Property Rights, Politics, and Community in Canada, and the Alberta Land Stewardship Act

KAPLINSKY, Eran*

THE CONSTITUTIONAL CONTEXT

Background

The British tradition is reflected in the design of Canada's political institutions. Notably, the enactment of the *British North America Act*, 1867[1] by the British Parliament carried over the notion of parliamentary supremacy. Unlike their American counterparts, lawmakers in Canada were not to be limited by a written constitution in their power to pass confiscatory legislation.[2] At the same time, however, the Fathers of

---

* Assistant Professor, University of Alberta, Faculty of Law.

1 *British North America Act*, 1867, now renamed *The Constitution Act*, 1867 (UK), 30 & 31 Victoria, c. 3 [BNA].

2 The Fifth Amendment to the American Constitution famously provides, "No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". The Fourteenth Amendment similarly constrains the powers of the states by providing, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

Confederation were acutely aware of the historical tensions in Britain between democracy and private property and of the role of Parliament and the common law in defending propertied interests against depredations by the political majority, and they embedded in the Act mechanisms crafted to protect private property.[3] To give proprietary interests franchise, the *British North America Act* established in addition to the House of Commons a Senate with the power to veto legislation, comprised of members who were appointed for life, rather than elected, and who were themselves all owners of substantial property.[4] Concern for private property was also reflected in the constitutional division of powers between the different levels of government. Although the provinces were given plenary jurisdiction over "property and civil matters", powers over specific matters (e.g., bankruptcy, trade, and commerce) which would otherwise fall to the provinces were explicitly reserved to the Parliament of Canada.[5] In addition, as customary in the colonies, the executive branch (i.e., the Governor General) retained a power of disallowance over any act of the provincial legislatures.[6]

---

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

3 For discussion see Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24: 2 Canadian Journal of Political Science 309 at 312–14.

4 See *The Constitution Act*, 1867, ss 17, 21, and 29. As Alvaro notes, the Senators' status and allegiance were symbolized and guaranteed by the proviso in s 23(3), that no one would be eligible for a Senate appointment unless they owned assets worth a net minimum value of $4,000.

5 Compare *The Constitution Act*, 1867, ss 92(13) and 91.

6 *The Constitution Act*, 1867, ss 56 and 90. See further, Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge: Cambridge University Press, 2000) at 16.

Over time Canada's constitutional framework proved conducive to extensive regulation, and despite the checks and balances inserted by the framers, property yielded to the will of the majority. The taking outright of private land for public use ordinarily triggered a right to compensation under the applicable expropriation statutes, but the state could exercise far-reaching regulatory powers and affect private investment detrimentally with impunity. By the middle of the 19th century local governments had regulated extensively the construction of buildings and the use and subdivision of land, and in the early 20th century began adopting comprehensive zoning schemes.[7] In the 1930s, multiple federal and provincial social-welfare programmes and economic regulation established the welfare state. While American "New Deal" legislation was invalidated time and again by the U.S. Supreme Court for infringing on constitutional rights,[8] challenges to similar legislation in Canada were far less common and limited to the division of powers provisions of the BNA.[9] In the 1970s, the regulatory state expanded its reach, with both

---

7 See, Raphaël Fischler, "Development Controls in Toronto in the Nineteenth Century" (2007) 36:1 Urban History Review 16; Elizabeth Bloomfield, "Reshaping the Urban Landscape: Town Planning Effects in Kitchener/Waterloo, 1912–1926" in Gilbert A. Stelter & Alan F. J. Artibise eds., *Shaping the Urban Landscape: Aspects of the Canadian City-Building Process* (Ottawa: Carleton University Press, 1982) 256.

8 In the 40-year period beginning with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) and ending with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the U.S. Supreme Court struck down some two hundred federal and state statutes regulating working conditions and other market relationships. The period is named the "Lochner era" after the decision in *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539.

9 Notably, in the case of Prime Minister Bennett's 1935 economic legislation package, most of which was struck two years later by the Privy

levels of government enacting environmental regulations.[10]

An opportunity to entrench the right to property formally in Canadian law arose during the 1982 patriation of the Constitution of Canada.[11] The *Constitution Act*, 1982 affirmed the Constitution as the supreme law of Canada and that any law inconsistent with the Constitution is of no force or effect.[12] An important new dimension of the

---

Council. In a seminal series of references, the Privy Council declared *The Weekly Rest in Industrial Undertakings Act*, S.C. 1935, c. 14, *The Minimum Wages Act*, S.C. 1935, c. 44, *The Limitation of Hours of Work Act*, S.C. 1935, c. 63, and *The Employment and Social Insurance Act*, S.C. 1935, c. 38, among others, ultra vires the Dominion as infringing on provincial authority over "property and civil rights", while upholding *The Farmers' Creditors Arrangement Act*, 1934, S.C. 1934, c. 53 under the jurisdiction of Parliament over "bankruptcy and insolvency" (see, e.g., *Attorney-General for Canada v Attorney-General for Ontario*, [1937] A.C. 355 (P.C.), 1 D.L.R. 684, [1937] 1 W.W.R. 312). See further F. R. Scott, "The Privy Council and Mr. Bennett's "New Deal" Legislation" (1937) 3:2 Canadian Journal of Economics and Political Science 234; Eric M. Adams, "Canada's 'Newer Constitutional Law' and the Idea of Constitutional Rights" (2006) 51 McGill Law Journal 435.

10 See Elaine Lois Hughes, Alastair R. Lucas & William A. Tilleman, *Environmental Law and Policy*, 3rd ed. (Toronto, ON: Emond Montgomery Publications, 2003) at 165. The first generation of federal environmental legislation included, for example, the *Clean Air Act*, SC 1970-71-72, c 47, and the *Canada Water Act*, RSC 1970, c5 (1st Supp.). Early examples of provincial environmental legislation include Alberta's *Land Surface Conservation and Reclamation Act*, SA 1973, c 34, Ontario's *Environmental Protection Act*, SO 1971, c 86, and Quebec's, *Environment Quality Act*, RSC 1977, c Q-2.

11 "Patriation" refers to the domesticizing the amending formula of the Constitution of Canada by parallel acts of the British and Canadian parliaments, such that further acts of the British Parliament are no longer required: see *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c 11 ["*Constitution Act*, 1982"].

