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Distinguishing the Appointment of an Interim Receiver: Unique Statutory Tests under Sections 47 and 243 of the *Bankruptcy and Insolvency Act* Are Clarified in *Fluorspar*

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Introduction

The Supreme Court of Newfoundland and Labrador's recent decision in *PricewaterhouseCoopers Inc. v Canada Fluorspar (NL) Inc.* ("*Fluorspar*"), 2022 NLSC 25, provides an overview of the current state of the law on the appointment of interim receivers. As was the result in *Fluorspar*, courts will likely appoint an interim receiver if an applicant can prove the required notice is about to be or was sent and the appointment is necessary for the protection of the debtor's estate or the interests of the creditor who sent that same notice.

Fluorspar also provides a unique jurisprudential break in distinguishing tests for the appointment of an interim receiver under s. 47(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**")[2] versus s. 243(1) or (1.1) of the BIA. As every insolvency situation is unique, interim receivership orders require carefully tailored responses from the courts. Unique legal considerations accordingly apply to applications for interim receiverships that are sought under different provisions of the BIA.

Factual Background

PricewaterhouseCoopers Inc. (the **"Applicant"**), in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and Bridging Income Fund LP, requested an order appointing an interim receiver over the property of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. (collectively, the **"Respondents"**).[3] The Applicant argued that an interim receiver is necessary to "preserve the Respondents' operations and maintain their property (and the security of their creditors) while their stakeholders pursue options to restructure the Respondents and avoid a bankruptcy."[4]

Given that the Respondents' business was financed by significant loans from different secured creditors, including the Applicant, the Applicant sought to develop a restructuring plan in order to avoid consequences such as negative cash flow and operational freezes. Appointing an interim receiver would allow for the preservation of the Respondents' property and business on a temporary basis until a restructuring plan can come to fruition. Ultimately, the Newfoundland

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[2] R.S.C. 1985, c. B-3 [BIA].
[3] *PricewaterhouseCoopers Inc. v Canada Fluorspar (NL) Inc.*, 2022 NLSC 25 at para 1 [*Fluorspar*].
[4] *Ibid.*

and Labrador Supreme Court (the "**NLSC**") appointed an interim receiver and, in the process, clarified the test to be applied when deciding whether its appointment is necessary.

Legal Analysis

The NLSC agreed with the Applicant and allowed an interim receiver to be appointed pursuant to s. 47(1) of the BIA, and extracted two salient factors to be considered when appointing an interim receiver. First, the requisite court must be satisfied that a notice is about to be or was sent under subsection s. 244(1) of the BIA. Second, the appointment of an interim receiver must be necessary for the protection of the debtor's estate or the interests of the creditor who sent the notice under subsection 244(1).

At hand, the only controversial issue to be determined was under the second test - whether the appointment was "necessary" for the protection of one of two things: the debtor's estate or the interests of the creditor who sent the required notice. The Applicant pointed to a recent British Columbia decision, *Pandion Mine Finance Fund LP v Otso Gold Corp.* ("*Pandion Mine*"),[5] as the test that which governs the appointment of an interim receiver under s. 47(1) of the BIA.[6] However, the NLSC disagreed with the Applicant's submission that Pandion Mine was determinative.

In particular, the test articulated in *Pandion Mine* was set out in the context of s. 243 of the *BIA*, not s. 47(1). On application by a secured creditor, s. 243 allows for a court to appoint a receiver if it considers it to be just or convenient to do so. In contrast, the NLSC in *Fluorspar* noted that the words "just and convenient" do not appear anywhere in s. 47 and that the appointment of an interim receiver to be "necessary" is a distinct threshold from that in s. 243.[7]

The NLSC then looked to another decision for guidance: *Bank of Nova Scotia v D.G. Jewelry Inc.*[8] There, Ground J of the Ontario Superior Court of Justice (the "**ONSC**") appointed a receiver and found that the receiver's role would be to develop and carry out a reorganization and bring a restructuring plan to the court for approval. The NLSC in *Fluorspar* found this consideration to be relevant and applicable, as the Applicant was seeking to preserve the Respondents' property and business on a temporary basis until a restructuring process could be brought forward. Proceeding on this basis, the NLSC found the following factors raised by the Applicant satisfied the requirements under the BIA and allowed the appointment of the interim receiver:

[5] 2022 BCSC 136 [*Pandion Mines*].
[6] *Ibid* at para 18.
[7] *Ibid* at para 19.
[8] 38 C.B.R. (4th) 7, [2002] O.T.C. 762.

