Chapter 6

Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings

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6.1 Introduction

This chapter canvasses two (admittedly disparate) subjects: comparative research into protection against state "takings" of property rights, with particular regard to what will be described as "regulatory takings"; and the existence of such protections in Canadian law. Its comparative aspect will attempt to demonstrate that there are among Western states a spectrum of legal protective frameworks for property rights.[1] In view of the paucity of comparative literature on the subject, the author will also offer some general comments on research methodology. Having provided something of a general comparative analysis, the chapter will then give some insight into the Canadian system, whose legal framework offers (relative to other Western states) weak protections for property-holders. This will entail both an historically based explanation for the feeble quality of those protections, as well as some conjecture about why that quality has not sparked a "property

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1 In some instances, readers may note certain similarities to the current regime in New Zealand.

rights" debate in Canada. The author concludes by drawing together some lessons from the discussion of both subjects from which property rights discourse in New Zealand might profit.

Before proceeding, however, it is useful to clarify what is meant by a "regulatory taking", since it is a term indigenous to United States jurisprudence. (In Canada it is alternatively referred to as a "constructive taking", a de facto expropriation or a de facto taking. The author has elsewhere expressed his preference for the term "constructive taking",[2] but on the assumption that the term employed by United States authorities is better known in New Zealand, this chapter will refer to "regulatory takings".) A regulatory taking is distinct from an expropriation, in that an expropriation entails the acquisition by the state of legal title to the land in question in order to confine such land to a public use, while a regulatory taking contemplates the imposition of restrictions upon privately held land by way of public regulation. In other words, a regulatory taking contemplates the landowner retaining title, while having to confine his or her use of the land to such residual uses that the regulation might permit. Of course, regulated land use is commonplace in modern civil society, and most instances of restricted land use (such as municipal zoning) are not typically viewed as triggering a regulatory taking. The normative concern which the concept of a regulatory taking addresses raises, however, arises where the regulation's scope is so expansive that it effectively denudes the property of all reasonably anticipated private uses. This concern recognises that, from a landowner's perspective, there is a threshold of restrictiveness beyond which the regulation – while falling short of an actual expropriation (because title rests with the landowner) – is *tantamount* to an expropriation, because the land has been effectively reserved for a public purpose, albeit without the legal nicety (and the pecuniary expense) of taking title. As such, the regulation, while leaving title with the landowner, has gone "too far" by freezing out all private use.

6.2 A comparative account of property rights

One of the striking qualities of Canadian law on state takings of property (and particularly on regulatory takings), at least to American researchers,[3] is the dearth of judicial decisions on the subject. It is probably futile to speculate as to why this might be the case, except perhaps to note that it might be explained by the absence of any significant property rights debate in Canada. Still, one might expect that property rights debates in other jurisdictions – particularly in the United States – would inform the content of legal rights or

2 Russell Brown "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40 UBC L Rev 315 at 316.

3 Donna R Christie "A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada" (2007) 32(2) Brooklyn J Intl L 343.

at least influence some of the legal thinking on the subject. That has not happened, however. One of the reasons, perhaps, is that United States law is seen among some Canadians (and, probably, most Canadians) as being the product of property rights zealots, whose influence has moved the direction of United States law in a way that privileges property rights at the expense of what those same Canadians might see as legitimate state interests. Indeed, even among those (again, probably, few Canadians) who advocate more robust property protections in Canadian law, the United States is seen as offering, among Western states, the least fettered of such protections.

This expressed view of United States law is, as will be seen, a misstatement verging upon caricature. This is, perhaps, inevitable, given that there has been until recently very little comparative research and literature on the subject of property rights protections. Indeed, the first large-scale comparative research devoted to the subject, which examined the legal regimes of 13 countries in North America, Europe and the Middle East, was published just last year.[4] The few previous efforts covered far fewer countries,[5] or in one instance was confined to a particular region (that did not cover North American or European countries).[6] Even in Europe, there has been almost no comparative research on property rights, and the sole major comparative project touching upon the subject did not address regulatory takings.[7]

Why the paucity of comparative research on this subject? In the author's opinion, there are at least two possible explanations. The first is that the emergence of foreign investment protection and promotion agreements (FIPAs) as the legal instrument by which international trade is to be regulated has made comparative analysis largely moot, at least with respect to the property rights of international investors. To use Canada as an example – Canada is a party to bilateral FIPAs with 35 countries and a trilateral FIPA with the United States and Mexico, and is in negotiations with eight countries and with groups of other countries that together comprise the entirety of the

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4 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010).

5 Donald Hagman and Dean Misczynski (eds) *Windfall for Wipeouts: Land Value Capture and Compensation* (American Society of Planning Officials, Chicago, 1978) covered Australia, Canada, New Zealand, the United Kingdom and the United States; Gregory S Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press, Chicago, 2006) examined constitutional property rights in Germany, South Africa and the United States; and Donna R Christie "A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada" (2007) 32(2) Brooklyn J Intl L 343 was confined to the three countries mentioned in its title.

6 See Tsuyoshi Kotaka and David L Callies (eds) *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries* (University of Hawai'i Press, Honolulu, 2002) which covered 10 Asian-Pacific countries.

7 John Sprankling, Raymond Coletta and Matthew C Mirow *Global Issues in Property Law* (Thomson/West, St Paul (Minn), 2006). Another European study, María Elena Sánchez Jordán and Antonio Gambaro (eds) *Land Law in Comparative Perspective* (Kluwer Law International, New York, 2002), refers in some places to regulatory takings.

Americas.[8] In addition, it is a party to the trilateral (and, from the Canadian standpoint, most significant) FIPA, the North American Free Trade Agreement (NAFTA).[9] Its provisions – which are typical of most FIPAs – provide that an "investor" from the United States or Mexico who has an "investment" in Canada may initiate a claim to determine through international arbitration whether Canada has imposed a "measure" that is "tantamount to … expropriation",[10] thereby triggering a right in the investor to compensation. A "measure" is defined as including "any law, regulation, procedure, requirement or practice" adopted or continued by any branch of government.[11] "Investment" is broadly stated as including all classifications of property, whether "acquired in the expectation or used for the purpose of economic benefit or other business purposes" and "interest arising from the commitment of capital and other resources …".[12]

The FIPA regime tends to eliminate the necessity for comparative analysis, since it codifies what might be considered an "international common law" of property rights. In the Canadian case, for example, FIPAs effectively constrain Canadian legislative power, which was "previously unbounded in regard to the regulation of property".[13] Moreover, they do so in generally the same manner in respect of Canadian state action as they do in FIPAs between other parties. Granted, the protections of FIPAs are applied only to international investors, leaving domestic law to apply to domestic property-holders. (Curiously, domestic property owners in Canada have weaker protections from the regulatory measures of Canadian public authorities than investors of United States or Mexican origin. Indeed, because a claim under NAFTA can be triggered by a measure adopted or continued by *any* branch of government, judicial shaping of the common law of takings (particularly where it rolls back property protections) is now subject to NAFTA scrutiny). The point, however, is that it may well be that the impetus for comparative research withered with the development of an international common rights regime.

Another possible explanation for the lack of comparative research in this field is that – to be blunt – it is difficult. Land-use regulatory instruments are

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8 See Foreign Affairs and International Trade Canada "Negotiations and Agreements" (2011) www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx (last accessed 18 August 2011).

