

# REGULATORY TAKINGS IN CANADA

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## I. INTRODUCTION

Canadian law lacks a robust “regulatory takings” doctrine, a phenomenon partially explained by Canada’s unique constitutional backdrop. Some Canadian provinces have statutes that provide greater protection for certain property rights. Canada also has international trade obligations that require it to protect foreign investors’ property rights. The only indirect recognition and remuneration of regulatory takings is encompassed in a longstanding interpretive presumption in favor of compensation in situations involving expropriation. Yet, despite all of these safeguards to protect property rights from regulatory takings and despite recent developments in regulatory takings jurisprudence, property rights receive minimal protection under Canadian law.

## II. CONSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF PROPERTY RIGHTS IN CANADA

Canada’s constitutional framework lacks safeguards to protect property owners from governments that unjustifiably expropriate private property. In many instances, it fails to adequately compensate such property owners.

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### A. *The 1867 Constitution*

Canada's constitution was originally a British statute called the Constitution Act, 1867 (the "1867 Constitution").<sup>1</sup> The 1867 Constitution stated that Canada was to have a constitution "similar in principle" to the British Constitution.<sup>2</sup> However, the 1867 Constitution, like the British Constitution, lacked a comprehensive bill of rights. The 1867 Constitution did not explicitly protect individual human rights. The only legal protection for freedom and equality came from provincial common law, except in Quebec, where protection came from the Civil Code. Even so, provincial legislatures in all provinces have the supreme authority to change provincial common law and civil codes. Specifically, provincial legislatures may change private property laws, but they are expected to do so realizing that they are democratically-elected bodies.

Extra-judicial procedural safeguards against regulatory takings appeared in several places. At the provincial level, federally-appointed provincial lieutenant governors could veto provincial property-expropriating legislation. However, in reality, provincial lieutenant governors did not override such legislation because they were hesitant to veto legislation that was enacted by democratically-elected provincial legislatures. In addition, upper houses of provincial governments acted as chambers of sober second thought, much like the House of Lords in the United Kingdom. However, these chambers were eventually abolished.

The federal government can simply "disallow" property-expropriating legislation. However, like the provincial lieutenant governors, the federal government in actual practice does not override such legislation by democratically-elected provincial legislatures.

The Federal Senate is explicitly designated to protect the interests of the property-owning classes.<sup>3</sup> The Canadian Constitution requires that Senate members have substantial net worth and hold a specified amount of real property.<sup>4</sup> Because the federal government lacks primary authority over property and civil rights, the Senate plays a limited role in protecting property rights. In theory, the Senate can block legislation from the House of Commons that expropriates property without compensating property owners. But even where the Senate has the authority to block such

1. Constitution Act, 1867, 30 & 31 Vict. ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

2. *Id.* pmbl.

3. *Id.* § 23.

4. Constitution Act, 1867, 30 & 31 Vict. ch. 3, § 23(3), as reprinted in R.S.C., No. 5 (Appendix 1985).

legislation, it rarely does so for several reasons. First, the Senate lacks democratic legitimacy vis-à-vis the democratically-elected House of Commons. Second, the Senate lacks moral authority because it consistently fails to account for the increasing population of the western Canadian provinces. In fact, some critics have charged that Senate membership has become a highly paid patronage award bestowed on friends of the governing party.<sup>5</sup>

### B. *The Canadian Bill of Rights*

In 1960, the federal government enacted the Canadian Bill of Rights, which protects the right not to be deprived of “life, liberty, security of the person and enjoyment of property” except by “due process of law.”<sup>6</sup> However, its reach is limited in two ways. First, the Canadian Bill of Rights applies only to the federal government, and subsequent legislatures have the authority to repeal it.<sup>7</sup> Second, under the Canadian Bill of Rights, measures infringing on property owners’ right to the enjoyment of property need only satisfy procedural fairness;<sup>8</sup> no case holds that “due process of law” also requires substantive fairness, such as just compensation.

### C. *The 1982 Constitution*

In 1982, Canada’s constitution underwent its most extensive overhaul since its enactment in 1867. The centerpiece was the Canadian Charter of Rights and Freedoms (the “Charter”).<sup>9</sup> The Charter differed from the Canadian Bill of Rights in that the Charter applied to both the federal and provincial governments. In addition, the Charter could only be altered through a formal amendment process due to its constitutional character.<sup>10</sup>

Section 7 of the Charter recognizes the right to “life, liberty, and security of the person.”<sup>11</sup> The framers of the 1982 Constitution avoided

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5. See, e.g., Gordon Gibson, *Challenges in Senate Reform: Conflicts of Interest, Unintended Consequences, New Possibilities*, 83 PUB. POL’Y SOURCES 1 (2004), available at <http://www.fraserinstitute.ca/admin/books/files/ChallengesInSenateReform.pdf>.