12 *Constitution Act*, 1982, s 52(1).

patriated Constitution was the Canadian *Charter of Rights and Freedoms*.[13] The rights guaranteed by the *Charter* were to be inviolable by the state, and the courts were empowered to grant to anyone whose protected rights were denied or infringed any remedy deemed appropriate and just in the circumstances.[14] Proposals to include the right to property among those protected by the *Charter* had strong advocates among scholars and policymakers, including, notably, Prime Minister Pierre Trudeau, and were vigorously and publicly debated. During this debate, the *Canadian Bill of Rights*, 1960[15] was held up as a potential model for the *Charter*. Section 1(a) of this federal legislation recognizes "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law".[16] As an ordinary statute with no formal constitutional status, the *Canadian Bill of Rights* applies only to the federal government and may be overridden by the Parliament. But had language similar in scope been incorporated into the *Charter* as the advocates of the right to property proposed, the courts would have been empowered to strike down confiscatory legislation and to stand guard against seizure by the state in the name of the public interest. Ultimately, however, property rights were denied constitutional protection. Section 7 of the *Charter* provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The omission of property was, as

13 Part I of the *Constitution Act*, 1982 ["the Charter"].

14 *Constitution Act*, s 24(1).

15 R.S.C. 1985, App. III ["*Canadian Bill of Rights*"].

16 *Canadian Bill of Rights*, s 1(a).

Canadian constitutional scholar Hogg observes, "a striking and deliberate departure" from the Canadian *Bill of Rights* and also from the constitutional texts that served as models for section 7, including the U.S. Constitution.[17] Subsequent attempts to amend the *Charter* by adding protection of private property have also been unsuccessful.[18]

Several explanations have been offered for eschewal of property rights from the *Charter*. Undoubtedly critical was the powerful opposition of some of the provinces who argued that the constitutional protection of property would jeopardize their social and economic programs and cause their political mandate to be subverted by a non-elected judiciary.[19] Other explanations point to a rejection of the American model of constitutionally protected private property,[20] the uncertainty about the

---

17 Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., vol. ii (Scarborough, Ont.: Thomson, Carswell, 2007) at § 47.9.

18 Sujit Choudhry, "The Lochner era and comparative constitutionalism" (2004) 2:1 International Journal of Constitutional Law 1 at 25–27.

19 See Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 Alberta Law Review 548.

20 Sujit Chouhry has shown that Trudeau (and others) were concerned that a "due process"-like section 7 would usher in a Canadian "Lochner era" in which the courts would be forced to strike down socially desirable regulation. See Choudhry, supra note 18, esp. at 21–27. According to Choudhry, Trudeau worried about the application of due process to property and contract more than other rights. Based on Trudeau's suggestions, the first draft of the Charter afforded property procedural protection by guaranteeing "the right of the individual to the enjoyment of property, and the right not to be deprived thereof except according to law": ibid. at 19. Section 7 of the *Charter* ultimately departed from American constitutionalism not only by excluding the right to property, but also by replacing the reference to "due process" with "principles of fundamental justice" with an aim to avoiding any substantive review by

scope of entitlements which a right to property would guarantee, and more fundamentally skepticism about the status of property as a core value in Canadian Society.[21] In any event, the absence of specific *Charter* protection of private property means that almost no government taking is beyond the power of the politically dominant majority.[22] All existing statutory protections of property in Canada, including the federal *Canadian Bill of Rights* and equivalent provincial enactments[23], as well as statutory rights to compensation for expropriation,[24] may be overridden by "legislative edict".[25]

As professor Russell Brown has argued, the domestic frailty of property rights in Canada is remarkably at odds with its international obligations and declarations.[26] Canada is a signatory to the 1948 *Universal*

---

the courts.

21 See Alvaro, *supra* note 3 = ; Richard W. Bauman, "Property Rights in the Canadian Constitutional Context" (1992) 8 South African Journal on Human Rights 344.

22 The *Charter* does protect certain proprietary entitlements indirectly. For example, section 15 of the *Charter* proscribes discriminatory confiscation by guaranteeing equality under the law, and section 8 prohibits unreasonable search and seizure: see Bruce Ziff, *Principles of Property Law*, 5 ed. (Toronto: Carswell, 2010) at 84–85. Section 8 does not extend to the taking of land by expropriation: *Becker v Alberta*, [1983] A.J. No. 1024; 148 D.L.R. (3d) 539 at 546; 45 A.R. 36; 9 C.R.R. 192; 21 A.C.W.S. (2d) 130; *Quebec v Laroche*, 2002 SCC 72, [2002] 3 SCR 708.

23 See, e.g., *Alberta Bill of Rights*, RSA 2000, c A-14. See also *Alberta Personal Property Bill of Rights*, RSA 2000, c A-31.

24 See, e.g., *Expropriations Act*, R.S.O. 1990, c. E.26.

25 See Ziff, supra note 22 = at 85.

26 See Russell Brown, "Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: the Canadian Experience" (2009) 1 International Journal of Law in the Built Environment 179 [Brown, "Legal Incoherence"]

Declaration of Human Rights, which recognizes that "[e]veryone has the right to own property" and provides that "[n]o one shall be arbitrarily deprived of his property".[27] Article 17, which contains these provisions, is widely regarded as binding, but has not been implemented. In addition, Canada has entered into bilateral Foreign Investment Promotion and Protection Agreements (FIPAs) with 26 countries, has concluded negotiations with 8 other countries and is actively engaged in negotiations with 9 others (including China and India). FIPAs seek to insure, inter alia, "that foreign investors will not be treated worse than similarly situated domestic investors or other foreign investors; they will not have their investments expropriated without prompt and adequate compensation; and, in any case, they will not be subject to treatment lower than the minimum standard established in customary international law."[28] Accordingly, each FIPA stipulates that neither party shall "nationalize or expropriate a covered investment either directly, or indirectly … .except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and

---

at 183–186.

27 *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71, Article 17.