9 North American Free Trade Agreement (opened for signature 8 December 1992, entered into force 1 January 1994). The Agreement came into effect in Canada as per the North American Free Trade Implementation Act SC 1994, c 44.

10 North American Free Trade Agreement (opened for signature 8 December 1992, entered into force 1 January 1994), art 1110.

11 North American Free Trade Agreement (opened for signature 8 December 1992, entered into force 1 January 1994), art 201.

12 North American Free Trade Agreement (opened for signature 8 December 1992, entered into force 1 January 1994), art 1139.

13 David Schneiderman "NAFTA's Takings Rule: American Constitutionalism comes to Canada" (1996) 46 Uni Toronto LJ 499 at 501.

remarkably diverse among different jurisdictions. Comparative analysis of regulatory takings must account for complex differences among jurisdictions that are not easily sorted into nice, tidy categories. In some countries, municipal zoning bylaws are the principal tools for regulating land use. In others, legally enforceable "plans" or building permits authorised by a national or sub-national state are employed.[14] In the United States, comprehensive or master plans are employed, although enforcement mechanisms differ from those of municipal zoning bylaws or national and sub-national statutory plans. The contrasts among these different instruments can, moreover, be quite nuanced. National statutes, for example, typically differentiate between levels of plans, both as to the scope of the geographic area covered, and as to the degree of detail (the more detailed plans usually covering the issuance of development permits and other concerns that would in, for example, the United States and Canada be covered under subdivision regulations and bylaws, design guidelines or (in the United States) planned unit development.[15]

In short, there is – with the notable exception of the common international regime represented by FIPAs – no universal approach to the regulation of land use and, therefore, to the legal response to a regulatory taking. Various countries, at different times, have adopted their own approaches. There are not, at least to the author's knowledge, two Western countries with the same law on regulatory takings, even among countries with a common legal and political heritage such as Australia, Canada, New Zealand and the United Kingdom (or, for that matter, Germany and Sweden), or even among the federal states within those groupings. This diversity, and the intricacy of land use regulation that prevails in each separate instance, probably also explains why comparative research in this field has been so lacking.

Such diversity and complexity also serve as a precaution: comparative research is risky business, and mistakes have been made. The leading comparative text on regulatory takings, compiled by an Israeli, Professor Rachelle Alterman, addressed this risk by involving scholars from each country under consideration.[16] That was done, wisely in this author's opinion, in response to Alterman's concern about our "tendencies to extrapolate from our own country's laws and practices or to assume that we can deduce about a specific legal arrangement based on our general knowledge of some foreign country".[17]

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14 See Rachelle Alterman "A View from the Outside: The Role of Cross-National Learning in Land-Use Law Reform in the United States" in Daniel R Mandelker (ed) *Planning Reform in the New Century* (Planners Press, Chicago, 2006) at 304.

15 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 8.

16 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 8.

17 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 12.

To date, what little comparative scholarship that exists justifies that concern. Recall the earlier point, for example, that both property-rights advocates and property-rights opponents in Canada typically cite United States law – and, in particular, United States law governing regulatory takings – as the paradigm of "property rights" jurisprudence.[18] "The connection between Americans and private property rights", one eminent Canadian author has observed, is "fundamental".[19] Certainly, property rights and their protection weighed heavily on the minds of the Founders, inasmuch as British sequestration was a common and serious complaint at the time of the Revolutionary War. Since then, from debtor relief laws of the late 18th century,[20] to early 19th century grants of monopolies and condemnatory powers,[21] to the abolition of slavery,[22] to the emergence in the 20th century of a modern regulatory state,[23] to the Obama administration's health care legislation,[24] United States political culture has been to a substantial degree characterised by "bitter rhetorical and political wars … about the nature, extent, and sanctity of claimed individual rights of private property".[25] And, even though there are other possible sources of constitutional protection for private property in the United States Constitution,[26] it is the takings clause of the Fifth Amendment to the United States Constitution – that provides "nor shall private property be taken for public use, without just compensation" – which has emerged as "the contemporary battleground for real and symbolic struggles between individual property claims and the prerogatives of state power".[27] Property rights advocates, using the takings clause, have galvanised public support to roll back what they see as excessive interference with property rights.

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18 David Schneiderman "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 UTLJ at 499.

19 Barry Appleton "Regulatory Takings: The International Law Perspective" (2002) 11 NYU Envtl LJ 35.

20 James W Ely *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press, New York, 1992) at 37–41.

21 Morton J Horwitz *The Transformation of American Law, 1780-1860* (Harvard University Press, Cambridge (Mass), 1977) at ch 3.

22 Robert M Cover *Justice Accused: Antislavery and the Judicial Process* (Yale University Press, New Haven, 1977); and William B Scott *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (Indiana University Press, Bloomington (IN), 1977) at 94–113.

23 Lawrence M Friedman *A History of American Law* (3rd ed, Simon and Schuster, New York, 2005) at 439-466.

24 See Jonathan H Adler "Cordray v Fisher on the Constitutionality of ObamaCare" (2010) The Volokh Conspiracy volokh.com/2010/09/17/cordray-v-fisher-on-the-constitutionality-of-obamacare (last accessed 19 August 2011).

25 Laura S Underkuffler-Freund "Takings and the Nature of Property" (1996) 9 CJLJ at 161.

26 For example US Const, art I, § 10, c. 1. "[n]o State shall … pass any … Law impairing the Obligation of Contracts".

27 Laura S Underkuffler-Freund "Takings and the Nature of Property" (1996) 9 CJLJ 161 at 162.

Probably unsurprisingly, the principal concern for these advocates has usually been regulatory takings. Richard Epstein, in particular, has contributed to the debate about regulatory takings, with his argument that regulatory action should be properly understood as "takings" under the Fifth Amendment.[28] And, since *Pennsylvania Coal v Mahon*,[29] United States law has recognised that government regulatory action short of taking title can still constitute a taking where the effect on property is sufficient,[30] with regulatory takings jurisprudence beginning to take its current form with the later decision of the United States Supreme Court in *Penn Central Transportation Co v New York City*.[31] In that case (which involved a dispute over the effect of the respondent's zoning regulations), the Court found that, where a regulation limits the use of land in a manner which does not permit its reasonable beneficial use, a taking may have occurred. This would depend on several factors, including the economic effect of the regulation upon the property-holder, the extent to which it prohibits reasonable expectations, and the character of the action.[32]

All this would tend to justify the common perception of the United States as some sort of property rights Xanadu. Yet, United States courts have long recognised and grappled with a balance to be struck between constitutional protections of property rights with public imperatives that necessarily entail infringing those rights. The case for such balancing is hardly novel. The law has long condoned forced exchanges, as part of the (implicitly utilitarian) Hobbesian solution of trading our original liberty and property for security. And, the case for balancing has found its way into some of the more recent (that is, post-*Penn Central*) United States Supreme Court jurisprudence dealing with *partial* diminutions of economic benefit and in determining whether they might constitute a regulatory taking for the purposes of the takings clause. In *Lucas v South Carolina Coastal Council*,[33] the Supreme Court established that, for there to be such a regulatory taking, the property-holder must be deprived of *all* benefit of the property. If there was some residual use – howsoever modest – the impugned regulation could not be seen as effecting a taking. In *Tahoe-Sierra Preservation Council Inc v Tahoe Regional Planning Agency*[34] which involved the issuance of temporary moratoria on development, the majority concluded that the property at issue could not be considered to have lost all economic benefit since it had a contingent value that would materialise into fully restored value once the moratorium was lifted. And, in *Lingle v*

28 Richard R Epstein *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, Cambridge (Mass), 1985).

29 *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).