- The receiver, secured creditors, shareholders and employees of the debtor company would suffer irreparable harm if the debtor company were to permanently shut down its business operations;
- The debt secured against the property of the debtor company may be jeopardized if not preserved;
- The remaining cash of the debtor company would be quickly expended if immediate measures are not put in place;
- The secured creditors and debtor company have consented to the appointment of an interim receiver;
- The interim receiver would not take possession of the debtor company's property;
- The interim receivership is only intended for a short period of time (in this case, likely no longer than 30 days);
- Court appointment of an interim receiver is necessary to permit the receiver to take steps to preserve the property of the debtor company; and
- The appointment of an interim receiver will provide the debtor company the opportunity to explore restructuring and maximize the value of its business.[9]

Finding that the appointment of an interim receiver was necessary and appropriate, the court was then tasked with determining the scope of the order. Whalen CJ began by, again, looking to the difference between s. 243(1) and s. 47. First, s. 243 provides for the appointment of a receiver and not an interim receiver. In other words, under s. 243, the appointment is not time limited as it is under s. 47. Additionally, the power that a court may grant a receiver under s. 243(1) is broader in scope than those it may grant to an interim receiver under s. 47.[10] As such, it is unsurprising that the tests under each provision differ. Given this background, while keeping in mind that every insolvency is unique, the NLSC held that the order tendered by the Applicant was overly broad and went beyond what is necessary for the protection of the estate of the debtor, including providing the receiver with immunity not authorized by statute.[11] As such, the court limited the scope of the order to ensure compliance with the statute and allowed only what was necessary for the protection of the estate of the debtor.[12]

Concluding Thoughts and Lasting Impact

The court's decision in *Fluorspar* clarified the necessary elements for appointing an interim receiver under s. 47 of the BIA, in contrast to s. 243. Though s. 243 may also deal with the appointment of receivers, the distinction between the two provisions was a conscious decision made by Parliament and their differences must be reflected in the relevant tests used for each. Under s. 47, a court must be satisfied that a required notice is about to be or was sent and that

[9] *Ibid* at para 22.
[10] *Ibid* at para 25.
[11] *Ibid* at para 32.
[12] *Ibid*.

the appointment of an interim receiver is shown to be necessary for either: (a) the protection of the debtor's estate; or (b) the interests of the creditor who sent the required notice.

Insolvency courts regularly consider extra-provincial decisions, and the impact of *Fluorspar* is likely to resonate in Ontario. Extra-provincial jurisprudence that is sound in law and appropriate in the circumstances of a case regularly serve as persuasive authority. Indeed, as the Honourable Robert J. Sharpe explains in *Good Judgment: Making Judicial Decisions*, a "judge should strive to maintain the coherence and integrity of the law as defined by the binding authorities, using persuasive authority to elaborate and flesh out its basic structure."[13] Given this background, Ontario courts will view the *Fluorspar* decision as persuasive if the facts of the case at bar are analogous to warrant its consideration. Ontario insolvency litigators should ensure that their motion materials provide an appropriate factual basis when moving under the separate receivership tests to accommodate these updated *Fluorspar* legal tests.

[13] Robert J Sharpe, *Good Judgment: Making Judicial Decisions*, (Toronto: University of Toronto Press, 2018) at 171–72.

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It's All Derivative: Will Ontario Courts Recognize and Enforce Ricochet Judgments?

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The Court of Appeal for Ontario recently considered if or when an Ontario court should recognize and enforce a recognition and enforcement judgment from another province pursuant to the common law. These "ricochet" or "derivative" judgments are generally rare, and the handful of Canadian courts that have permitted their recognition and enforcement have not addressed the court's authority for doing so at common law. Accordingly, in *H.M.B. Holdings Limited v. Antigua and Barbuda*,[1] the Court of Appeal had the opportunity to conclude and clarify that the common law test for the recognition and enforcement of foreign judgments does not contemplate the viability of ricochet judgments.

The Appellant, HMB Holdings Limited ("HMB"), was granted an expropriation award against the Attorney General of Antigua and Barbuda ("Antigua") by the Judicial Committee of the Privy Council of Antigua and Barbuda. HMB subsequently brought an action in British Columbia to recognize and enforce the Privy Council's judgment and secured default judgment (the "BC Judgment"). In 2018, HMB commenced an application in Ontario for an order under the *Reciprocal Enforcement of Judgments Act*[2] against Antigua,[3] which application was dismissed. After exhausting its appeals from the decision of the application judge at the Court of Appeal for Ontario[4] and the Supreme Court of Canada,[5] HMB commenced an action in Ontario, seeking to recognize and enforce the BC Judgment—not the Privy Council's judgment—pursuant to the common law.

Following Antigua's successful motion for summary judgment, in which the motion judge dismissed the Ontario action on the basis that there was no real and substantial connection between BC and the underlying action in Antigua and Barbuda, HMB appealed to the Court of Appeal.

The Court of Appeal agreed that the action should be dismissed but arrived at that conclusion on a different basis than the motion judge. In so doing, the Court provided important guidance on the legal regime around recognition and enforcement.

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[1] 2022 ONCA 630, aff'ing *H.M.B. Holdings Ltd. v. Attorney General of Antigua and Barbuda*, 2021 ONSC 2307.
[2] *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5.
[3] 2019 ONSC 1445.
[4] 2020 ONCA 12, aff'ing *H.M.B. Holdings Limited v. Antigua and Barbuda*, 2019 ONSC 1445.
[5] 2021 SCC 44 aff'ing *H.M.B. Holdings Limited v. Antigua and Barbuda*, 2020 ONCA 20.