28 Foreign Affairs and International Trade Canada, "Negotiations and Agreements", online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?view=d> (accessed August 2, 2011). Canada and Japan are also exploring a potential trade agreement and/or FIPA. In February 2011, the Government of Canada embarked on a comprehensive consultation process and is seeking input on a potential free trade initiative with Japan: see Consultations on possible negotiations for a comprehensive economic partnership agreement with Japan, (2011) C Gaz I, 653. Japan, notably, follows the U.S. in recognizing in its constitution an inviolable right to property; Article 29.

effective compensation". The FIPAs clarify further that "indirect expropriation results from … measures … that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure". Whether a regulatory measure constitutes indirect expropriation is to be determined on the basis of a "case-by-case, fact-based inquiry" that considers, inter alia, its "economic impact", "the extent to which the measure … interfere[s] with distinct, reasonable investment-backed expectations", and the "character of the measure". Finally, except in "rare circumstances", measures which are designed to protect "legitimate public welfare objectives, such as health, safety and the environment", and which are applied non-discriminatorily, do not constitute indirect expropriation."[29] The full significance of these provisions will be discussed in the following section, but for now, and setting aside the question of remedies[30] suffice it to emphasize that the effect of these FIPA provisions is to remove certain powers over private property owned by foreign, but not domestic, investors out of the hands of Canadian lawmakers.[31]

---

29 For an example of this language, see Canada-Jordan FIPA, Article 13 and Annex B.13(1) ("Agreement between Canada and the Hashemite Kingdom of Jordan for the promotion and protection of investments", online: >http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/jordan-agreement-jordanie-accord.aspx?lang=eng>).

30 Ziff suggests that the original power of disallowance under section 90 of the *Constitution Act*, 1867, might be revived by the federal government to strike down provincial acts that violate treaty obligations: see Ziff, *supra* note 22 = at 86.

31 Schneiderman has made this observation following the implementation of the 1994 North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the United States: David Schneiderman, "Nafta's

Takings and the Right to Compensation in Canadian Jurisprudence

No common law right to compensation for an authorized taking exists independent of statute as a substitute for constitutional protection of property. In *Sisters of Charity of Rockingham v R*[32], the Privy Council held that where land is expropriated by statute for public use, the affected owner must establish a statutory right to be entitled to compensation for the value of the land taken, or for damages. At the same time, Canadian courts follow the principle stated by the House of Lords in *AG v De Keyser's Royal Hotel*,[33] that "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation." An entitlement to compensation was

---

Takings Rule: American Constitutionalism Comes to Canada" (1996) 46:4 The University of Toronto Law Journal 499. The investment protection measures contained in NAFTA are an earlier version of those contained in the FIPAs and have a similar effect.

32 [1922] 2 A.C. 315 [P.C.].

33 [1920] A.C. 508 [*De Keyser's Royal Hotel*] at 542. The rationale of the presumption is explained by Lord Atkinson: "Bowen L.J. in London and North Western Ry. Co. v. Evans(1) said: 'The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle … if it sees fit to do so, but, it is not likely that it will be found disregarding it, without plain expressions of such a purpose'". See also *Burmah Oil v Lord Advocate* [1965] A.C. 75 at 167 ("it is clearly settled that, where the executive is authorised by a statute to take the property of a subject for public purposes, the subject is entitled to be paid, unless the statute has made the contrary intention quite clear") per Upjohn L.J.

implied by the Supreme Court of Canada in *Manitoba Fisheries v R.*[34] There by federal legislation an exclusive right to market freshwater fish was given to a crown corporation, putting the plaintiffs, who had owned and operated such a business prior to the legislation, out of business. Ritchie J. found that the loss of the plaintiffs' goodwill constituted "property", and that the legislation effected a "taking" of this property. As there was nothing in the legislation authorizing the taking without compensation, the plaintiffs were entitled to compensation in accordance with the rule of construction established in *De Keyser's Royal Hotel.*[35]

But while the legislature is not presumed to countenance an injustice, the principle of sovereignty allows it to endorse it explicitly.[36] For example, recently the Government of Alberta, through the *Carbon Capture and Storage Statutes Amendment Act, 2010,*[37] declared the provincial Crown to be the owner of all the pore space under the province's surface in order to carry out a carbon sequestration initiative. The legislation provides that the vesting of the pore space in the crown shall not be deemed an expropriation, and moreover, that no entitlement to compensation, damages, or declaratory relief arises out of this provision in the Act.[38] Express provisions denying compensation can also be found in statutes that limit the use and enjoyment of private land.[39] Planning

---

34 [1978] 6 W.W.R. 496, 88 D.L.R. (3d) 462, [1979] 1 S.C.R. 101, 23 N.R. 159.

35 See also analysis of the rule in *A & L Investments Ltd v Ontario*, (1997) 36 O.R. (3d) 127, [1997] O.J. No. 4199 (principle in *De Keyser's Royal Hotel* does not apply when there is no acquisition of property by the state).

36 *Medical Assn (British Columbia) v British Columbia,* 15 D.L.R. (4th) 568, [1985] 2 W.W.R. 327, 58 B.C.L.R. 361, 1984 CarswellBC 409.

37 SA 2010 c14.

38 s 15.1(4)-(5).

39 See e.g., *Greenbelt Act*, S.O. 2005, c 1, s 19.

and zoning enabling statutes typically immunize planning authorities from the requirement to compensate landowners for any losses arising from the adoption of statutory plans, or the enactment of zoning bylaws or other land use controls, or the issuance of development permits.[40] It is almost certain, however, that with few exceptions land use regulations do not trigger a right to compensation under the Canadian law of regulatory takings.

American courts have recognized a landowner's right to compensation for regulatory harms in certain instances even where no interest in the land is forcibly acquired by the state by "eminent domain". Where regulations require an owner to suffer a physical intrusion of the land, or deny the owner all economically viable uses of the land, or simply go "too far", the courts have held that the Fifth Amendment to the U.S. Constitution, which prohibits that "private property be taken for public use, without just compensation" applies.[41] Because no similar constitutional grounding for compensation exists in Canada, claims for regulatory takings, like claims for formal expropriation, must be statutory. For an owner to succeed, the owner must demonstrate that the government's action constitutes a "de facto" or "constructive" taking within the meaning of the statute upon which the claim is based, and that an applicable statute provides for compensation expressly or under the rule of construction in *De Keyser's Royal Hotel*. Few such claims have ever succeeded in Canada.[42]

---

40 See, e.g., *Local Government Act*, RSBC 1996, c 323, s 914; *Municipal Government Act*, RSA 2000, c M-26, s 621(1) (*but* see s 644).

