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BEYOND PATCHWORK PROTECTION

Towards comprehensive property rights in Canadian law

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TRUE NORTH
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Canadians rarely stop to think that everything they own, from their homes and savings to their farms, vehicles, and small businesses, exist only so long as government allows it.

A single regulation, order, or policy change can erase a lifetime of work, uproot families, and disrupt lives. Indeed, across Canada, property owners have watched livelihoods disappear overnight through land-use restrictions, forfeiture orders, and regulatory bans.

Property rights underlie the stability that Canadians take for granted when they leave home, run businesses, or save money. Yet each of these assumptions depends on an invisible foundation – respect for property rights – that is far weaker in Canada than in almost every other developed country.

This report examines the current state of property rights protection in Canada, focusing on protections against takings by government.

Canada is one of the few developed democracies with no constitutional protection for property rights. Unlike the United States, Germany, or France – all of which constitutionally guarantee compensation when government takes property – Canada relies on ordinary statutes and judge-made law that can be changed or ignored. This gap permits governments considerable discretion with respect to how to treat property. The result is a patchwork of protections that vary considerably depending on the nature of the property and taking at issue.

Expropriation laws ensure fair market compensation for formally taken land, but most government actions affecting property aren't classified as expropriations. Licences can be revoked, businesses regulated out of existence, or assets seized under forfeiture laws – all without compensation. Government increasingly uses property seizure as a punishment, and widespread regulatory restrictions often strip property of value without triggering any right to compensation.

The consequences reach far beyond individual hardship. Weak property rights discourage investment, erode public trust, and concentrate power in the state. A society that treats ownership as conditional undermines citizens' freedom to plan, build, and innovate.

The solution to this checkerboard of protections is a comprehensive framework for property rights protection. This framework has four pillars:

1. **Fair compensation for all takings:** Whether government takes property through direct expropriation or constructively through regulation that removes substantially all reasonable uses of property, fair compensation must be provided.
2. **Legitimate public purpose:** Property deprivations must serve a valid public purpose. Government interference with property rights cannot be justified solely by administrative convenience.
3. **Due process before deprivation:** No property should be seized, frozen, or forfeited without notice to the owner and a meaningful opportunity to be heard before an impartial decision-maker.
4. **Proportionality:** Property deprivations must be proportionate to legitimate government objectives, and the severity of any interference must be demonstrably necessary to achieve the government's stated purpose.

A comprehensive framework could be implemented through legislation or constitutional amendment. Ultimately, a comprehensive statutory framework offers the most practical path forward, providing robust protection without requiring the political consensus necessary for constitutional amendment. **MLI**

Les Canadiens se demandent rarement *si tout ce qu'ils possèdent n'existe qu'au bon vouloir du gouvernement, que ce soit leurs maisons et leurs économies, leurs fermes et leurs véhicules ou, encore, leurs petites entreprises.*

Une seule réglementation, requête ou modification de politique peut détruire une vie entière de travail, briser une famille et bouleverser les habitudes. Et, effectivement, partout au Canada, des propriétaires ont vu leur vie basculer du jour au lendemain en raison de restrictions, de confiscations et de réglementations liées à des terrains.

Les droits de propriété sous-tendent l'idée de permanence tenue pour acquise par les Canadiens lorsqu'ils sortent de chez eux, dirigent leurs entreprises ou épargnent de l'argent. Ces scénarios touchent à un fondement invisible – le respect des droits de propriété – bien moins musclés au Canada que dans la plupart des pays développés.

Ce rapport analyse la protection des droits de propriété au Canada, notamment en cas d'expropriation gouvernementale.

Le Canada ne protège pas les droits de propriété dans sa constitution, contrairement à la plupart des démocraties développées. Alors que les États-Unis, l'Allemagne et la France garantissent constitutionnellement une indemnisation en cas d'expropriation, le Canada s'appuie sur des lois et des jurisprudences modifiables. Cette lacune laisse

beaucoup de liberté aux gouvernements quant à la manière d'envisager la propriété. Elle donne lieu à de multiples mesures de protection disparates qui varient selon la nature du bien et de l'expropriation en cause.

