supreme Court of Canada's Incremental Change Test Does Not Work" (2003) 26:4 Adv Q 345 at 369–75. See also Russell Brown, *Judicial Activism in the Law of Negligence* (SJD Thesis, University of Toronto Faculty of Law, 2006) [unpublished] at 54–55.

³⁴¹ *Cooper v Hobart*, *supra* note 319 at para 22, citing *Donoghue v Stevenson*, *supra* note 193.

³⁴² *Air Canada v British Columbia*, [1989] 1 SCR 1161 at 1199–200, La Forest J; *Kleinwort Benson Ltd v Lincoln City Council*, [1999] 2 AC 349 at 401 (HL), Lord Hoffmann.

³⁴³ Wills, *supra* note 2 at 838.

³⁴⁴ *Ibid* at 842. See also *ibid* at 812.

³⁴⁵ *Ibid* at 839.

³⁴⁶ *Ibid* at 841.

pecuniary character of the *loss*, but with whether the loss is consequential upon an injury to a *right* in the plaintiff:

Properly interpreted, the common law does not generally have a problem with awarding pure economic losses since it does so routinely in actions for defamation or where the plaintiff and defendant are in a special relationship. What the common law finds problematic is awarding damages that do not flow from the violation of a right, situations of *damnum absque injuria*.³⁴⁷

Strikingly, in *Maple Leaf* — the very case Wills relies upon to advance his objection³⁴⁸ — the Supreme Court endorsed precisely this justification for the general exclusionary rule.³⁴⁹ As it explained, the categories of pure economic loss should not be permitted to “obscur[e] the starting point in a principled analysis of an action in negligence, which is to identify *what rights are at stake*.”³⁵⁰ Those categories are merely shorthands for the kinds of circumstances where plaintiffs in negligence have been held to suffer “an injury to a right that can be the subject of recovery in tort law.”³⁵¹ Hence, though the facts ostensibly fell within the category of “negligent supply of shoddy goods or structures,” the plaintiffs in *Maple Leaf* could not recover their losses for want of an interference with “*their rights*” in person or property.³⁵²

In this light, it is evident that constructive takings doctrine is eminently consistent with the common law’s general approach to pure economic loss. The question is not whether such takings fall within the categories developed for the tort of negligence,³⁵³ but whether the plaintiff suffered any injury to their rights. Recall that a *de facto* expropriation is an effective dispossession of the owner, which is to say, a deprivation of their right in property.³⁵⁴ Wills seems to deny this proposition, arguing that the plaintiff retains its “bundle of rights” and only lost the “economic value” of its property.³⁵⁵ But an owner’s loss of the “use and enjoyment of its property” *does* amount, in law, to an injury to its rights, and cannot be dismissed merely as a loss of value.³⁵⁶ As the tort of private nuisance demonstrates, conduct that tends to make an owner’s use of its land “unreasonably difficult”³⁵⁷ amounts to a “wrong

³⁴⁷ JW Neyers & Andrew Botterell, “*Tate & Lyle: Pure Economic Loss and the Modern Tort of Public Nuisance*” (2016) 53:4 *Alta L Rev* 1031 at 1045. See generally Peter Benson, “The Basis for Excluding Liability for Economic Loss in Tort Law” in David G Owen, ed, *The Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995) 427. See also Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 21, 23; Donal Nolan, “Rights, Damage and Loss” (2017) 37:2 *Oxford J Leg Stud* 255 at 267.

³⁴⁸ Wills, *supra* note 2 at 812, 839.

³⁴⁹ 1688782 *Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at para 19 (“[s]uch loss falls outside the scope of a plaintiff’s legal rights — the loss is *damnum absque injuria* and unrecoverable”) [*Maple Leaf*].

³⁵⁰ *Ibid* at para 21 [emphasis added].

³⁵¹ *Ibid* at para 23.

³⁵² *Ibid* at paras 41, 57 [emphasis in original].

³⁵³ Indeed, Wills’ fixation on the categories developed specifically for the tort of negligence is puzzling, in light of Neyers and Botterell’s observation, above, that there are other torts, such as defamation, where pure economic loss is recoverable despite falling outside those categories. This fact shows that the *Maple Leaf* categories cannot reasonably be construed as applying to all torts.