6. Canadian Bill of Rights, 1960 S.C., ch. 44 (Can.).

7. *Id.* § 1(a).

8. *Authorson v. Canada (A.G.)*, [2003] 2 S.C.R. 40 (Can.).

9. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

10. The amendment process requires the consent of seven provinces with half the population of Canada as well as the Federal House of Commons.

11. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 7 (U.K.). In *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 (Can.), Chief Justice Dickson compared the wording of section 7 to the “Due Process” Clause in the American Bill of Rights and

recognizing property and other economic rights because they feared that Canadian courts would use it to block social welfare legislation,<sup>12</sup> similar to how U.S. courts invoked the Due Process Clause to block New Deal legislation during the 1930s and 1940s.<sup>13</sup> But closer inspection of United States due process cases reveals that U.S. courts did not block social welfare legislation by invoking property interests; they blocked legislation by construing the *liberty* interest to extend to freedom of contract.<sup>14</sup> Canadian courts construed the omission of “property” from section 7 of the Charter as a strong indication that the courts must avoid reviewing government decisions involving economic matters and social spending.<sup>15</sup> Thus, in construing “security of the person” under section 7, the omission of the word “property” elsewhere has been interpreted as signaling that the right to social welfare is not included.<sup>16</sup>

Section 8 of the Charter prohibits “unreasonable search and seizure.”<sup>17</sup> Canadian courts construe this provision narrowly to include actions for property takings during criminal investigations and to exclude deliberate property expropriations.<sup>18</sup>

noted: “The intentional exclusion of property from s. 7, and the substitution thereof of ‘security of the person’ . . . leads to a general inference that economic rights as generally encompassed by the term ‘property’ are not within the perimeters of the s. 7 guarantee.” *Id.* at 1003.

12. See Chief Justice Dickson’s comments in *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 1003 (Can.).

13. See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905). The framers also avoided using the phrase “due process of law,” fearing that Canadian Courts would interpret the clause to include both substantive and procedural fairness. Instead, the Charter refers to “principles of fundamental justice.” Nevertheless, the Supreme Court of Canada has construed “principles of fundamental justice” to include substantive fairness. See, e.g., Reference re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486, 504 (concluding that the limits of “principles of fundamental justice” were left to be defined within the acceptable sphere of judicial activity).

14. See *Lochner*, 198 U.S. at 53 (“The right to purchase or sell labor is part of the liberty protected by [the Fourteenth Amendment].”).

15. See, e.g., Reference re ss. 193 and 195.1(1)(C) of the Criminal Code, [1990] 1 S.C.R. 1123 (Can.).

16. See *Gosselin v. Quebec (A.G.)*, [2002] 4 S.C.R. 429, 491 (Can.) (noting that whether section 7 could operate to protect economic rights was an open question).

17. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 8 (U.K.).

18. *Becker v. Alberta*, [1983] 148 D.L.R. (3d) 539 (Alta. C.A.) (“Section 8 does not extend to the taking of real property by expropriation.”). In *Porter v. Canada*, a federal court examined the provisions of the Canadian Charter of Rights and Freedoms and historical and current theories of forfeiture law, including comparative American law, to arrive at an appropriate balance between the longstanding practice of forfeiture and the contemporary emphasis on the sanctity of individual rights and freedoms. *Porter v. Canada*, [1989] 3 F.C. 403, 410–12 (T.D.).