Les lois sur l'expropriation assurent une indemnisation basée sur la juste valeur marchande, mais la plupart des mesures gouvernementales touchant la propriété ne peuvent être qualifiées d'expropriations. Les permis peuvent être révoqués, les entreprises, réglementées au point de disparaître, et les actifs, saisis en vertu des lois sur la confiscation de biens – sans indemnisation. Les gouvernements saisissent de plus en plus de biens à titre de sanction, et les restrictions réglementaires généralisées les dévaluent souvent entièrement sans dédommagement.

Les conséquences vont bien au-delà des épreuves personnelles. Des droits de propriété faibles découragent les investissements, érodent la confiance du public et concentrent le pouvoir dans les mains de l'État. Une société qui définit la propriété comme étant conditionnelle nuit à la capacité des citoyens de planifier, de construire et d'innover.

La solution à cette mosaïque de mesures réside dans un cadre complet de protection pour les droits de propriété. Ce cadre repose sur quatre piliers :

1. ***Une juste indemnisation pour toutes les expropriations :*** *qu'elles soient directes ou réglementaires, en fonction de pratiquement toutes les utilisations raisonnables de la propriété.*
2. ***Un objectif public légitime :*** *les dépossessions des droits de propriété doivent servir un objectif public valable. En matière de droits de propriété, le gouvernement ne peut pas intervenir seulement pour des raisons de commodité administrative.*
3. ***Un droit de recours avant la dépossession :*** *aucun bien ne doit être saisi, gelé ou confisqué sans que le propriétaire soit informé et puisse se défendre devant un décideur impartial.*
4. ***La proportionnalité :*** *les dépossessions doivent être proportionnelles aux objectifs légitimes du gouvernement, et toute ingérence grave doit être manifestement nécessaire pour atteindre l'objectif gouvernemental déclaré.*

Un cadre complet pourrait être instauré par une loi ou un amendement constitutionnel. Mais, au final, un cadre législatif complet offre la voie la plus pratique à suivre : une protection solide sans besoin du consensus politique exigé pour un amendement constitutionnel. **MLI**

Introduction

The current landscape of property rights in Canada

Canada stands virtually alone among developed democracies in having a constitution that fails to directly protect property rights. The consequences of this omission are written across Canadian history: the wartime confiscation and forced sale of Japanese Canadians' property (Adams and Stanger-Ross 2017), the expropriation and demolition of Africville (Clairmont and Magill 1999), and the legislative extinguishment of a billion dollars owed to disabled veterans (*Authorson v. Canada (Attorney General)*, 2003 SCC 39). These historical injustices might seem like artifacts, but the pattern continues in contemporary cases.

In November 2021, British Columbia banned mink farming, citing COVID-19 public health concerns. The ruling immediately banned breeding and required all live mink to be removed from farms by April 1, 2023. Unsurprisingly, this decision had immediate and devastating consequences, effectively destroying the going-concern value of these family enterprises. What remained were stranded, low-resale assets – purpose-built sheds, wire-cage systems, feed-prep facilities – and heavy debt loads that banks now viewed as unsupported by future income. As one farmer put it, "This isn't a transition, it's an eviction … the banks are looking at us and realizing we don't have any income" (Luymes 2021). BC Mink Producers Association president Joseph Williams said grimly, "Our livelihoods have just been taken away" (Labbé 2021).

The province refused to provide any compensation for its decision. Five mink farms launched civil lawsuits seeking compensation, arguing that the ban amounted to a constructive taking of their businesses. The BC Supreme

Court disagreed, finding that the government hadn't taken the businesses but merely ended them (*C&A Mink Ranch Ltd. v British Columbia*, 2024 BCSC 770). The BC Court of Appeal upheld this decision in August 2025 (*Dargatz Mink Ranch Ltd. v. British Columbia (Ministry of Agriculture and Food)*, 2025 BCCA 272).

In September 2008, Ontario Provincial Police raided two rental properties owned by Margaret and Terry Reilly. The properties were rooming houses for low-income tenants, part of the Reillys' deliberate effort to help marginalized members of society. Although police found only four marijuana plants, Ontario's Director of Asset Management seized both properties under the *Civil Remedies Act*, alleging they were "instruments of crime." The Reillys had no criminal record and faced no allegation of wrongdoing. The basis for seizure was not anything they had done, but rather the bare allegation that some tenants had paid portions of their rent with proceeds from drug activity (Canadian Constitutional Foundation 2016).