41 *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) [*Lucas*].

42 For a survey of the case law see Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling"

Two cases best illustrate the Canadian position. In *Mariner Real Estate v Nova Scotia (A.G.)*[43], the respondents' lands were designated as protected beaches under provincial legislation, and their applications for permits to build single-family dwellings were subsequently denied by the Minister on the grounds that the lands on which the development was proposed were critical for preservation in their present state due to their ecological value and sensitivity. The owners argued that the drastic restrictions on their use of their lands constituted de facto expropriation within the meaning of the provincial expropriation legislation, for which they were entitled to compensation. Cromwell J.A. (as he was then) began his analysis by acknowledging the limited precedent for de facto expropriation in the Canadian jurisprudence.[44] In Cromwell's view, furthermore, the doctrine of de facto expropriation in Canada is narrowly constrained – to the point of being "conceptually difficult" – by the courts' limited mandate to review land use regulations in the absence of constitutional protection of property on the one hand, and by the unavailability of compensation except by statute on the other. The only question for the court was according to Cromwell, whether the *Expropriation Act* entitled the owners to compensation, and specifically, whether the regulations effected "expropriation", which was defined in

---

(2007) 40 University of British Columbia Law Review 315 [Brown, "The Constructive Taking at the Supreme Court of Canada"] at 321–328.

43 (1999), 177 D.L.R. (4th) 696, 178 N.S.R. (2d) 294, 26 R.P.R. (3d) 37, (C.A.) [*Mariner Real Estate*]

44 "The claim of de facto expropriation, or as it is known in United States constitutional law, regulatory taking, does not have a long history or clearly articulated basis in Canadian law. We were referred to only three Canadian cases in which such a claim was made successfully, only two of which dealt with the expropriation of land"; *ibid.*, at ¶ 37.

the Act as the compulsory "taking of land", the term "land" encompassing also "any estate, term, easement, right or interest in, to, over or affecting land".

After surveying the case law and commentary, the court came to the conclusion that even the regulatory extinguishment of virtually all of the economic value and the benefits associated with ownership for the purpose of enhancing the public welfare was not tantamount to expropriation. Expropriation resulted only from the "virtual extinction of an identifiable interest in land", but while restrictions on the use of land may be so extensive and stringent that they deprive the owner *de facto* of his or her interest in land, "[i]t is not … the decline in market value that constitutes the loss of an interest in land, but the taking away of the incidents of ownership reflected in that decline."[45] In this case, the court reasoned, the owners were still permitted to use their lands for low intensity uses such as camping, as they had done before the regulations.

In reaching its conclusions, the court asserted a well-established principle that "In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation".[46] In assessing

---

45 *Ibid.*, at ¶ 82.

46 At ¶ 42, following *British Columbia v Tener*, [1985] 1 S.C.R. 533, [1985] 3 W.W.R. 673, 17 D.L.R. (4th) 1 [*Tener*]: "compensation does not follow zoning either up or down" (per Estey J.). The claim in *Tener* arose from a denial of the grantees of certain mineral rights of the access to the lands under which the minerals were situated, after the lands were turned into a park. The claim for de facto expropriation was upheld because the Crown was held to have acquired an interest held by the grantees: according to the majority, the nature of the interest was part of the original grant; according to the minority the interest recovered was a profit: see further Eric C. E.

whether the effect of regulation in a particular case was to remove virtually all of the incidents of ownership, the regulatory effects must be evaluated against the reasonable uses of the lands in question, and the long tradition of pervasive land use regulation in Canada.[47] The common law does not recognize the right to a particular use as property[48], and the respondents could not claim a right to residential development on environmentally sensitive lands.[49]

The reasoning suggests also that landowners cannot expect to be compensated when the regulations sterilize the land or freeze development altogether. Cromwell J.A. referred to *Calgary* (*City*) *v Hartel Holdings Co*.[50]. In that case, the municipality expressed interest in acquiring lands for a future park. The lands lay in the path of urban expansion and were slated for residential development by their owner. Unwilling to pay fair market value for the lands, the municipality chose not to expropriate the lands, but sterilized the lands instead by holding them in their existing, economically unviable zoning designation. The Supreme Court of Canada found that the enabling legislation did not require compensation in these circumstances. But the case does not stand for the proposition that land may be *permanently* sterilized without compensation, but rather that a municipality may exercise its authority

---

Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1992) at 25; Brown, "The Constructive Taking at the Supreme Court of Canada" *supra* note 42 = at 329–333.

47 at ¶ 49.

48 *Belfast* (*City*) *v. O.D. Cars Ltd.*, [1960] A.C. 490, [1960] 1 All E.R. 65 (H.L.)

49 *Mariner Real Estate, supra* note 43 = at ¶ 85.

50 [1984] 1 S.C.R. 337, 8 D.L.R. (4th) 321 [*Hartel*]. Reference was made also to *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32, 142 D.L.R. (4th) 206.

to freeze development in good faith and for a public purpose, and that if it is desirable to limit the period during which the owner is at the mercy of the authorities, then it is up to the legislature to do so.[51] More to the point, however, *Hartel* stands as an example in which a municipality was able to circumvent the rule contained in Alberta's *Municipal Government Act*,[52] that zoning must not be used to press land into public service without compensation to its owner. Similarly, the policies of the Ontario Municipal Board have established a long-standing principle that "if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved".[53] While acknowledging this rule, Cromwell refused to elevate its status from administrative policy to a legal principle. In this respect, he emphasized, Canadian and American law diverged. In *Lucas v South Carolina Coastal Council*,[54] a case whose facts were remarkably similar to those in *Mariner Real Estate*, the U.S. Supreme Court held that regulations that deny the owner of land all economically viable uses of it (typically by requiring the land to be left substantially in its natural state) pose a heightened risk of pressing private property into public service under the guise of mitigating serious public harm, and therefore constitute a *per se* taking which entitles the

51 *Hartel*, [1984] 1 S.C.R. 337 at 354.

52 *Municipal Government Act*, RSA 2000, c M-26, s 644.

53 See *Re Nepean Restricted Area By-law 73-76* (1978), 9 O.M.B.R. 36 (cited by Cromwell J.A., *supra* note 43 = at ¶ 50). For application of this principle, see *Russell v Toronto* (*City*) (1997), 36 O.M.B.R. 169.