In *Porter*, the plaintiff was apprehended for transporting “illegally manufactured spirits” and had his 1986 Toyota truck, valued at \$14,000, seized under the Excise Act. *Porter*, 3 F.C. at 406–07. The Act provided that all such spirits and all vehicles used to transport them were to be forfeited to the Crown. *Porter*, 3 F.C. at 407. The federal court considered whether this forfeiture provision was

Section 11 prohibits “cruel or unusual treatment” and is one of the few sections that indirectly protects property rights. For example, excessive fines or property forfeiture could be viewed as having an unreasonably harsh impact on the offender.<sup>19</sup>

#### *D. Implied Constitutional Rights*

Against the 1930s backdrop of Alberta’s “social credit” government, the Supreme Court of Canada considered whether there was an “implied bill of rights” in Canada, where judicially enforceable safeguards against extreme legislative action could be inferred from the structure of the Canadian Constitution.<sup>20</sup> Some judges had suggested that the Canadian Constitution’s preamble, which refers to Canada as having a constitution “similar in principle” to that of the United Kingdom, permitted the courts to recognize and enforce certain unwritten principles.<sup>21</sup>

Although the Supreme Court in *A.G. (Can.) v. Montreal*<sup>22</sup> rejected the idea that there is an implied bill of rights, the Court has in more recent times acknowledged the possibility that Canada’s constitution includes certain unwritten principles.<sup>23</sup> Nevertheless, the Court has noted that there are compelling reasons to insist upon the primacy of the written

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rendered inoperative due to the Charter. *Porter*, 3 F.C. at 418. The federal court determined that the action should be dismissed and that the forfeiture did not affect the plaintiff’s rights under the Charter. The court reasoned as follows:

These cases lead one to the conclusion that Section 8 [of the Charter] is designed primarily to protect the privacy interests of individuals and affords protection to property only where that is required to uphold the protection of privacy. (In that sense, it might be said to be a “dependent” property right.) In the case before me, there is no allegation that any privacy interest of the plaintiff has been violated. The search which resulted in the discovery of the illicit spirits is presumed to be valid. Therefore, the subsequent seizure as forfeit (based on actual discovery of the spirits, not simply on a reasonable belief of their presence) cannot be gainsaid on the basis of the minimal “dependent” property rights which section 8 may be said to afford.

*Porter*, 3 F.C. at 419–20.

19. See *Bishop v. Annapolis*, [1986] 37 L.C.R. 1, ¶ 19 (N.S.S.C.). The court held that since neither sections 7 nor 8 of the Charter protected property rights, the Charter did not affect the power of expropriation conferred by the Expropriation Act of Nova Scotia, even though no provision in that Act provided for a pre-expropriation hearing.

20. See generally *In matter of Three Bills Passed by the Legislative Assembly of the Province of Alberta*, [1938] S.C.R. 100 (concluding that because legislatures are democratically elected means there must be some protection for free expression). This case is often referred to as the “Alberta Press case.”

21. See, e.g., *Reference Re Alberta Statutes*, [1938] S.C.R. 100 (Can.) (Duff, J.), available at <http://www.canlii.org/en/ca/scc/doc/1938/1938canlii1/1938canlii1.html>.

22. *A.G. (Can.) v. Montreal*, [1978] 2 S.C.R. 770, 796–97 (Can.).

23. *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, ¶¶ 60–61 (Can.).

constitution, regardless of the existence of such unwritten principles.<sup>24</sup> Regardless, it is unlikely that these unwritten principles include the protection of property rights because the framers of the modern written constitution refused to recognize this principle.

### III. PROTECTION BEYOND THE CANADIAN FEDERAL GOVERNMENT

#### A. *Provincial Protections*

Several provinces have enacted statutes to protect property rights. However, like the Canadian Bill of Rights, these statutes have only quasi-constitutional force.

Alberta's "Personal Property Bill of Rights" (Alberta Bill of Rights) provides that the government can take property only if there is a process in place to determine compensation.<sup>25</sup> First, the Alberta Bill of Rights protects only tangible property that can be physically touched, seen, moved, or physically possessed.<sup>26</sup> The statute explicitly excludes intangible personal property, incorporeal rights, and interests in land.<sup>27</sup> Second, the taking of the property must amount to a permanent taking of title.<sup>28</sup> The statute does not list lesser interferences, such as regulatory interference with the ability to use the property. Finally, nothing in the statute requires that the compensation be "just" or "adequate." Alberta is considered the most conservative province, yet its statute weakly protects property from government expropriation.

On the opposite end of the spectrum is Quebec's "Charter of Human Rights and Freedoms" (Quebec Charter), the counterpart to the Federal Charter.<sup>29</sup> The Quebec Charter applies to both government and private conduct. Unlike human rights codes that exist in other provinces, the Quebec Charter protects civil liberties<sup>30</sup> and privacy<sup>31</sup> and guarantees protection against discriminatory treatment.<sup>32</sup> However, the Quebec Charter's provisions governing property rights<sup>33</sup> are as narrow and limited as those governing the Alberta Bill of Rights.

