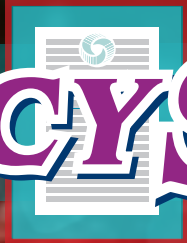


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THE FIRST CANADIAN

Property Rights Index

Assessing the State of Property Rights Protections in Canada

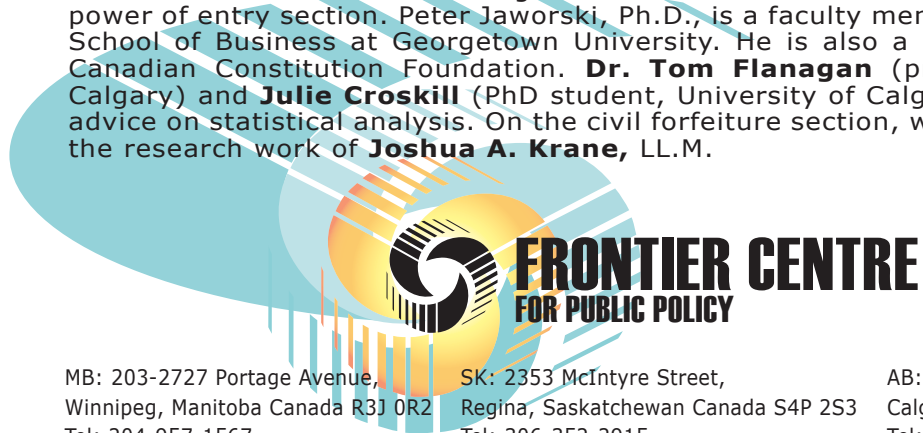
Joseph Quesnel



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The First Canadian Property Rights Index

Assessing the State of Property Rights
Protections in Canada

Joseph Quesnel

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Executive Summary














- The inspiration for this Index came from the International Property Rights Index (IPRI), a measure of most countries in the world on a battery of indicators on their legal environment, as well as physical and intellectual property protections.
- Composite measures of property rights protections in Canada exist at the national level but not at the provincial or territorial level, which is odd considering that in the constitution the provinces are responsible for property rights.
- This property rights index is not an exhaustive account of property rights in every Canadian jurisdiction; however, it seeks to understand how each jurisdiction has handled some of the most significant property rights challenges.
- The basic premise behind the scores is that the greater the number of procedural hurdles the provincial and territorial governments must leap to interfere in lawful property ownership, the better. Hence, the higher the score, the more the property rights are protected.
- Property rights are not absolute. In Canada, they are quite precarious and subject to government regulatory whim, especially since our constitution does not formally protect them as is done in other jurisdictions. However, the common law does provide compensation if land is taken.
- The only requirement is a common law presumption that the statutes provide compensation in case of expropriation.
- Canadians ought to care about property rights, because they are connected to our economic well-being and our liberal democratic rights.
- To measure property rights protection, a Canadian Property Rights Index is necessary. This Index measures eight indicators or items that affect property rights. Each indicator or item has several components that are measured to determine an overall score for a given indicator. Each indicator has a total possible score, and each jurisdiction's score is converted to a percentage, which is used to rank each province or territory in that area and overall.
- The first indicator measures registering and/or transferring property. Regimes with the Torrens registration system receive higher scores, because it protects property better than does the older deed system. In addition, land transfer taxes act against a province's score, because they hinder the transfer of property.
- The second indicator deals with expropriation. Provinces and territories with greater protections for individuals caught in the expropriating process receive higher scores. Jurisdictions with narrower grounds for municipal expropriation are rewarded with higher scores.
- The third indicator is land-use planning and constructive takings doctrine. A constructive taking occurs when a land-use regulation is so severe it almost amounts to a full expropriation. Different legal systems in Canada treat these takings differently. The more rights to compensation, the higher the score. The Quebec Civil Code offers better protections against regulatory or constructive takings than what is available in common law provinces and territories.



This pond is located in Orono, in southern Ontario. The pond sits on property owned by the Jaworski family, a couple who operate Willow Pond Country Bed and Breakfast. The couple faced bylaw complaints and possible fines regarding the use of their own property. Land use regulations are some of the most direct threats to property rights in Canada today. This sign was placed by the pond during the 2010 Liberty Summer Seminar, an annual event hosted to promote economic and political freedom.

- The municipal power of entry is the next indicator. Jurisdictions with notice, warrant and judicial oversight requirements score higher in the Index.
- Civil forfeiture is the next indicator, and it measures protections for individuals in provinces with civil forfeiture regimes. Civil forfeiture is a civil proceeding where the government uses the courts to take title of property used in unlawful activity. Jurisdictions with more procedural protections against these proceedings receive a higher score.
- Endangered species is the sixth indicator, and it deals with how well jurisdictions safeguard property from regulation that seeks to protect endangered wildlife, fish and plants. Jurisdictions that provide procedural safeguards for landowners receive higher scores.
- The seventh indicator is heritage property. Governments may designate property of historic and heritage value and thereby limit its use to the owner. Jurisdictions that provide compensation and respect property owners who are facing designation receive a higher score.

Final Rankings

Jurisdiction	Final Score
 Nova Scotia	68.25%
 Nunavut	67%
 Alberta	66.5%
 British Columbia	65%
 Manitoba	60.5%
 Saskatchewan	60.5%
 Ontario	59%
 New Brunswick	59%
 Quebec	54.6%
 Yukon Territory	54%
 Newfoundland and Labrador	52.5%
 Northwest Territories	52%
 Prince Edward Island	47%

- The last indicator deals with successions, addressing the rights of individuals to dispose of their estate upon their death as they wish. The less regulatory interference with a testator's will, the higher the score.
- The rankings reveal that Nova Scotia, Nunavut, Alberta, British Columbia and Saskatchewan/Manitoba have the highest scores on the Index. The lowest ranking jurisdictions are Prince Edward Island, Northwest Territories, Newfoundland, Yukon, and Quebec. Thus, with some notable exceptions, the Index confirms the conventional wisdom that the Western provinces have stronger property rights than the Eastern provinces do.
- The results show that property rights are precarious across Canada. Some central recommendations are the constitutional entrenchment of property rights as is common elsewhere; the governmental rollback of regulation, as this constitutes the greatest threat to property rights today; and the creation of national and regional research centres or movements dedicated solely to property rights enhancement across Canada.

The prohibition 'Thou shalt not steal' has no legal force upon the Sovereign Body.

– **Justice William Riddell** in *Florence Mining Co. Ltd. v. The Cobalt Lake Mining Co. Ltd.* (1909)

Background

The inspiration for the Index came from the International Property Rights Index (IPRI), which measures most countries in the world against a battery of indicators on their legal environment, as well as physical and intellectual property protections. The Frontier Centre for Public Policy collaborated with the Washington, D.C.-based Property Rights Alliance in its release of the IPRI. For the past three years, the Frontier Centre contributed Canadian property rights case studies. The Canadian Property Rights Index is not intended to be exhaustive or offer the last word on property rights in Canada. Instead, it is meant to provide a comparative measure of how the provinces and territories have responded to some of the most significant challenges to property rights in this country. Thousands of laws and regulations limit the rights of property owners. It would indeed be difficult and unmanageable to quantify and measure them all; therefore, the Index focuses on eight areas in which one finds the most common and significant threats to property.

During the release of the 2011 IPRI, reporters questioned this author about how each Canadian province scored on the IPRI. The author was not able to provide an answer, as the IPRI ranks each country in a general aggregate sense. Provincial and territorial governments have jurisdiction over property and civil rights under *The Constitution Act*, so an index at that level makes sense.

Some important differences from the IPRI should be noted. First, we decided to exclude intellectual property rights in the Index, because they are under federal jurisdiction, so they fall outside the scope of this analysis.

We excluded natural resources also, because they are in public hands. Individuals and companies use and benefit from these resources through grants, permits, licences and leases, but these people and companies lack proprietary title to these resources. Taxation (although there is the exception of the land transfer tax) is not part of the Index, as it could form its own index. Landlord-tenant relations are also not included. The focus is on real and personal property.

The Canadian Property Rights Index looks mainly at several ways that property rights are profoundly affected across provinces and territories. In time, this list of indicators may change or grow.

The eight property rights indicators are as follows:

1. Registering and/or Transferring Property - Provinces and territories have different ways to register land title. This indicator recognizes whether the jurisdiction follows the superior Torrens system or the inferior deeds system.

It also determines whether the jurisdiction has an onerous land transfer tax.

- 2. Expropriation (procedural safeguards and grounds for expropriation) -** When governments force the transfer of land title from a private landowner to itself, there are procedural safeguards that protect landowners. However, not all jurisdictions have similar safeguards. This indicator measures the presence of 11 safeguards. The indicator also evaluates whether the powers of expropriation are broad and sweeping or narrow in scope.
- 3. Land-use Planning (or downzoning) and/or Constructive Takings -** Land-use planning interferes with property, as it restricts its uses. This often leads to land value reductions. This indicator identifies whether a jurisdiction has a right to compensation in case of reduction in value. Constructive takings refer to the ability of government to regulate land use to the point where its value or uses are almost close in effect to an actual expropriation. Different jurisdictions have different ways to deal with constructive takings, and this indicator recognizes these ways.
- 4. Municipal Power of Entry -** Provincial and territorial laws provide municipalities with the power to allow officials to enter and inspect properties in order to enforce municipal by-laws. However, there are important safeguards designed to protect landowners. This indicator identifies whether a jurisdiction has these safeguards.
- 5. Civil Forfeiture -** Governments have the ability through the Courts to seek title to property that has been used in, or is gained from, unlawful activity. Civil forfeiture does not require criminal conviction and has a lower burden of proof than is necessary in criminal cases. However, jurisdictions have different safeguards to protect property owners from abuse. This indicator identifies the presence of these safeguards.
- 6. Endangered Species -** The government may designate land that contains endangered species (wildlife, fish and plant). This affects the uses to which land can be put and reduces its value. However, jurisdictions have different safeguards to respect landowners who face such designation. This indicator identifies these safeguards.
- 7. Heritage Property -** Governments may designate property deemed to be of important cultural and heritage significance to the community. This indicator measures what procedural safeguards exist to protect property owners who face this designation.
- 8. Wills and/or Successions -** The ability to pass property on to the next generation is an important exercise of property rights. Thus, the ability to will property without government interference is an important gauge of property rights. This indicator measures the ability of property owners to make a legal will with as little interference as possible.

Each jurisdiction receives a numerical score based on the total number for that indicator. Each indicator has a number of components that measure that particular concept. A jurisdiction's score depends on the presence or absence of some procedural feature that protects property rights. In many instances, a score of 1 through 3 is provided. However, due to gradations and nuances within components, sometimes

a higher total is possible (such as out of 4 or 5). The scores for each component are added together to form a number for each indicator. Expropriation, however, is handled slightly differently in the scoring system. In the first expropriation part, jurisdictions receive a point for each procedural safeguard they possess from their respective legislation. So, they receive a score out of a total of 11. The expropriation section provides further details.

That number in turn is converted into a percentage. That percentage is the score for that jurisdiction in that particular indicator. All the percentages are divided by 8 to yield a final score (with the exception of jurisdictions that lack civil forfeiture regimes. Those jurisdictions divide by 7). That score is the jurisdiction's overall score and makes it possible to rank the jurisdiction. Each numerical score that a jurisdiction receives in an indicator is converted into a percentage that becomes the jurisdiction's final score for that indicator. All the indicators are added together and divided by 8 (or 7), which is the number of total indicators, to yield a final percentage score, which allows for a ranking of the jurisdictions.

All indicators have an equal weighting. This should not be taken as a statement about the relative importance of one indicator or another. All indicators represent important dimensions to property rights in Canada today as well as in other national jurisdictions.

TABLE 1
Methodology

Indicator	Max. Possible Score
Registering and/or Transferring Property	7
Expropriation (Two parts - Procedural Safeguards and Powers and/or Grounds of Expropriation)	15
Land-use Planning (downzoning) and/or Constructive Takings	6
Municipal Power of Entry	10
Civil Forfeiture	27
Endangered Species	15
Heritage Property	13
Wills and/or Successions	14

It is not possible to measure exhaustively every aspect of property rights. How each jurisdiction fits within the Index is not the absolute word on how that jurisdiction treats property rights in all areas. It is only a reflection of how the jurisdiction compares with others based on the eight criteria. Table 1, previous page, contains detailed information on methodology.

TABLE 2
Summary of Results

Jurisdiction	Registering and/or Transferring Property	Expropriation	Land-use Planning and/or Constructive Takings	Civil Forfeiture	Endangered Species	Heritage Property	Municipal Power of Entry	Wills and/or Successions	Final Score
Nova Scotia	71%	47%	50%	89%	100%	82%	50%	57%	68.25%
Nunavut*	100%	80%	16%	N/A	92%	41%	90%	50%	67 %
Alberta	86%	87%	16%	63%	62%	88%	80%	50%	66.5%
British Columbia	71%	80%	37%	89%	54%	82%	50%	57%	65%
Manitoba	57%	60%	16%	67%	62%	65%	100%	57%	60.5%
Saskatchewan	86%	40%/20% (30%)	16%	67%	54%	65%	80%	86%	60.5%
Ontario	57%	80%	16%	87%	69%	71%	30%	64%	59%
New Brunswick	43%	67%	16%	89%	46%	76%	80%	57%	59%
Quebec	36%	40%	50%	70%	54%	71%	30%	86%	54.6%
Yukon*	57%	33%	16%	N/A	46%	76%	100%	50%	54%
Newfoundland*	57%	47%	66%	N/A	69%	35%	30%	64%	52.5%
Northwest Terr.*	57%	67%	16%	N/A	46%	41%	90%	50%	52%
PEI*	43%	27%	16%	N/A	62%	65%	60%	57%	47%

* The following jurisdictions do not have civil forfeiture legislation, so that measure is excluded from their score. The absence of civil forfeiture is actually to the credit of each of province or jurisdiction in terms of property rights protections. Civil forfeiture itself can diminish property rights protections and is prone to abuse. Therefore, these jurisdictions actually should score higher in this area to some degree, but because they lacked civil forfeiture laws they were not included for comparability purposes. Other jurisdictions should look to these provinces and territories for inspiration.

Discussion of results

The results confirm that, with some notable exceptions, the conventional wisdom that Canada's Western provinces are more committed to property rights than the Eastern provinces are is true. There does appear to be a tension between newer Canada and older, traditional Canada regarding property rights. Using only the eight indicators, Alberta and British Columbia are in the top five, as are Manitoba and Saskatchewan. Nova Scotia is the very notable exception to the pattern. However, Nova Scotia stands out because of high scores in endangered species, civil forfeiture and heritage property. Nova Scotia also defied Atlantic Canadian tradition by adopting the stronger Torrens registration system. Historians have identified a pattern where older property institutions such as the deed system dominate in Atlantic Canada, whereas provinces more recently admitted into Confederation were incorporated into the Torrens system. The Atlantic provinces also traditionally held to the rule against perpetuities (which will be discussed in the wills and/or successions indicator) that attempted to prevent concentrations of wealth and the tying up of estates in family trusts.

Ontario fits right near the middle, almost as a middle ground between the more property-respecting West and the more traditional Atlantic provinces. Ontario is transferring to a Torrens system. The northern half of the province was founded more recently and adopted the Torrens system, whereas the older southern half was until recently under a deeds system. Quebec scored lower than Ontario did, but it is also a middle-performing jurisdiction, caught between the West and Atlantic Canada. One possible explanation for Quebec's lower ranking is its inheritance of an older property system (the seigneurial system) that it may be still committed to, but is none the less transitioning out of. Critics may latch onto Quebec's lower ranking in order to criticize the policy choices of the province, but it should be pointed out that Quebec's unique legal system provides landowners with more judicial protection against constructive takings, as Quebec's Civil Code is more welcoming of claims.

Although the Western provinces do lead in the Index, this is not a call for complacency. Other land-use regulations exist outside the Index, such as environmental designations, that are growing concerns in Alberta and British Columbia. Alberta's land-use framework featured laws that many Albertans interpreted as limiting rights to compensation, consultation and access to appeal.¹ Compensation is payable under common law for expropriation, but to avoid that, legislatures would simply define certain actions as not expropriation. However, as some legal experts insist, it is not possible under Canada's current legal regime to know when regulation ends and an actual taking begins. Thus, Alberta would be in the same boat as other jurisdictions where simply defining a government policy or action as outside the legal definition of expropriation leaves property or landowners very vulnerable. While Alberta may have received a high score on expropriation in terms of procedural safeguards, legislation affecting property rights could be akin to expropriation but not captured in the Index. The results need some perspective. While Alberta enjoys high scores in other areas, its civil forfeiture regime, for example, has the lowest number of procedural safeguards to protect individual property owners, as the government has wide discretionary powers.

As well, land-use planning is a weak category for all jurisdictions. For example, Ontario’s *Greenbelt Act* and *Places to Grow Act* have severe land-use restrictions that cause significant strain on property rights. All jurisdictions need to work on their land-use planning.