54 505 U.S. 1003 (1992) [*Lucas*].

owner to compensation.[55] In contrast, Canadian law does not equate the total loss of economic value with a taking of an interest in land, or the expected benefit to the public with an acquisition of such an interest by the state.[56]

The Supreme Court of Canada affirmed this position recently in *Canadian Pacific Railway v Vancouver* (*City*).[57] The dispute concerned a corridor of land consisting of some 45 acres in the city of Vancouver. The lands were owned by the appellant CPR and used as a railway, but as industrial uses gave way to extensive urbanization, freight transport gradually ceased, and CPR decided to decommission the railway and seek other economic uses of its property by developing proposals for residential and commercial uses and also by inviting the City or any public body to purchase or expropriate the lands. On its part, the City, anticipating the discontinuation of the railway, expressed interest in maintaining the corridor for a potential urban transit line. When these plans failed to materialize, City Council adopted an official development plan which designated CPR's lands "for use only as a public thoroughfare" for transportation and greenways (including pedestrian trails and cyclist paths).[58] The effect of the bylaw was, in the words of the Court, "to freeze the redevelopment potential of the corridor and to confine CPR to

---

55 *Ibid*., at 1017. "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership"; *ibid.* at 1029.

56 *Mariner Real Estate, supra* note 43 = at ¶ 100–106.

57 [2006] 1 S.C.R. 227, 262 D.L.R. (4th) 454 [*CPR v Vancouver*].

58 See the trial judgment, 47 Admin. L.R. (3d) 56, 33 M.P.L.R. (3d) 214, [2002] B.C.J. No. 2451.

uneconomic uses of the land".[59] This "freeze" was intended not as a moratorium, but as means to permanently secure the amenities of the corridor as a public benefit without formally acquiring title to the lands.

CPR's claim for a de facto taking of its property failed. The Supreme Court of Canada, in a brief decision (drawing essentially on three cases: *Manitoba Fisheries, Tener*, and *Mariner Real Estate*), pronounced that: "For a de facto taking requiring compensation at common law [*sic*], two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property".[60] McLachlin C.J. found that CPR failed to meet both requirements. In her view, the City did not gain an interest in land, but merely "some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a [taking]".[61] The Chief Justice did not elaborate further on this point.[62] As to the second test, McLachlin C.J. followed the reasoning of Cromwell J.A. in *Mariner Real Estate*, in holding that the City's regulation did not deny CPR all reasonable private uses (specifically, and notwithstanding the trial judge's findings[63], CPR could restore its railway

---

59 *CPR v Vancouver, supra* note 57 = at para. 8.

60 *Ibid*, at para. 30.

61 *Ibid*, at para. 33.

62 For insightful criticism of the Court's decision, particularly with respect to the first test, see Brown, "The Constructive Taking at the Supreme Court of Canada", *supra* note __.

63 The trial judge's wrote: "With the changing nature of Vancouver and the changing nature of commercial transportation, CPR no longer needs a rail line running through the west side of Vancouver. There are no longer any industries within this area of Vancouver with goods to be transported by

operations).[64] Finally, the Court observed that even if CPR could show that the tests for a de facto taking had been met, the City was immunized by *Vancouver Charter*,[65] which provided that in the exercise of any of the City's powers over planning and development matters, "any property thereby affected shall be deemed as against the city not to have been taken … and no compensation shall be payable". McLachlin C.J. concluded that because CPR's lands would have been deemed not to have been taken even it could establish a de facto taking, none of the provisions of the British Columbia *Expropriation Act* would apply.[66]

Thus, the lack of constitutional protection of property, and the courts' unwillingness to develop a doctrine of constructive takings by applying it to even the most oppressive form of land use regulations (and for now at least, to reconcile domestic law with Canada's international obligations with respect to private property) – leaves Canada in a unique position among developed nations. This status is confirmed by Rachelle Alterman's recent comparative study of 13 countries, which ranks Canada lowest in terms of the right to compensation.[67] As Justice Cromwell observed in *Mariner Real Estate*: "In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost

---

rail"; *supra* note 58 at para. 3.

64 *C.P.R. v Vancouver, supra* note 57 = at para. 34

65 SBC 1953, c 55.

66 Including, importantly, *Expropriation Act*, RSBC 1996, c 125, s 2, which gives it preference over other enactments in case of inconsistency.

67 Rachelle Alterman, ed., *Takings International: a Comparative Perspective on Land Use Regulations and Compensation Rights* (Chicago, Ill.: American Bar Association, 2010) at 28. The countries studied were the Canada, Australia, United Kingdom, France, Greece, Finland, Austria, United States, Poland, Sweden, Israel, and the Netherlands.

without exception, been found not to constitute compensable expropriation".[68] The logic is impregnable, and the result is predictably self-reinforcing. *Because* the state has been immunized from the requirement to compensate landowners, extensive and restrictive regulation became the norm. It is against this background that the public's reaction to the Alberta *Land Stewardship Act* should be evaluated.

PROPERTY RIGHTS AND THE ALBERTA LAND STEWARDSHIP ACT

As the preceding section explains, ultimate responsibility for land use regulation has been reserved to the provinces as part of their jurisdiction over "Property and Civil Rights in the Province".[69] But as land use has been historically very much a matter of local concern in Alberta and elsewhere in Canada, responsibility for planning and zoning has been delegated largely to local governments.[70] Alberta experimented with regional planning from 1977 to 1995, but the regional planning commissions were disbanded since and their plans were repealed, and

---

68 *Mariner Real Estate, supra* note 43 = at ¶ 42.

69 BNA, section 92(13). The provinces have no authority, however, over matters under federal jurisdiction, including federal Crown lands, telecommunications, railways, aeronautics, and Indian reserve lands. See, for example, *Lacombe v Sacré-Coeur* (*Municipality*) [2010] 2 S.C.R. 453, 2010 SCC 38, 75 M.P.L.R. (4th) 1, 324 D.L.R. (4th) 625 (aeronautics); *British Columbia* (*Attorney General*) *v Lafarge Canada Inc*., [2007] 2 S.C.R. 86, 281 D.L.R. (4th) 54, 34 M.P.L.R. (4th) 1, 2007 SCC 23 (public harbours).