1. "Real and substantial connection" test and bars to recognition and enforcement

The Court concluded that, as a general principle, courts in one jurisdiction will recognize and enforce the judgements of another jurisdiction, provided that the "real and substantial connection" test is met and none of the bars to recognition and enforcement are present. The "real and substantial connection" test refers to the connection between the proceeding and the parties to the action, on the one hand, and the original jurisdiction which issued the judgment, on the other hand. There is no need to assess the relationship between the enforcing forum and the defendant—the enforcing court has jurisdiction as long as there was effective service on the defendant against whom recognition and enforcement is being sought.

Even where a real and substantial connection is established, the court may nevertheless refuse to recognize and enforce a foreign judgment if it was obtained by fraud, the foreign court breached the rules of natural justice, or enforcement would be tantamount to an abuse of process or otherwise contrary to public policy.

2. Common law enforcement test does not apply to ricochet judgment

The Court of Appeal highlighted the difference between an original foreign judgment and a recognition and enforcement judgment. A decision about whether to recognize and enforce a foreign judgment is a local decision that must be made by each court in accordance with its own law. The enforcing court is not tasked with assessing whether the foreign judgment is enforceable in any and all other jurisdictions. Rather, the analysis is limited to whether the law of a local jurisdiction is available to assist the judgment creditor in accessing assets in that jurisdiction with a view to satisfying the judgment.

In British Columbia, the Court's task was limited to assessing whether the Privy Council Judgment should be recognized and enforced in BC, having regard for the applicable laws of that province. The inquiry specifically considered whether: (1) pursuant to BC's *Court Jurisdiction and Proceedings Transfer Act*, the Privy Council had jurisdiction over the dispute or the parties; (2) Antigua was properly served with HMB's claim; and (3) Antigua had any defences to a judgment for recognition and enforcement in BC (e.g., a limitation-period defence).

Likewise, the Ontario Court's task was limited to assessing whether, based on Ontario law, the Privy Council Judgment should be recognized and enforced in Ontario. It was not to assess whether BC's recognition and enforcement judgment should, in turn, be recognized and enforced in Ontario.

3. Recognition and enforcement in multiple jurisdictions is possible if well-orchestrated

While the Court of Appeal seems to have foreclosed the viability of ricochet judgments at common law, it affirmed the ability of a judgment creditor to recognize and enforce a foreign judgment in multiple jurisdictions.

HMB argued that it was inefficient to require it to bring concurrent recognition and enforcement proceedings in multiple jurisdictions, and suggested that it should be allowed to first seek recognition and enforcement in BC and, if those enforcement efforts do not yield sufficient assets to satisfy the original foreign judgment, resort to Ontario and other jurisdictions for recognition and enforcement. The Court held that nothing precluded HMB from commencing sequential enforcement proceedings, so long as each proceeding was commenced within the limitation period applicable in each enforcing jurisdiction. HMB could have first brought an action for enforcement in Ontario within the applicable two-year limitation period, and then commenced similar proceedings in BC after the expiry of Ontario's two-year limitation period but before the expiry of BC's ten-year limitation period. In the Court's view, allowing HMB to proceed in the manner it desired would improperly circumvent Ontario's limitation period and deprive Antigua of a legitimate defence.

Takeaway

The Ontario Court of Appeal has effectively closed the door on the recognition and enforcement of ricochet judgments at common law in Ontario. The Court endorsed the Supreme Court of Canada's *obiter* statement in *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, that an enforcing court's judgment "has no coercive force outside its jurisdiction" and whether recognition and enforcement should proceed "depends entirely on the enforcing forum's laws". Litigants who secure a foreign judgment should implement a holistic strategy for enforcement, which takes into account all of the jurisdictions in which there are assets to satisfy the foreign judgment, as well as each jurisdiction's unique enforcement laws and limitation periods. While the Court signaled that the doctrines of *res judicata*, issue estoppel or abuse of process may assist litigants in simplifying subsequent recognition and enforcement proceedings, following *HMB Holdings*, Ontario litigants should not expect to avoid multiple proceedings altogether. The recognition and enforceability of a foreign judgment in Ontario will be assessed on the merits of the connection between Ontario and the original forum, not by reference to a subsequent enforcing forum.

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Apportionment of Damages in Negligence and Contract

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Can damages be apportioned between defendants when one defendant is liable in negligence for the same damage caused by another defendant's breach of contract? Although the case law is sparse and inconsistent and grounded in different theories, the answer appears to be yes.

Apportionment in Tort Law

It is well established in tort law that a defendant is liable for any injuries caused or contributed to by their[1] negligence.[2] When a defendant is negligent, they are liable for 100% of the resulting loss.