The other identified dynamic is a North-South divide. The Arctic territories, with the exception of strongly performing Nunavut, scored lower on the Index. One possible explanation is that Nunavut is Canada’s newest jurisdiction, so perhaps it has not incorporated as much land-use regulation into its framework. In fact, in all three territories, there is a noticeable lack of clarity on some legislation. Perhaps the explanation is the commitment of Nunavut’s rural population to property rights protection. The higher score will need to be studied in order to find plausible explanations.

To reiterate, these rankings are the result of carefully selecting eight important indicators of property rights protections. Strong property rights according to these criteria do not mean the jurisdiction does not have punishing taxes, unbalanced landlord-tenant relations or regulatory hurdles to business creation. Property rights are one important part of the right policy mix, but there are other important elements that fall outside the scope of the Index that need equal attention.

The top five jurisdictions are:

Nova Scotia	68%
Nunavut Territory	67%
Alberta	66%
British Columbia	65%
Manitoba/Saskatchewan	60.5%

The bottom five jurisdictions are:

Quebec	54.6%
Yukon	54%
Newfoundland	52.5%
Northwest Territories	52%
Prince Edward Island	47%

Property rights in Canada

It should come as no surprise to hear that Canadians do not have an absolute right to property ownership. Canada and the United States have what has been called a modified feudal system.² The fee simple estate is the highest and most complete form of ownership allowed under this system. Under the old English law that both countries inherited, all lands were ultimately owned and taxed by the sovereign, who in turn granted rights to possess land. Real estate under the original feudal system was held in life estate, meaning that ownership reverted to the sovereign upon the death of the grantee. Thus, the feudal title system did not allow real property to be passed down to heirs.

Under our current system of fee simple estate, title to land no longer reverts to the sovereign and can be passed to heirs. However, real property is subject to liens, mortgages, taxes, powers of expropriation (what the United States calls the right of eminent domain) for public purposes, escheat (the process by which property can be transferred to the state when a person dies without a will and no legal heirs can be located) and police powers.

The highest form of property rights is allodial title, which is title without fealty to any lord or superior. It is a complete, undivided and inalienable interest in real property, in this case, in land. Allodial title frees one from encumbrances and obligations, including mortgages, taxes and liens. Allodial land is also not subject to police power, expropriation or escheat. Aboriginal title is the closest form of property to allodial title. It is inalienable and is free of encumbrance. However, true allodial title does not exist. Nevada and Texas claim to have allodial title, but they only mean that all property taxes are paid upfront.³ There is debate over whether true allodial title exists in the Orkney and Shetland Islands, north of the Scotland mainland, where an older Norse feudal tenure is still used in some parts.⁴

The federal government and provincial governments of Canada are under no constitutional (as opposed to statutory) obligation to pay fair compensation or any compensation for expropriated property. By contrast, in the United States, the Fifth Amendment to the Constitution requires the federal Congress to pay “just compensation” for expropriated property, and the Due Process Clause of the Fourteenth Amendment imposes the same limitations on the state legislatures.⁵ According to constitutional scholar Peter Hogg, neither the Constitution Act nor the 1982 amendments contain any guarantee of compensation in Canada, and in the absence of any guarantees, legislative power is virtually unlimited, save the common law presumption of compensation in event of expropriation.⁶

Alternatively, put more directly and colourfully, in the *Florence Mining Co. Ltd. v. The Cobalt Lake Mining Co. Ltd.* decision (1909), Justice Riddell laid out the dictum that the prohibition “‘Thou shalt not steal’ has no legal force upon the Sovereign Body.”

In Canada, courts determine whether the regulations in question entitle a respondent to compensation under the relevant expropriation act.

In contrast, in the United States, Supreme Court judges have determined that the

point of the Takings Clause in the U.S. Constitution is to ensure that the government does not force some people to bear all of the burdens of public benefits that in all fairness should be borne by the public as a whole.

Canadian courts have no such broad mandate to review legislative judgments about the appropriate distribution of burdens and benefits. Being unconcerned about who shoulders the burden of land-use restrictions and regulations is problematic and ought to be corrected. This will be discussed in the suggested reforms section near the end of this document.

Canada is actually at the bottom of the pack when it comes to compensating regulatory takings. In a survey of 13 countries, Canada and Australia were the most restrictive in terms of compensation.⁷ Rachele Alterman, the survey author, wrote: "Among the 13 countries, Canada ranks as offering the lowest degree of compensation rights."⁸

In terms of major takings (where a regulation extinguishes nearly all of a property's value), direct partial takings (apply to some portion of the land) and indirect partial takings (apply to injuries caused by regulatory decisions that relate to other parts of land in the area), Canada fares poorly in all categories, according to Alterman's research mentioned above. As will be seen, in common law jurisdictions, government must remove virtually all reasonable uses of a property for a claim for compensation to even be considered by the Courts. Countries such as Poland, Germany, Sweden, Israel and the Netherlands provide quite broad compensation rights. We ought to look at these countries, including the United States, for our inspiration.

Given legislative supremacy in regulating land use and property, it may seem that there is nothing to prevent governments from emptying individuals and private companies of their property and property interests. However, a clear rule of statutory interpretation in Anglo-Canadian law is that a statute that takes away private property requires the payment of compensation. The rule is expressed thus: "Unless the words of the statute clearly do demand, a statute is not to be construed so as to take away the property of a subject without compensation."⁹

Herein lies the problem of regulatory or constructive takings, where a regulation's effects could be such that it empties property rights to the point where it is almost akin or virtually identical to an actual expropriation (which is why it is called *de facto* expropriation, or under the Quebec Civil Code, a "disguised" expropriation). The mere regulation of property, even if it devalues the property, is not a taking that requires compensation.¹⁰ Many legal scholars concede it is not easy to determine where regulation ends and a taking begins. Hogg argued that payment of compensation goes against the purposes of regulation:

Where a statute is regulatory not involving a taking of property, the general rule is that no compensation is payable for loss caused by the statute. Most forms of regulating impose costs on those who are regulated and it would be intolerably costly to compensate them. Moreover, much regulation has a redistributive purpose: it is designed to reduce the rights of one group (manufacturers, employers, for example) and increase the rights of another (consumer, employee, for example). A compensation regime would work at cross-purposes to the purposes of regulation.¹¹

We assume, however, that there is much more room for compensation for property rights—infringing regulations that are not explicit expropriations, although we concur with Hogg that not all cases can be compensated. That would intolerably raise the cost of government for everyone. Governments could reduce the ways they regulate property and land use to avoid ever getting into the debate of what should or should not be compensated. This is borne out by the economic literature that argues that increased regulations and property rights infringements do affect economies at a definite point.

Many legal theorists and social scientists assume that policymakers and politicians are under a fiscal illusion when they are not required to pay compensation, as they do not appreciate the full cost of their decisions. Thus, these decisions are less than optimal.¹² Governments ignore costs outside their own budgets, so they cannot appreciate the full costs and benefits of not compensating property owners.

So many forms of property regulation, such as heritage or endangered species designations, do not trigger compensation requirements by legal necessity. Thus, for the purpose of the Index, it is important to record where governments do provide compensation in the absence of requirement.

That said, there is some case law in which the Courts have ruled in favour of plaintiffs in constructive takings cases. These are rare, but they have contributed to an emerging legal doctrine. This doctrine will be discussed in the land-use planning indicator, as different legal systems have different legal doctrines for the treatment of constructive takings.

Property rights are commonly understood to be a bundle of rights that involves the right to use a good, earn income from that good, transfer the good to others and the right to enforcement of these rights.¹³

However, as is the case with other rights, property rights are not absolute. Many regulations eliminate or curb this right. Libertarian thinkers, most notably those of the more anarcho-capitalist persuasion, argue for a more absolutist position on property rights, finding very few, if any, justifications for limiting property rights. For some, expropriation would not be permissible. For example, Murray Rothbard, famed anarcho-capitalist thinker, called eminent domain “a licence for theft.”¹⁴ Libertarian economist Bruce L. Benson called expropriation unnecessary, as utilities, for example, have other options to acquire the contiguous parcels of land needed to build pipelines or roads.¹⁵ We do not begin with the assumptions that the best protection of property rights is the absence of any regulation and that all infringements are impermissible. To live in a society of laws and ordered liberty, there must be rational regulation and police powers.

We take some regulation for granted and measure property rights based on the idea that more procedural protections for property holders is better and will yield a higher score. Features such as the right to be notified of infringement or the right to be consulted beforehand, and, very importantly, the right to compensation for infringements are critical safeguards for property owners. We assume that public goods that sometimes infringe on property rights exist, such as the designation and protection of endangered species or the designation of heritage properties. However, it is assumed that the government should limit that infringement to the best of its

ability, and it should compensate the affected landowners.

We also assume that private property holders should not have to bear the full cost of public goods from which everyone benefits. As much as possible, governments ought to distribute those burdens more evenly. Or as U.S. legal scholar Allison Dunham said:

To compel a particular owner to undertake an activity to benefit the public, even if in the form of restriction is to compel one person to assume the cost of a benefit conferred on others without hope of recoupment of the cost The accident of ownership or a particular location determines the people in the community bearing the cost of increasing the general welfare. A further consequence of an attempt to obtain a benefit by means of a restriction is that the full cost of the public benefit is thereby concealed from those in our democratic society who are given the power of deciding whether or not they want to obtain the benefit.¹⁶

In a paper by the Canadian Real Estate Association, it was noted that English common law and the Civil Code of Quebec have recognized some rights as applying to land ownership. The paper referenced above categorized them in three ways.

- The Right of Use
- The Right of Possession
- The Right of Alienation

Each of the indicators we used in the Index touch on these important elements of property. For example, property registration affects the ability to transfer or alienate title, as does the ability of the state to affect a will once drafted and given legal effect. The right to use land as one sees fit conflicts with the power of municipal officials to enter a property when they choose, without warning. Using property as one sees fit is also affected by a government designating part of a person's land for the protection of an endangered plant or animal. Designating a home as a heritage site interferes with the ability to alter the property in some ways. The above dimensions are all important and has attempt is made to order them or impose a hierarchy. This resistance to ordering is reflected in the decision to avoid unequal weighting between Index indicators, as will be discussed later.

Why care about property rights protection?

Clearly delineated property rights are essential to a flourishing economy. Secure and enforceable property rights also provide entrepreneurs and investors with a secure and stable return on investment. Policymakers should be reminded that the confidence of investors affects business opportunities for all Canadians.¹⁷ Property rights, therefore, are everyone's concern, as they are related to our standard of living, our general prosperity and our economy's ability to create jobs.

The empirical case for property rights is overwhelming. The data show how property rights affect national economies globally. The 2011 International Property Rights Index found that among the 129 countries included in the Index, those countries at the top of the IPRI rankings continue to enjoy an overwhelmingly higher GDP per capita than do those at the bottom. This relationship holds true in reverse as well. Countries in the bottom 20 per cent have some of the lowest GDP per capita rankings in the world.

There is no reason to think that stronger property rights in Canada would not have similar effects.

Over the years, Canadians have become increasingly conscious of how precarious their property rights are. Across jurisdictions, citizens have had property that has been in their family for generations taken away through expropriation so that local governments can engage in community economic development, only to have that expropriation abandoned at great expense to the owner and the expropriating authority. They have had parts of their land frozen beyond any economic use by local by-laws and most importantly, beyond recourse or remedy. We see senior citizens who find themselves fighting for their condominiums, because relatives have used their property for fraudulent purposes and civil forfeiture proceedings have commenced.

Secure property rights are also central to a liberal democratic conception of individual rights. Without guaranteed individual property, citizens are at the mercy of rulers and cannot develop the necessary autonomy for a properly functioning liberal democracy. Property rights allow us to be secure in our homes, and they provide a buffer of sorts from government intrusion into our lives. Our real and personal property is also central to our ability to make a living. A Canadian property rights index that seeks to capture how each province and territory does on several dimensions of property rights can, therefore, enhance our consciousness of these rights and contribute to greater democratic autonomy.

1. Registering and/or transferring property

Canada's 10 provinces and three territories have a similar approach to property, but jurisdictions have different land tenure systems. The main difference between Canadian provinces and territories is the presence of a deeds registration system versus a Torrens title system. The Northwest Territories were integrated into a Torrens system when they joined Canada, and it continues in the three Prairie provinces that emerged from that territory. Historically, Southern Ontario and the Atlantic provinces had retained the more traditional deeds system, although this is changing. Earlier in common law, landowners had to prove ownership of a particular piece of land to its earliest grant by the Crown or sovereign. The proving documents are the chain of title. However, this process could lead a landowner on a search spanning hundreds of years and was subject to many potential legal challenges over land ownership. Legislation modified the common law position to limit required title searchers to validate lawful ownership. A deeds registration system involved registration of title and was often criticized for slowing down land transfers and for being costly and unreliable.¹⁸

Robert Torrens introduced a new title system in 1858 in Australia to resolve problems with the common law and the deed registration system. To better protect land rights in South Australia, he established a central registry of all land. The registry also recorded any easements and mortgages. The chief strength of the Torrens system is the maintenance of a land register. Formerly, it was paper records, but it is now in an electronic database. The land has a number and a file that includes the property boundaries and any legal interests that affect it, such as easements and any restrictive covenants. The government guarantees the accuracy of the registry and compensates those affected by any errors in the record. There is no longer a need to produce long documents that prove a lawful transfer of title. All the necessary information and proof is contained in a single certificate of title. There are provisions to challenge title under a Torrens system, but challenges are rare.¹⁹

The main advantages of the Torrens over the deeds system is the certainty of title to land offered under the Torrens and the fact that land transactions are simplified and less costly. As such, the transfer of real property from one individual or business to another is easier under a Torrens system.

For the purposes of the Index, the assumption is that jurisdictions with a Torrens system afford more property rights and easier property transfer than do those with a deed registration system. Therefore, Torrens provinces and territories receive a higher score than jurisdictions that are under the deeds system. Provinces and territories that are converting from a deeds system to a Torrens receive a slightly higher score among those with a deeds system.

Land transfer tax (also known as property transfer tax, real estate transfer tax, realty transfer fee, etc.) is a tax on the passing of title to property from one person or entity to another. The presence of a land transfer tax is included in the Index because the economic literature strongly suggests that onerous land transfer taxes affect the transfer of property from one owner to another. Recent studies (and one older one) by

the C.D. Howe Institute show that the punitive land transfer tax imposed in Toronto continues to affect land transfers and the economy.²⁰

Our research revealed that Toronto’s 2008 imposition of a municipal land transfer tax offered a “natural experiment” in the effects of land transfer taxes on real estate sales. Three Canadian scholars, Benjamin Dachis, Gilles Duranton and Matthew Turner, published their study in May 2011 in the *Journal of Economic Geography*. Their analysis showed that Toronto’s 1.1 per cent tax caused a 15 per cent decline in the number of house sales as well as a decline in housing prices about equal to the tax. They calculated that there was a welfare loss of \$1 for every \$8 in tax revenue collected.

For the purposes of the Index, only provincial taxes are considered. These appear to be recent innovations—the property transfer tax in British Columbia was imposed in 1987 by Bill Vander Zalm’s government—1 per cent on consideration below \$200,000 and 2 per cent on consideration above \$200,000. Ontario’s land transfer tax was first imposed by Bill Davis’s Progressive Conservative government in 1974 at rates from 0.3 per cent to 0.6 per cent—these increased in the 1980s to the current rates, which scale from 0.5 per cent to 2.0 per cent (on land worth more than \$400,000). Provincial jurisdictions that do not impose land transfer taxes are Alberta, Saskatchewan and rural Nova Scotia (which charges 1.5 per cent in the Halifax Regional Municipality).

Jurisdictions with a punitive land transfer tax receive a lower score than those that do not have one. However, even some provinces with a land transfer tax have a first-time homebuyer’s exemption. Those jurisdictions receive credit in their score for that. Nunavut Territory is a special case, as it has neither a land transfer tax nor a title registration, so it receives an even higher score.

Table 3 demonstrates some of the differences among the Prairie provinces based on the presence of a land transfer tax as opposed to a title registration fee, as well more punitive regimes depending on when the threshold starts and at what home value.

TABLE 3		Prairie Provinces’ Title Registration Fees				
House Value	\$100,000	\$200,000	\$300,000	\$400,000	\$500,000	
Alberta	\$55	\$75	\$95	\$115	\$135	
Saskatchewan	\$300	\$600	\$900	\$1,200	\$1,500	
Manitoba	\$470	\$1,720	\$3,720	\$5,720	\$7,720	

2. Expropriation²¹

Expropriation is one of the most significant ways government can infringe on property rights, because it involves the involuntary transfer of title from a private owner to the government. Expropriation generally occurs when a voluntary transfer between a willing seller (landowner) and a willing buyer (the government) fails to yield agreement. A public agency (for example, a government or other agency that is empowered to expropriate, such as a school board or utility) takes property for a purpose deemed to be in the public interest. Typically, the landowner receives a notice of intent to expropriate and eventually an expropriation order. Often, there is an appeals process and a process for determining compensation. As mentioned above, the common law used in most of Canada assumes that compensation is payable for an expropriation.

However, not all jurisdictions treat expropriation in the same way. Some provide more protections for landowners than others do. The following section will measure these nuances from the perspective of individual landowners.