30 *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 413.

31 *Penn Central Transportation Co v New York City* 438 US 104 (1978).

32 *Penn Central Transportation Co v New York City* 438 US 104 (1978) at 124–125.

33 *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

34 *Tahoe-Sierra Preservation Council Inc v Tahoe Regional Planning Agency* 535 US 302 (2002).

Chevron,[35] Justice O'Connor affirmed for a unanimous Supreme Court the threshold stated in *Lucas*, meaning that a regulatory taking occurs only where regulations completely deprive an owner of "*all* economically beneficial us[e]" of property.[36]

When compared to jurisdictions like Canada and Australia, the protections afforded by United States law for property-holders are indisputably robust.[37] At the same time, such comparisons can be misleading. United States law, in fact, offers no more significant protections than do a surprising collection of Western countries, including Austria and Finland. Austrian constitutional law, for example, maintains that "property is inviolable"[38] and, while that provision has been interpreted narrowly in some of its nine states, certain state constitutions provide a wider scope of property protection, at least in respect of regulatory takings, than does United States jurisprudence.[39] For example, in Corinthia, Vorarlberg, Lower Austria and Salzburg, property-owners may claim for the loss incurred if land use plans diminish (*even only partially*) the value of land[40] – an entitlement which, it bears mentioning, the United States Supreme Court has refused to read into the takings clause. Elsewhere in Austria, courts – at least in theory – will compensate property-holders who can demonstrate economic loss arising from their reliance on the development rights that attached to the land in question at the time of acquisition.[41]

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35 *Lingle v Chevron USA Inc* 544 US 528 (2005).

36 In doing so, the Court overruled *Agins v City of Tiburon* 447 US 255 (1980) at 260, which had found that "the question [of when a regulatory taking has occurred] necessarily requires a weighing of private and public interests" and that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable uses of his land". In *Lingle v Chevron USA Inc* 544 US 528 (2005), the Court rejected the "substantially advances … formula" as having "no proper place in our takings jurisprudence". Rather, it addresses a question that arises prior to a takings claim, which is whether a regulation is effective in achieving a legitimate goal. If it is not, then it is invalid and it is otiose to consider whether compensation is due under the takings clause. *Lingle*, therefore, clarified that the *only* test for determining whether a regulation amounts to a taking is whether it denies an owner all economically viable uses of his or her land.

37 Donna R Christie "A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada" (2007) 32(2) Brooklyn J Intl L 343.

38 Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Länder represented in the Council of the Realm – StGG (Austria)

39 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 195–214

40 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 210.

41 "In theory", since the particular type of loss that is compensable varies from state to state. In one case, compensation was denied where a land use plan reclassified land from "expected building land" to "agricultural land" Verfassungsgerichtshof (VfGH) im ErkenntnisVfSlg 11914/1988.

Finland, conversely, whose constitution contains a guarantee for "full compensation" in the event of expropriation,[42] typically grants compensation rights for some forms of what would in the United States be understood as a "regulatory taking". In instances of "near expropriation", where the landowner is left with no ability to use the land to economic advantage, property-holders are entitled to compensation.[43] In one recent case, property-holders were found to be entitled to compensation for a *partial* regulatory taking, where the discovery of flying squirrel nests in trees prohibited them from harvesting timber for previously permitted commercial purposes, causing a four per cent decrease in property value.[44] (Flying squirrels are statutorily protected wildlife under Finland's Nature Conservation Act.) According to the court, a four per cent decrease exceeded the threshold of a "near expropriation". Again, it is worth noting that this is a more robust protection than United States law has furnished. In cases of land use restrictions more generally, however, Finnish statute law provides that regulated property must still have uses available to the landowner that "generate a reasonable return",[45] failing which the land must either be expropriated or the land owner duly compensated for lost value. The point here is that, like much of Austrian state-based law, the response of Finnish law to restricted land use does not differ substantially from that of United States law.

Careful comparative analysis has also demonstrated that an equally surprising (given common assumptions) collection of Western states, including Sweden, Israel and the Netherlands, afford their citizens *more* robust protections than are extended to United States property-holders. What characterises these countries' legal response to a regulatory taking is that they generally allow for compensation for *partial* regulatory takings (as opposed to the case-specific instances of compensation for partial regulatory takings in Austria and Finland). In Sweden, for example, the property clause of Sweden's constitution speaks of "restrictions by the public administration",[46] which has been interpreted and taken by Swedish statutory law as applying not only to eminent domain but also to regulatory takings.[47] The threshold for a

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42 The Constitution of Finland 1999 (731/1999) available at www.om.fi/21910.htm (last accessed 19 August 2011).

43 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 177.

44 Supreme Court of Finland KKO:2008:73.

45 Land Use and Building Act 123/1999 (Finland). The Act is available (in English) at Land Use and Building Act 123/1999Finlex www.finlex.fi/fi/laki/kaannokset/1999/en19990132.pdf (last accessed 19 August 2011). Grateful thanks to Niilo Niemi for drawing this English-language resource to the attention of the author.

46 The Instrument of Government 1974 SFS 1974:152 (Sweden) available at Sveriges Riksdag www.riksdagen.se/templates/R_Page____6307.aspx (last accessed 19 August 2011).

47 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 293–312.

compensable regulatory taking depends upon the type of regulation. Heritage building protection, for example, must diminish the value of the land by at least 15 per cent to trigger a compensatory right (in which case compensation is made for such diminution that exceeds that 15 per cent threshold). In respect of most other planning decisions, however, there is no threshold, and compensation is simply awarded to the degree by which the value is diminished.[48]

Israel and the Netherlands, while having mutually distinct constitutional and political traditions, each grant the most extensive compensation rights for regulatory takings, including partial regulatory takings, available to the author's knowledge to property-holders in Western states. Israel's "unwritten constitution" – essentially a series of court decisions and statutes that are viewed as having acquired quasi-constitutional status collectively termed the "Basic Law" – includes the statute Basic Law: Human Dignity and Liberty, which stipulates that "[t]here shall be no violation of the property of a person", unless such violation is by statute, "befit[s] the values of the State of Israel", is enacted for "a proper purpose" and is of "an extent no greater than is required".[49] While this has been applied to accord a right to compensation for regulatory takings,[50] that right was already effectively provided in a series of decisions of the Israeli Supreme Court, and the Basic Law: Human Dignity and Liberty is now "cited in almost every opinion of the courts as an additional legal anchor for interpreting the right to compensation."[51] Moreover, the right to compensation for restrictions on property use caused by local planning restrictions had existed since 1965 with the enactment of the Planning and Building Law, which established a right to compensation for injuries – even partial injuries, consisting of a diminution in land value – caused by approval of a new or amended land use plan.[52] In the Netherlands, compensation for partial regulatory takings is not left to interpretation, but is expressly set out in the Dutch Constitution, which provides that "there shall be a right to full or partial compensation if in the public interest the competent authority destroys property or renders it unusable or restricts the exercise of the owner's rights to

48 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 301.