24. *Id.* ¶ 65.

25. Alberta Personal Property Bill of Rights, R.S.A., ch. A-31, § 2 (2000).

26. *Id.* § 1(b).

27. *Id.* § 1(b)(i)–(iii).

28. *Id.* § 2(b).

29. Charter of Human Rights and Freedoms R.S.Q., ch. C-12.

30. *Id.* § 3.

31. *Id.* §§ 5, 9.

32. *Id.* §§ 10–20.

33. Section 6 provides: "Every person has a right to the peaceful enjoyment and free disposition

*B. Canada's Obligations Under the North American Free Trade Agreement (NAFTA)*

Surprisingly, chapter 11 of NAFTA contains language that seems to protect foreign investors' property rights more robustly than Canadian law protects its domestic investors' property rights. Article 1105, regarding the minimum standard of treatment, states that investors from other NAFTA states must be treated "in accordance with international law, including fair and equitable treatment and full protection and security."<sup>34</sup> Article 1110, regarding expropriation and compensation, states that NAFTA parties may not "*directly or indirectly nationalize or expropriate* an investment of an investor of another Party in its territory or take a measure *tantamount to nationalization or expropriation* of such an investment."<sup>35</sup> NAFTA makes exceptions where a government expropriates property for a public purpose, on a nondiscriminatory basis, in accordance with due process of law and article 1105(1), and on payment of compensation.<sup>36</sup>

An investor aggrieved by actions that violate chapter 11 has the right to bring a claim for compensation directly against the host state.<sup>37</sup> Because it would be politically and economically difficult for Canada to withdraw from NAFTA, the treaty provisions have quasi-constitutional force.

In *Metalclad Corp. v. Mexico*,<sup>38</sup> a NAFTA arbitration panel found that Mexico expropriated Metalclad's rights to operate a landfill for hazardous waste.<sup>39</sup> Initially, the Mexican federal government assured Metalclad that the company had everything necessary and did not need a municipal construction permit.<sup>40</sup> On this assurance, Metalclad openly and notoriously constructed the landfill until the municipality issued a "Stop Work Order," on the basis of Metalclad's failure to obtain a municipal construction permit.<sup>41</sup> The federal government then assured Metalclad that if it applied for a municipal construction permit, the municipality would have no legal basis for denying the permit, and the municipality would issue the permit

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of his property, except to the extent provided by law." *Id.* § 6. Section 7 provides: "A person's home is inviolable." *Id.* § 7. Section 8 provides: "No one may enter upon the property of another or take anything therefrom without his express or implied consent." *Id.* § 8.

34. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105, ¶ 1, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

35. *Id.* art. 1110, ¶ 1 (emphasis added).

36. *Id.* art. 1110 ¶ 1(a)-(d).

37. *Id.* arts. 1116, 1117.

38. *Metalclad Corp. v. Mexico*, ICSID (W. Bank) Case No. ARB(AF)/97/1 (2000).

39. *Id.* ¶ 104.

40. *Id.* ¶ 80.

41. *Id.* ¶ 87.

as a matter of course.<sup>42</sup> Thirteen months after Metalclad submitted a permit application—well after Metalclad completed construction of the landfill—the municipality denied the permit without any basis relating to flaws in the proposed physical construction or defects in the site.<sup>43</sup> The municipality denied the permit at a meeting to which Metalclad received no notice, no invitation, and no opportunity to appear.<sup>44</sup> In addition to finding that Metalclad was not treated fairly under article 1105,<sup>45</sup> the NAFTA panel found that the Mexican government took a measure tantamount to expropriation in violation of article 1110 when it acquiesced to the municipality’s denial of the permit, even though it had endorsed and approved the project.<sup>46</sup>

In contrast, the panel in *S.D. Myers, Inc. v. Government of Canada* took a narrow approach to the scope of article 1110.<sup>47</sup> The majority held that an “expropriation” or measure tantamount did not occur because (1) the investor’s loss was only temporary, and (2) Canada was not enriched by the deprivation.

The majority agreed with the *Pope & Talbot* tribunal<sup>48</sup> that measures “tantamount to expropriation” must be measures such as “creeping expropriation,” which occurs in steps often disguised as other kinds of measures rather than one overt and complete taking.<sup>49</sup> When expropriation happens over time, such as when land is first designated for future public use but is later expropriated, the landowner’s entitlement to compensation likely vests only upon the actual taking or final expropriation, when the landowner presumably no longer has the ability to continue to utilize the land.