The procedures of expropriation are found in legislation at the federal and provincial and/or territorial levels.

Fifteen procedural statutes were looked at, one from every province and territory. For comparative purposes, the federal government's expropriation procedures were also included. For this purpose, the Frontier Centre commissioned a legal expert on expropriation to conduct research.

Each jurisdiction's expropriation law was evaluated along 11 criteria.

The choice of evaluation criteria is based on aspects of the statutes that show more respect for property rights.

The expropriation indicator includes two parts. The first is the presence of procedural protections for landowners whose property is subjected to expropriation. The second section looks at expropriation solely in terms of the scope of the expropriation powers granted by that jurisdiction's legislation. For instance, are the powers very wide and discretionary, allowing the expropriation authority to expropriate for vaguely defined grounds, or are the powers clearly defined and enumerated? The tighter the definition, the less potential for abuse. Therefore, provinces and territories with a clearer and more circumscribed power of expropriation have a higher score than those with a broader one. To determine a final score for the expropriation score, one adds the total number of Yes responses on the first expropriation section with the second expropriation table, which has a total maximum score of four.

What is interesting is that the power to expropriate is not found in expropriation laws. In addition, according to legal expert Bruce Melville, a great number of organizations and individuals can legally expropriate and determining exactly how many would be very difficult. He said there are likely "tens of thousands."

Private companies and individuals may also expropriate. Railways, pipeline operators and gas and electric utilities are private companies that possess expropriation powers.

To keep this section manageable, we made a decision to focus on expropriation powers vested in municipal governments. Unlike private corporations with expropriation powers, municipal governments are accountable to voters and have a range of activities that are much broader than that of private expropriating authorities.

Municipal governments receive their expropriation powers from provincial laws, therefore they are dependent upon their own provinces' statutes for their powers. As such, the expropriation powers in municipal statutes vary widely from one province to another.



Evaluation Criteria for Table 4 - Comparative Expropriation Procedures

Criterion No.	Criterion Description
1.	Advance notice - Some statutes include a requirement for the expropriating authority to deliver notice to an owner before the title to the land is transferred to the authority. This requirement is typically found in statutes that provide the owner with an opportunity to object to the intended expropriation. When there is no advance notice requirement, the authority is free to take title without the owner's prior knowledge. A "Yes" indicates that the expropriating authority must deliver advance notice to an owner.
2.	Right to Inquiry - Some statutes provide an option for an owner to request that an inquiry or investigation be carried out by a third party before the expropriating authority acquires title to the land. The purpose of the inquiry is typically to consider the justification for the proposed expropriation and to explore possible alternatives. A "Yes" indicates that an inquiry is available under some conditions.
3.	Statutory agreement - Some statutes provide for a statutory agreement between the expropriating authority and an owner. These agreements provide for the owner's co-operation to the extent of transferring title to the expropriating authority but provide the owner with access to a court or tribunal to determine compensation. A "Yes" indicates that a statutory agreement is available.
4.	Advance payment before entry - Some statutes require the expropriating authority to deliver payment of compensation prior to taking possession of the expropriated land. Availability of an advance payment is a significant benefit for an owner, because it provides a source of funds from which to acquire a replacement property while compensation is being determined. A "Yes" indicates that the expropriating authority must deliver an advance payment.
5.	Appraisal report - Some statutes provide the owner with a right to receive, at the authority's expense, the appraisal report that supports the expropriating authority's offer of compensation. Access to this report is an important step in providing the owner with information that is required to evaluate the authority's offer. A "Yes" indicates that an owner has the right to obtain an appraisal report at the expense of the expropriating authority.
6.	Interim costs - Some statutes provide the owner with the opportunity to obtain interim funding from the expropriating authority for reimbursement of legal, appraisal or other incurred costs. A "Yes" indicates that an owner has the opportunity under some conditions to receive interim reimbursement of reasonable expenses.
7.	Final costs - Most statutes deal with reimbursement of an owner's expenses for professional services after compensation for all other matters has been determined. No statutes provide an absolute guarantee of full reimbursement of owner expenses. However, some statutes are more generous to an owner than are others. A "Yes" indicates that an owner has a non-discretionary legal right under some conditions to reimbursement of reasonable expenses.
8.	Independent determination of compensation - The availability of an independent body to make the determination of compensation payable is an important requirement to ensure fairness. This can be an established court or an administrative tribunal or ad hoc arbitrator. A "Yes" indicates that an independent body is given the power to make the determination.
9.	Appeals - The right to appeal the initial determination of compensation is an important requirement to ensure fairness. A "Yes" indicates that a right to appeal exists. Where this right is found in a separate statute, the appropriate reference is supplied.
10.	Reversionary rights - A reversionary right refers to the right of an owner to reacquire title to expropriated land when the expropriating authority decides after expropriation is complete that the land is not required for its purposes. A "Yes" indicates that the applicable statute contains a reversionary right.
11.	Home-for-a-home - Some statutes provide that when a personal residence is expropriated, the owner should receive sufficient compensation to acquire a similar home even if the cost to acquire a replacement property is greater than the market value of the land taken. A "Yes" indicates that a home-for-a-home provision is available in the applicable statute.

TABLE 4
Comparative Expropriation Procedures

Jurisdiction / Expropriation Law		Criterion 1 - Advance Notice	
		Included	Statute
	Canada <i>Expropriation Act, 1985</i>	Yes	s. 5, 6, 8
	Alberta <i>Expropriation Act, 2000</i>	Yes	s. 8
	British Columbia <i>Expropriation Act, 1996</i>	Yes	s. 6
	Manitoba <i>Expropriation Act</i>	Yes	s. 4, Sched A, S. 1
	New Brunswick <i>Expropriation Act, 1973</i>	Yes	s. 6, 8
	Newfoundland and Labrador <i>Expropriation Act, 1990</i>	Yes	s. 7
	Nova Scotia <i>Expropriation Act, 1989</i>	No	
	Northwest Territories <i>Expropriation Act, 1988</i>	Yes	s. 5
	Nunavut Territory <i>Expropriation Act, 1988</i>	Yes	s. 5
	Ontario <i>Expropriations Act, 1990</i>	Yes	s. 06
	Prince Edward Island <i>Expropriation Act, 1988</i>	No	Ss. 7 & 12
	Quebec <i>Expropriation Act</i>	Yes	s. 40
	Saskatchewan A <i>Expropriation Procedure Act, 1978</i>	No	
	Saskatchewan B <i>Municipal Expropriation Act, 1978</i>	No	
	Yukon <i>Expropriation Act, 2000</i>	No	

TABLE 4
Comparative Expropriation Procedures

Jurisdiction	Criterion 2 - Right to Injury		Criterion 3 - Statutory Agreement	
	Included	Statute	Included	Statute
 CA	Yes	s. 09	No	
 AB	Yes	s. 10	Yes	s. 30
 BC	Yes	s. 10	Yes	s. 3
 MB	Yes	Sched A, s. 3	No	
 NB	Yes	s. 09	No	
 NFL	No		No	
 NS	No		No	
 NT	Yes	s. 8	No	
 NU	Yes	s. 8	No	
 ON	Yes	s. 06	Yes	s. 30
 PEI	No		No	
 QC	Yes	s. 44	Yes	
 SK	Yes	s. 07	Yes	
 SK	No		No	
 YK	No		No	

TABLE 4
Comparative Expropriation Procedures
















Jurisdiction	Criterion 4 - Advance Payment		Criteria 5 - Appraisal Report	
	Included	Statute	Included	Statute
 CA	Yes	s. 16	Yes	s. 16
 AB	Yes	s. 31	Yes	s. 32
 BC	Yes	s. 20	Yes	s. 20
 MB	Yes	s. 16	No	
 NB	Yes	s. 37	Yes	s. 37
 NFL	No	s. 18	No	
 NS	Yes	s. 13	Yes	s. 13
 NT	Yes	s. 18	Yes	s. 19
 NU	Yes	s. 18	Yes	s. 19
 ON	Yes	s. 25	Yes	s. 25
 PEI	No		No	
 QC	Yes	s. 53.2	No	
 SK	No	s. 20	Yes	s. 22
 SK	No		No	
 YK	Yes	s. 21	No	

TABLE 4
Comparative Expropriation Procedures















Jurisdiction	Criterion 6 - Interim Costs		Criterion 7 - Final Costs	
	Included	Statute	Included	Statute
 CA	Yes	s. 29	Yes	s. 39
 AB	Yes	s. 25	Yes	s. 39
 BC	Yes	s. 48	Yes	s. 45
 MB	No		Yes	s. 15
 NB	No		Yes	s. 52
 NFL	No		No	s. 48
 NS	No		Yes	s. 52
 NT	No		Yes	s. 36
 NU	No		Yes	s. 36
 ON	No		Yes	s. 32
 PEI	No		No	s. 27
 QC	No		No	s. 68
 SK	No		Yes	s. 43
 SK	No		No	s. 10
 YK	No		No	s. 16

TABLE 4
Comparative Expropriation Procedures
















Jurisdiction	Criterion 8 - Independent Determinations		Criterion 9 - Appeals	
	Included	Statute	Included	Statute
 CA	Yes	s. 09	Yes	<i>Federal Courts</i>
 AB	Yes	s. 10	Yes	s. 37
 BC	Yes	s. 10	Yes	<i>Court of Appeal</i>
 MB	Yes	Sched A, s. 3	Yes	s. 44
 NB	Yes	s. 09	Yes	<i>Judicature Act</i>
 NFL	No		Yes	s. 32
 NS	No		Yes	<i>Utility and Review Board Act</i>
 NT	Yes	s. 8	Yes	
 NU	Yes	s. 8	Yes	
 ON	Yes	s. 06	Yes	s. 31
 PEI	No		Yes	s. 19
 QC	Yes	s. 44	Yes	
 SK	Yes	s. 07	Yes	s. 44
 SK	No		Yes	s. 7
 YK	No		Yes	s. 14

TABLE 4
Comparative Expropriation Procedures














Jurisdiction	Criterion 10 - Reversionary Rights		Criterion 11 - Home for a Home	
	Included	Statute	Included	Statute
 CA	No		Yes	s. 26
 AB	Yes	s. 70	Yes	s. 47
 BC	Yes	s. 21	No	
 MB	Yes	s. 51	Yes	s. 26
 NB	No		Yes	s. 40
 NFL	No	s. 55	No	
 NS	No	s. 67	Yes	s. 27
 NT	No		Yes	s. 30
 NU	No		Yes	s. 30
 ON	Yes	s. 42	Yes	s. 15
 PEI	No	s. 30	No	
 QC	No		No	
 SK	No		No	
 SK	No		No	
 YK	No		Yes	s. 9

TABLE 5

Second Expropriation Table Rankings















Jurisdiction	Law	Rank
 AB	s. 14 - For any municipal purpose or as authorized by other legislation	2 (50%)
 BC	s. 31 - For the purpose of exercising or performing its powers, duties and functions	2 (50%)
 MB	s. 254 - For any municipal purpose	1 (25%)
 NB	s. 8 - For the purpose of carrying out any of its powers or providing any of its services	2 (50%)
 NFL	s. 50 - For the purpose of any powers given to a council	4 (100%)
 NT	s. 1 - For any purpose for which the municipality is authorized to acquire real or personal property	2 (50%)
 NS	s. 52 - For any purpose for which it may spend money	1 (25%)
 NU	s. 71 - For construction of roads	4 (100%)
 ON	s. 6 - For any purpose for which the municipality is authorized to acquire real property	1 (25%)
 PEI	s. 51 - For the purpose of providing any municipal services it is authorized to provide by the Act	2 (50%)
 QCa	s. 570 - For any municipal purpose	1 (25%)
 QCb	s. 1097 - For any municipal purpose	1 (25%)
 SK	s. 3 - For any municipal purpose	1 (25%)
 YK	s. 265 - For any municipal purpose	1 (25%)

TABLE 6

**Overall Rankings for Expropriation
(Combined*)**

Jurisdiction	Overall Score
 Canada	9
High Level	
 Alberta	13 - 87%
 British Columbia	12 - 80%
 Nunavut Territory	12 - 80%
 Ontario	12 - 80%
 New Brunswick	10 - 67%
 Northwest Territories	10 - 67%
 Manitoba	9 - 60%
Middle Level	
 Nova Scotia	7 - 47%
 Newfoundland and Labrador	7 - 40%
 Quebec	6 - 40%
 Saskatchewan A**	6 - 40% (<i>Expropriation Procedure Act</i>)
Low Level	
 Yukon Territory	5 - 33%
 Prince Edward Island	4 - 27%
 Saskatchewan B	3 - 20% (<i>Municipal Expropriation Act</i>)

* Combined "Yes" responses in first expropriation table with score from second expropriation tables.
 **Note on Saskatchewan: This province has two statutes governing expropriation. For the purposes of assigning a score for expropriation, the total points for both were converted into a percentage score and on the final chart were averaged to yield the final score for expropriation.

TABLE 7

Laws Defining Expropriation Powers in Each Jurisdiction

Jurisdiction	Law
 Canada	<i>Expropriation Act, 1985</i>
 Alberta	<i>Municipal Government Act</i>
 British Columbia	<i>Community Charter</i>
 Manitoba	<i>Municipal Act</i>
 New Brunswick	<i>Municipalities Act</i>
 Newfoundland and Labrador	<i>Urban and Rural Planning Act, 2000</i>
 Northwest Territories	<i>Cities, Towns and Villages Act</i>
 Nova Scotia	<i>Municipal Government Act</i>
 Nunavut Territory	<i>Cities, Towns and Villages Act</i>
 Ontario	<i>Municipal Act, 2001</i>
 Prince Edward Island	<i>Municipalities Act</i>
 Quebec A	<i>Cities and Towns Act</i>
 Quebec B	<i>Municipal Code of Quebec</i>
 Saskatchewan A	<i>Expropriation Procedure Act</i>
 Saskatchewan B	<i>Municipal Expropriation Act</i>
 Yukon Territory	<i>Municipal Act</i>

3. Land-use planning (Downzoning) and/or constructive takings

Land-use planning also affects private property, as it places restrictions on property. Restrictions on permitted land uses also affect land value, which concerns landowners. For this section, the Frontier Centre commissioned a legal expert in land-use planning.²²

According to this expert, most land-use planning decisions are made at the municipal level by local governments that have been given those powers by provincial law.

Municipalities justify this power by stating that they need it to develop land in an “orderly fashion.” That may be so, but this reduction in land value, or downzoning as it is called, raises questions of whether the landowners receive compensation for the reduced value. As mentioned before, governments are not under any obligation to provide this, but when they do, it represents respect for property rights.

This section focuses on instances where reduction in land value may be anticipated. Most jurisdictions have laws that address these instances. Three general categories were identified: (1) restrictions on zoning powers, (2) restrictions on compensation and (3) rights to compensation.

Legal doctrine affecting constructive takings/*de facto* expropriation

Legal scholars have concluded that Canadian law “lacks a robust regulatory takings doctrine.”²³ However, as mentioned above, some important cases have provided more clarity. In *Manitoba Fisheries Ltd. v. The Queen* (1978), the Supreme Court of Canada held that legislation granting a Crown corporation exclusive rights to export fish amounted to a taking, which meant the company was entitled to compensation. A fish exporting company was put out business when a federal statute created a fish monopoly. The *Queen (B.C.) v. Tener* (1985) is a constructive takings case where a provincial statute made it impossible for the plaintiffs to gain access to their mineral rights in a provincial park. The denial of access amounted to a taking, so compensation was required. In both cases, the statutes were silent on compensation, which typically meant it was not payable. In *Canadian Pacific Railway Co. v. City of Vancouver* (2006), the Court restated the test for constructive (or *de facto*) taking. Justice McLachlin said that 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.

In that case, the City of Vancouver, acting under a statutory power granted by municipal statute, enacted a by-law restricting the uses to which lands owned by the CPR could be put. The land was a 45-acre corridor that held an abandoned railway line, and the company was thinking of developing the land for residential or commercial purposes. The by-law prevented that, as the land effectively became a public thoroughfare, and only certain purposes were allowed. The Supreme Court admitted the by-law froze the redevelopment potential of the corridor and reduced it to non-economic uses. The

Court, however, held that it was not a taking and argued that the by-law did not restrict all uses of the property, as the company could still use it as a public thoroughfare. So, essentially removing all reasonable uses meant almost all reasonable uses of the land would have to be eradicated by a regulation. The analysis rests on determining whether the regulation is of sufficient severity to remove virtually all of the rights associated with the property owner’s interests.

However, legal research has discovered that Quebec and the rest of Canada differ in this respect. Legal scholar Malcolm Lavoie observed, “[T]he common law and civil law approaches to constructive takings differ to a surprising extent.”²⁴

Citing *Donnacona (Ville de) c. Gagné-Lambert*, [1976] R.J.Q. 503 (C.A.), Lavoie added:














The Quebec Court of Appeal has struck down zoning rules that leave a broad range of uses to the owner, including the construction of schools, churches and administrative buildings, on the basis that none of these uses is profitable.²⁵

As Lavoie goes on to explain, Canadian common law would lead (and has led) to the opposite result—specifically, upholding the zoning, with no compensation to the affected landowner, as was the case in the *Canadian Pacific* judgment.