If the plaintiff's injury is caused or contributed to by two or more persons, provincial negligence statutes expressly permit the apportionment of damages between negligent defendants as well as claims for contribution and indemnity between them. These statutes also permit apportionment to contributorily negligent plaintiffs.[3] However, these statutes do not expressly apply to apportionment between negligence and non-tortious causes, which has led to some interesting and contradictory case law.

In *Athey v Leonati*, the Supreme Court of Canada held that there is no apportionment between negligent and non-culpable causes. In *Athey*, the appellant's back injury was caused by the defendants' negligence but was compounded by a pre-existing condition. The respondents argued that the appellant's loss should be apportioned between the negligent cause (the car accidents) and the non-culpable cause (the pre-existing condition).[4] The Court held that such apportionment was not fair, explaining:

> Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose

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1 Rather than using singular gendered pronouns, we will use "they/their" throughout this article.

2 *Athey v Leonati*, [1996] 3 SCR 458 at para 12, 140 DLR (4th) 235 (SCC) [*Athey*].

3 In some provinces, contributory negligence is dealt with in a separate statute. See generally, Ontario: *Negligence Act*, RSO 1990, c N.1; Alberta: *Tortfeasors Act*, RSA 2000, c T-5, *Contributory Negligence Act*, RSA 2000, c C-27; Manitoba: *The Tortfeasors and Contributory Negligence Act*, CCSM c T90; Saskatchewan: The *Contributory Negligence Act*, RSS 1978, c C-31; British Columbia: *Negligence Act*, RSBC 1996, c 333; New Brunswick: *Tortfeasors Act*, RSNB 2011, c 231, *Contributory Negligence Act*, RSNB 2011, c 131; Nova Scotia: *Tortfeasors Act*, RSNS 1989, c 471; *Contributory Negligence Act*, RSNS 1989, c 95; PEI: *Contributory Negligence Act*, RSPEI 1988, c C-21; Newfoundland and Labrador: *Contributory Negligence Act*, RSNL 1990, c C-33; Yukon: *Contributory Negligence Act*, RSY 2002, c 42; Northwest Territories: *Contributory Negligence Act*, RSNWT 1988, c C-18; Nunavut: *Contributory Negligence Act*, RSNWT (Nu) 1988, c C-18.

4 *Athey*, *supra* note 2 at para 12.

> of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.[5]

In *Hans v Volvo Trucks North America*, Saunders JA questioned whether *Athey* applied "to all non-tortious contributing causes or only to those contributing causes for which another party has no liability. Does it apply, for instance, where one party's liability sounds in tort and the other party's liability sounds in contract?"[6] That is the question we explore in this article.

Judicial Approaches to Apportionment Beyond Tort

Limiting *Athey* to its facts, courts have apportioned loss between tortious and culpable but non-tortious causes by taking two different approaches: first, some courts have extended contributory negligence legislation to apportion liability; second, some courts have apportioned using common law contractual principles.[7]

Contributory Negligence Legislation

The first approach to apportioning liability between negligence and breach of contract (for example) has been to extend contributory negligence legislation to the contractual claim. This approach interprets the term "fault" in the legislation broadly to encompass both tort and contract.[8]

The dissenting opinion in *Smith v McInnis* is most commonly cited to support interpreting the legislation broadly. *Smith* dealt with apportionment between two contractual causes, however the dissent considered the application of tort law principles of apportionment. The issue was whether a third party was liable in contract to the defendant, and if so, what damages would be owed.

The majority found that the third party was not liable at all and did not consider the question of apportionment. However, Pigeon J, writing for the dissent, found the third party liable and went on to consider the possible bases for apportionment. He held that the *Contributory Negligence Act* in Nova Scotia was not limited to tortfeasors. Pigeon J considered the "inspiration" for the Act, and found that the term "fault" should be interpreted according to civil law principles, in particular the principle of causality.[9] Accordingly, "[t]o the extent that the damage suffered by a plaintiff is due to his own fault, it is held not to have been caused by the fault of the defendant."[10]

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5 *Ibid* at para 20.
6 *Hans v Volvo Trucks North America Inc*, 2018 BCCA 410 at para 68.
7 *Petersen Pontiac Buick GMC (Alta) Ltd v Campbell*, 2013 ABCA 251 at para 37 [*Petersen*]. See generally *Smith et al v McInnis et al*, [1978] 2 SCR 1357, 91 DLR (3d) 190 (SCC) [*Smith*]; *Doiron v Caisse Populaire D'Inkerman Ltee* (1985), 17 DLR (4th) 660, 61 NBR (2d) 123 (NB CA) [*Doiron*].
8 *Smith*, *supra* note 7 at para 56; *ACA Cooperative Association Ltd v Associated Freezers of Canada Inc* (1992), 93 DLR (4th) 559 at para 112, 113 NSR (2d) 1 (NS CA) [*ACA Cooperative*].
9 *Smith*, *supra* note 7 at paras 54-56.
10 *Ibid* at para 56.