70 See Frederick A. Laux, *Planning Law and Practice in Alberta*, 3rd ed. (Edmonton: Juriliber, 2005), § 1.2.

the ministry of municipal affairs shut down its planning branch, resulting in the delegation of virtually all planning functions to individual municipalities.[71] The results of uncoordinated competition for land uses over the last decade of unprecedented prosperity and population growth in the province have become apparent. While some 80% of the population lives in urbanized areas, much of the province's advantage comes from its abundant natural resources. Activities such as oil and gas extraction, agriculture, forestry, mining, housing, and recreation often come into conflict and threaten the environment and the sustainability of the province. A prominent example is the operations being carried out on Alberta's oil sands – the second largest proven reserve of crude oil reserve in the world – which has recently attracted not only domestic, but international attention.[72]

To address these concerns, the Alberta government announced in 2005 plans to develop a comprehensive Land Use Framework [LUF] for the province. In his Speech from the Throne, the Lieutenant Governor of Alberta explained: "Much as the land sustains the agriculture industry, it also sustains other economic mainstays such as energy, forestry, and tourism. Wise land management is crucial to ensure the sustainability of these sectors and continued prosperity for Albertans. That's why this government will develop a land-use management framework supported by effective resource and environmental policies and shared, integrated information systems".[73] The Ministry of Sustainable Resource

71 *Ibid*., at § 1.3(10)(c).

72 See, e.g., Damian Carrington "Canada threatens trade war with EU over tar sands" *The Guardian* (20 February 2012).

73 Alberta Hansard, March 2, 2005 at 7.

Development was put in charge of creating the LUF. An initial report was published in September[74] followed by extensive public consultation. In December 2008, LUF was released.[75] LUF sets out the province's approach to achieving its long-term economic, social, and environmental goals, by coordinating all land use policies in the province under provincial leadership. To this end, LUF identifies seven strategies: (1) develop seven regional land-use plans based on seven new land-use regions; (2) create a Land Use Secretariat and establish a Regional Advisory Council for each region; (3) cumulative effects management will be used at the regional level to manage the impacts of development on land, water and air; (4) develop a strategy for conservation and stewardship on private and public lands; (5) promote efficient use of land to reduce the footprint of human activities on Alberta's landscape; (6) establish an information, monitoring and knowledge system to contribute to continuous improvement of land-use planning and decision-making; (7) include aboriginal peoples in land-use planning.

The legislative framework for supporting and implementing the LUF is the Alberta *Land Stewardship Act*[76] [ALSA]. Its purposes are defined as follows:

(a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;

(b) to provide a means to plan for the future, recognizing the need to

74 https://landuse.alberta.ca/Documents/LUF Managing Prosperity Developing a Land Use Framework for Alberta Report-2005-09.pdf.

75 Alberta, *Land-Use Framework* (Edmonton: Government of Alberta 2008).

76 SA 2009, c A-26.8.

manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;
(c) to provide for the co ordination of decisions by decision makers concerning land, species, human settlement, natural resources and the environment;
(d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.[77]

ALSA delegates to the provincial Cabinet broad powers to establish planning regions and create and approve regional land use plans. Each regional plan must articulate the vision and objectives for the region and may describe the land use policies designed to attain or maintain those objectives, including thresholds, monitoring processes, and timelines.[78] In order to harmonize all land use policies in the province as intended by LUF, ALSA takes precedence over all other provincial enactments and statutory plans. Every regional plan once approved, becomes binding on the provincial government and its agencies and requires every municipality to make its land use policies and regulations consistent with it.[79] ALSA provides further the power to "permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values" through the use of a conservation directive specified in the regional plan.[80]

The powers contemplated by ALSA can have drastic impact on

77 ALSA, s 1(2).
78 ALSA, ss 3–10.
79 ALSA, ss 13–17.
80 ALSA, s 37.

private land. The adoption of a regional plan can curtail valuable rights of use and development, while the promulgation of a conservation directive in effect sterilizes private land in order to secure long-term public benefits. Anticipating legal action by private landowners, ALSA gives the owner of land made subject to a conservation directive a right of notice and a claim against the Crown for compensation for the decline in market value as well as for injurious affection.[81] On the other hand, section 19 provides that "No person has a right to compensation by reason of this Act, a regulation under this Act, a regional plan or anything done in or under a regional plan" except as expressly provided for under the sections dealing with conservation directives or under another enactment. In a news release, the government prided itself for making Alberta "the first jurisdiction in Canada to compensate landowners whose property values are affected by conservation and stewardship restrictions under regional plans."[82]

But the statement did nothing to prevent a political storm over ALSA's impact on property rights.[83] The sentiment among rural

---

81 ALSA, s 38–43.

82 Government of Alberta, News Release, "Bill 36, the Alberta Land Stewardship Act sets the bar for responsible regional planning" (April 27, 2009) online: <http://alberta.ca/home/news.cfm>. By comparison, when a greenbelt was established in Southern Ontario's so-called "Golden Horseshow" area, the enabling legislation *expressly denied* landowners whose lands were set aside for conservation any right to compensation and barred any legal action against the government; see *Greenbelt Act*, S.O. 2005, c 1, s 19.

83 Other bills and enactments affecting property rights that had been introduced by the government came under fire: for example, Bill 19 (*Alberta Land Assembly Project Area Act*), which authorized the cabinet to set aside private land for future projects such as utility corridors and rapid rail, and

landowners especially, was that the government had trampled their deep-rooted property rights by introducing a system of central-planning that placed unprecedented, draconian powers in the hands of unelected bureaucrats. The reforms were said, among other things, to allow regional plans which were not reviewable by the courts to override statutory leases, operator licenses, and other valuable natural resource extraction rights granted under other provincial enactments, and to deny landowners any right to appeal decisions affecting their lands.[84] By 2010, the Progressive Conservative government was preparing for the next provincial elections, and property rights had emerged suddenly as a critical issue. The party, the longest ruling in Canada, was being flanked from the right by the emergent Wildrose Party. In January, Ted Morton, the Minister of Sustainable Resource Development, who led the development of LUF and ALSA since 2006, was promoted to the Finance portfolio as part of a major Cabinet shuffle. But only a year later, Premier Stelmach announced he will not be seeking re-election, and Morton resigned from Cabinet to pursue the party leadership race. Meanwhile, the waves of protest were sustained in town hall meetings across rural Alberta. Property rights advocates and government critics presented improbable interpretations of the legislation and constructed calamitous scenarios.[85] There was even suggestion that ALSA gave the province the

---

to proscribe any private use or development of any designated lands that could interfere with such future projects. None have been as controversial as ALSA.