49 Basic Law: Human Dignity and Liberty 1992 (Israel) ss 3 and 8; available (in English) at www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last accessed 19 August 2011). See for an excellent review of these provisions, Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 315–317.

50 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 316.

51 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010).

52 Planning and Building Law 1965 (Israel) s 197.

it".[53] Currently, the Dutch Spatial Planning Act 2006 provides that land use regulations can give rise to a claim for capital loss (such as a diminution in value) or a loss of income (such as a reduction arising from, for example, restricted parking).[54] Again, it bears emphasising that such protections go well beyond those furnished by United States law.

6.3 Property rights protections in Canada

Canada is rare among developed Western states for its lack of constitutionally entrenched property rights.[55] The constitution-making process that generated this lacuna – although it was a conscious and deliberate omission – occurred, broadly speaking, in two stages. The Constitution of Canada was originally a United Kingdom statute, the Constitution Act 1867,[56] which stipulated that Canada was to have a constitution "similar in principle" to the Constitution of the United Kingdom. As such, the Constitution Act 1867 – which was the product of the first round of constitution-making in Canada – did not contain an explicit "bill of rights" or any other codification of individual rights against the state. Moreover, at the second stage of constitution-making – that is, when a "bill of rights" constitutional model *was* adopted by Canada in 1982 (in the form of the Constitution Act 1982,[57] which included the Canadian Charter of Rights and Freedoms)[58] – the enumerated individual protections did not include a right to property or to compensation for a taking (which are referred to collectively in this chapter as "property rights"). Since 1982, Canadian courts have consistently refused to interpret provisions of the Charter in such a way as to encompass property rights.[59]

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53 Constitution for the Kingdom of the Netherlands 1983 (Netherlands) (Grondwet voor het Koninkrijk der Nederlanded), art 14. See generally Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 344–345.

54 Spatial Planning Act 2006 (Netherlands) part 6.1.

55 Richard W Bauman "Property Rights in the Canadian Constitutional Context" (1992) 8 S Afr J Hum Rts at 344; and Donna R Christie "A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada" (2007) 32(2) Brooklyn J Intl L 343 at 345.

56 The Constitution Act 1867 (UK), 30 and 31 Vict c 3 (formerly the British North America Act 1867).

57 Constitution Act 1982 (Canada); this was contained within the Canada Act 1982 (UK), sch B.

58 Canada Act 1982 (UK), sch B, part 1.

59 See *New Brunswick v Estabrooks Pontiac Buick Ltd* (1982) 44 NBR (2d) 201 (NBQB); affirmed in 144 DLR (3d) 21 (NBCA); *Becker v Alberta* 1983 ABCA 161, (1983) 148 DLR (3d) 539; *Bishop v Annapolis* [1986] 37 LCR 1 (NSSC); and *A & L Investments Ltd. v Ontario (Minister of Housing)* (1997) 36 OR (3d) 127 (ONCA), where leave to appeal to the Supreme Court of Canada was subsequently refused at (1997) 155 DLR (4th) 469. In *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927 at 1003; Dickson CJ compared the wording of s 7 of the Charter (which enshrines a right to "life, liberty and security of the person") to the Due Process

6.3.1 *1867*

Several historical factors within those two constitution-making stages probably explain the current absence of constitutionalised property rights in Canada. The first round of constitution-making (that is, the step which led to the Confederation of the original Canadian provinces in 1867 and the Constitution Act 1867) occurred while the franchise was in flux in the United Kingdom, shifting from proprietary thresholds to democratic suffrage.[60] The first Prime Minister of the new Confederation (and the principal driving force among English-speaking political leaders behind Confederation), Sir John A Macdonald, saw property rights and democracy as being in mutual tension.[61] And, being a product of his party and, more particularly, his party at that time, he wished to preserve some privilege for property-holders as such, whether in preference to the majority of franchisees, or in some way distinct from them. As he explained:

> While the principle of representation by population is adopted with respect to the popular branch of the legislature, not a single member of the Conference, not a single one of the representatives of the government or the Opposition of any one of the Lower Provinces was in favour of universal suffrage. Everyone felt that in this respect the principle of the British Constitution shall be carried out, and that classes and property should be represented as well as numbers.[62]

This preference for property rights took concrete form in, first of all, the creation of a national upper house of Parliament "explicitly designated to protect the interests of the property-owning classes"[63] – the Senate of Canada – whose members were to be (and still are) appointed (not elected) and must meet a minimum property requirement of at least "Four thousand Dollars over and above his Debts and Liabilities".[64] By enshrining property ownership

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clause in the American Bill of Rights and observed: "The intentional exclusion of property from s 7, and the substitution therefore 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."

Another potentially applicable Charter provision is s 8, which prohibits "unreasonable search and seizure", although its scope has been restricted to property taken during a criminal investigation, and has been found not to afford a right to compensation for expropriation. *Becker v Alberta* 1983 ABCA 161, (1983) 148 DLR (3d) 539 at [2]): "[section] 8 does not extend to the taking of real property by expropriation."

60 Karl Polanyi *The Great Transformation* (Beacon Press, Boston, 1957).

61 Alexander Alvaro "Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24(2) Can J Polit Sci 309 at 313.

62 *Parliamentary Debates on the Subject of Confederation of the British North American Provinces, 3rd sess, 8th Provincial Parliament of Canada* (Government of Canada, Ottawa, 1865, reprinted 1951) at 39.

63 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 94.

64 The Constitution Act 1867 (UK), s 30 and 31 Vict c 3, s 23(4).

as the threshold for Senate membership, Macdonald meant to ensure that those who had veto power over Commons legislation held a vested interest in property and were not dependent upon constituent voters' support. Second, Macdonald also enshrined mechanisms for limiting power that might be exercised by provinces over property ownership pursuant to the Constitution Act 1867 which granted to the provinces jurisdiction over "property and civil rights." To that end, several matters which otherwise would have come within "property and civil rights" – for example, the regulation of trade and commerce, banking, currency, bills of exchange and promissory notes, patents and copyrights – were specifically included among federal powers. In addition, the federal government was also vested with residual power "to make Laws for the Peace, Order, and good Government of Canada", which "contemplated that certain matters which would otherwise have come within property and civil rights could attain such a national dimension so as to come within federal competence."[65] The Constitution Act 1867 also included a "disallowance power", giving the federal government (through the Vice-Regal representative) the power of disallowance over acts of provincial legislatures. The mischief sought to be addressed here was encroachment by democratically elected provincial legislatures upon property rights.

Despite Macdonald's property rights-oriented constitutional regime, the status of property (and therefore the rights of property holders) quickly eroded. Party discipline rendered the Senate little more than an echo chamber to the House of Commons, and inflation rendered the $4000 threshold for Senate membership meaningless.[66] The political and, it has been suggested, "moral" authority of the Senate to protect property rights against the will of the elected House of Commons also diminished over time.[67] Moreover, provincial jurisdiction over property was expanded by a series of decisions of the Judicial Committee of the Privy Council.[68] Finally, the disallowance power was used rarely (and has not been used since 1943).[69]

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65 Peter W Hogg *Constitutional Law of Canada* (2nd ed, Carswell, Toronto, 1985) at 455.

66 Alexander Alvaro "Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24(2) Can J Polit Sci 309 at 315.

67 Rachelle Alterman *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, Chicago, 2010) at 94. 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 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 upon friends of the governing party.