A similar finding was made in *ACA Cooperative Association Ltd v Associated Freezers of Canada Inc*, in which some defendants were liable in tort and others were liable in both contract and tort. The Nova Scotia Court of Appeal held that the term "fault" in the *Contributory Negligence Act* was broad enough to include both tort and contract.[11] The Court stated that "[u]nder s. 4 of the Contributory Negligence Act the court has a duty to apportion negligence liability among the parties responsible whether in tort or contract. On the present facts it is not possible to make a meaningful division."[12]

This approach has been followed in courts in most of the common law provinces,[13] but has also been criticized. In *Doiron v Caisse Populaire d'Inkerman Ltee*, La Forest JA (as he then was) questioned the use of contributory negligence legislation saying there was virtually no justification for the approach.[14] In his view, extending negligence legislation into the realm of contract ignored the legislation's purpose, which was to "avoid the injustice and rigidity of an absolutist concept of fault in negligence law."[15] La Forest JA criticized *Smith*, stating:

> The important fact is that there is no authority requiring the application of absolutist common law tort notions of responsibility to contracts. Indeed, as Pigeon J. observes, there never developed in contract law the rigid rules against apportionment of loss that prevailed in tort law and, in fact, loss was apportioned in the rare cases where separate breaches of contract contributed to a single loss. So there does not seem to be any inherent requirement in contract law dictating an absolutist doctrine of liability.[16]

Perhaps for this reason, in Ontario, the application of negligence legislation to contractual claims has been soundly rejected. In *Dominion Chain Co v Eastern Construction Co* ("*Giffels*"), the Ontario Court of Appeal held that while the term "fault" in section 2(1) of *The Negligence Act* was likely broad enough to capture breach of contract, the term "tort-feasors" in other parts of the Act limited the ambit of the term "fault".[17] Instead, Ontario courts found a different way to apportion damages between negligence and breach of contract: using common law contractual principles.

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11 *ACA Cooperative*, *supra* note 8 at para 112.

12 *Ibid* at para 121. S.4 of the Nova Scotia *Contributory Negligence Act* states "Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree to which each person was at fault."

13 *Doiron*, *supra* note 7 at para 40 contains a list of case law that follows this approach.

14 *Ibid* at para 49.

15 *Ibid* at para 51.

16 *Ibid* at para 55

17 *Dominion Chain Co v Eastern Construction Co* (1976), 12 OR (2d) 201 at para 9, 68 DLR (3d) 385 (ON CA), aff'd on other grounds [1978] 2 SCR 1346, 84 DLR (3d) 344 (SCC) [*Giffels*]. This decision was affirmed by the SCC but the Court did not make a finding on this point. Ontario cases since have consistently followed this approach: *Treaty Group Inc v Drake International Inc*, [2005] OJ No 5232, 144 ACWS (3d) 383 (ON SC); *Cosyns v Smith* (1983), 146 DLR (3d) 622, [1983] OJ No 3006; *Parkhill Excavating Limited v Robert E. Young Construction Limited*, 2017 ONSC 6903 [*Parkhill*].

Common Law Contractual Principles

Two common law contractual principles have been used to justify apportionment between tort and contract: the principle of causation and the principle of reasonable foreseeability.[18]

The principle of causation was used in *Smith* as a secondary justification for apportionment. Pigeon J explained that contributory negligence was never a defence in contract.[19] However, according to the principle of causality, separate breaches of contract contributing to the same loss allow a trial judge to apportion damages between the two defendants, even though they breached different contracts.[20] Pigeon J theorized that the rationale for the apportionment was the same in contract and negligence: to prevent a party at fault from escaping liability.[21] Therefore, at least in the case of separate breaches of contract contributing to the same loss, apportionment is permitted.[22]

In contrast, the New Brunswick Court of Appeal in *Doiron* relied on the reasonable expectations of the parties. *Doiron* dealt with a breach of contract flowing from the plaintiff's negligent behaviour. La Forest JA stated that extending apportionment to contractual breaches would not be the rule in all cases, but would depend on "the public expectations about the type of contract involved as well as the particular expectations one must assume the parties had having regard to all the circumstances, including the relationship of the parties, their past dealings, the nature of the contract, and so on."[23] In a subsequent case, the Alberta Court of Appeal found this analysis "persuasive" in the context of apportionment between multiple defendants liable in tort and contract, and apportioned the damages.[24]

Conclusion

As the cases discussed above show, the law on apportionment between contractual and tortious causes of action remains unsettled. The Supreme Court of Canada has not yet commented on the various methods of apportionment applied to contractual claims or between negligence and contractual claims, other than in *obiter*; in *Giffels*, the SCC declined to rule on the Court of Appeal's rejection of a broad interpretation of negligence legislation in favour of using contract law causation principles.[25] Regardless of this uncertainty, one outcome is clear: if two people are culpable, the court will find a way to apportion damages to both of them.