³⁵⁴ *Annapolis*, *supra* note 1 at para 19. Compare *Maple Leaf*, *supra* note 349 at para 45 (explaining that the liability rule in *Winnipeg Condominium* “analogize[s]” economic loss from shoddy goods or structures “to physical injury to the plaintiff’s person or property”).

³⁵⁵ Wills, *supra* note 2 at 839.

³⁵⁶ *Annapolis*, *supra* note 1 at para 19.

³⁵⁷ Christopher Essert, *Property Law in the Society of Equals* (Oxford: Oxford University Press, 2024) at 93.

of indirect, or constructive, eviction or ouster” that is actionable by the right holder.³⁵⁸ Indeed, James Penner explicitly frames nuisance as a kind of constructive “expropriation of the plaintiff’s right,” where “the nuisance tortfeasor dispossesses the plaintiff from the subject matter of her right *without taking it himself*”³⁵⁹ — that is, without seizing the property *de jure*. Properly speaking, then, the economic losses sustained by the victim of an uncompensated taking are consequential upon an injury to its property rights, giving rise to the liability for compensation.³⁶⁰ The tort does not “transform[]” economic value into property,³⁶¹ but rather redresses an injury to the plaintiff’s property rights consistent with other proprietary torts.

Finally, it is apposite to respond to Wills’ claim that the cause of action in constructive takings cannot engage Crown liability.³⁶² Generally speaking, under various federal and provincial statutes, the Crown is liable for torts committed by its servants.³⁶³ Crown servants include government officials and entities that are subject to *de jure* control by the Crown, as well as entities expressly legislated to be agents of the Crown.³⁶⁴ Wills maintains that a “servant or agent of a public authority cannot complete the tort of constructive expropriation,” because the “servant does not acquire the beneficial interest” or remove “all reasonable uses of the property.”³⁶⁵

To the contrary, the leading cases establish that a servant of the Crown can, in fact, simultaneously deprive the plaintiff of property and acquire an advantage as required under the *CPR* test. In *Manitoba Fisheries*, the Crown corporation, “an agent of Her Majesty in Right of Canada,” had been “authorized to license continued participation in the fish export industry” but did not grant the plaintiff any licence; by omitting to do so, it both deprived the plaintiff of its business and acquired an advantage, namely, the plaintiff’s customers.³⁶⁶ Similarly, in *Tener*, it was the government ministers that denied the park use permit necessary for the plaintiffs to engage in mineral exploitation, thereby recovering, in their official capacity as ministers, control over “a part of the right granted to the [plaintiffs] in 1937.”³⁶⁷ And as *Annapolis* and *Lynch* confirm, the conduct of municipal corporations — which are, strictly speaking, “creatures of the legislature”³⁶⁸ — can, in principle, deprive the plaintiff of the reasonable uses of its land and acquire the relevant advantage for the municipality’s own purposes.³⁶⁹ Therefore, the cause of action in constructive taking poses little difficulty under the existing regimes on Crown and public authority liability.

³⁵⁸ JE Penner, *Property Rights: A Re-Examination* (Oxford: Oxford University Press, 2020) at 144.

³⁵⁹ *Ibid* at 148–49 [emphasis in original].

³⁶⁰ *Annapolis*, *supra* note 1 at paras 21, 24.

³⁶¹ Wills, *supra* note 2 at 839–40.

³⁶² *Ibid* at 835.

³⁶³ *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 3(b)(i). See e.g. *Proceedings Against the Crown Act*, RSNS 1989, c 360, s 5(1)(a); *Crown Proceeding Act*, RSBC 1996, c 89, s 2(c). See generally Hogg, Monahan & Wright, *supra* note 46 at 160–66.

³⁶⁴ *Langelier*, *supra* note 297 at 65; *Eldorado*, *supra* note 297 at 575–76; *Nova Scotia Power Inc v Canada*, 2004 SCC 51 at paras 12–13; *Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 92.