68 See, for example, *Citizen's Insurance Company of Canada v Parsons* (1881) 7 App Cas 96 (PC); and *Reference re Natural Products Marketing Act* [1937] AC 377 (PC).

69 Alexander Alvaro "Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24(2) Can J Polit Sci 309 at 315.

Furthermore, while Macdonald was the dominant political force in the new Dominion for its first 25 years, it should not be assumed that his was the sole opinion (even if it was the prevailing opinion). Other elements of Canadian political culture – both within the provinces and the Liberal Party at a federal level – were, from its inception, characterised by a high degree of deference to what they saw as the state's interest in orderly development. As Edward Blake, MP (then Canada's Leader of the Opposition) once famously stated in the Canadian House of Commons:[70]

> I am a friend to the preservation of the rights of property … but I believe in the subordination of those rights to the public good … I deny that the people of my Province are insensible to or careless about the true principles of legislation. I believe they are thoroughly alive to them, and I am content that my rights of property, humble though they are, and those of my children, shall belong to the Legislature of my country to be disposed of subject to the good sense and right feeling of the people of that Province.

6.3.2 *The Declaration, UN Covenants and the Bill of Rights*

After the first round of constitution-making in 1867, property rights were subject to explicit public discourse in Canada on two occasions. The first followed the signing by Canada at the United Nations of the Universal Declaration of Human Rights[71] (the UDHR), art 17 of which provides that "[e]veryone has the right to own property alone as well as in association with others", and that "[n]o one shall be arbitrarily deprived of his property". While there has been substantial debate among Canadian international lawyers on the UDHR's binding effect as a written codification of customary international law, art 17 is among certain of its provisions which have generally been accepted as binding. This would make sense, as it has long been recognised in customary international law that the state cannot expropriate property without providing adequate compensation.[72] Similarly, the International Covenant on Civil and Political Rights[73] and the International Covenant on

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70 *Parliamentary Debates* (Government of Canada, Ottawa, 1882) at 915.

71 Universal Declaration of Human Rights GA Res 217A, UN GAOR, 3rd sess (1948).

72 Ian Brownlie *Principles of Public International Law* (6th ed, Oxford University Press, Oxford, 2003) at 509-512; Hugh Kindred and Phillip Saunders (eds) *International Law: Chiefly as Interpreted and Applied in Canada* (Emond Montgomery Publications, Toronto, 2000) at 646-647.

73 International Covenant on Civil and Political Rights GA Res 2200A, UNGAOR, 21st sess, 1496th plen mtg (1966). Canada has also ratified the Optional Protocol attached to the Covenant, which establishes in art 1, an individual mechanism to consider complaints from individuals or groups who allege that their rights under the International Covenant on Civil and Political Rights have been violated.

Economic, Social and Cultural Rights[74] are binding treaties into which Canada has entered. While neither of the Covenants expressly refer to property rights, Canada has taken the position that they have the "effect" of protecting property rights.[75] There being no such guarantee within Canada's domestic legal order, however, the argument went, "some sort of written statement of rights and freedoms, one which would include protection of property",[76] should be effected. Again, democratically-based objections were raised, although the concern was no longer that power would reside in propertied classes, but rather that it would rest with an unelected judiciary.

A compromise was struck in 1960 with the Canadian Bill of Rights,[77] an ordinary (that is, not constitutionally enshrined) statute that recognises a "right of the individual" to the "enjoyment of property and the right not to be deprived thereof except by due process of law".[78] Several factors, however, have worked in combination to weaken the effectiveness of this property protection. First, it applies only to federal (and not provincial) laws and, as a federal statute, can itself be repealed by a simple majority vote of federal legislators. Second, the Bill of Rights also provides that it can be circumvented where there is an express declaration in the impugned federal statute to the effect that it shall operate notwithstanding the Bill of Rights. Third, because the rights protected are those of "the individual"; corporations are excluded from the Bill of Rights' scope. Fourth, even within the Bill of Rights' limited scope, it has been interpreted narrowly, resulting in its having had little practical effect. (Indeed, in its 50 years of effect the Supreme Court of Canada has cited it only once to find federal legislation inoperative, and that case did not implicate property rights).[79]

A more fundamental limitation of the Bill of Rights is the purely procedural quality of its guarantee (of "due process of law"). Furthermore, the meaning of that procedural protection has itself been given a narrow meaning by Canadian courts.[80] Most recently, the Supreme Court of Canada has affirmed that the Crown will be immune for an infringement of property rights so long as it is effected by a validly enacted statute, "the only procedure [being] due any citizen of Canada [being] that the proposed legislation receives three readings in the Senate and House of Commons and that it receive

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74 International Covenant on Economic, Social and Cultural Rights GA Res 2200A, UNGAOR, 21st sess, 1496th plen mtg (1966).

75 See correspondence dated 8 March, 1978 from then-Secretary of State for External Affairs, Don Jamieson, reproduced in Charles B Bourne *The Canadian Yearbook of International Law* (vol XVII, University of British Columbia Press, Vancouver, 1979) at 350–351.

76 Alexander Alvaro "Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24(2) Can J Polit Sci 309 at 316; Pierre E Trudeau *A Canadian Charter of Human Rights* (Queen's Printer, Ottawa, 1968).

77 Canadian Bill of Rights SC 1960 c 44.

78 Canadian Bill of Rights SC 1960 c 44, s 1(a).

79 *R v Drybones* [1970] SCR 282.

80 See, for example, *R v Martin* (1961) 35 WW.R 385 (ABSCAD) at 398–399.

Royal Assent".[81] A federal statute that stripped the plaintiff in that case of a property right (specifically, a right of action to recover property) was therefore, even in the absence of a hearing,[82] unassailable under the Bill of Rights.

6.3.3 *The Charter*

The second occasion upon which property rights were revived as a subject of public discourse occurred during the federal government's constitutional initiative in the 1970s and early 1980s, which included a proposed bill of rights (which ultimately became the "Charter"). In 1978, the federal government proposed a Charter containing a guarantee of "the right of the individual to the use and enjoyment of property, and the right not to be deprived thereof except in accordance with law."[83] This was re-drafted when federal-provincial constitutional talks began in earnest in late 1980, with the federal government proposing a "Charter" that would contain the following provision:

> Everyone has the right to the use and enjoyment of property, individually or in association with others, and the right not to be deprived thereof except in accordance with law and for reasonable compensation.

This provision was strenuously opposed by several provinces, whose governments spanned the Canadian political spectrum. Four of Canada's right-leaning Progressive Conservative premiers (principally the premier of Prince Edward Island, joined by the premiers of Manitoba, Newfoundland and Nova Scotia) opposed it on the grounds that it might invalidate provincial laws restricting foreign ownership of property. Saskatchewan's left-leaning New Democratic premier – a constitutional lawyer – fretted that it would impede social welfare legislation, just as the Due Process clause had been invoked to block New Deal legislation in the United States during the 1930s. The government of Alberta – then, as now, generally regarded as Canada's most conservative government (which is currently disputable) of Canada's most conservative province (which is probably not disputable) – opposed it on the rationale that entrenchment of property rights in the proposed "Charter"

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81 *Authorson v Canada (Attorney General)* [2003] 2 SCR 40 at [37]. The plaintiff sued for breach of fiduciary duty in respect of the Federal Government's improper management of funds (specifically, failure to pay interest) held for the benefit of war veterans. The Bill of Rights protection was invoked by the plaintiff when the Federal Government passed an amendment to the Department of Veterans Affairs Act RSC 1985 c V-1, s 5.1; thereby immunizing itself against claims "for or on account of interest on moneys held."