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18 *Parkhill*, *supra* note 17 at para 209.
19 *Smith*, *supra* note 7 at para 51.
20 *Ibid* at para 57.
21 *Ibid*.
22 *Ibid*.
23 *Doiron*, *supra* note 7 at paras 62 and 64.
24 *Petersen*, *supra* note 7 at para 49.
25 *Dominion Chain Co v Eastern Construction Co*, [1978] 2 SCR 1346 at para 14, 84 DLR (3d) 344 (SCC). Although Laskin CJ was prepared to assume for the purposes of the case that when two contractors "each of which has a separate contract with a plaintiff who suffers the same damage from concurrent breaches of those contracts, it would be inequitable that one of the contractors bear the entire brunt of the plaintiff's loss".

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Annapolis Group Inc v Halifax Regional Municipality, 2022 SCC 36 - A new chapter on *de facto* Expropriation?

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Expropriation has been described as the "forcible acquisition by the Crown of privately-owned property, for public purposes"[1] and as an "ultimate exercise of governmental authority."[2] Described like that, it is not surprising that there is a rich history of caselaw concerning the exercise. Most recently, in October 2022, the Supreme Court of Canada (the "SCC") released its decision in *Annapolis Group Inc v Halifax Regional Municipality*, reconsidering the test for *de facto* expropriation, also known as constructive taking.

The *Annapolis Group* decision (in a 5-4 majority) suggests a shift in the common-law approach to constructive taking by emphasizing that the authority's acquisition of "beneficial interest" (a phrase that had become central in expropriation) to mean an advantage flowing from the land. However, the SCC's decision addressed only a partial summary judgment motion by Halifax to strike the respondent's ("Annapolis") claim for expropriation on the basis there was no cause of action because there was no actual acquisition. Thus, the SCC did not actually apply its stated approach to the merits of the dispute - instead, Annapolis was permitted to trying to prove its expropriation claim against Halifax.

Well before *Annapolis Group*, in 2006 the SCC had released the decision in *Canadian Pacific Railway v Vancouver*[3] and in doing so arguably set a high-water mark for claimants trying to establish a constructive taking. With *CPR v Vancouver*, claimants were required to show a public authority gained a beneficial interest in property through regulation, which some courts began to interpret as an acquisition of an interest in the subject land.[4] With the ruling in *Annapolis Group,* the SCC expands on the assessment surrounding a constructive taking, and (suggest the SCC dissenters) may have lowered the threshold for aggrieved owners advancing claims for same. This article discusses the treatment of constructive taking in Canada, as it informed the majority in *Annapolis Group*, and the potential implications *Annapolis Group* could have on subsequent decisions applying the reformulated approach.

Annapolis Group Inc v Halifax Regional Municipality

The history leading to *Annapolis Group* warrants review. Starting in the 1950s, Annapolis acquired acres of property near Halifax with the intention of developing and reselling the land. In 2006, the Regional Municipality of Halifax introduced a Municipal Planning Strategy that set

[1] *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 60 at para 18 [hereinafter *Annapolis Group*].
[2] *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32 at para 20.
[3] *Canadian Pacific Railway v Vancouver (City)*, [2006] 1 SCR 227 [hereinafter *CPR v. Vancouver*].
[4] *Annapolis Group*, para. 41.

zoning for future development, including over Annapolis' land. In the years that followed, Annapolis unsuccessfully attempted to obtain development approval. Eventually, it brought a claim against Halifax for expropriation (along with other claims including as unjust enrichment), alleging Halifax's zoning measures deprived the land of all reasonable or economic use and in doing so, effectively expropriated the land without any compensation.

Before Annapolis could go to trial, Halifax sought partial summary dismissal of Annapolis' expropriation claim, alleging that claim had no reasonable chance of establishing Halifax had acquired a beneficial interest in the land or flowing from the land, or that Annapolis had been deprived of all reasonable use. Halifax argued there had been no change of use, that there were no material facts in dispute, and that Halifax's continuance of existing zoning could not constitute the basis for an expropriation claim.

The motion judge dismissed Halifax's application, finding (among other things) that there were material facts in dispute surrounding the property's use as a park, its promotion of same, and the interplay with future planning approvals. However, the Nova Scotia Court of Appeal overturned, and struck Annapolis' claim.

In the SCC's majority ruling, the Court restored the motions judge's decision, allowing Annapolis future opportunity to advance its claim for constructive taking via trial. The SCC majority examined the jurisprudence upon which the *CPR v Vancouver* test was based, finding that the central phrase of "acquiring a beneficial interest" more concerned the *effect* of a regulation on a landowner, and less on whether proprietary interest in the land was actually acquired by the governing authority.[5]

The Court held that the pre-*CPR v Vancouver* jurisprudence supported the view that "beneficial interest", which the authority must acquire to ground an expropriation claim, did not refer to actual acquisition of interest by the authority, but rather, more broadly to mean "an advantage" flowing from the landowner to the Crown.[6] By interpreting *CPR v Vancouver* in a seemingly restrictive manner and requiring a claimant to establish an authority's actual acquisition of the subject lands, the SCC's majority cited a risk of eroding the distinction between *de facto* and *de jure* expropriation.