So, in the Index, additional points are given to the score of Quebec for its unique legal approach toward constructive takings, as it is more welcoming to claims for compensation. Common law provinces and territories, logically, receive fewer points.

TABLE 8

Primary Statutes

Jurisdiction	Zoning Restrictions (0)	Restrictions on Compensation (0)	Right to Compensation (3)	Common Law Jurisdiction (1) Civil Code Jurisdiction (3)	
 AB		s. 621 (1)		Common law 1	1 (12%)
 BC		s. 914(1)	s. 914(2)	Common law 1	3 (37%)
 MB		s. 192		Common law 1	1 (17%)
 NB		s. 75		Common law 1	1 (17%)
 NFL		s. 5	s. 96	Common law 1	4 (50%)
 NT		s. 30		Common law 1	1 (17%)
 NS	s. 222	s. 261	s. 222	Common law 1	4 (50%)
 NU		s. 30		Common law 1	1 (17%)
 ON				Common law 1	1 (17%)
 PEI	s. 8(2)			Common law 1	1 (17%)
 QC	s. 246			Civil Code 3	3 (37%)
 SK		s. 238		Common law 1	1 (17%)
 YK		ss. 351(4), 352		Common law 1	1 (17%)

** Provinces and territories that fall under the common law received a score of 1, as they have a weaker legal doctrine when it comes to constructive or de facto expropriation. Canada’s only province under the Civil Code received a score of 3, as that jurisdiction has a legal approach that is more welcoming of claims involving a constructive taking (which is referred to in Quebec as disguised expropriation).

4. Municipal power of entry

Municipal officials are granted certain rights by provincial statute to create by-laws that allow for entry onto land in order to carry out an inspection to ensure that its by-laws, directions, orders and conditions of a licence are being complied with. As a function of by-law enforcement, municipal power, or right of entry onto private property, is one option available to municipalities by legislation.

The “*Municipal Act*” or “*Municipalities Act*” of each province or territory (most often called that, although sometimes called the *Hamlets Act* as in Nunavut and Northwest Territories, the *Municipal Government Act* in Nova Scotia, or the *Municipal Code* in Quebec) sets out the powers and restrictions of the right of entry. Depending on the jurisdiction, a bylaw officer may apply for, or be already empowered, to enter onto private property, or may impose fines for non-compliance.

Notice Required - Some jurisdictions, such as British Columbia under its Community Charter, provide an occupier with at least 24 hours’ written notice of a proposed entry and the reasons for it. Others, such as Ontario, do not require notice, although entry must be at a reasonable time.

Warrant Required - Does the jurisdiction require the officer to seek a warrant from a court or justice of the peace to enter onto private property and hence have to provide reasons for the entry? Some jurisdictions do not require such approval. Observers note that a Justice for the Peace requirement is not as robust a protection as a court hearing. Justice of the Peace requirements, they note, serve more of a “rubber stamp” function in approving warrants.

Oversight - Is there some kind of formal oversight, by an ombudsman or similar body, over the entire process?

TABLE 9

Municipal Power of Entry

Jurisdiction	Notice required? Yes (3), No (1)	Warrant Required? Yes (4), No (1)	Oversight? Yes (3), No (1), Not sure (2)	Overall Score
 MB	Yes (3)	Yes (4)	Yes (3)	10
 YK	Yes (3)	Yes (Justice of the Peace*) (4)	Yes (3)	10
 NU	Yes (3)	Yes (Nunavut Court of Justice) (4)	Not sure (2)	9
 NT	Yes (3)	Yes (Supreme Court) (4)	Not sure (2)	9
 AB	Yes (3)	Yes (Court of Queen's Bench) (4)	No (1)	8
 SK	Yes (reasonable effort) (3)	Yes (Justice of the Peace/Court*) (4)	No (1)	8
 NB	No (1)	Yes (Entry warrant) (4)	Yes (3)	8
 PEI	Yes (3)	No (1)	Not sure (2)	6
 BC	No (1)	No (1)	Yes (3)	5
 NS	No (1)	No (1)	Yes (3)	5
 ON	No (1)	No (1)	No (1)	3
 QC	No (1)	No (1)	No (1)	3
 NFL	No (1)	No (1)	No (1)	3

* Please note that some observers believe a Justice of the Peace requirement on warrants serves more of a 'rubber stamp' function than a court hearing. As such, those observers would say a Justice of the Peace requirements offers less protection for property rights owners affected by a municipal entry.

5. Civil forfeiture

Civil forfeiture refers to a remedial device contained in provincial (or territorial, although no province in Canada has successfully adopted civil forfeiture legislation) statutes that is designed to recover the proceeds of unlawful activity as well as the property used to facilitate that unlawful activity.²⁶ Court proceedings are brought against the property, not the property owners. The Court then inquires into the origin and use of the property. If the Crown can prove to the satisfaction of the Court that the property is either the proceeds of, or an instrument of, unlawful activity, the Court is empowered to transfer title to the state. The proceedings are civil. A conviction against any person is not required, and the burden of proof is a balance of probabilities rather than the criminal standard of beyond a reasonable doubt.²⁷

Modern civil forfeiture originated in the United States in the 1970s and 1980s and has proliferated in countries that follow the common law. Largely in response to organized crime, civil forfeiture regimes have three main objectives: 1) to disgorge offenders of their ill-gotten gains, 2) to disable the financial capacity of criminal organizations and 3) to compensate victims of crime.²⁸ While notice is usually given to persons with an interest in the targeted property, a significant number of civil proceeds are uncontested, either because no one has come forward to contest the government or a settlement has been reached.

The policy rationale for civil forfeiture is that gains from unlawful activity should not accumulate in the hands of those who commit or benefit from unlawful activity. From a governmental perspective, it is often difficult to secure convictions against leaders of organized crime, as they are far removed from the activity. Civil forfeiture bypasses this problem by allowing the state to go after the property used in crime. It is also felt that the state has an interest in ensuring that victims of crime are compensated.²⁹

Historically, forfeiture rules were contained in federal criminal laws such as the *Criminal Code*, narcotics control legislation and customs and fisheries legislation. When Parliament expanded its forfeiture powers through the *Criminal Code*, courts required that forfeiture be exercised in accordance with the principles of criminal law, including the presumption of innocence and proof beyond reasonable doubt. The Courts imposed criminal standards, because they regarded forfeiture as an extension of Parliament's criminal law authority.³⁰

The provinces began introducing civil forfeiture laws in 2001. The passage of the Ontario law triggered a constitutional challenge. The basis of the challenge was whether the provinces, which have jurisdiction over "property and civil rights," were empowered to enact these laws. Canada's federal Parliament has jurisdiction over "criminal law and procedure" (which explains why there is one federal criminal code and not state and/or provincial criminal codes as in the United States). The Supreme Court of Canada concluded that Ontario's *Civil Remedies Act*, 2001 was constitutional in *Chatterjee v. Ontario (Attorney General)*, because the legislation was aimed at suppressing crime and compensating victims and thus within the provincial domain over "property and civil rights."

The problem with civil forfeiture regimes is that they often adversely affect third parties who become entangled in the proceedings. One B.C.-based criminal defence lawyer wrote:

Civil forfeiture threatens to be employed in situations where the connection between the crime and the property is tenuous, disproportionate (meaning the asset is used only occasionally or in small part for the commission of crime), or where the state wants to get back at individuals it isn't able to convict in a criminal court [31](#)

The claim that asset forfeiture is taking a bite out of organized crime is suspect. For instance, researchers from the United States, Australia and Great Britain noted that forfeiture failed to limit organized crime.³² In June 2011, the Manitoba government claimed that \$1.4-million in assets was successfully forfeited. The evidence for the claim, however, is suspect given that the revenue gained from asset forfeiture is a fraction of the total monetary value of organized criminal activity.

Definition of Property - Property subject to forfeiture is generally defined the same way and includes all real property, such as buildings and land, and personal property, such as vehicles and boats. Some provinces define the term more precisely, whereas some provinces (such as Quebec) do not define it at all. Many statutes are broad enough to include intellectual property, and Alberta's statute is much broader in scope than others are. The clearer the definition, the better for property rights and the higher the score.

Scope of Unlawful Activity - Similarly, the definition of the scope of unlawful activity varies among provinces. Ontario and Manitoba, for example, include all Canadian and provincial offences as well as all foreign jurisdiction offences if the act or omission would also be an offence in Ontario or Manitoba. Alberta, on the other hand, does not include foreign jurisdiction offences. The more limited the scope, the higher the score.

Scope of Proceeds of Unlawful Activity - These are quite similar among provinces, as they all tend to include directly and indirectly acquired property. Ontario, however, has a narrower definition.

Scope of Instruments of Unlawful Activity - These are quite similar in that most of the provinces capture property used, or likely to be used, to engage in unlawful activity that is intended to, or was likely to, cause the acquisition of other property or result in serious bodily harm to a person. However, Quebec has no definition, and New Brunswick only captures property used, or likely to be used, to engage in unlawful activity. That broad scope could be abused. Again, a narrower scope and definition yield a higher score.

Legitimate Owner Defence Available - If the Court finds that property is the proceeds of unlawful activity or an instrument of unlawful activity and a party to the proceeding proves that he, she or it is a legitimate owner or a responsible owner of the property, the Court, except where it would clearly not be in the interests of justice, shall make such order as it considers necessary to protect the legitimate owner's or the responsible owner's interest in the property. However, this defence is not available to the same extent in all provinces. Alberta provides no standalone

defence, although court discretion is implicitly available (see below under residual discretion). Also, in most provinces the defence is available for both proceeds and instruments of unlawful activity, but in Nova Scotia the defence is available only with respect to instruments of unlawful activity. Better access to the defence, of course, yields a higher score.

Residual Discretion - In the forfeiture proceeding, this component speaks to whether the Court must issue the forfeiture order or whether the Court has discretion to decline to exercise its authority. The more permissive and discretionary the language, the higher the score, as this would allow the Court to tailor the outcome to the circumstances, may be appropriate in many cases.

Interim Preservation Order - The powers of the Court to put a temporary hold or restriction on the property pending disposition of the final proceeding are similar among provinces. The Crown can seek interim preservation orders on an *ex parte* basis, meaning it need not give notice to the person who has possession of the property before getting the order.

Immunity for Liability for the Crown and its Agents - In most provinces, the Crown or any agents acting on its behalf cannot be sued for negligence when managing property held under an interim preservation order or in the performance of their duties under the statute unless they are acting in bad faith. In Alberta, the Crown is not liable even if the conduct was in bad faith, while in Quebec and Nova Scotia there are no express immunity provisions. Restrictions on immunity confer a higher score.

Limitation Period - The limitation period is the length of time during which a civil forfeiture proceeding can be brought. The shorter the limitation period, the higher the score.

In contrast, federal forfeiture regimes seem to provide more procedural safeguards for individuals. They are therefore the preferred means of ensuring that those who commit unlawful acts do not benefit from “ill-gotten gains.” Even if a province does not have a statute that provides for civil forfeiture, there is still access to federal criminal forfeiture provisions. Here are some basic differences between criminal or conviction-based forfeiture and civil forfeiture.

- Where the person has not been convicted of a crime, the Crown must establish beyond reasonable doubt that the property ought to be forfeited pursuant to 490 and 490.1 of the *Criminal Code*. Because of the stricter standard of proof, the rules of evidence are also stricter. In this regard, hearsay evidence is generally excluded.
- The Crown cannot make applications to forfeit just any property, which they can do under the civil forfeiture statutes. The property has to be seized pursuant to the exercise of a search warrant or in the context of a peace officer’s exercise of his or her duties (e.g., the property seized incident led to an arrest).
- The property generally cannot be detained indefinitely.
- A person need only establish that he or she is entitled to lawful possession and not that he or she is a responsible owner (this is more relevant in the context of an instrument of crime in which a person has to do all that can reasonably be done to prevent the property from being used to engage in unlawful activity).

- The scope of unlawful activities to which the provision applies is generally limited to *Criminal Code* offences and not any provincial or foreign offence.

All that being said, the civil forfeiture statutes are a workaround of the more restrictive rules in the *Criminal Code*.



TABLE 10

Civil Forfeiture Rankings I













Jurisdiction	Definition of property - Open (1) or Defined (3)?	Scope of unlawful activity - Very wide (1), Wide (2) or Closed (3)?	Scope of proceeds of unlawful activity - Wider (1) or More closed (3)?	Scope of instruments of unlawful activity - Very wide (1) or More closed (3)?	Legitimate owner defence available? - No standalone defence (1), Full defence (3), limited defence (2)	Residual discretion - Mandatory (1) or Permissive (3)?	Interim Preservation Order - Powers too broad? No (3), Yes (1)	Immunity for liability for Crown and its Agents - No immunity (3) or available privately (3), No liability for Crown except for bad faith (2), No liability, even if bad faith (1)	Limitation period? Yes, 10 years (3), Yes, 15 years (2), No (1)
	Defined (3)	Very Wide (1)	More closed (3)	More Closed (3)	Full Defence (3)	Mandatory (1)	No (3)	No liability except for bad faith (2)	Yes, 15 years (proceeds), none (instruments) (2)
	Open (1)	Closed (3)	Wider (1)	Closed (but bodily harm not serious) (3)	No standalone defence (1)	Provision not explicit but couched in permissive terms (3)	Too broad (1)	No liability even if acting in bad faith (1)	Yes, 10 years (3)
	Open (1)	Closed (3)	Wider (1)	No definition (1)	Full defence (3)	Permissive (3)	No (3)	No immunity (3)	None (1)
	Defined (3)	Closed (3)	Wider (1)	Closed (3)	Full defence (3)	Permissive (3)	No (3)	No liability except for bad faith (2)	Yes, 10 years (3)
	Defined (3)	Very wide (1)	Wider (1)	Closed (3)	Full defence (3)	Mandatory (1)	No (3)	No liability except for bad faith (2)	None (1)
	Defined (3)	Closed (3)	Wider (1)	Very wide (1)	Full defence (3)	Permissive (3)	No (3)	No liability except for bad faith (2)	Yes, 10 years (3)
	Defined (3)	Closed (3)	Wider (1)	Closed (3)	Limited defence (2)	Permissive (3)	No (3)	Liability by private action (3)	Yes, 10 years (3)
	Defined (3)	Very wide (1)	Wider (1)	Closed (3)	Full defence (3)	Mandatory (1)	No (3)	No liability except for bad faith (2)	None (1)

TABLE 11

Civil Forfeiture Rankings II


Highest scoring provinces or territories by virtue of not having civil forfeiture

 Yukon Territory
 Northwest Territories
 Nunavut Territory
 Newfoundland & Labrador
 Prince Edward Island

Higher scoring provinces with forfeiture

	Score
 British Columbia	24
 Nova Scotia	24
 New Brunswick	24
 Ontario	21

Lowest scoring province

	Score
 Quebec (sans forfeiture)	19

Civil Forfeiture Rank Overall Score

 Alberta	15
 British Columbia	14
 Nova Scotia	14
 New Brunswick	13
 Yukon Territory	13
 Ontario	12
 Quebec	12
 Saskatchewan	11
 Manitoba	11
 Prince Edward Island	11
 Northwest Territories	7
 Nunavut Territory	7
 Newfoundland & Labrador	6

6. Endangered species

In all the provinces and territories, natural resources such as fish and wildlife are held in a trust-like relationship on behalf of citizens by the provincial or territorial government (the Crown). The habitat these resources exist in is a mix of private land, Crown land leased for use by the private sector and Crown land managed by the government.³³

The challenge, of course, is that some of these natural resources are often mobile and transient.³⁴

Endangered species legislation prohibits damage to or destruction of habitat for species at risk. Most provinces and territories have standalone endangered species, although some jurisdictions rely on wildlife acts and other codes. All these laws typically sanction powers of enforcement. The process of listing species as at least determined oftentimes by independent scientists to ensure the process is not politicized. Generally, conservation officers are authorized to conduct searches. Often, these officers have the power to issue fines. Sometimes, they have the power of forfeiture of property for lack of compliance. This frequently occurs when maintaining habitat for endangered species affects private landowners.

Much of the criticism levelled at Canada's federal and provincial legislation that deals with endangered species is based on the experience of the United States where the burdens of the *Endangered Species Act* were regularly placed unfairly on "unlucky landowners."³⁵

The main concerns were over the shoot, shovel and shut up incentive created by the legislation.³⁶ If a landowner reveals that an endangered species exists on his or her land, then the value of that land may fall, often dramatically, because the uses to which the land can be put are reduced. Keeping that information to oneself reduces the risk of a loss in value. Landowners even have an added incentive to remove or kill endangered species on their land or to purposely render the habitat unsuitable for these species before they are discovered.³⁷














The assumption is that endangered species regulations are necessary and provide the public with the benefit of protecting species for future generations. There is, however, a compelling interest in governments co-operating with landowners who share land with these species. Landowners should not be required to shoulder the full cost of a public benefit.

Does the legislation require the government to give its reasons for listing an endangered species? - The public needs to know what kind of science was used to determine listing a particular species for protection.