82 *Authorson v Canada (Attorney General)* [2003] 2 SCR 40 at [13] and [45]. The Court held that a right to a hearing only applies where an adjudicative procedure is necessary for the discretionary application of a law to contestable facts.

83 Bill C-60, Constitutional Amendment Bill. "An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorise the taking of measures necessary for the amendment of the Constitution with respect to certain matters."

would derogate from provincial powers, thereby augmenting federal powers.[84] Ultimately, some provinces (in particular Prince Edward Island and Saskatchewan), joined by the federal New Democratic Members of Parliament, threatened to withhold support for any constitutional accord that contained a property rights provision, and the federal government withdrew the impugned provision.

6.3.4 *Post-Charter and Canadian common law*

Since that time, and despite an (ultimately unsuccessful) third round of constitutional negotiations in 1992, there has been no "property rights" debate in Canada worthy of note. There is no singular obvious reason for this, other than perhaps a general sense of public passivity or contentment. There seems to be in Canada a broadly shared sentiment that the regulation of property rights is a legitimate planning tool that ought not, in the public interest, be confined by hard and fast constitutional rules that might have the effect of tying the government's hands in advancing its policies, particularly as they may pertain to public welfare or environmental preservation.[85] Moreover, the absence of written *constitutional* limitations on the state's power to infringe property rights does not mean that there are no protections for property rights *at all*. (Conversely, the mere fact of constitutional protections does not, in and of itself, signify that such protections subsist *de facto*. Protections of property rights are found in, for example, the Constitution of Zimbabwe,[86] whose government is notorious for its violation of the rights of property-holders, and were even guaranteed protection by the Constitution of the USSR,[87] which was for 70 years regarded – both by itself and its Western adversaries – as the paradigm of the triumph of the state over private property interests.) Ultimately, a country's constitutional provisions are not as important as its political, legal and social culture. Respect for property rights in Canada – such as it exists, and notwithstanding the absence of an express constitutional protection – has emanated in part from deep social consensus[88] and an idea that justiciable rights encompass more than

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84 Alberta also emphasised that it had already legislated statutory bills of rights which included protection for property. They, however, suffer from the same deficits as the federal Bill of Rights: see Russell Brown "'Takings': Government Liability to Compensate for Forcibly Acquired Property," in Karen Horsman and Gareth Morley (eds) *Government Liability: Law and Practice* (Canada Law Book, Aurora (Ontario), 2007) at [4-1–4-63].

85 Richard W Bauman "Property Rights in the Canadian Constitutional Context" (1992) 8 S Afr J Hum Rts 344.

86 Tom Allen *The Right to Property in Commonwealth Constitutions* (Cambridge University Press, Cambridge, 2000).

87 *Constitution of the Union of Soviet Socialist Republics* 1977 (USSR), arts 37 and 57.

88 Perhaps Canadian legal and political culture shares this quality with New Zealand. See Richard Epstein "Natural Resource Law – Property Rights and Takings" (New Zealand Business Roundtable, Wellington, 1999) at 14: "In New Zealand, the legal regime essentially

codified entitlements under written constitutions. That same idea has led the Supreme Court of Canada to recognise that the expropriation of property "constitutes … a very significant interference with a citizen's private property rights".[89] As a result, and as a matter of positive Canadian law, courts will, *absent express legislative language directing otherwise*, order compensation to owners of property that has been taken by the state.[90] In addition, the federal, provincial and territorial levels of government have enacted expropriation statutes, which adopt a conventional scheme that contemplates compensation for expropriation, as determined by rules for establishing market value and for payment of disturbance damages, ancillary losses and interest.[91]

Where Canada's legal regime for property rights is (in the author's opinion) deficient, however, is in respect to what is known in United States jurisprudence as the "regulatory taking".[92] The distinction that has already been drawn[93] between a regulatory taking and the more commonly understood instance of a taking – that is, an expropriation – is worth reiterating here since (as will be seen) that distinction has occasionally been lost on courts and commentators. Whereas an expropriation entails the state taking actual title to the land in question in order to confine such land to a public use, a regulatory taking contemplates the imposition of restrictions on the use and enjoyment of privately held land by way of public regulation. The question then arises as to the degree to which such use and enjoyment must be restricted before a regulation's effects qualify as regulatory taking. As Bruce Ziff has explained:[94]

> At some point, admittedly hard to locate, excessive regulation must be seen as equivalent to confiscation. If property is a bundle of rights, then state action that removes the ability to exercise those rights leaves merely the twine of the bundle (bare title), but little else.

After the decision of the Supreme Court of Canada in *British Columbia v Tener*,[95] the common law rule regarding compensation – that is, that

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leaves all legal power in the hands of the sovereign, so that private property is protected by social consensus and not constitutional decree."

89 *Toronto Area Transit Operating Authority v Dell Holdings Limited* [1997] 1 SCR 32 at [20].

90 *Manitoba Fisheries v Canada* [1979] 1 SCR 101.

91 The scheme is described in *Rebel Holdings Ltd v Division Scolaire Franco-Manitobaine* 2008 MBCA 65, [2008] 228 Man R (2d) 157. Supplementary reasons for the decision are available at *Rebel Holdings Ltd v Division Scloaire Franco-Manitobaine* 2008 MBCA 100.

92 See the discussion in Donna R Christie "A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada" (2007) 32(2) Brooklyn J Intl L at 345.

93 Donna R Christie "A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada" (2007) 32(2) Brooklyn J Intl L 343.

94 Bruce Ziff "'Taking' Liberties: Protections for Private Property in Canada"; Elizabeth Cooke (ed) *Modern Studies in Property Law* (Hart Publishing Oxford, 2005) vol 3 at 341.

95 *British Columbia v Tener* [1985] 1 SCR 533.

compensation for a taking must be paid absent clear statutory language to the contrary – was understood in Canadian law as applying to regulatory takings.[96] The sole qualifier was that the regulation's effect must be a *total* stripping from the property-holder of all rights of use and enjoyment.[97] The Supreme Court of Canada has, however, recently cast doubt upon whether a regulatory taking is compensable in *any* circumstances. In *Canadian Pacific Railway Co v Vancouver (City)*,[98] the plaintiff CPR owned a "corridor" of land on which, for most of the 20th century, it operated a railway, approximately one-half of which fell within the boundary of the City of Vancouver. Eventually, rail operations were discontinued and, as surrounding urban development intensified, CPR invited the City to purchase or expropriate the corridor under British Columbia's Expropriation Act[99] (which would have entailed payment of compensation). The City opted instead to exercise its planning powers to reserve the corridor for its own purposes without actually acquiring it. To that end, in 2000, the City adopted the Arbutus Corridor Official Development Plan By-law (the "ODP Bylaw"),[100] designating the corridor as a public thoroughfare for transportation and "greenways" such as heritage walks, nature trails and cycling paths,[101] and precluding any other form of development. The City's own enabling statute also provided:

> It shall be unlawful for any person to commence or undertake any development contrary to or at variance with the official development plan.