42. *Id.* ¶ 88.

43. *Id.* ¶ 90.

44. *Metalclad Corp. v. Mexico*, ICSID (W. Bank) Case No. ARB(AF)/97/1, ¶ 91 (2000).

45. *Id.* ¶¶ 100–01.

46. *Id.* ¶ 104.

47. *S.D. Myers, Inc. v. Government of Canada* (U.S. v. Can.) (Nov. 13, 2000), [http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcnadapartialaward\\_final\\_13-11-00.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcnadapartialaward_final_13-11-00.pdf).

48. *Pope & Talbot, Inc. v. Government of Canada* (U.S. v. Can.) (June 26, 2000), <http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF>.

49. For further information on the concept of creeping expropriation, see Patrick J. Donovan, *Creeping Expropriation and MIGA: The Need for Tighter Regulation in the Political Risk Insurance Market*, 7 GONZ. J. INT’L L. (2003-04), available at <http://www.gonzagajil.org/pdf/volume7/Donovan/Donovan.pdf>. The article defines creeping expropriation as follows:

Creeping expropriation occurs when a governmental regulatory body changes property rights in the attempt to disrupt the enterprise to the point of non-functionality. This may be accomplished through the raising of taxes or fees charged the enterprise, the stiffening of regulation, or the institution of non-tariff barriers.

*Id.* at 10.



In a separate concurring opinion, Arbitrator Bryan Schwartz renewed expressed concerns that article 1110 would be used by investors in ways that would unduly impair the ability of host governments to act in the public interest in such areas as environmental regulation.<sup>50</sup> Schwartz stated that the export ban did not constitute an expropriation, after noting the debate over whether article 1110 contains a “regulatory takings” doctrine.<sup>51</sup> Given the cautious approach NAFTA arbitrators have generally taken to “regulatory takings,” chapter 11 of NAFTA will not likely be used except in exceptional circumstances where a remedy is needed for measures that fall short of the deprivation of property rights.<sup>52</sup>

Ideally, better remedies for “regulatory takings” under international law will pressure Canadian authorities to adopt a more generous compensatory approach for their own citizens. For example, suppose that regulatory actions trigger a NAFTA right to compensation for two American companies and that a Canadian company was involved in similar activities. The Canadian company would argue it is unjust that Canadian law does not protect its right to compensation. Canadian authorities may agree and ultimately provide compensation. However, the cautious approach that NAFTA arbitrators have taken regarding regulatory takings suggests that comparing the treatment of foreign nationals to Canadian nationals will rarely be a source of useful political leverage.

#### IV. THE INTERPRETIVE PRESUMPTION AS APPLIED TO REGULATORY TAKINGS JURISPRUDENCE

In developing common law and construing statutes, judges have able to provide some protection for property rights, subject to legislative override. Today, expropriating legislation is construed as containing an implicit and legally enforceable right to compensation unless a legislature provides otherwise.<sup>53</sup>

Property rights in Canada do receive legal protection in one respect. There is a common law interpretive presumption that legislatures intend

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50. S.D. Myers, Inc. v. Government of Canada (U.S. v. Can.) (Nov. 13, 2000), [http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcnadapartialaward\\_final\\_13-11-00.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcnadapartialaward_final_13-11-00.pdf) [hereinafter Schwartz].

51. Schwartz, *supra* note 50, ¶¶ 202–23.

52. See generally Emma Aisbett, Larry Karp & Carol McAusland, *Regulatory Takings and Environmental Regulation in NAFTA's Chapter 11* (Dep't of Agric. & Res. Econ., UCB, CUDARE Working Paper 1014, 2006), available at [http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1108&context=are\\_uch](http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1108&context=are_uch) (providing an in-depth analysis of the role of chapter 11 of NAFTA in environmental regulation).