Is there a requirement to notify landowners or lessees about the presence of species at risk on their property? - A notification requirement signals the intent of working with landowners to protect endangered species. Assumptions should not be made that landowners know the list of species or that they can identify these species if they even notice them.

TABLE 12

Endangered Species

Jurisdiction	Does the legislation require the government to give its reasons for listing an endangered species? No Requirement (2), Yes (3) No (2), Yes (3)	Is there a requirement to notify landowners or lessees about the presence of species at risk on their property? No (1) No (1)	Is there a requirement of full and fair compensation for a designation? Is it market value as opposed to discretionary? Yes (4), Discretionary (2),	Does the framework allow for voluntary conservation agreements between the province and the landowner? Explicit (3), Vague (2),
 BC	No requirement (2)	No requirement (2)	No (1)	Vague (2)
 AB	No requirement (2)	No (2)	No (1)	Yes (3)
 SK	No (2)	No (2)	No (1)	Vague (2)
 MB	No (2)	No (2)	No (1)	Yes (3)
 ON	Partially (3)	No (2)	No (1)	Yes (3)
 QC	No (2)	No (2)	No (1)	Vague (2)
 NB	No (2)	No (2)	No (1)	No (1)
 NS	Yes (3)	Yes (3)	Yes (4)	Yes (3)
 PEI	No (2)	No (2)	No (1)	Yes (3)
 NFL	No (2)	No (2)	Discretionary (2)	Yes (3)
 YK	No (2)	No (2)	No (1)	No (1)
 NT	No (2)	No (2)	No (1)	No (1)
 NU	Yes (3)	No (2)	Yes (4)	Yes (3)

Endangered Species Overall Score		
	Nova Scotia	13
	Nunavut Territory	12
	Ontario	9
	Newfoundland & Labrador	9
	Manitoba	8
	Alberta	8
	Prince Edward Island	8
	Saskatchewan	7
	British Columbia	7
	Quebec	7
	New Brunswick	6
	Yukon Territory	6
	Northwest Territories	0

Is there a requirement for full and fair compensation for a designation? - Is it market value as opposed to discretionary?

Does the framework allow for voluntary conservation agreements between the province and landowners? - These voluntary agreements allow the land to be used while being designated. Sometimes they require funding, but these arrangements exemplify the use of incentives and co-operation rather than just a blunt regulatory instrument to ensure compliance.

7. Heritage property

Policymakers and communities have decided that heritage is a precious resource, a cultural or natural asset that is visible to everyone and gives identity and distinctiveness to a community. To preserve heritage properties for future generations to enjoy, provinces and territories have enacted legislation that protects these sites. Designations do not always restrict use of the property, but the protection it affords may prevent unsympathetic changes or delay demolition while practical options are explored and advice provided.

All three levels of government designate heritage objects or places. However, for the Index, only provincial and municipal designations are of interest. Each provincial government has a distinct system and approach to heritage conservation. The government may delegate the authority to preserve historic buildings to municipalities and/or have a provincial heritage register.

Governments are not obligated to provide compensation for property rights affected by heritage designations, but some jurisdictions do and some provide tax relief (property tax abatement, etc.) as a way to help the affected property owners.

Notice Period for Provincial Designation - Is there a notice of intent to designate a property? How long is that period? There could be requirements to notify in the newspaper.

Notice Period for Municipal Designation - These are the same as the provincial designations.






Post-designation Compensation Measures - These are often direct grants to property owners and nowadays can come in the form of tax abatements.

Timely Compensation for Loss of Economic Value - Some jurisdictions do not provide this and some outright forbid it. Some make allowance for discretionary compensation. Others require compensation.













Land Registry: Is Notice from the Province and/or the Municipality Required? Is the Heritage Designation Noted on the Deed? - This is either discretionary or mandatory. It would be important for a future buyer to know if land has been designated as a heritage property.

TABLE 13

Heritage Property

Jurisdiction	Notice period provincial for designation? Yes (3), No (1)	Notice period for municipal designation? Yes (3), No (1), Yes, but unspecified period. (2)	Post-designation compensatory measures? Yes (4), No (1) Authorize, but not require. (2)	Timely and/or immediate compensation for loss of economic value? Yes (4), No (1), May pay (2)	Land Registry: Is the heritage designation noted on the deed? Required (3), Vague (2) Not required (1)
 BC	Yes, legally 30 days. (3)	Yes, public hearing required. (3)	No, there is no provincial funding for heritage property upkeep. (1)	Yes, Preferably by agreement between owner and municipality, but failing that, by binding arbitration. (4)	Yes (3)
 AB	Yes, 30 days notice to property owner. 30 days notice to the rest of the province via the <i>Alberta Gazette</i> , to allow for representations at hearing. (3)	Yes, six days notice. (3)	(2) s. 50 of the <i>Act</i> authorizes but does not require the Lt. Gov. in Council to make regulations for compensation of titleholders affected by non-municipal heritage designations, and for the Minister to make compensation according to those regulations.	Yes. Preferably by agreement between owner and municipality, but failing that, by binding arbitration at the Land Compensation Board. (4)	Yes (3)
 SK	Yes 60 days notice. (3)	Yes, 30 days notice to owner; NOI is good for 20 days, after which a new one is needed. (3)	Some funds are available, but not required for all (2). Under \$50,000 can be disbursed at the discretion of the Foundation.	No (1)	Vague (2)
 MB	Yes, in the area, or single issues of two different newspapers in the area. (3)	Yes, 21 days notice to owner and lessee. (3)	No, none required. (1)	No, none required (1)	Yes (3)
 ON	Yes, but downloaded to municipalities. (3)	Yes, 30 days notice to owner; newspaper publication requirement outside Toronto (in Toronto, other arrangements). (3)	For provincial designations, no, but at discretion of both levels of government. At least 30 municipalities follow a tax credit scheme set out by the provincially co-ordinated Heritage Tax Relief Program, which may provide tax credits for 10 per cent to 40 per cent of restoration or other work done on municipally designated heritage properties (with a cap on total compensation). (2)	No, none required (1)	Yes (3)

	QC	Yes, 30 days notice from the Minister of Culture, Communications and the Status of Women. (3)	Yes, 60 days' notice to general public. (3)	None required. However, s. 51 of the previous Act authorizes the Minister to offer assistance with maintenance, restoration or alteration of cultural property, inter alia. (2)	No, none is required. (1)	Yes (3)
	NB	Yes, 30 days notice from the Minister to the owner. (3)	Yes, the owner must be given notice, but the period is unspecified by the Act. (2)	Yes, there is a Property Tax Abatement program for heritage property owners. Details at: http://www2.gnb.ca/content/gnb/en/services/services_renderer.17276.html . By undertaking an approved restoration project to a designated heritage property, the Property Tax Abatement Program for Heritage Properties. (4)	No, none is required. (1)	Yes (3)
	NS	Yes, 30 days notice to all titleholders. (3)	Yes, 30 days notice. (3)	Yes, Provincial portion of PST on renovations is refundable: http://www.gov.ns.ca/snsmr/pdf/ans-taxcomm-heritage-property-rebate-application.pdf . (4)	No, none is required. (1)	Yes (3)
	PEI	Yes, Adequate in Act. 30 days notice specified in regulations. (3)	There is no separate municipal designation. Same timeline as province.	No, none is required. (1)	No, S. 12 of the Act forbids payment of compensation. (1)	Yes (3)
	NFL	No notice requirement in Act. (1)	No separate municipal and/or provincial designations.	The Heritage Foundation has grant money to offer to heritage property owners. (2)	No, none is required. (1)	No (1)
	YK	Yes (3), 60 days notice, newspapers.	Yes, 60 days, objections filed. (3)	Per s. 15(6) of the Act, the Minister may, with the approval of the Commissioner in Executive Council, pay compensation up to the amount the property has depreciated by virtue of the heritage designation. (May, not shall, which implies this is optional.) (2)	May pay (2)	Yes (3)
	NT	Not sure, discretion with Minister. (2)	Not sure, discretion with Minister. (2)	No (1)	No (1)	Not required, Minister. (1)
	NU	No specified period (2)	Not specified (2)	No (1)	No (1)	No mention (1)

Heritage Property Overall Score		
	British Columbia	14 (82%)
	Nova Scotia	14 (82%)
	New Brunswick	13 (76%)
	Yukon Territory	13 (76%)
	Ontario	12 (71%)
	Quebec	12 (71%)
	Saskatchewan	11 (65%)
	Manitoba	11 (65%)
	Prince Edward Island	11 (65%)
	Northwest Territories	7 (41%)
	Nunavut Territory	7 (41%)
	Newfoundland & Labrador	6 (35%)

8. Wills and/or successions

The ability to transfer property between generations is also an important aspect of property rights protection, as it concerns the critical element of disposition and alienation of one's property. This item or indicator looks at important aspects of the wills and succession process judged by the degree to which provincial and/or territorial laws or rules interfere with the ability of competent adults to discharge their property or property interests as they see fit.

As in the case of other property rights, the right of inheritance and succession is not absolute. In the 19th century, the law of primogeniture, i.e., inheritance by the eldest son, gave way when there was no will, to a sharing of land among the spouse and children. In 1910, Alberta and Saskatchewan, following the example of New Zealand, became the first provinces to enact legislation restricting the power to leave property by will in order to protect the rights of married women upon the death of their husbands. Gradually, all the common law provinces enacted legislation called testators' family maintenance or dependants' relief legislation that empowered a judge to set aside a will if the maker of the will failed to provide adequate maintenance for a spouse or other dependants.³⁸ The Index also assumes that these are rational regulations that protect those closest to the deceased and prevent their descent into poverty. However, these restrictions should be limited and reserved for the closest familial connections.

It should be stated that sometimes lawmakers get around laws and rules that prevent conditional property transfers through taxation, especially through taxing long-term trusts. Unfortunately, the power of taxation (with the exception of land transfer taxes in the case of the registering and/or transferring of property indicator) is avoided within the Index as the focus is mainly on the conventional understanding of real and personal property (although personal and corporate tax removes physical property, this report does not assume all tax confiscation is wrong or constitutes a property rights violation in the usually understood sense). That being said, it should be acknowledged that despite the abolition or reform of provisions controlling property disposition, states through taxation may operate to make that freedom illusory to a certain degree.

This Index assumes that the freer an individual is to dispose of his or her estate as she or he wishes, the better. Therefore, the fewer restrictions on disposition or alienable according to a person's intentions, the higher the score.

Rules against perpetuities

The Law Reform Commission of Nova Scotia, in a 2010 report, defined the rule against perpetuities as a legal rule that limits the duration of certain restrictions on the transfer of property.

By different means of estate planning—usually trusts—and other forms of property disposition, a testator may postpone the time when property may be possessed and used freely by a beneficiary or grantee. The rule establishes that such inheritances may only be postponed for so long. At a definite point, the property must be fully transferred to its beneficial owner, free of restrictions. Typically, the rule operates by voiding a property transfer if the delay, restriction or contingency places the transfer outside the allowable perpetuities period.³⁹

The common law rule against perpetuities is to the effect that no legal interest in property is valid unless it is certain, at the time when the disposition takes effect, that the interest must be vested within a life or lives in being plus 21 years. Property may not be tied up in trust, subject to restricted use, for longer than 20 years after the death of a person who was alive at the disposition. The rule applies to all types of contingent future interests of property, real or personal, whether by trust, power, estate, option to purchase, conditional easement or otherwise.⁴⁰

Although the Courts have traditionally avoided interfering with the free transfer of property, the modern rule evolved from specific social conditions:

The rule was devised in the late seventeenth century, when family settlements designed to keep property within aristocratic families from generation to generation came into vogue. In a society in which wealth and status were bound up with land ownership, it was perhaps to be expected that the aristocracy would seek to protect its fortunes against improvident heirs and their creditors.⁴¹

So, the concern at that time was that land would be tied up in perpetuity in family estates. The purpose of the rule has shifted somewhat as the problem of family settlements has waned. The Law Reform Commission of Nova Scotia deemed in a 2010 report that the rule is now designed to “balance the law’s general concern to respect the intentions of property owners, on the one hand, with the competing concern to ensure that living persons may freely use and enjoy the property they possess.”







However, in Canada, most jurisdictions have not left the rule intact. It has been abolished in some jurisdictions and substantially reformed in most jurisdictions other than the Atlantic provinces.














Canadian jurisdictions have adopted two kinds of reform. One is outright abolition. The second is the wait and see approach. This involves postponing the application of the rule by allowing that the interest may be held in trust during the perpetuity period while events on the ground work themselves out. This means a disposition cannot be declared invalid at the outset. The other approach is to extend the allowable perpetuity period or to allow an absolute number of years rather than depend on the indeterminate duration of any lives in being.

Breadth of class of beneficiaries - This refers to legislation that deals with support for dependants and mandatory reasonable provision for those dependants out of the

TABLE 14

Wills and/or Successions

Jurisdiction	Breadth of class of beneficiaries - Very limited (3) Broad (1)	Contracting out allowed by testator? Yes (3) No (1)	Rule against perpetuities? - Rule does not exist, Abolished (5), Full rule exists (1), Wait and see (2), Longer periods (3)	Marriage automatically voids will? Yes (1), No (3)	Score
 SK	Limited (3)	Yes (3)	Abolished (5)	Yes (1)	1
 QC	Limited (3)	No (1)	Rule does not exist. (5)	No (3)	1
 ON	Limited (3)	Yes (3)	Rule in effect, modified, wait and see. (2)	Yes (1)	9
 NFL	Limited (3)	Yes (3)	Modified, but close to common law rule. (2)	Yes (1)	9
 BC	Limited (3)	No (1)	Rule in effect, but 80 years. (3)	Yes (1)	8
 MB	Broad (1)	No (1)	Abolished (5)	Yes (1)	8
 NB	Limited (3)	Yes (3)	Full rule exists. (1)	Yes (1)	8
 NS	Limited (3)	Yes (3)	Full rule exists. (1)	Yes (1)	8
 PEI	Broad (1)	Yes (3)	Modified, life in being plus 60 years. (3)	Yes (1)	8
 AB	Broad (1)	No (1)	Rule in effect, modified, wait and see. (2)	No (3)	7
 YK	Broad (1)	Yes (3)	Modified, wait and see. (2)	Yes (1)	7
 NT	Broad (1)	Yes (3)	Modified, wait and see. (2)	Yes (1)	7
 NU	Broad (1)	Yes (3)	Modified, wait and see. (2)	Yes (1)	7

Endangered Species Overall Score		
	Saskatchewan	12
	Quebec	12
	Ontario	9
	Newfoundland & Labrador	9
	British Columbia	8
	Manitoba	8
	New Brunswick	8
	Nova Scotia	8
	Prince Edward Island	8
	Alberta	7
	Yukon Territory	7
	Northwest Territories	7
	Nunavut Territory	7














estate of the deceased. The wider the class of dependants as beneficiaries, the lower the score.

Contracting out allowed by testator - By contracting out, someone may by contract assign his/her property elsewhere on their death. There are certain financial arrangements one can make that involve contracts in which a person promises to bequeath his property to someone else—a reverse mortgage, for instance, or an option to purchase. The carrying out of these contracts shouldn't be infringed upon by the legislation. This ability of the deceased to contract out their property does not mean that dependent relatives, i.e., the beneficiaries under the *Act*, can sign a contract assigning away their rights under the provisions of the *Act*. Being able to contract out is seen as more property-respecting and so produces a higher score than not having the ability to do so.

Marriage automatically voids will - Many Canadians are unaware that marriage in most jurisdictions results in the revocation of a lawfully drawn up will. Unless a will is revised (to reflect a new spouse if applicable), an individual can die intestate with an estate distributed according to set rules in each province or territory. In Quebec, however, marriage does not automatically void the will, and an Alberta law proclaimed in force in February 2012 means the same is true for that province. A similar change is expected in British Columbia in 2013. Comparable changes may be made in other jurisdictions over time. A higher score goes to jurisdictions where a will is not automatically voided by a marriage.

TABLE 15

Final Rankings

Jurisdiction	Registering and/or Transferring Property	Expropriation	Land-use Planning and/or Constructive Takings	Civil Forfeiture	Endangered Species	Heritage Property	Municipal Power of Entry	Wills and/or Successions	Final Score
 NS	71%	47%	50%	89%	100%	82%	50%	57%	68.25%
 NT	100%	80%	16%	N/A	92%	41%	90%	50%	67 %
 AB	86%	87%	16%	63%	62%	88%	80%	50%	66.5%
 BC	71%	80%	37%	89%	54%	82%	50%	57%	65%
 MB	57%	60%	16%	67%	62%	65%	100%	57%	60.5%
 SK	86%	40%/20% (30%)	16%	67%	54%	65%	80%	86%	60.5%
 ON	57%	80%	16%	87%	69%	71%	30%	64%	59%
 NB	43%	67%	16%	89%	46%	76%	80%	57%	59%
 QC	36%	40%	50%	70%	54%	71%	30%	86%	54.6%
 YK	57%	33%	16%	N/A	46%	76%	100%	50%	54%
 NFL	57%	47%	66%	N/A	69%	35%	30%	64%	52.5%
 NT	57%	67%	16%	N/A	46%	41%	90%	50%	52%
 PEI	43%	27%	16%	N/A	62%	65%	60%	57%	47%

Ideas for reform

This Canadian Property Rights Index demonstrates that there is much room for improvement on the property rights front. Part of the problem is the almost unlimited freedom that provincial and territorial legislatures have to regulate and curb property rights given the absence of constitutional protection. The United States and most major European countries have either constitutional protections for property rights or compensation requirements. Before discussing reform proposals in each of the eight indicators or items, here are some general recommendations:

1) Place property rights or right to timely and full compensation in the Constitution. A good template for this is the recommendation put forward by Federal MP Scott Reid (Lanark-Frontenac-Lennox and Addington) and MPP Randy Hillier (Lanark-Frontenac-Lennox and Addington) when they jointly presented resolutions in the House of Commons and the Legislative Assembly of Ontario to amend Canada's Constitution to embed property rights within the *Charter of Rights and Freedoms*. The motion, if passed, would entrench property rights alongside those mentioned in the *Canadian Bill of Rights, 1960*, including the right to life, liberty and security of the person. The constitutional amendment uses the amending formula found in s. 43, which would only affect the province of Ontario. Such a move should first be attempted in other jurisdictions, perhaps in more hopeful areas such as Alberta. Canadians from all regions should be informed that protections or compensatory measures for property rights infringements are common in Europe, not just in the United States.