In contrast, and harkening the reasoning in *CPR v Vancouver*, the four-judge dissent in *Annapolis Group* disagreed with the majority, finding that "beneficial interest" should be understood in proprietary terms, and not the broader notion of an "advantage." The minority opined that the majority's accepting Annapolis' plea to deviate from the Court's decision in *CPR v Vancouver* could "radically" change the landscape of municipal planning by affording a "windfall to developers" and expanding the potential liability of municipalities engaged in land use regulation.[7]

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[5] *Annapolis Group*, at para 38.
[6] *Annapolis Group*, at para 38 & 40.
[7] *Annapolis Group*, at para 91.

While the decision in *Annapolis Group* stemmed from a motion for partial summary judgement, it suggests future reform in application of the test for constructive taking.

Expropriation, More Broadly?

Annapolis Group explores much of the central tenants of expropriation. Expropriation is typically described in two forms: (i) actual or *de jure* expropriation, whereby a government authority formally acquires title or possession of the land via legislation; and (ii) constructive taking or *de facto* expropriation, where there is an effective appropriation of private property via government exercise of regulatory powers that significantly impairs an owner's use and enjoyment of property. In Quebec, courts also recognize disguised expropriation, which is based on the *Civil Code of Québec,* but which focusses on use much less on the "acquisition branch of the CPR test".

With the event of a common law expropriation there is a presumptive right to compensation, although rebuttable via clear statutory language.[8] Perhaps because clear statutory language can limit use without creating corresponding rights to compensation, courts' considering expropriation may be confined to deciding whether the regulation in question entitles the respondent to compensation, rather than passing judgment on the manner in which a legislature "apportions the burdens [between private and public interests] flowing from use regulation."[9]

Historical Treatment of Constructive Taking and Discussed in Annapolis Group

In *Annapolis Group*, the SCC explored the pre-*CPR v Vancouver* case law to underscore consistency with the jurisprudence discussing "beneficial interest." First up, was the SCC's 1979 decision in *Manitoba Fisheries Ltd v The Queen*[10]*,* which yields perhaps the clearest support for the notion that intangible interests[11], other than land itself, may be considered property and subject to expropriation.

In *Manitoba Fisheries,* the Court was asked to decide whether a regulation restricting a corporation's rights on fish marketing and export had formed a taking.[12] The Court concluded that the impugned regulation "had the affect of depriving the appellant of its goodwill" and "rendering its physical assets virtually useless and that the goodwill so taken away constitutes property of the appellant for the loss of which no compensation whatever has been paid."[13] Not only did the regulation deprive the appellant of its rights, but in essence, transferred the

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[8] *Annapolis Group,* at para 21; see also *Attorney-General v De Keyser's Royal Hotel*, [1920] AC 508 (HL) at p 542.
[9] *Mariner Real Estate v Nova Scotia (AG)*, 1999 NSCA 98 at para 41 [hereinafter *Mariner*].
[10] *Manitoba Fisheries Ltd v The Queen*, [1979] 1 SCR 101 [hereinafter *Manitoba Fisheries*].
[11] Such as an advantage flowing from the land.
[12] The claimant, Manitoba Fisheries Ltd. ("MF"), was a privately held commercial fishery. Parliament enacted an Act which granted a federal Crown corporation a monopoly over the export of fish in Manitoba but allowed the corporation to delegate licenses to individual enterprises, such as MF. MF did not receive a license and went out of business.
[13] *Manitoba Fisheries*, at p 118.

appellants goodwill to the Crown. The Court focused on the *effect* of the regulation and the advantage – good will in a business enterprise - acquired therefrom by the public authority via regulation.

By virtue of its legislation (creating a provincial monopoly), the government had gained an economic advantage (in respect of the export of fish) that would otherwise have flowed to the corporation, but not actual acquisition of property. This led to the conclusion that "once it is accepted that the loss of goodwill of the appellant'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 statuary compulsion acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown."[14]

Next, the SCC examined the 1985 decision in *R v Tener*[15], which considered the Crown's gain in terms of non-monetary "value."[16] In *Tener* the Province of British Columbia denied the Teners a permit for mineral development and exploration on lands that were eventually located within a provincial park. Estey J., writing for the majority, indicated that the Province did not merely prevent the respondent from realizing their interests, but expropriated their interest in that it acquired, through refusal of extraction, the right granted to the Teners. Specifically, although the Teners maintained their mineral rights, the Province had regulated away rights to mineral exploration and so recovered the Tener's mineral rights while securing the advantage of preserving the land as a public park. In concurring, Wilson J. opined that the impugned regulation had the effect of depriving the respondent of their goodwill and transferring an *advantage* to the government, much like in *Manitoba Fisheries*. That the Teners need not to have established that the Province actually acquired a proprietary interest in land was underscored by Wilson J.'s reasons: "while the grant or refusal of a licence or permit may constitute mere regulation in some instances, it cannot be viewed as mere regulation when it has the effect of defeating the respondents' entire interest in the land."[17]