53. See, e.g., *British Columbia Med. Ass'n v. British Columbia*, [1984] 58 B.C.L.R. 361 (C.A.), *leave to appeal to Supreme Court of Canada refused*, [1985] 61 B.C.L.R. xxxii (S.C.C.).

expropriatory legislation to contain the right of compensation, unless the statutes expressly provide otherwise.<sup>54</sup> In applying this presumption, Canadian courts have refused to develop an aggressive “regulatory takings” doctrine.<sup>55</sup>

### A. *Compensation Denied*

In most cases, compensation is denied to the affected property owner. The most common ground for denying compensation, according to Alan Macek, is a finding by the courts that only a subset of property rights has been removed.<sup>56</sup>

#### 1. *Property Subset*

In *Alberta (Minister of Public Works, Supply and Services) v. Nilsson*,<sup>57</sup> Justice Marceau described the contemporary state of regulatory expropriation in Canada. Justice Marceau defined regulatory expropriation as a regulation with “sufficient severity to remove virtually all of the rights associated with the property holder’s interest.”<sup>58</sup> One commentator has noted that “this narrow interpretation of property rights allows severe restrictions on the use of land without triggering ‘taking’ and compensation.”<sup>59</sup>

*Mariner Real Estate Ltd. v. Nova Scotia* usefully illustrates how much governments can regulate without compensating affected property

54. Such interpretive presumptions can be quite influential. Canadian administrative law is largely rooted in interpretive presumptions. For example, there is a presumption that the legislature intends for an administrative body to decide questions in an impartial manner and with procedural fairness, thereby allowing an affected person an opportunity to be heard before the matter reaches a decision. Bryan Schwartz, *Woodward’s Estate: A Case of Non-Constitutional Law*, 4 QUEEN L.J. 124 (1978).

55. See generally Alan Macek, Note, Regulatory Expropriations: Takings without Compensation? (Mar. 12, 2003), [http://www.expropriationlaw.ca/articles/art03700\\_files/art03701.pdf](http://www.expropriationlaw.ca/articles/art03700_files/art03701.pdf) (providing further comments on Canadian law in this area); J. Bruce Melville, Regulatory Takings in Canada (July 13, 2003), <http://www.expropriationlaw.ca/articles/art00300.asp>; see also Raymond E. Young, *Canadian Law of Constructive Expropriation*, 68 U. SASKATCHEWAN L. REV. 345 (2005); Donna R. Christie, *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada* (FSU Coll. of Law, Pub. Law Research Paper No. 186, 2006), available at <http://ssrn.com/abstract=882096> (providing a more detailed comparative discussion).

56. Macek, *supra* note 55, at 3.

57. *Alberta (Minister of Public Works, Supply and Services) v. Nilsson*, [1999] 70 Alta. L.R.3d 267 (Alberta Q.B.), *aff’d*, 2002 ABCA 283 (Alberta Ct. Appeal), available at <http://www.albertacourts.ab.ca/jdb/1998-2003/ca/Civil/2002/2002abca0283.pdf>.

58. *Nilsson*, 70 Alta. L.R.3d at ¶ 48.

59. Macek, *supra* note 55, at 4.

owners.<sup>60</sup> Here, private individuals owned shore properties that were currently undeveloped but potentially valuable. The properties were classified as “beaches,” and the private landowners were denied permits to build homes on these lands.

According to Alan Macek,<sup>61</sup> the Nova Scotia Court of Appeal found that the owners still had some property rights because the owners could continue to use their lands for camping and similar low intensity activities. The owners still held title to their lands and could therefore continue to use their lands. And because the owners were not prohibited from using their lands, the provincial expropriation statute, which required government authorities to compensate for expropriations, was not triggered. The Court specifically found that a loss of economic value was not sufficient evidence to show that land had been expropriated. The Court deemed the economic losses to be separate from any property losses. Thus, while there was no dispute in the case that the land in question had lost significant economic value as a result of the home building regulation, the Court ultimately held that economic loss did not necessarily imply a loss of the rights to the land that trigger a right to compensation.

In *Steer Holdings Ltd. v. Manitoba*,<sup>62</sup> the complainant owned property that straddled a creek. A change in land development regulations prohibited the complainant from building a bridge across the creek to connect the two pieces of the property. This change in building regulations decreased the value of the land significantly. However, the trial judge confirmed that “a mere prohibition or dissipation of value is not necessarily a taking” and that a public benefit arising out of a regulation was not enough to indicate that a transfer of rights had taken place.<sup>63</sup> The

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60. *Mariner Real Estate Ltd. v. Nova Scotia*, [1999] 177 D.L.R. (4th) 696 (N.S.C.A.).

61. Macek, *supra* note 55, at 4.

62. *Steer Holdings Ltd. v. Manitoba*, [1992] 21 R.P.R. (2d) 298 (Man. Q.B.).