2) Governments need to roll back regulation in a systematic way. It may sound simplistic or naïve to point out, but the greatest threat posed to property rights, particularly in rural areas, is over-regulation. Absent over-regulation, governments would not need to consult or compensate landowners. Planning legislation, environmental regulations and other restrictions on land use are some of the most obvious problems for landowners everywhere. The growth of the modern state seems to include more regulation, oversight and bureaucratic cost. It is difficult for average citizens to know what the law is without the aid of a lawyer. Any agenda to promote greater property rights must include a concerted rollback on regulation.

3) Establish an independent education centre, research organization or self-financed citizens' group that is completely devoted to property rights enhancements across Canada. Perhaps there should also be one in each province and territory. Having one national centre would ensure that all the provinces and territories know what other jurisdictions are doing, and they could share best practices to improve property rights. It is not necessarily the case that governments or politicians will push for enhanced property rights or compensation, because this would increase government costs and liabilities and would reduce governmental power. A citizen-driven, independent organization could provide the necessary push for the issue to reach the attention of the public. A good example is the landowners' movement started by Keith Wilson in Alberta, who brought attention to the land stewardship bills and galvanized Albertans.

4) Canadian jurisdictions need to move toward the systems of compensation for regulatory takings that are common throughout the advanced industrialized world. A widespread campaign needs to inform the public that Canada is last among advanced economies when it comes to regulatory takings.

The following are some recommendations for each property rights indicator in the Index:

Registering and/or Transferring Property

- All remaining jurisdictions must be informed about the advantages of the Torrens system over the deeds registration system. These jurisdictions could receive government funds to help with the transition costs.
- At a minimum, some of the jurisdictions that charge a more onerous land transfer tax must align their housing value brackets with the current value of homes. In addition, first-homebuyer exemptions should be extended where they are not now. All jurisdictions should slowly replace their land transfer taxes with simple and less costly title registration fees or even remove them.

Expropriation

- Each jurisdiction must bring all expropriation powers and processes under one statute. This way, everything is clearer and easier to locate.
- All jurisdictions must move toward clarifying the purposes of expropriation and the powers granted in their statutes. The grounds for expropriation must be reduced and enumerated clearly in binding legislation. Vaguely defined municipal purposes must be clarified. Expropriation must return to clearly defined public purposes such as the building of necessary infrastructure.
- All jurisdictions should curb the ability of governments to expropriate for economic development purposes. Governments should not be in the business of business.

Land-use Planning and/or Constructive Takings

- All jurisdictions need to expand the right to compensation for those affected by land-use policies that downzone. Restrictions on compensation should be severely limited.
- Putting compensation provisions in the Constitution would force politicians who lack the incentive to do so, to write these measures into relevant statutes.

Municipal Power of Entry

- At minimum, all jurisdictions should require notice and a warrant before allowing municipal officials onto private property.
- Tighten up regulations to ensure that officials only enter property under serious circumstances.

Civil Forfeiture

- Provinces with civil forfeiture must tighten up the definitions of property and the scope of unlawful activity.
- More classes of offences must be excluded from the purview of civil forfeiture, not added.

- Courts must be given considerably more discretionary authority regarding whether to issue a forfeiture order based on the circumstances of the case and how it affects the owner.
- Where possible, more jurisdictions need to eliminate civil forfeiture regimes altogether in favour of federal criminal forfeiture.

Endangered Species

- All remaining jurisdictions should move toward full compensation for designations.
- Governments should devote much more money toward conservation agreements and other partnerships with private landowners, as these will increase landowner buy-in for these measures.

Heritage Property

- The compensation for designations should be full and timely.
- There ought to be more partnerships with private landowners and more tax relief schemes.

Wills and/or Successions

- All jurisdictions should eliminate or at least modify their rules against perpetuities.
- The remaining provinces and territories should end the rule whereby marriage automatically voids a will.

Conclusion

Property rights are indeed tenuous throughout Canada, although we demonstrated through the Index that some regions tend to perform better than others (Western provinces generally perform better than Eastern ones do and the southern regions perform better than northern regions do).

Nova Scotia and Nunavut Territory are the two highest-performing jurisdictions that defy both patterns. Both jurisdictions deserve careful study.

Absent constitutional protection, these rights exist at the mercy of legislatures. The Index has demonstrated that precariousness, particularly in areas of regulation. For example, all jurisdictions need to deal better with land-use planning, as regulations for environmental reasons are proliferating, particularly in Alberta, British Columbia and Ontario (Alberta's land-use framework is one important example, as is Ontario's *Greenbelt Act*). All provinces and territories are in the same boat, so to speak. We hope the Index will shine a spotlight on how insecure our property rights really are and spur the public to action.

Some jurisdictions clearly have stronger protections in certain areas. This is to be expected. As the note on data that was provided by Dr. Tom Flanagan mentions, Canadian jurisdictions do not necessarily have a consistent approach toward property rights, or as he put it, "The absence of internal data structure suggests that legislatures, when they act in this field, view the issues in isolation rather than seeing them as belonging to a broader field on which they should strive for consistency."

The Index results, while not providing the absolute word on property rights in every province or territory, can show the public and legislators where the blind spots are in certain areas and how they can improve. The ideal result is that legislatures, pressed on by an informed public, will strive for consistency in all public policy areas that affect property rights. The public and policymakers should be interested in promoting property rights, because respect for property rights is critical to economic growth and prosperity. As mentioned above, the creation of regulation poses the greatest threat, and if regulation were limited, there would be little need for procedural safeguards or the need to pay compensation.

In closing, we hope that Canadian jurisdictions will improve in the areas that need improving. In future, we will enhance the Index so that Canadians can get a better sense of how their governments are responding to evolving challenges to property rights. We look forward to being surprised by future results.

Appendix A

Notes on methodology

The Index does not measure property rights in an absolute sense for no such measurement exists. It selects significant dimensions of government policy and action that challenge property rights and measures the government response to them. These dimensions properly belong in the category of property rights protection in Canada and are somewhat transferable across jurisdictions around the world.

An index is a social scientific tool that acts as “a composite measure of variables, or a way of measuring a construct using more than one data item.”⁴² There are typically two considerations when creating an index. First, does it have validity? Do the indicators in fact measure what they are supposed to measure? Second, do the items chosen to measure a concept have unidimensionality? That is, each item must measure each concept only once, so there is no duplication. For example, to measure depression, one should not include items that more accurately measure anxiety, even though the concepts are similar.⁴³ In the case of property rights protections, it is important that each item or indicator is unique. As will be discussed in the methodology section below, the Index was subjected to proper social scientific tests to ensure that the categories’ measures do not overlap. Our data set was subjected to empirical analysis by Dr. Tom Flanagan, a political scientist at the University of Calgary, and PhD student Julie Croskill. These researchers produced a matrix of all eight dimensions correlated against each other. They determined that “there was not a pattern of significant correlations, either positive or negative.” Results from a Cronbach’s alpha test were small and negative in sign. As such, Flanagan and Croskill concluded that the indicators were not empirically related to one another. In other words, how a jurisdiction scores in one area does not predict performance in another.




Flanagan concluded, however, that the Index is useful in another aspect, or as he put it: “Aggregating these eight dimensions into a single Property Rights Index is, therefore, not based on the structure of the data but on the conceptual insight that these dimensions are all aspects of what theorists normally consider property rights.”

Flanagan did not view this as a problem but rather suggested that “the absence of internal data structure suggests that legislatures, when they act in this field, view the issues in isolation rather than seeing them as belonging to a broader field on which they should strive for consistency.”

Appendix B

Expropriation

Jurisdiction	Powers or Purpose
1  AB	s. 3 - To provide good government, to provide services that are necessary for the municipality and to develop and maintain safe and viable communities.
2  BC	s. 7 - To provide good government, services, laws and other matters for community benefit, stewardship of public assets and fostering the economic, social and environmental well-being of its community.
3  MB	s. 3 - To provide good government, to provide services that are necessary for the municipality and to develop and maintain safe and viable communities.
4  NB	Municipal powers are found in numerous sections of the <i>Act</i> . The First Schedule contains a list of specific authorized services.
5  NF	Municipal powers are found in Part VII of the <i>Municipalities Act</i> , 1999.
6  NT	s. 53 - Authorizes acquisition for any municipal purpose. However, municipal purpose is not explicitly defined.
7  NS	s. 65 - Authorizes municipal spending for a lengthy list of specified matters.
8  NU	Road construction is the only ground available for expropriation.
9  ON	s. 8 - The powers of a municipality are to be interpreted broadly. s. 9 - Municipalities are granted the same powers as a natural person.
10  PEI	ss. 30, 31 - The list of services that a municipality is authorized to provide. Note that a municipality can apply to the province to expand the list.
11  QCA	Municipal purpose is not explicitly defined in the <i>Act</i> , but the general powers of a municipality are set out in Division IV, Part 1 and also in the <i>Municipal Powers Act</i> , RSQ c. C-47.1.

Jurisdiction	Powers or Purpose
11  QCB	Municipal purpose is not explicitly defined in the <i>Act</i> but the general powers of a municipality are set out in various provisions of the <i>Act</i> and also in the <i>Municipal Powers Act</i> , RSQ c. C-47.1.
12  SK	<i>Cities Act</i> , s. 4 - To provide good government, services, facilities and other things that are necessary and desirable, to develop and maintain safe and viable communities, to foster economic, social and environmental well-being and to provide wise public stewardship of public assets. <i>Municipalities Act</i> , s. 4 - same
13  YK	s. 3 - To provide good government and services, facilities and things that are necessary or desirable for the municipality.

The following text is directly quoted from a research memo prepared by Bruce Melville.

2.1. Alberta

The *Municipal Government Act* applies. Section 14 provides a power to expropriate for any municipal purpose or as may be authorized by other legislation. Section 3 provides a list of municipal purposes that includes: (a) the provision of good government, (b) the provision of services, facilities or other things that are necessary or desirable for the municipality and (c) the development and maintenance of safe and viable communities.

Although economic development is not expressly included as a municipal purpose, I believe that the purposes described in s. 3 are nevertheless very broad and would allow expropriation to accomplish economic development objectives.

2.2. British Columbia

The *Community Charter* applies. Section 31 provides a power to expropriate for the purpose of exercising or performing a municipality's powers, duties and functions. Section 7 provides a list of municipal purposes that includes: (a) the provision of good government, (b) the provision of services, laws and other matters for community benefit, (c) the stewardship of public assets and (d) fostering the economic, social and environmental well-being of its community.

These municipal purposes are very broad. Inclusion of the phrase "fostering the economic ... well-being of its community" in the list of municipal purposes clearly supplies the grounds required to authorize expropriation for economic development objectives.

2.3. Manitoba

The *Municipal Act* applies. Section 254 provides a power to expropriate for any municipal purpose. Section 3 provides a list of municipal purposes that includes (a) the provision of good government, (b) the provision of services, facilities or other things that are necessary or desirable for the municipality and (c) the development and maintenance of safe and viable communities. Although economic development is not expressly included as a municipal purpose, I believe that the purposes described in s. 3 are nevertheless very broad and would allow expropriation to accomplish economic development objectives.

2.4. New Brunswick

The *Municipalities Act* applies. Section 8 provides a power to expropriate for the purpose of carrying out any of its powers or providing any of its services. Various municipal powers are set out in different sections within the statute and the First Schedule contains a list of specific services that municipalities are authorized to provide. In addition, s. 192 provides a regulation making provision that authorizes the province to expand the list of municipal powers.

Unfortunately, municipal powers included within the *Act* are not collected in a single location, which makes it difficult to track them down. None of the municipal powers appears to provide a broad, unrestricted power to engage in economic development activity. Nevertheless, the *Act* does permit a municipality to engage in several specific types of economic activity including the development of land for housing (s. 111) and to acquire and operate electric power

generation facilities (s. 111.2) and to engage in industrial development, urban redevelopment and renewal (First Schedule).

2.5. Newfoundland and Labrador

The *Urban and Rural Planning Act, 2000*, applies. Section 50 provides a power to expropriate for the purpose of any power given to a municipal council. Municipal powers are found primarily in Part VII of the *Municipalities Act, 1999*.

All the prescribed powers are very specific and none can be described as authorizing economic development functions.

2.6. Northwest Territories

The *Cities, Towns and Villages Act* applies. Section 1 provides a power to expropriate for any purpose for which a municipality is authorized to acquire land. Section 53 authorizes acquisition for any municipal purpose. Municipal purpose is not explicitly defined nor is there a listing of specific services that may be provided.

It should be noted that the *Act* provides a limited power to engage in economic development activities. Section 66 authorizes a municipality to provide its services on a commercial basis and s. 68 authorizes a municipality to encourage economic development for a municipal purpose.

2.7. Nova Scotia

The *Municipal Government Act* applies. Section 52 provides a power to expropriate for any purpose for which a municipality is authorized to spend money. Section 65 authorizes municipal spending for a lengthy list of specified matters. One of the matters listed in subsection 65(ao) authorizes spending for industrial parks, incubator malls and land and other facilities for the encouragement of economic development.

2.8. Nunavut Territory

The *Cities, Towns and Villages Act* applies. Section 71 provides a power to expropriate for road construction purposes. No other expropriation powers are granted.

2.9. Ontario

The *Municipal Act, 2001*, applies. Section 6 provides a power to expropriate for any purpose for which a municipality is authorized to acquire real property. Section 9 confirms that a municipality has all the powers of a natural person and s. 8 requires that the powers of a municipality are to be interpreted broadly. This language leaves few, if any, limits on the grounds for exercise of the expropriation power, including economic development activity.

2.10. Prince Edward Island

The *Municipalities Act* applies. Section 51 provides a power to expropriate for the purpose of providing any service that a municipality is authorized to provide. Sections 30 and 31 contain a list of authorized services. Note, however, that the *Act* also allows a municipality to obtain authorization from the province to provide additional services. Thus, the available grounds for expropriation could vary from municipality to municipality within this province.

Section 30 authorizes a municipality to provide industrial or commercial development. This clearly provides authorization to engage in limited economic development activity.

2.11. Quebec

There are two municipal governance statutes in Quebec. The *Cities and Towns Act* provides in s. 570 a power to expropriate for any municipal purpose. The *Municipal Code of Quebec* contains the same provision in s. 1097. Municipal purpose is not explicitly defined. Some of the general powers of a municipality are set out in Division IV, Part 1 of the *Cities and Towns Act*. Additional powers are found in the *Municipal Powers Act*.

Section 4 authorizes a municipality to engage in local economic development within certain limits.

2.12. Saskatchewan

The *Municipal Expropriation Act* applies. Section 3 provides a power to expropriate for any municipal purpose. The definition of municipal purpose is found in two other statutes: the *Cities Act*, s. 4 and the *Municipalities Act*, s. 4. Both of these statutes contain the same definition of municipal purpose as the (a) provision of good government, (b) provision of services, facilities and other things that are necessary or desirable, (c) the development and maintenance of a safe and viable community, (d) the fostering of economic, social and environmental well-being and (e) stewardship of public assets.

These municipal purposes are very broad. Inclusion of the phrase "to foster economic ... well-being" in the list of municipal purposes clearly supplies the grounds required to authorize expropriation for economic development objectives.

2.13. Yukon

The *Municipal Act* applies. Section 265 provides a power to expropriate for any municipal purpose. Municipal purposes are defined in s. 3 to include the provision of (a) good government and (b) services, facilities or things that are necessary or desirable.

Section 286 authorizes a municipality to partner with another government for the purpose of engaging in any matter relating to physical, social or economic development. This appears to provide authorization to engage in economic development activity.

2.9. Ontario

The *Municipal Act, 2001*, applies. Section 6 provides a power to expropriate for any purpose for which a municipality is authorized to acquire real property. Section 9 confirms that a municipality has all the powers of a natural person and s. 8 requires that the powers of a municipality are to be interpreted broadly. This language leaves few if any limits on the grounds for exercise of the expropriation power, including economic development activity.