As a result, CPR was statutorily prohibited from developing its own land for contrary purposes, including residential or commercial development.[102] Indeed, the Court recognised that the ODP Bylaw's effect was "to freeze the redevelopment potential of the corridor and to confine CPR to uneconomic uses of the land".[103] At trial, the City acknowledged that this effect was not inadvertent, its intent in passing the ODP Bylaw being to ensure that CPR could not develop its property.[104] CPR took the position, inter alia, that these circumstances revealed a de facto taking of the corridor by the City, for which compensation was owed. By this term, CPR (and the Court) understood the question as going to regulatory takings. That is, CPR argued that the effects of

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96 *Casamiro Resources Corp v British Columbia (Attorney General)* (1991) 55 BCLR (2d) 346 (BC CA).

97 *British Columbia v Tener* [1985] 1 SCR 533 at [35]; *Steer Holdings Ltd v Manitoba* (1992) 83 Man R (2d) 171; (1992) 99 DLR (4th) 61 (Man CA). *Harvard Investments Ltd v Winnipeg (City)* (1995) 107 Man R (2d) 114 (Man CA). Leave to appeal to the Supreme Court of Canada was refused in *Harvard Investments Ltd v City of Winnipeg* 1996 SCC 3.

98 *Canadian Pacific Railway Co v Vancouver (City)* 2006 SCC 5.

99 Expropriation Act RSBC 1996 c 125.

100 *Arbutus Corridor Official Development Plan* City of Vancouver Bylaw no 8249 (25 July 2000).

101 *Canadian Pacific Railway Co v Vancouver (City)* 2006 SCC 5 [4].

102 Vancouver Charter SBC 1953 c 55, s 563(3).

103 *Canadian Pacific Railway Co v Vancouver (City)* 2006 SCC 5 [8].

104 *Canadian Pacific Railway Co v Vancouver (City)* 2002 BCSC 1507 at [54].

the City's regulation of its use and enjoyment of the corridor, while not entailing an outright expropriation of title, was nonetheless of such a magnitude that the City could be seen as having *constructively* taken CPR's rights of use and enjoyment of the corridor. These arguments persuaded the trial judge to quash the ODP Bylaw inasmuch as it "denude[d] [the corridor] of all use, except as a public thoroughfare",[105] leaving it as "a park" which has been "appropriated by the City for the enjoyment of the public and the enhancement of the [City]".[106]

The City successfully appealed. Writing for the Court, McLachlin CJ found that CPR was unable to satisfy either requirement of the two-part test which she stated had to be met by a regulatory or de facto taking:

> (1) an acquisition of a beneficial interest in the property or flowing from it, and
> (2) removal of all reasonable uses of the property.[107]

While, therefore, expressing "considerable sympathy" for CPR's position,[108] she found that the corridor had not been constructively taken and that in the result CPR was not entitled to compensation from the City.

It is worth reiterating, in order to appreciate fully the problem arising from McLachlin CJ's reasons, the normative concern which the device of the regulatory taking addresses, in as much as that normative concern informs the positive law's view of what constitutes a regulatory taking. From the perspective of a landowner, there is a threshold beyond which the imposition of restrictions by a public authority on the use and enjoyment of property, while falling short of actual expropriation, effectively (and sometimes intentionally) achieves a taking. It is not a taking-by-*taking*, but a taking-by-*regulation*. The rationale for recognizing and compensating for a regulatory taking being understood, McLachlin CJ's assessment of CPR's inability to meet the first part of the two-part test that she stated for recognition of a regulatory taking – the acquisition of a beneficial interest in the property – merits reproduction in its entirety:

> First, CPR has not succeeded in showing that the City has acquired a beneficial interest related to the land. To satisfy this branch of the test, it is not necessary to establish a forced transfer of property. Acquisition of beneficial interest related to property suffices. Thus, in *Manitoba Fisheries*, the government was required to compensate a landowner for loss of good will. See also *Tener*.

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105 *Canadian Pacific Railway Co v Vancouver (City)* 2002 BCSC 1507 at [76].

106 *Canadian Pacific Railway Co v Vancouver (City)* 2002 BCSC 1507 at [81]–[82].

107 *Canadian Pacific Railway Co v Vancouver (City)* 2006 SCC 5 at [30].

108 *Canadian Pacific Railway Co v Vancouver (City)* 2006 SCC 5 at [9]. At [63], McLachlin CJ once again emphasises that "one may sympathise with CPR's position".

> CPR argues that, by passing the ODP By-law, the City acquired a *de facto* park, relying on the observation of Southin J.A. that "the by-law in issue now can have no purpose but to enable the inhabitants to use the corridor for walking and cycling, which some do (trespassers all), without paying for that use" …. Southin JA went on to say: "The shareholders of …CPR ought not to be expected to make a charitable gift to the inhabitants" …. Yet, as Southin JA acknowledged, those who now casually use the corridor are trespassers. The City has gained nothing more than 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 "tak[ing]".[109]

For the Supreme Court of Canada, then, an actual *acquisition* by a public authority of a "beneficial interest" relating to the land is necessary to give rise to a regulatory taking. This has, of course, for Anglo-American common lawyers, a specific meaning. A "beneficial interest" is a term of art, referring to the equity that rests with the beneficial owner of property. The paradigm is the interest held by the beneficiary of trust property (as distinct from the bare legal title that rests with the trustee). In the absence, then, of any explanation by the Court of why the City's imposition of a requirement that the corridor's use would be confined to the City's own purposes is not "the sort of benefit" that denotes a taking, we can only resort to that common understanding of a "beneficial interest." Meaning, we should infer that the benefit must be a tangible one, or at least one in which a beneficial interest in the equitable and proprietary sense can be recognised. A "beneficial" interest in land does not, after all, denote some mere notional interest. Rather, it represents, from the standpoint of a property rights-holder, the most significant form of proprietary interest, because it confers all associated rights of use and enjoyment in the land, including the right to enforce the exclusion of others from such use and enjoyment. In short, CPR could not demonstrate a regulatory taking because the Court saw legal significance in CPR's inability to point to such an interest accruing to the City. All the City had done was merely seek to confine the CPR's use of its property to the City's own purposes. Yet, confining that use to the regulator's purposes is *precisely* what a regulatory taking is and does; in requiring that the City actually acquire a *benefit*, the Court was conflating the elements of an attenuation of property rights (that is, a *regulatory taking*) with actual expropriation of those rights.[110]

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109 *Canadian Pacific Railway Co v Vancouver (City)* 2006 SCC 5 at [32]–[33]. The reference to *Manitoba Fisheries* signifies *Manitoba Fisheries Ltd v Canada* [1979] 1 SCR 101.