In 2006, the SCC released its decision in *CPR v Vancouver* confirming a two-part test for constructive taking: (i) a public body has acquired a beneficial interest in the subject property or flowing from it; and (ii) that it deprived the owner of all reasonable use of their property.[18] In *CPR v Vancouver*, the SCC held that the City of Vancouver did not engage in constructive taking by enacting a by-law denying Canadian Pacific Railway ("CPR") the ability to develop its land for commercial or residential use. Chief Justice McLachlin (writing a unanimous decision)

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[14] *Manitoba Fisheries*, at p 110.
[15] *R v Tener*, [1985] 1 SCR 533 [hereinafter *Tener*].
[16] *Ibid* at paras 59-60. Here the non-monetary "value" obtained by the Crown was an *advantage* – specifically, preserving the land as a provincial park in the public interest.
[17] *Tener,* at para. 34. Shortly after in 1991, the Province of British Columbia denied the issuance of a resource permit for exploration and development work on private land in *Casamiro Resource Corporation v British Columbia,* 1991 CanLII 211 (BC CA). Writing for the Court, Southin J held, "this order in counsel has the same practical effect as the refusals in the *Tener* case of a park use permit. It has reduced the Crown grant to meaningless pieces of paper…" In both cases, the Province's property rights in Provincial parks were enhanced through the elimination of subsurface rights that could have been realized through mining. In turn, an advantage had flowed to the Crown absent any formal acquisition of land.
[18] *CPR v. Vancouver*, at para 30.

accepted that acquisition of a beneficial interest related to property suffices to establish the first requirement of the test for constructive taking. However, she did not accept that development freeze, which provided "assurance that the land will be used or developed in accordance with [Vancouver] vision" (i.e., a public park) amounted to a beneficial interest.[19] As a result, some later courts appear to have interpreted this to mean that only a proprietary interest in property could satisfy the beneficial interest branch of the test.

The ruling in *CPR v Vancouver* had immediate effect. Namely, after *CPR v Vancouver*, plaintiffs not only had to show that the government acquired a legal interest, but that such an interest was tied to possession of the land. As Professor Russell Brown (now Justice) observed in academic articles, the two-step test established in *CPR v Vancouver*, and particularly the requirement to prove an acquisition of beneficial interest, rendered constructive taking almost unattainable, collapsing the distinction between *de jure* and *de facto* expropriation.[20] Thus the challenge in *Annapolis Group* appeared to be reconciling *CPR* with the prior jurisprudence.

Takeaways

The decision in *Annapolis Group* echoes many of the sentiments in the pre-*CPR v Vancouver* case law. The Court noted that the test for constructive taking is that stated by *CPR v Vancouver*. However, because the test focuses on the *effects* of a regulation and the *advantages* flowing from it, the decision suggests that future courts assessing constructive taking should consider, among other things, the nature of the land, nature of the government action, notice to the owner of restrictions at the time of purchase, and whether the restrictions are consistent with their reasonable expectations.[21]

Apart from notions that *CPR v Vancouver*, may have set the bar too high, certain recent courts have been able to apply the *CPR v Vancouver* analysis in the manner suggested in *Annapolis Group*. For instance, in *Compliance Coal Corporation v British Columbia*[22], the Court was satisfied that the first branch of the *CPR* test had been established where the Province had eliminated mining, which enhanced the value of surface lots owned by British Columbia. The Court opined that this was an "arguable equivalent to the benefit gained by the Province in *Tener* and *Casamiro*."[23] Similarly, Quebec courts appear to have not applied as restrictive a beneficial or "proprietary" interest requirement.[24]

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[19] *CPR v Vancouver*, at para 33.
[20] See Russell Brown, "Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience" (2009) 1 :3 International Journal of Law in the Built Environment 179 at p 186.
[21] *Annapolis Group*, at para 45.
[22] *Compliance Coal Corporation v British Columbia (Environmental Assessment Office)*, 2020 BCSC 621.
[23] *Ibid* at para 96.
[24] In *Dupras v City of Mascouche*, 2022 QCCA 350, the Quebec Court of Appeal agreed with prior decisions whereby the Quebec Court held that expropriation may result from a restrictive by-law or from the combination of a by-law and physical appropriation of land. See also *Montreal (City) v Benjamin*, 2004 CanLII 44591 where the Quebec Court of Appeal granted compensation for disguised expropriation to the owner of land following the adoption of by-laws having the effect of transforming the zoning from industrial to zoning restricted to limited public uses, thus depriving the owner of any use of his land.

Following *Annapolis Group*, claimants will still need to prove that through regulation, a public authority has gained or acquired an "advantage", but that the scope for a *de facto* expropriation may be greater. Thus, it remains to be seen whether courts applying *Annapolis Group* relax the stringent requirements for what constitutes an authority's acquisition of interest. Suffice to say, the discussion in *Annapolis Group* is unlikely to be the last word on the modern test for constructive taking.