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2.4. New Brunswick

The *Municipalities Act* applies. Section 8 provides a power to expropriate for the purpose of carrying out any of its powers or providing any of its services. Various municipal powers are set out in different sections within the statute and the First Schedule contains a list of specific services which municipalities are authorized to provide. In addition s. 192 provides a regulation making provision that authorizes the Province to expand the list of municipal powers.

Unfortunately, municipal powers included within the *Act* are not collected in a single location which makes it difficult to track them down. None of the municipal powers appear to provide a broad unrestricted power to engage in economic development activity. Nevertheless, the *Act* does permit a municipality to engage in several specific types of economic activity including the development of land for housing (s. 111) and to acquire and operate electric power generation facilities (s. 111.2) and to engage in industrial development, urban redevelopment and renewal (First Schedule).

2.5. Newfoundland and Labrador

The *Urban and Rural Planning Act, 2000*, applies. Section 50 provides a power to expropriate for the purpose of any power given to a municipal council. Municipal powers are found primarily in Part VII of the *Municipalities Act, 1999*.

All of the prescribed powers are very specific and none could be described as authorizing economic development functions.

2.6. Northwest Territories

The *Cities, Towns and Villages Act* applies. Section 1 provides a power to expropriate for any purpose for which a municipality is authorized to acquire land. Section 53 authorizes acquisition for any municipal purpose. "Municipal purpose" is not explicitly defined nor is there a listing of specific services that may be provided.

It should be noted that the *Act* provides a limited power to engage in economic development activities. Section 66 authorizes a municipality to provide its services on a commercial basis and s. 68 authorizes a municipality to encourage economic development for a municipal purpose.

2.7. Nova Scotia

The *Municipal Government Act* applies. Section 52 provides a power to expropriate for any purpose for which a municipality is authorized to spend money. Section 65 authorizes municipal spending for a lengthy list of specified matters.

One of the matters listed in sub-section 65(ao) authorizes spending for industrial parks, incubator malls and land and other facilities for the encouragement of economic development.

2.8. Nunavut

The *Cities, Towns and Villages Act* applies. Section 71 provides a power to expropriate for road construction purposes. No other expropriation powers are granted.

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Section 30 authorizes a municipality to provide industrial or commercial development. This clearly provides authorization to engage in limited economic development activity.

2.11. Quebec

There are two municipal governance statutes in Quebec. The *Cities and Towns Act* provides in s. 570 a power to expropriate for any municipal purpose. The *Municipal Code of Quebec* contains the same provision in s. 1097. "Municipal purpose" is not explicitly defined. Some of the general powers of a municipality are set out in Division IV, Part 1 of the *Cities and Towns Act*. Additional powers are found in the *Municipal Powers Act*.

Section 4 authorizes a municipality to engage in local economic development within certain limits.

2.12. Saskatchewan

The *Municipal Expropriation Act* applies. Section 3 provides a power to expropriate for any municipal purpose. The definition of "municipal purpose" is found in two other statutes: the *Cities Act*, s. 4, and the *Municipalities Act*, s. 4. Both of these statutes contain the same definition of municipal purpose as the (a) provision of good government, (b) provision of services, facilities and other things that are necessary or desirable, (c) the development and maintenance of a safe and viable community, (d) the fostering of economic, social and environmental well-being and (e) stewardship of public assets.

These municipal purposes are very broad. Inclusion of the phrase "to foster economic ... well-being" in the list of municipal purposes clearly supplies the grounds required to authorize expropriation for economic development objectives.

2.13. Yukon

The *Municipal Act* applies. Section 265 provides a power to expropriate for any municipal purpose. Municipal purposes are defined in s. 3 to include the provision of (a) good government and (b) services, facilities or things that are necessary or desirable.

Section 286 authorizes a municipality to partner with another government for the purpose of engaging in any matter relating to physical, social or economic development. This appears to provide authorization to engage in economic development activity.

Appendix C

Land-use planning indicator

Bruce Melville also prepared a memo for the Frontier Centre for this indicator. This is the relevant legislation related to land-use planning across Canada.

2.1. Municipal planning powers

2.1.1. Alberta

The principal planning legislation in Alberta is incorporated into the *Municipal Government Act* as Part 17. This *Act* expressly provides in s. 621 that with certain specified exceptions, nothing in Part 17 of the *Act* gives a person a right to compensation. The only exception found in Part 17 pertains to historical designations pursuant to s. 28 of the *Historical Resources Act*, which is discussed in more detail below.

2.1.2. British Columbia

The principal planning legislation in British Columbia is the *Local Government Act*. This *Act* expressly provides in subsection 914(1) that no compensation shall be payable to any person for any reduction in value of an interest in land that results from adoption of an official community plan or a by-law authorized by Part 26, Division 7 of the *Act*. Subsection 914(2) creates an exception for by-laws under Division 7 that restrict the use of land to a public use. It appears then that a by-law restricting the use of land to a public use could require payment of compensation.

2.1.3. Manitoba

The principal planning legislation in Manitoba is the *Planning Act*. This *Act* provides a statutory defence in s. 192 for any liability arising from the *Act* absent bad faith. This effectively eliminates any right to compensation for land-use planning regulations.

2.1.4. New Brunswick

The principal planning legislation in New Brunswick is the *Community Planning Act*. It provides in s. 75 that “[l]and shall not be deemed to be injuriously affected by reason only of the enactment, making or continuing of a by-law or regulation hereunder, or the amendment or repeal thereof.” This effectively rules out the payment of compensation.

2.1.5. Newfoundland and Labrador

The principal planning legislation in Newfoundland and Labrador is the *Urban and Rural Planning Act, 2000*, which provides in s. 5 that no person shall be entitled to compensation for a reduction in the value of that person’s interest in land as a result of the application of the *Act*. Nevertheless, s. 96 provides a procedure by which a property owner can require a municipality to purchase land that is incapable of reasonably beneficial use as a result of a land-use plan.

2.1.6. Northwest Territories

The *Planning Act* is the principal planning legislation in the Northwest Territories. It provides in s. 30 that no person shall be entitled to compensation by reason of the making or administration of a zoning by-law.

2.1.7. Nova Scotia

The principal planning legislation in Nova Scotia is the *Municipal Government Act*, which provides in s. 261 that property is deemed not to be injuriously affected by the adoption, amendment or repeal of land-use planning measures pursuant to the *Act*. Another provision of interest is found in s. 222 that applies to cases in which a municipality zones land for future public use. In those cases, the municipality must purchase the property within a period of one year following the designation for future use or allow alternative uses pursuant to another zone.

2.1.8. Nunavut Territory

The *Planning Act* of the Northwest Territories was adopted as the principal planning legislation for Nunavut Territory. It provides in s. 30 that no person shall be entitled to compensation by reason of the making or administration of a zoning by-law.

2.1.9. Ontario

The principal planning legislation in Ontario is the *Planning Act*. This statute does not contain any provisions that deal with potential municipal liability for land-use planning regulations.

2.1.10. Prince Edward Island

The principal planning legislation in Prince Edward Island is the *Planning Act*. The *Act* does not provide any statutory remedies for downzoning. However, it should be noted that s. 8(2) contains a restriction on municipal land-use powers by providing that no zone shall be established that provides exclusively for public use unless all the land so zoned is owned by the Crown, a municipality or public authority or is intended to be acquired by the Crown, a municipality or public authority within six months after the date of establishment of the zone.

2.1.11. Quebec

The principal planning legislation in Quebec is the *Land Use Planning and Development Act*. Section 246 prevents the application of land-use planning regulations in cases involving the staking of mineral claims or development of minerals carried on pursuant to the *Mineral Act*. Otherwise there are no provisions dealing with potential municipal liability for land-use planning regulations.

2.1.12. Saskatchewan

The principal planning legislation in Saskatchewan is the *Planning and Development Act, 2007*. This *Act* provides in s. 238 that every person is deemed not to have suffered any damages, and property is deemed not to have been injuriously affected by reason of the adoption of a development plan or zoning by-law.

2.1.13. Yukon

The principal planning legislation in Yukon Territory is the *Municipal Act*. Two provisions in the *Act* appear to provide a statutory defence to any claims for compensation. Subsection 351(4) prohibits any legal challenge to a by-law on the ground that it is unreasonable. Section 352 prohibits any legal claims for actions taken in good faith by a municipality pursuant to the *Act*.

2.2. Other planning powers

2.2.1. Alberta

The *Historical Resources Act, R.S.A. 2000*, c. H-9 provides the province with powers to designate historical resources (s. 19) and historic areas (s. 24). Designation can lead to significant restrictions on land use. Compensation must be paid (s. 50) for provincial designations under the *Act*.

The *Act* also provides municipal governments with powers to designate historical resources (s. 26) and historic areas (s. 27). Compensation must be paid (s. 28) for municipal designations under the *Act*.

2.2.2. British Columbia

The *Community Charter, S.B.C. 2003*, c. 26 provides municipal governments with the express power to regulate, prohibit and impose requirements in respect of trees (s. 8). However, s. 50 provides some restrictions on the exercise of this power, specifically in situations that might restrict or eliminate development opportunities. Subsection 50(3) provides an obligation to compensate in some circumstances. Section 51 expressly limits the obligation to pay compensation to the situations described in s. 50.

2.2.3. Canada

The *Aeronautics Act, R.S.C. 1985*, c. A-2 provides the government of Canada with the power to enact land-use restrictions that protect aircraft glide paths adjacent to airports from the encroachment of structures. Section 5.8 expressly prohibits the payment of compensation to anyone who suffers a loss from the application of an airport zoning regulation to any lands, buildings, structures or objects. It is interesting to note that this restriction on compensation has been in effect since 1985, but prior to that year the statute provided for payment of compensation in these circumstances.

2.2.4. Nova Scotia

The *Beaches Act, R.S.N.S. 1989*, c. 32 provides the province with the power to designate beach areas and to regulate land use within beach areas. Section 12 expressly prohibits compensation for any losses or impact caused by enactment of this statute.

Appendix D

Municipal power of entry

The following pieces of legislation were analyzed by researcher Peter Jaworski to determine the powers of municipal entry. Jaworski's results were then incorporated into the Index.

BRITISH COLUMBIA: *Local Government Act*

http://www.bclaws.ca/EPLibraries/bclaws_new/document/LOC/freeside/--%20L%20--/Local%20Government%20Act%20RSBC%201996%20c.%20323/00_Act/96323_09.xml#section268

Part 6 – Challenge and Enforcement of By-laws

Division 3 – Enforcement of Regional District By-laws

Inspections to determine whether by-laws are being followed

268. If a board has authority to regulate, prohibit and impose requirements in relation to a matter, the board may, by by-law, authorize officers, employees and agents of the regional district to enter, at all reasonable times, on any property to inspect and determine whether all regulations, prohibitions and requirements are being met.

ALBERTA: *Municipal Government Act*

<http://www.qp.alberta.ca/documents/Acts/M26.pdf>

Municipal inspections and enforcement

542. (1). If this or any other enactment or a by-law authorizes or requires anything to be inspected, remedied, enforced or done by a municipality, a designated officer of the municipality may, after giving reasonable notice to the owner or occupier of land or the structure to be entered to carry out the inspection, remedy, enforcement or action,
- (a) enter on that land or structure at any reasonable time, and carry out the inspection, enforcement or action authorized or required by the enactment or by-law,
 - (b) request anything to be produced to assist in the inspection, remedy, enforcement or action, and
 - (c) make copies of anything related to the inspection, remedy, enforcement or action.
- (1.1) A consent signed under s. 653 is deemed to be a reasonable notice for the purposes of subsection (1).
- (2) The designated officer must display or produce on request identification showing that the person is authorized to make the entry.
- (3) In an emergency or in extraordinary circumstances, the designated officer need not give reasonable notice or enter at a reasonable hour and may do the things in subsection (1)(a) and (c) without the consent of the owner or occupant.
- (4) Nothing in this section authorizes the municipality to remedy the contravention of an enactment or by-law.

Court authorized inspections and enforcement

543. (1). If a person
- (a) refuses to allow or interferes with the entry, inspection, enforcement or action referred to in section 542, or
 - (b) refuses to produce anything to assist in the inspection, remedy, enforcement or action referred to in section 542, the municipality may apply to the Court of Queen's Bench for an order under subsection (2).
- (2) The Court may issue an order
- (a) restraining a person from preventing or interfering with the entry, inspection, enforcement or action, or
 - (b) requiring the production of anything to assist in the inspection, remedy, enforcement or action.
- (3) A copy of the application and a copy of each affidavit in support must be served at least three days before the day named in the application for the hearing.
- (4) In an emergency or in extraordinary circumstances, the Court may hear the application without notice to any person.

SASKATCHEWAN: *The Municipalities Act*

<http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/M36-1.pdf>

DIVISION 4

Enforcement of Municipal Law

Inspection

362. (1). If this Act or a by-law authorizes or requires anything to be inspected, remedied, enforced or done by a municipality, a designated officer may, after making reasonable efforts to notify the owner or occupant of the land or building to be entered to carry out the inspection:

- (a) enter that land or building at any reasonable time and carry out the inspection authorized or required by the enactment or by-law;
 - (b) request that anything be produced to assist in the inspection; and
 - (c) make copies of anything related to the inspection.
- (2) The designated officer shall display or produce on request identification showing that he or she is authorized to make the entry.
- (3) When entering any land or building pursuant to this section, the designated officer may:
- (a) enter with any equipment, machinery, apparatus, vehicle or materials that the designated officer considers necessary for the purpose of the entry; and
 - (b) take any person who or thing that the designated officer considers necessary to assist him or her to fulfill the purpose of the entry.
- (4) In an emergency or in extraordinary circumstances, the designated officer need not make reasonable efforts to notify the owner or occupant and need not enter at a reasonable hour and may do the things in clauses (1)(a) and (c) without the consent of the owner or occupant.
- (5) Repealed. 2007, c.32, s.23.
- (6) Notwithstanding subsections (1) to (5), a designated officer shall not enter any place that is a private dwelling without:
- (a) the consent of the owner or occupant of the private dwelling; or
 - (b) a warrant issued pursuant to s. 363 authorizing the entry.

Warrant re access to land or buildings

363. (1). If a person refuses to allow or interferes with an entry or inspection described in s. 26, 27, 28, 29 or 362 or if a person fails to respond to a designated officer's reasonable requests for access to property for the purposes mentioned in any of those sections, the municipality may apply to a justice of the peace or a provincial court judge for a warrant authorizing a person named in the warrant to:
- (a) enter the land or building and to carry out the work or inspection authorized or required by the Act or a by-law; and
 - (b) search for and seize anything relevant to the subject matter of the warrant.
- (2) On an application pursuant to subsection (1), the justice of the peace or provincial court judge may issue the warrant sought on any terms and conditions that the justice of the peace or provincial court judge considers appropriate.

MANITOBA: *The Municipal Act*

<http://web2.gov.mb.ca/laws/statutes/ccsm/m225e.php#239>

DIVISION 3

ENFORCEMENT OF BY-LAWS

Municipal inspections and enforcement

239. (1). If this or any other Act or a by-law authorizes or requires anything to be inspected, remedied, enforced or done by a municipality, a designated officer of the municipality may, after giving reasonable notice to the owner or occupier of land or the building or other structure to be entered to carry out the inspection, remedy, enforcement or action,
- (a) enter the land or structure at any reasonable time, and carry out the inspection, enforcement or action authorized or required by the Act or by-law;
 - (b) request that anything be produced to assist in the inspection, remedy, enforcement or action; and
 - (c) make copies of anything related to the inspection, remedy, enforcement or action.

Identification

239. (2). The designated officer must display or produce on request identification showing that he or she is authorized to make the entry.

Emergencies

239. (3). In an emergency, or in extraordinary circumstances, the designated officer need not give reasonable notice or enter at a reasonable hour and may do the things referred to in clauses (1)(a) and (c) without the consent of the owner or occupant.

Court authorized inspections and enforcement

240. (1). The municipality may apply to the Court for an order under subsection (2) if a person
- (a) refuses to allow or interferes with the entry, inspection, enforcement or action referred to in s. 239; or
 - (b) refuses to produce anything to assist in the inspection, remedy, enforcement or action referred to in section 239.

Court order

240. (2). On an application under subsection (1), the Court may issue any order it considers appropriate, including
- (a) restraining a person from preventing or interfering with the entry, inspection, enforcement or action; or
 - (b) requiring the production of anything to assist in the inspection, remedy, enforcement or action.

ONTARIO: *Municipal Act*

http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_01m25_e.htm#BK514

S. 436

Power of entry re inspection

436. (1). A municipality has the power to pass by-laws providing that the municipality may enter on land at any reasonable time for the purpose of carrying out an inspection to determine whether the following are being complied with:
1. A by-law of the municipality passed under the *Act*.
 2. A direction or order of the municipality made under the *Act* or made under a by-law of the municipality passed under the *Act*.
 3. A condition of a licence issued under a by-law of the municipality passed under the *Act*.
 4. An order made under section 431. 2006, c. 32, Sched. A, s. 184.