63. *Id.* at 308. The “public benefit” identified by the trial judge was environmental preservation and the development of the surrounding area into a public park:

Mr. McCaffrey, on behalf of Steer, submitted that by blocking his client’s planned commercial project, and probably any other major development on the land, the Bluestem Park to the north had been enhanced and that by making it likely that creek bank property would remain undeveloped, the public interest was served. This may be true. The residents of the area, environmentalists and planners no doubt believe that to be the case. This acknowledgment is not, however, tantamount to a finding that there has been the kind of confiscation and transferring of interest or benefit of the kind found by the Supreme Court in either *Manitoba Fisheries (supra)* or *Tener (supra)*. *Id.* at paragraph 39.

In this connection, it is noteworthy that although the commercial project which Steer had planned was stopped, there is nothing in the legislation that assures or seeks to assure that the Steer property will be used or managed in a way that promotes creek bank improvement or

appellate court upheld these findings.<sup>64</sup> According to Alan Macek, “[t]hese authorities show that a decrease in economic value of property is not enough to trigger a taking and requiring compensation.”<sup>65</sup>

## 2. *Benefit Directed at Government*

According to regulatory takings jurisprudence, a landowner who wishes to qualify for compensation must also show that the benefit of the regulation is directed at the government and not a third-party. *A & L Investments Ltd. v. Ontario*<sup>66</sup> illustrates this principle. In the case, a provincial act had the effect of retroactively lowering rents payable by tenants. Several landlords sued for compensation, claiming that the regulation expropriated their rights. The Ontario Court of Appeals held that the transfer of rights had to be for the benefit of the State. Thus, in this case, no compensation was payable because the government did not directly benefit from the impugned regulation. The Ontario Court of Appeals stated that “[t]he limitation on the subject’s property rights must be balanced by a corresponding acquisition by the state.”<sup>67</sup>

Alan Macek noted that “the current law on the taking of property by the government is that rights to the land have to be transferred [sic] to the state, not merely extinguished, through the effects of the regulation.”<sup>68</sup> However, the recent decision of the British Columbia Court of Appeals in *Rock Resources Inc. v. British Columbia* may signal a shift in the direction of the law’s development.<sup>69</sup> As summarized by R. E. Young,<sup>70</sup>

In examining the legislation as a whole to see if some implied intention not to pay compensation for a taking of personal property might be found, the Court noted that although the Act provided for

the public interest. So long as it acts within the law, Steer is free to use its own land as it chooses.

*Id.* at paragraph 40. The circumstances which I have described provide no basis for concluding that there has been the kind of taking and transferring which gives rise to a legal entitlement to compensation.

*Id.* at 309.

64. *Steer Holdings Ltd. v. Manitoba*, [1992] 99 D.L.R. (4th) 61 (Man. C.A.).

65. Macek, *supra* note 55, at 9.

66. *A & L Investments Ltd. v. Ontario*, [1997] 36 O.R. (3d) 127 (Ont. C.A.), *application for leave to appeal to Supreme Court of Canada dismissed*, [1997] S.C.C.A. Nos. 657, 658 (S.C.C.).

67. *Id.* at 134.

68. Macek, *supra* note 55, at 10.

69. *Rock Resources Inc. v. British Columbia*, [2003] 229 D.L.R. (4th) 115 (B.C.C.A.), *leave to appeal to Supreme Court of Canada dismissed*, [2003] S.C.C.A. No. 375 (S.C.C.).

70. Young, *supra* note 55.

compensation for real property expropriated, but not for personal property, the silence as to personal property in such context was not *per se* sufficient to rebut the operation of the presumption. In the face of silence, the Court went on to declare compensation payable with respect to personal property and crafted the order to import a mechanism for determining compensation [footnotes omitted].<sup>71</sup>

Justice Huddart wrote a dissenting opinion that reflected the traditional reasoning found in previous Canadian judgments on point, which requires an express statutory right before compensation may be awarded. Justice Huddart stated the following in paragraph 165 of *Rock Resources*: “[T]he question for me is whether the Court can create a right to compensation where the Legislature did not evince an intention to compensate for the ‘taking’ of a statutory right with commercial value, or provide any mechanism for doing so.” In that same paragraph, Justice Huddart further stated that silence can “evince only one intention: not to pay compensation.”<sup>72</sup>