84 ALSA, s 11.

85 For a flavor of the debate see, e.g., Josh Wingrove "Cutting-edge law fuels property rights debate in Alberta" *The Globe and Mail* (Mar 4, 2011), A.9; Kevin Libin "New Alberta act a rough patch; Property rights may be

power to expropriate land (i.e., to take title *de jure*) without compensation.[86] Section 19 was painted as extinguishing existing entitlements, when in truth, no such rights existed under Canadian law. Under the feeble regulatory takings doctrine embodied by *CPR v Vancouver*[87], most conservation directives (made explicitly compensable by ALSA) would not be considered a de facto taking requiring compensation, let alone land use restrictions contained in a regional plan.

Nonetheless, the damage was done. The Government responded to the attacks on ALSA by enacting in May 2011 the *Alberta Land Stewardship Amendment Act*.[88] The second reading of the Bill was accompanied by the following explanation by the Minister of Sustainable Resource Development, which was clearly intended to repudiate the attacks and allay citizens' fears:

I can't express strongly enough, Mr. Speaker, that when we're looking at these amendments, we cannot cancel or take away, remove, or rescind somebody's land title or their freehold mineral rights…. Mr. Speaker, we've also in this particular amendment made sure that we provided for compensation if private land that is identified for conservation is indeed put into things like a conservation directive. We've defined that there are statutory consents that, indeed, may require us to

---

red-hot election issue" *National Post* (17 Mar 2011), A.10.

86 See Nigel Bankes, "ALSA and the property rights debate in Alberta: a certificate of title to land is not a 'statutory consent'", blog post February 11, 2011, online: <http://ablawg.ca/2011/02/11/alsa-and-the-property-rights-debate-in-alberta-a-certificate-of-title-to-land-is-not-a-%E2%80%9Cstatutory-consent%E2%80%9D/>.

87 *Supra* note 57 =.

88 SA 2011, c 9 ["ALSA amendments"].

look at compensation. We have also defined that statutory consents do not include things like land title. Also, it's very clear that the existing provisions for compensation and appeal remain for any individual that is directly or adversely affected by what might happen in a regional plan. I think that there have been some, probably deliberate, interpretations of the original act that were never intended. I believe that in certain circumstances as I've gone around and talked to Albertans, they in some cases were fearful, in most cases anxious. In some cases, most certainly, landowners were angry. The Premier asked me to review the original act and to be sure that I could clarify for Albertans what the intent of this act is, and where there was necessity for change, we should look at the requirement for change and put the changes in place that would give Albertans a feeling of some comfort with respect to what the plans were intended to do.[89]

The amended ALSA begins by declaring: "In carrying out the purposes of this Act … the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest".[90] This qualification of the government's power is not entirely unique. Local governments engaged in land use planning and regulation under the authority delegated to them by the Alberta *Municipal Government Act*, must do so "without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest".[91] ALSA, as amended, incorporates

89 Alberta Hansard (March 8, 2011) at 247–248.

90 ALSA, s 1(1).

91 *Municipal Government Act*, RSA 2000, c M-26, s 617.

the same limitation, but refers to property expressly as a protected right. ALSA also adds a due process requirement, echoing the debate over the right to property in the *Charter* and inviting, perhaps, judicial substantive means-ends review.[92] The courts have not had an opportunity to test this proviso.

The amendments purport to strengthen the position of landowners in several other ways. First, similar to the arrangement under the *Municipal Government Act*,[93] ALSA now authorizes the Minister to grant at the request of any landowner a variance in respect of any restriction contained in the regional plan.[94] A variance is a discretionary administrative relief, which may be given in cases of special hardship and only when reconcilable with the purpose of the enabling legislation and the relevant policies. Second, the amendments narrow the definition of statutory consents by excluding permits, licenses, and other instruments issued under several provincial enactments, including the *Land Titles Act* (presumably in order to dispel any notion that a regional plan can extinguish title to land) and any enactment prescribed in the regulations.[95] Third, the amendment vest development permits and approvals under the *Municipal Government Act* by providing that a regional plan may not affect, amend or rescind such rights where the development has progressed to the installation of improvements on the relevant land at the time the regional plan comes into force.[96] In addition, before a provision in a regional plan that affects a statutory consent can

92 *Supra* note = 20.
93 *Municipal Government Act*, s 640(6).
94 ALSA, s 15.1.
95 ALSA, s 2(2).
96 ALSA, s 11(3).

be adopted, the Minister must give the holder of the consent notice and an opportunity to suggest alternatives to the proposed measures. The notice must include "any proposed compensation and the mechanism by which compensation will be determined under any applicable enactment".[97]

Perhaps the most intriguing amendment to ALSA is contained in section 19. The section in its original version provided :

Compensation limited
19. No person has a right to compensation by reason of this Act, a regulation under this Act, a regional plan or anything done in or under a regional plan except either
(a) as expressly provided for under Part 3, Division 3, or
(b) as provided for under another enactment.

The amended section now states:

Compensation
19. A person has a right to compensation by reason of this Act, a regulation under this Act, a regional plan or anything done under a regional plan
(a) as provided for under section 19.1,
(b) as provided for under Part 3, Division 3, or

---

97 ALSA, s 11(2). The compensation referred to must arise out of another enactment, as section 11(2) does not create a right to compensation *ex proprio vigore*.

(c) as provided for under another enactment.

The original version is titled, "Compensation limited" and begins with the words "No person has a right to compensation". In contrast, the amended version, titled simply "Compensation" begins with the words, "A person *has a right to compensation*". Moreover, the new version adds a new head of compensation under the new section 19.1. That section purports to confer a right to compensation on registered owners (but not tenants or holders of other lesser interests) who suffer a "compensable taking" as a direct result of a regional plan. A "compensable taking" is further defined as "the diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity".[98]

On the surface, the amendments reflect a fundamental change of approach – from a clear priority given to the public purposes served by ALSA at the expense of private interests, to a renewed respect for property rights in the province and a recognition that, to paraphrase U.S. Supreme Court Justice Holmes in one of the most famous regulatory takings cases,[99] fairness concerns demand that the community as a whole pay for the policy changes it desires.[100] But on closer look, the operative significance of the amendments, beyond their symbolism, may be called into question.