Inspection powers

- (2). By-laws passed under subsection (1) may provide that for the purposes of an inspection the municipality may,
- (a) require the production for inspection of documents or things relevant to the inspection;
 - (b) inspect and remove documents or things relevant to the inspection for the purpose of making copies or extracts;
 - (c) require information from any person concerning a matter related to the inspection; and
 - (d) alone or in conjunction with a person possessing special or expert knowledge, make examinations or take tests, samples or photographs necessary for the purposes of the inspection. 2006, c. 32, Sched. A, s. 184.

QUEBEC: *Municipal Code of Quebec*

http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_27_1/C27_1_A.htm

SECTION III

BUILDINGS

§ 1. – Visits to Houses

492. Every local municipality may make, amend or repeal by-laws to authorize its officers, between 7:00 a.m. and 7:00 p.m., to visit and examine all movable and immovable property, as well as the interior or exterior of any house, building or edifice whatsoever, to ascertain if the by-laws are carried out, to verify any information or determine any fact necessary to the exercise by the municipality of the power to issue a permit or a notice of compliance of an application and to grant an authorization or any other form of permission, conferred on the municipality by an *Act* or regulation, and to compel the owners, tenants or occupants of such properties, buildings or edifices to receive its officers, and to answer all questions put to them relative to the carrying out of the by-laws.

M.C. 1916, a. 392; 1996, c. 2, s. 455; 2001, c. 35, s. 28

NEW BRUNSWICK: *Municipalities Act*

http://www.canlii.org/en/nb/laws/stat/rsnb-1973-c-m-22/latest/rsnb-1973-c-m-22.html#ENFORCEMENT_831116

102. 1 (0.1) In this section,

“dwelling” means a building any part of which is used or is intended to be used for the purposes of human habitation, whether or not the building is in such state of disrepair so as to be unfit for such purpose;

“dwelling unit” means one or more rooms located within a dwelling and used or intended to be used for human habitation by one or more persons.

102. 1 (1) Subject to any restrictions set out in the officer’s appointment, an officer appointed by a municipality to administer the municipality’s by-laws may enter, at all reasonable times, upon any property within the municipality for the purpose of making any inspection that is necessary for the administration or enforcement of a by-law.

102. 1 (1.1) Where an entry warrant has been obtained under the *Entry Warrants Act*, a person who is leasing a dwelling or dwelling unit to another person shall not refuse entry to or obstruct or interfere with an officer referred to in subsection (1) who under the authority of that subsection is entering or attempting to enter the dwelling or dwelling unit to ensure compliance with a by-law under subsection 94(1) or (3) or s. 190.

102. 1 (1.2) A person who violates or fails to comply with subsection (1.1) commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category F offence.

102. 1 (1.3) Notwithstanding subsection 56(6) of the *Provincial Offences Procedure Act*, the minimum fine that may be imposed by a judge under that *Act* in respect of an offence under subsection (1.2) shall be \$1,000.

102. 1 (1.4) Where an offence under subsection (1.2) continues for more than one day,

(a) the minimum fine that may be imposed is the sum of

(i) \$1,000; and

(ii) the minimum fine set by the *Provincial Offences Procedure Act* for a category F offence multiplied by the number of days during which the offence continues after the first day; and

(b) the maximum fine that may be imposed is the maximum fine set by the *Provincial Offences Procedure Act* for a category F offence multiplied by the number of days during which the offence continues.

102. 1 (2) If an officer referred to in subsection (1) is refused admission to any property within the municipality, the officer may serve or cause to be served, on the person having control of the property, a demand that the officer named in the demand be permitted to enter upon the property in accordance with subsection (1).
102. 1 (3) Service may be effected under subsection (2) by personal delivery to the person having control of the property or by depositing the demand in the mail in a prepaid, registered envelope addressed to the person at his or her last known address.
102. 1 (4) The service of a demand by mail as provided for in subsection (3) is deemed to be complete upon the expiration of six days after the demand has been deposited in the mail.
102. 1 (5) Proof of the service of a demand in either manner provided for in subsection (3) may be given by a certificate purporting to be signed by the officer, naming the person on whom the demand was made and specifying the time, place and manner of service of the demand.
102. 1 (6) A document purporting to be a certificate of the officer made pursuant to subsection (5) shall
- (a) be admissible in evidence without proof of the signature; and
 - (b) be conclusive proof that the demand was served on the person named in the certificate.
102. 1 (7) When entering upon any property under the authority of this section, an officer referred to in subsection (1) may be accompanied by a person who has special or expert knowledge in relation to the subject matter of the inspection.
102. 1 (8) Before or after attempting to effect entry under this section, an officer referred to in subsection (1) may apply for an entry warrant in accordance with the *Entry Warrants Act*.

NOVA SCOTIA: Municipal Government Act

<http://nslegislature.ca/legc/statutes/muncpgov.htm>

Right of entry

267. (1) This Section applies to this Part and Part IX.
- (2) A person authorized by the Minister or by a council has the right to enter at all reasonable times in or upon any property within the municipality, without a warrant, for the purposes of an inspection necessary to administer an order, land-use by-law, development agreement, regulation or statement of provincial interest.
- (3) The authorized person shall not enter any place actually being used as a dwelling without the consent of the occupier unless the entry is made in daylight hours and written notice of the time of the entry has been given to the occupier at least 24 hours in advance of the entry.
- (4) Where a judge is satisfied, on evidence under oath, that the entry is refused or no person is present to grant access, the judge may by order authorize entry into or on the property during reasonable hours set by the judge.
- (5) Any order made by a judge shall continue in force until the purpose for which entry is required is fulfilled. 1998, c. 18, s. 267.

NEWFOUNDLAND: Municipalities Act

http://www.canlii.org/en/nl/laws/stat/snl-1999-c-m-24/latest/snl-1999-c-m-24.html#PART_XVII_OFFENCES_AND_PENALTIES_612518

Right of entry

158. (1) Employees or agents of a council authorized by that council may enter upon all real property and at reasonable times into the buildings and structures on real property, whether publicly or privately owned, to do all things necessary for the purpose of making surveys or examinations or obtaining information relative to the construction, alteration, repair, maintenance or inspection of a water supply system, sewage system, storm drainage system or other works that the council is empowered to undertake or to control in the municipality.
- (2) Employees or agents of a council may at reasonable times enter upon all real property, whether publicly or privately owned, and enter into the buildings or structures on real property for the purpose of carrying into effect the work and system of water supply, sewage and storm drainage or other works that the council is empowered to undertake or control in the municipality.

Diversion of watercourses

161. (1) Subject to the *Water Resources Act* and regulations made under that *Act*, a council may alter or divert a watercourse, whether publicly or privately owned, within the municipality for the purpose of improvement of a watercourse or of the water supply or of the removal of the sewage of the municipality or for storm drainage purposes, or for the purpose of carrying out a development, and may remove impure or offensive soil, lay pipes, construct drains, grade surrounding land, change the directions of or fill up the watercourse, as the council considers necessary.
- (2) A council may for the purpose of subsection (1) enter upon all lands within the municipality and dig and excavate upon those lands and go under all buildings and structures that may be erected on the lands, and may require the owner or occupier of all buildings and structures upon those lands to make alterations in the walls, cellars and other portions of the buildings and structures that may be necessary for those purposes.

PRINCE EDWARD ISLAND: Municipalities Act

<http://www.gov.pe.ca/law/statutes/pdf/m-13.pdf>

YUKON: *Municipal Act*

<http://www.gov.yk.ca/legislation/acts/municipal.pdf>

Inspections and enforcement

346. (1) If this or any other Act or a by-law authorizes or requires anything to be inspected, remedied, enforced, or done by a municipality, then officers of the municipality, after giving reasonable notice to the owner or occupier of land or the building or other structure may
- (a) enter the land or structure at any reasonable time, and carry out the inspection, enforcement, or action authorized or required by the Act or by-law;
 - (b) request that anything be produced to assist in the inspection, remedy, enforcement, or action; and
 - (c) make copies of anything related to the inspection, remedy, enforcement, or action.
- (2) The officers must display or produce on request identification showing that they are authorized to make the entry.
- (3) In an emergency, or in extraordinary circumstances, the officers need not give reasonable notice or enter at a reasonable hour and may do the things referred to in clauses (1)(a), (b), and (c) without the consent of the owner or occupant.

Court authorized inspections and enforcement

347. (1) The municipality may apply to a justice of the peace for an order under subsection (2) if a person
- (a) refuses to allow or interferes with the entry, inspection, enforcement, or action referred to in section 346; or
 - (b) refuses to produce anything to assist in the inspection, remedy, enforcement or action referred to in section 346.
- (2) On an application under subsection (1), the Court may issue any order it considers appropriate, including
- (a) restraining a person from preventing or interfering with the entry, inspection, enforcement, or action; or
 - (b) requiring the production of anything to assist in the inspection, remedy, enforcement or action.

NORTHWEST TERRITORIES: *Hamlets Act*

<http://www.canlii.org/en/nt/laws/stat/snwt-2003-c-22-sch-c/latest/snwt-2003-c-22-sch-c.html>

Property Entry and Inspections

Notice of certain by-laws

141. Council may not give third reading to a by-law that authorizes the entry into or use of real property without the consent of its owner or occupier, unless council first gives public notice of the by-law or, if the real property of a specific person is affected, actual notice to that person.

Inspections and enforcement

142. (1) If any enactment or by-law authorizes or requires any thing to be inspected, remedied, enforced or done by a hamlet, an officer may, after giving reasonable notice to the owner or occupier of the land or structure affected,
- (a) enter the land or structure at any reasonable time, and carry out the inspection, remedy, enforcement or action authorized or required by the enactment or by-law;
 - (b) require anything to be produced to assist in the inspection, remedy, enforcement or action; and
 - (c) make copies of any thing related to the inspection, remedy, enforcement or action.

Identification

- (2) The officer shall, on request, display or produce identification showing that the person is authorized to make the entry.

Imminent Danger

- (3) The officer authorized to perform a task under subsection (1) need not give reasonable notice and may enter at any hour and perform a task referred to in subsection (1) without the consent of the owner or occupant, if the officer or council is of the opinion that
 - (a) there is imminent danger to public health and safety; or
 - (b) the action is warranted by extraordinary circumstances.

Judicial Remedies

Court Authorized Inspections and Enforcement

143. (1) A hamlet may, by originating notice, apply to the Supreme Court for an order under subsection (2) if a person
- (a) refuses to allow or interferes with the entry, inspection, remedy, enforcement or action referred to in section 142; or
 - (b) refuses to produce any thing to assist in the inspection, remedy, enforcement or action referred to in section 142.

Court order

- (2) The Supreme Court may issue an order
 - (a) restraining a person from preventing or interfering with the entry, inspection, remedy, enforcement or action; or
 - (b) requiring the production of any thing to assist in the inspection, remedy, enforcement or action.

Imminent Danger

(3) The Supreme Court may hear the application without notice to any person if, in its opinion, there is imminent danger to public health or safety or if it is otherwise warranted by extraordinary circumstances.

NUNAVUT TERRITORY: *Hamlets Act*

<http://www.canlii.org/en/nu/laws/stat/rsnwt-nu-1988-c-h-1/latest/rsnwt-nu-1988-c-h-1.html>

Entry by designated officer

174. (1) If this or any other enactment or by-law authorizes or requires anything to be inspected, remedied, enforced or done by a municipal corporation, a designated officer of the municipal corporation may, after giving reasonable notice to the owner or occupier of the land or structure to be entered to carry out the inspection, remedy, enforcement or action,
- (a) enter the land or structure at any reasonable time and carry out the inspection, remedy, enforcement or action authorized or required by the enactment or by-law;
 - (b) request that anything be produced to assist in the inspection, remedy, enforcement or action; and
 - (c) make copies of anything related to the inspection, remedy, enforcement or action.

Identification

(2) The designated officer must display or produce on request identification showing that the officer is authorized to enter the land or structure.

Entry without notice

(3) Where the council or the designated officer authorized to do a thing under subsection (1) has reasonable grounds to believe that there is imminent danger to public health and safety, or where other extraordinary circumstances warrant, the designated officer need not give reasonable notice or enter at a reasonable hour and may do the things in subsection (1) without the consent of the owner or occupier.

Notice of certain by-laws

175. No council shall give third reading to a by-law that authorizes the entry or use of real property without the consent of the owner or occupier of it, unless it first gives public notice of a summary of the by-law or, where the real property of a specific person is affected, actual notice to that person.

Application to court

175. 1. (1) The municipal corporation may apply to the Nunavut Court of Justice for an order under subsection (2) if a person
- (a) refuses to allow or interferes with the entry, inspection, enforcement or action referred to in paragraph 174(1)(a); or
 - (b) refuses to produce anything to assist in the inspection, remedy, enforcement or action referred to in paragraph 174(1)(b).

Order of court

- (2) The court may issue an order
- (a) restraining a person from preventing or interfering with the entry, inspection, enforcement or action; or
 - (b) requiring the production of anything to assist in the inspection, remedy, enforcement or action.

Hearing without notice

(3) Where in the opinion of the Court there is imminent danger to public health and safety, or extraordinary circumstances warrant, the Court may hear the application without notice to any person.

Appendix D - Endangered species

The following pieces of legislation were analyzed to determine the endangered species indicator:

1. British Columbia - *Wildlife Act*
2. Alberta - *Wildlife Act*
3. Saskatchewan - *Wildlife Act*
4. Manitoba - *Wildlife Act, Endangered Species Act*
5. Ontario - *Fishing and Wildlife Conservation Act, Endangered Species Act*
6. Quebec - An act respecting threatened or vulnerable species and an act respecting the conservation and development of wildlife.
7. New Brunswick - *Fish and Wildlife Act, Endangered Species Act*
8. Nova Scotia - *Wildlife Act, Endangered Species Act*
9. Prince Edward Island - *Wildlife Conservation Act*
10. Newfoundland - *Wild Life Act, Endangered Species Act*
11. Yukon - *Wildlife Act*
12. Northwest Territories - *Wildlife Act*
13. Nunavut Territory - *Wildlife Act*

Appendix E - Heritage property

The following pieces of legislation were analyzed to determine the heritage property indicator:

1. British Columbia - *Heritage Conservation Act, Local Government Act*
2. Alberta - *Historical Resources Act*
3. Saskatchewan - *Heritage Property Act, Saskatchewan Heritage Foundation Act*
4. Manitoba - *Heritage Resources Act*
5. Ontario - *Ontario Heritage Act*
6. Quebec - Currently: *Cultural Property Act*; as of October 19, 2012, *Cultural Heritage Act*
7. New Brunswick - *Heritage Conservation Act*
8. Nova Scotia - *Heritage Property Act*
9. Prince Edward Island - *Heritage Places Protection Act*
10. Newfoundland - *Historic Resources Act*
11. Yukon - *Historic Resources Act*
12. Northwest Territories - *Historical Resources Act (2010)*
13. Nunavut Territory - *Historical Resources Act (NWT - 1989) // Nunavut Land Claims Agreement <http://www.gov.nu.ca/hr/site/doc/nlca.pdf>*

Appendix F - Wills and/or successions

These pieces of legislation were analyzed for the wills and/or successions indicator:

1. British Columbia - *Wills Variation Act, Perpetuity Act*
2. Alberta - *Wills and Succession Act* (replaced *Dependants Relief Act, (February 1, 2012), Part V, Division II, Perpetuities Act*)
3. Saskatchewan - *Dependants' Relief Act, Trustee Act*
4. Manitoba - *Dependants Relief Act, The Perpetuities and Accumulations Act*
5. Ontario - *Succession Law Reform Act, Part V, Perpetuities Act*
6. Quebec - Art. 684-695 of the *Civil Code*
7. New Brunswick - *Provision for Dependants Act, Property Act*
8. Nova Scotia - *Testators' Family Maintenance Act, Trustee Act*
9. Prince Edward Island - *Dependants of a Deceased Person Relief Act, Perpetuities and Accumulations Act*
10. Newfoundland - *Family Relief Act, Perpetuities and Accumulations Act*
11. Yukon - *Dependants Relief Act, Perpetuities Act*
12. Northwest Territories - *Dependants Relief Act, Perpetuities Act*
13. Nunavut Territory - *Dependants Relief Act, Perpetuities Act*

Endnotes

1. Alberta's land-use framework, known collectively by critics as the Land Bills, comprises the following legislation: *Alberta Land Stewardship Act* (Bill 36), the *Land Assembly Project Area Act* (Bill 19) and the *Electric Statutes Amendment Act* (Bill 50). Lawyer Keith Wilson was instrumental in raising awareness about the possible impact of Alberta's Land Bills. The Alberta Landowners Council (www.albertalandonerscouncil.com), which he was instrumental in forming, is a good example of an effective property rights watchdog that individuals in other jurisdictions should emulate.
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10. See *Mariner Real Estate v. Nova Scotia* (1999) 177 D.L.R. (4th) 696 (N.S. C.A.) (Designation of private land as beach, severely restricting the use of the land, is not a taking requiring compensation); *Alberta v. Nilsson* (2002) 220 D.L.R. (4th) 474 (Alta., C.A.) (Freeze on development of land is not a taking requiring compensation). Even a confiscation of virtually all incidents of ownership does not necessarily amount to a full taking.
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Further Reading

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