The Canadian Supreme Court’s most recent judgment on this issue confirms its continuing reluctance to transplant American notions of a regulatory takings doctrine into Canadian law. In *Canadian Pacific Railway Co. v. Vancouver (City)*,<sup>73</sup> the city of Vancouver adopted a development plan that effectively froze the development of a certain parcel of land owned by a railway company. The development plan then restricted the use of the land to non-economic uses.<sup>74</sup>

The railway company argued that the city’s conduct amounted to an effective taking of the property in question, thus entitling the Railway to compensation.<sup>75</sup> The Court disagreed. Chief Justice McLachlin found that the railway did not succeed in showing that the city acquired a beneficial interest relating to the land in question.<sup>76</sup> While the Court acknowledged that it would be sufficient to show that the acquisition of a beneficial interest related to the property,<sup>77</sup> Chief Justice McLachlin noted that evidence of such an acquisition was not provided in the instant case.<sup>78</sup> Additionally, the Chief Justice noted that the development plan did not

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71. *Id.* at 362.

72. *Rock Resources Inc.*, 229 D.L.R. (4th) at 157.

73. *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] 1 S.C.R. 227, available at <http://scc.lexum.umontreal.ca/en/2006/2006scc5/2006scc5.pdf>.

74. *See id.* ¶¶ 1–8.

75. *Id.* ¶¶ 27, 29.

76. *Id.* ¶ 32.

77. *Id.*

78. *Id.* ¶¶ 32–33.

remove all reasonable uses of the property.<sup>79</sup> Thus, Chief Justice McLachlin concluded that the City was not required, by statute or by common law, to compensate the railway company for the effects of the development plan on the company's land.<sup>80</sup>

### B. *Compensation Granted*

Even when Canadian courts do find that an expropriation has occurred, the courts usually grant minimal compensation to the harmed property owners. The Canadian Supreme Court's landmark decision *Manitoba Fisheries Ltd. v. Canada*<sup>81</sup> involved a claim for compensation based on de facto expropriation. The Court held that the claimant was entitled to compensation for the transfer of the goodwill of a private business to the new provincial marketing board that gained a monopoly over freshwater fish marketing. While it was innovative for the Court to recognize "goodwill" as a property interest that could be expropriated, the facts of the case satisfy some of the tests for "expropriation" acknowledged in the case law generally. Here the private owner lost all of the property at issue because it was largely transferred to the government.

Recent cases show a similar trend. In *British Columbia v. Tener*,<sup>82</sup> the claimant owned mineral rights in a provincial park.<sup>83</sup> Although British Columbia did not formally expropriate the land, it enacted statutes requiring owners to get permits before exploring or producing minerals in parks.<sup>84</sup> The Canadian Supreme Court held that the owner was entitled to compensation. Moreover, the Court found that the owner had lost the

79. *Id.* ¶ 34.

Second, the by-law does not remove all reasonable uses of the property. This requirement must be assessed "not only in relation to the land's potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put": see *Mariner Real Estate*, at p. 717. The by-law does not prevent CPR from using its land to operate a railway, the only use to which the land has ever been put during the history of the City. Nor, contrary to CPR's contention, does the by-law prevent maintenance of the railway track. Section 559's definition of "development" is modified by the words "unless the context otherwise requires." Finally, the by-law does not preclude CPR from leasing the land for use in conformity with the by-law and from developing public/private partnerships. The by-law acknowledges the special nature of the land as the only such intact corridor existing in Vancouver, and expands upon the only use the land has known in recent history.

*Id.*

80. *Id.* ¶ 63.

81. *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 S.C.R. 101.

82. *British Columbia v. Tener*, [1985] 1 S.C.R. 533.

83. *Id.* at 536.

84. *Id.* at 536–37.

value of his property interest, while the government had gained additional property rights.

#### V. PROGNOSIS ON THE PROTECTION OF PROPERTY RIGHTS IN CANADA

The conclusion is clear: property rights are minimally protected under the Canadian Constitution. Moreover, quasi-constitutional documents such as the Canadian Bill of Rights and the Quebec Charter offer minimal protection. As a result, Canadian courts have no solid grounds to begin to develop an aggressive “regulatory takings” doctrine.

On the contrary, constitutional legal developments have signaled that the protection of property rights is ultimately left to democratically elected legislatures. Local legislators that fail to work to protect property rights are likely to lose confidence among their constituents and to lose the business of potential foreign investors. However, judges will not find protections of property rights where none are explicitly provided for.