Section 19.1 defines a "compensable taking" by setting out each element for the purposes of the Act. A "taking" is defined as the "the

98 ALSA, s 19.1(1)(a).

99 *Pennsylvania Coal Company v. Mahon* (1922) 260 U.S. 393.

100 "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change" (*ibid*., at 415). As previously noted, takings analysis in Canada, unlike in the U.S., is not grounded constitutional law.

diminution or abrogation of a property right, title or interest" – more broadly perhaps than the Supreme Court's definition ("an acquisition of a beneficial interest in the property or flowing from it")[101]. On the other hand, "compensable" is meant to be understood as "giving rise to compensation *in law or equity*". But under Canadian law, all claims for compensation must be found in statute.[102] In other words, the new category of compensable claims now referred to in section 19(a) comprises a null set.

The effects of ALSA on the right to compensation may be summarized therefore as follows. First, where land is made subject to a conservation directive, ALSA provides for compensation. In the absence of statutory compensation, the affected owner would not be entitled to compensation unless the directive is found to effect a de facto expropriation under the *CPR v Vancouver* standard. Second, ALSA does not create an independent right to compensation for losses resulting from the effects of a regional plan on a statutory consent, but refers to compensation that may be offered under legislation.[103] With very few exceptions, the various enactments under which statutory consents are issued in Alberta, do not provide compensation.[104] Finally, ALSA restored

---

101 See *CPR v Vancouver, supra* notes 59–60.

102 Per *Sisters of Charity of Rockingham v R, supra* note 32.

103 See note 97, *supra*.

104 For an example of (limited) compensation under another enactment, see *Mineral Rights Compensation Regulation*, Alta Reg 317/2003, which protects certain reliance interests of the holder of mineral rights, but not expected profits. This regulation would be applicable if, for example, a regional plan would rescind or extinguish oil leases or other mineral rights. See further, David R. Percy, "Attitudes Towards Resource Ownership" (Conference of the Canadian Society for Unconventional Resources, Calgary, Alberta, 15–

provincial authority over land use regulation, but did not change the fundamental approach to compensation, pointed out in *Mariner Real Estate*[105] : "In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation". In other words, the right to compensation supposedly extinguished by ALSA in its original version, but revived in its present form, is a mirage.

While the legal meaning of ALSA was being debated, the government took further steps to appease property owners as the provincial elections were set to take place. In November 2011, a "Property Rights Task Force" was established. The task force held a series of public consultations across the province and published its final report in February 2012.[106] The report concluded that Albertans desired (a) active consultation about initiatives affecting property rights; (b) access to courts and representation to negotiate or argue against government actions affecting their property rights; and (c) appropriate compensation. The government responded to the Task Force's Report, by announcing a Property Rights Advocate Office.[107] In March, the *Property Rights Advocate Act*, was given a third reading.[108] Section 2(2) of that Act provides that "Where a person has a right to compensation as a result of an expropriation or compensable taking, that person must have

---

17 November, 2011), esp. at 7–8.

105 *Supra* note 43 at ¶ 42.

106 Government of Alberta, *Report of the Property Rights Task Force: Engagement with Albertans* (Edmonton: Govt. of Alberta, 2012).

107 Government of Alberta, *Government Responds: Property Rights Task Force* (Edmonton, Govt. of Alberta, 2012).

108 SA 2012, c P-26.5 (awaiting proclamation).

recourse to an independent tribunal or the courts, or both, for the purpose of determining full and fair compensation". The definition of a "compensable taking" in respect of land is virtually identical to the one in ALSA: "the diminution or abrogation pursuant to an enactment of a property right, title or interest giving rise to compensation in law or equity".[109] The Act authorizes the Property Rights Advocate to hear complaints relating to the expropriation or compensable taking of a person's land, but given that expropriations are comprehensively administered under the *Expropriation Act*,[110] and given the improbable scope of compensable takings as defined, it is difficult to see the import of this complaint mechanism.

The provincial elections were held in April of 2012. The Progressive Conservatives defied the polls, winning another majority term. But they lost several former strongholds in rural Alberta, where the issue of property rights agitated many voters. Ted Morton, the former leadership candidate and one of ALSA's architects, was one of four cabinet ministers who lost their ridings. The future of the Land Use Framework and ALSA appears secure for now, but so far no regional plan has received Cabinet approval as required by the legislation. Of the seven regions identified by LUF, only the Lower Athabasca Region (home to the oil sands development) draft plan has been made public.

---

109 *Property Rights Advocate Act*, s 1(c).

110 RSA 2000, c E-13.

CONCLUSIONS

Much has been said about the compromised and confused state of property rights in Canada. The vulnerability of private property against the state originates in the British principle of parliamentary sovereignty, but the decision to exclude property from the *Charter* followed extensive and vigorous deliberation. The courts' unwillingness to develop a robust doctrine of regulatory takings in the absence of a constitutional right to property and judicial pronouncements such as those in *Mariner Real Estate* and *CPR v Vancouver*, can only encourage regulators to impose greater burdens on private owners in the name of the public good. The average Canadian may rest secure in the knowledge that his or her home will not be taken by the government without compensation, but the threat of regulation does loom large.

Proponents of the broad compensatory rights for land use regulations advance efficiency and fairness arguments. A duty to compensate forces policymakers to confront the full costs of their policies and to assess those costs against the putative benefits. Compensation also ensures that the costs of regulatory policies are shared among the community as a whole, rather than a select group of landowners. This paper highlights a concern of a different nature. Uncertainty with respect to the entitlement to compensation can create political resistance to desirable policies, especially in groups whose wealth is closely tied to their land, as in the rural sector. The recent experience with Alberta's Land Use Framework and the *Alberta Land Stewardship Act* exemplifies the apprehension and misconceptions surrounding property, takings, and the right to compensation, which persists among Canadian legislators and landowners alike.