³⁶⁵ Wills, *supra* note 2 at 835.

³⁶⁶ *Manitoba Fisheries*, *supra* note 21 at 101, 103–104. See also *Annapolis*, *supra* note 1 at paras 28–29.

³⁶⁷ *Tener*, *supra* note 22 at 536–38, 551–52, 563.

³⁶⁸ *Pacific National Investments Ltd v Victoria (City)*, 2000 SCC 64 at para 33.

³⁶⁹ *Annapolis*, *supra* note 1 at paras 68, 72; *Lynch*, *supra* note 31 at para 3.

V. CONCLUSION

Referring to the work of those he called “jurist[s],” legal commentators who focused on the merely empirical and posited dimension of law, Immanuel Kant once remarked that they were bound to understand law “[l]ike the wooden head in Phaedrus’s fable,” that is, “a head that may be beautiful but unfortunately it has no brain.”³⁷⁰ In advancing his vehement critique, Wills has done a useful service by capturing, in one sweep, the essence of key objections raised by detractors of the *Annapolis* judgment and the doctrine of constructive takings it elucidates. Yet, on closer examination, it emerges that the alleged faults emanate not from the doctrine itself, but in the strictly empirical standpoint adopted by the critic. As I have argued, Wills’ critique is founded upon a Benthamite conception of common law as nothing more than a hodgepodge of black letter rules, “laid down” by judges according to private judgments of expediency, and a thin notion of coherence as consistency with preceding rule-choices. Strangely absent is any idea of the common law as a systematic ordering of norms, animated by underlying juridical principles, which unify and render intelligible the doctrines expressed in the decided cases. Fully exposed, it becomes apparent that Wills’ dogmatic, Benthamite presuppositions sustain neither a faithful nor attractive model of common law adjudication, prescinding as it does from the “brain” or reason of the law.

It is perhaps fitting that, like his spiritual forebear,³⁷¹ Wills favours wholesale legislative reform of the common law. Unable to understand constructive takings doctrine as a rational ordering, Wills’ ultimate proposal is for the legislature to “simply abolish the tort.”³⁷² The severity of the proposal underscores the dogmatism behind his critique, especially considering that *Annapolis* reaffirms that “provincial legislatures remain free, as they always have been, to ‘alter the common law’ in respect of constructive takings.”³⁷³ All things considered, outright abolition of the tort may or may not be justified. Regardless, one thing is clear: it would not “restore a level of coherence to the common law.”³⁷⁴ So long as one holds the whole of the law to transcend the rule-choices merely posited “in a certain place and at a certain time,”³⁷⁵ *Annapolis* cannot plausibly be cast as a defect of legal reasoning. Far from being an aberration, the Supreme Court’s judgment exemplifies the traditional method by which the common law “works itself pure” through the activity of lawyers and judges discerning and applying the precepts of juridical reason.³⁷⁶

³⁷⁰ Immanuel Kant, “The Metaphysics of Morals” in Mary J Gregor, ed, *Practical Philosophy* (Cambridge: Cambridge University Press, 1996) 353 at [6:230]. See generally Patrick Capps & Julian Rivers, “Kant’s Concept of Law” (2018) 63:2 Am J Juris 259 at 292–94.

³⁷¹ See e.g. Jeremy Bentham, “Supplement to Papers on Codification, &c” in Philip Schofield & Jonathan Harris, eds, *The Collected Works of Jeremy Bentham: ‘Legislator of the World’: Writings on Codification, Law, and Education* (Oxford: Clarendon Press, 1998) 68 at 128–39; Bentham, *Of Laws in General*, *supra* note 160 at 153, 182–84. See also Postema, “Bentham as a Common Law Revisionist”, *supra* note 166 at 195–98.

³⁷² Wills, *supra* note 2 at 841, 844.

³⁷³ *Annapolis*, *supra* note 1 at para 78 [citations omitted].

³⁷⁴ Wills, *supra* note 2 at 844.

³⁷⁵ Kant, *supra* note 370 at [6:229].

³⁷⁶ *Omychund v Barker* (1744), 1 Atk 21 at 23 (Ch (Eng)).