110 In the author's opinion, a similar analytical error has been committed in respect of the New Zealand Government's adherence to the Kyoto Protocol: Kyoto Protocol to the United Nations Framework Convention on Climate Change (opened for signature 11 December 1997, entered into force 16 February 2005). Specifically, it has been suggested that, because New Zealand in adhering to its terms "took ownership of sequestered carbon in New Zealand trees planted prior to 1 January 1990", the New Zealand Government effected a regulatory taking. See Lewis Evans and Neil Quigley *Protection of Private Property Rights and Just Compensation: An Economic Analysis of the Most Fundamental Human*

A substantial reason for difficulty here is that there is precious little judicial authority in Canadian law on the substance of the regulatory taking. Foreign case authorities have not been canvassed by Canadian courts on the point, and only two domestic appellate decisions have spoken directly to the requirements for a regulatory taking. McLachlin CJ relied on one of them – the decision of the Nova Scotia Court of Appeal in *Mariner Real Estate Ltd v Nova Scotia (Attorney General)*[111] – to support her proposition that a beneficial interest must fall to a public authority for a regulatory taking to have been effected by the ODP Bylaw. There, the Court had gone further, concluding that "there must not only be a taking away of land from the owner, but also the acquisition of land" by the public authority for there to be a taking.[112] The other – the decision of the British Columbia Court of Appeal in *Casamiro Resources Corp. v British Columbia (Attorney General)*[113] – concluded otherwise: while "[t]he diminution of rights does not always amount to a taking which as a matter of law is *equivalent to expropriation*", it is effected where the regulation of property turns "the grants [into] meaningless pieces of paper".[114]

Not having a mature body of jurisprudence for guidance, the Supreme Court of Canada missed the point. The absence of a tangible benefit accruing to the public authority does not preclude characterisation of the regulatory measure in question as amounting to a regulatory taking. The question of acquired benefit is, in fact, irrelevant. Rather, it is the *loss* to the plaintiff derived from the derogation by the public authority of its rights of use and enjoyment which is significant. Even were a public authority to benefit from a regulatory taking, it could never do so in a proprietary sense, but rather only in the sense that it acquires a mere *advantage*. (For example, in *CPR v Vancouver* the City could be understood as having acquired the advantage of indefinitely reserving CPR's lands to the City's purposes.) Moreover, such an advantage need not accrue to the public authority *qua* legal entity, but to the public authority *qua* general public.

In the result, the Supreme Court of Canada's first statement on the regulatory taking in over 20 years leaves the Canadian law in some confusion, from which it now seems reasonable to conclude that property-holders in Canada enjoy no protection from regulatory takings.

Right Not Provided in New Zealand (New Zealand Institute for the Study of Competition and Regulation 2009) at 26–27. This is not, however, a regulatory taking, but expropriation.

111 *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 178 NSR (2d) 294 (NS CA).

112 *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 178 NSR (2d) 294 (NS CA) at [91].

113 *Casamiro Resources Corp v British Columbia (Attorney General)* (1991) 55 BCLR (2d) 346 at [17].

114 *Casamiro Resources Corp v British Columbia (Attorney General)* (1991) 55 BCLR (2d) 346.

6.4 Conclusion

It is tempting to try to gather together a list of key things to examine when engaging in comparative research of the kind discussed here. For example, one might wish to consider whether the jurisdiction in question is unicameral or bicameral, federal or unitary, common law or civilian, or democratic or totalitarian. Yet, trends that conform to any of any of these characteristics appear elusive. Each system appears to be sui generis. Moreover, in trying to find an explanation for the strength or weakness of any particular country's property protection regime, we might well mislead ourselves. The case for and against property rights has, after all, been fought at both ends of the political spectrum, at least in Canada. Both conservative and left-leaning interests have at different times argued both for and against them. The author of the United States Supreme Court's decision in *Lucas*,[115] for example, was Justice Scalia, then as now regarded as one of the more (if not the most) politically conservative (and, arguably, libertarian) justices on that bench.[116] Therefore, to characterise the debate in political terms may not be particularly helpful in capturing the reasons for why protections are or are not found in a particular country's constitution.

The most one can say is that there is a range of protective frameworks that might usefully be considered with reference to strength of protections for regulatory takings and to the threshold – that is, the degree of interference with property rights – that a regulation must effect before it is considered as a "regulatory taking". Moreover, the particular framework that might apply in particular countries could defy commonly held preconceptions about those countries and, as a result, comparative analysis cannot begin and end with an analysis of positive law. It requires insight into the nuances of the specific political, legal and social culture of the country under consideration. (For that reason, the best work will be done by local researchers, not academic tourists, and rarely will a serious comparative analysis of more than one country be feasibly done by a single researcher.)

The question for New Zealanders to contemplate is where, on that continuum of property protections offered within the array of frameworks that are apparent among Western states, they want their country's framework of property protections to fall. In the author's judgment, the Canadian regime is, on balance, undesirably weak. The ability of public authorities to immunise themselves from liability to compensate for expropriation, combined with the effect of *CPR v Vancouver* which is to save legislators the trouble of doing so for a complete regulatory denuding of land value, leaves property holders in an unreasonably vulnerable position, judged by whatever normative reference

115 *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

116 The only justice said to be possibly more libertarian than Justice Scalia, Justice Thomas, joined Justice Scalia's reasons in *Lucas: Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

point one prefers, vis-à-vis the power of the state to regulate rights out of existence. Moreover, this absence of robust protection – when juxtaposed with the superior protections afforded to rights in respect of property *situated within* Canada but held by a resident of a counterpart state under a FIPA – seems a bizarre omission from the terms by which citizen and state interact in a constitutional democracy. While one might debate whether a constitutional protection would be ameliorative (the Supreme Court of Canada might, for example, interpret it in such a way that restricts its application to cases of expropriation, and not regulation), the case for such a protection is clearly enhanced by this state of affairs.

At the same time, however, a regime that provides protection where regulation effects a partial devaluation of property, while clearly possible (as is demonstrated by the Swedes, Israelis, the Dutch and, in some cases, the Austrians and the Finns), is practically difficult if taken to its logical conclusion that *any* diminution in value requires compensation. (Indeed, it may be that the positive law in those countries is for that reason tempered in its application by the social democratic imperatives for which their jurisdictions are all known. Hence the importance of involving local researchers). On one hand, an incremental threshold – which would see *any* diminution in value effected by regulation as a "regulatory taking" – is appealing from the standpoint of liberty. It recognises that takings (which are, in essence, forced transfers of rights) restrict, to the extent of such transfers, individual freedom.[117] Such forced transfers, however, are implicitly contemplated by the very notion of government, even limited government. They are the means by which people move from voluntary association to political organization, and they are necessary to achieve a measure of conventional public goods. Indeed, it is only when individuals are forced to surrender certain individual rights in exchange for state protection that the state, even in its most minimal form, becomes possible.

In the case of regulatory takings, then, a balance ought to be struck between accommodating the necessity of forced transfers to the state on one hand, and conferring upon the state legal immunity for a total stripping-by-regulation of reasonably anticipated uses on the other. Once one accepts, however, that an incremental threshold (of *any* diminution in value) is both impractical and defeating of the purpose of the state, there is no obvious principled threshold (10%? 25%? >50%?) short of the United States position – which, as we have seen, represents an approximate middle-point in the continuum of property protections among Western states. In other words, the most viable position, in the sense of protecting the property holder from taking-by-regulation while ensuring the state's ability to function even in

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117 Richard A Epstein "One Step Beyond Nozick's Minimal State: The Role of Forced Exchanges in Political Theory" in Ellen Frankel Paul, Fred D Miller Jr, and Jeffrey Paul (eds) *Natural Rights Liberalism from Locke to Nozick* (Cambridge University Press, Cambridge, 2005) at 287.

accordance with a conception of limited government, is to require the state to compensate for the effects of a regulation where the property-holder is able to demonstrate that those effects represent a *complete* deprivation of all economically beneficial uses.