What followed was a ten-year legal battle that left Margaret Reilly shattered and saw the Attorney General sell their properties to third parties. Only after intervention by the Canadian Constitution Foundation did the Reillys ultimately receive a settlement in 2018. After the settlement, Margaret Reilly acknowledged that, "it would have been much less expensive for me to walk away from the two buildings in the very beginning" (Owen 2018). As her lawyer Shawna Fattal said, "Unfortunately (and I believe many would agree), the way (the Attorney General) has been using the CRA legislation has expanded so far beyond their original objective, now often targeting innocent persons who have never been suspected of any wrongdoing" (Owen 2018).

In August 2025, the BC Supreme Court ruled in *Cowichan Tribes v. Canada (AG)* that Aboriginal title overrides private property interests, rendering fee simple land titles – long considered the most complete form of land ownership – "defective and invalid" (2025 BCSC 1490 at para 7). (Fee simple land title means you own the property outright and indefinitely, subject only to government powers like taxation, and private restrictions such as easements or covenants that run with the land.)

The Court invalidated the titles of lands owned by the federal Crown and the City of Richmond, and declared "BC owes a duty to the Cowichan to negotiate in good faith reconciliation of the Crown granted fee simple interests held by third parties." This leaves private third-party owners in a precarious

position, uncertain whether they will retain possession of their property, face additional payments to the Cowichan Tribes or lose their interests entirely.

These three cases illustrate a troubling pattern. Without constitutional protection, property rights in Canada remain vulnerable to state action. And what unites these modern examples with their historical predecessors is not the method of deprivation but its legal permissibility: Canadian authorities can eliminate property interests without compensation, often through administrative processes that bypass normal due process protections and place the burden on owners to prove their innocence.

The vulnerability persists because Canadian property rights rest on a patchwork of common law protections. This fragmented foundation allows regulators to slowly chip away at property rights, thinning procedural safeguards and expanding restrictions without compensation.

Understanding property rights

At their core, property rights define and secure an owner's authority over how a resource is used. Whether someone seeks to occupy your land, use your car, or redirect income from your business, they are attempting to substitute their preferences for yours. Property rights create barriers against such substitution, establishing zones of individual authority over resource use. The substitution threat can originate from private individuals, like thieves and trespassers, or from government actors through expropriation, taxation, or regulation. In either case, the essential violation is the same: someone other than the owner is determining how the owner's resources will be employed.

Legal property rights have both a substantive and a protective dimension. First, a property right is a specific substantive entitlement with respect to a particular resource. An owner possesses a bundle of these entitlements, such as the right to possess and use, the right to exclude others, the right to transfer or sell, the right to modify or destroy, and the right to income from the property. Second, a property right also refers to a secondary protection that shields an owner's entitlements against outside interference or removal. These safeguards establish procedural and substantive limits on how first-order property

rights may be restricted or taken. For example, a landowner generally has a substantive right to use their land and may also have statutory or common law rights that limit a government's ability to remove their rights to use the land. Such second-level protections are particularly important when the potential interference comes from the state, whose regulatory and expropriation powers are uniquely far-reaching.

Why property rights matter

Humans have a deep, intuitive sense of property and ownership that begins in early childhood (Fasig 2000). While the ultimate origins of this feeling are contested by evolutionary biologists and psychologists, the universality of these patterns across cultures suggests that it is a fundamental aspect of human psychology (Rochat et al. 2014; Khan and Turri 2022; Espinoza and Barrett 2023). Research also shows that once we develop a sense that something is ours, we value it more and feel its loss more acutely than comparable gains (Kahneman et al. 1990). Our possessions often carry fragments of our identity and when these things are taken from us, we can experience profound violations that trigger strong reactions of injustice.

Given these deep psychological roots, it is perhaps unsurprising that political theorists have identified property as central to legitimate government. In his *Second Treatise of Government*, John Locke treated property, alongside life and liberty, as a natural right that precedes the state (Locke [1689] 1988). Locke held that "The great and chief end therefore, of men uniting into commonwealths, and putting themselves under government is, the preservation of their property" (Locke [1689] 1988, 350-351). A government that cannot reliably protect property undermines personal freedom and forfeits its legitimacy: "Whenever the legislators endeavour to take away, and destroy the property of the people ... they put themselves into a state of war with the people" (Locke [1689] 1988, 412).

In addition to protecting against the profound sense of violation that occurs when anything we consider ours is taken, property rights have several instrumental benefits. Secure property rights underpin economic development by creating confidence that investments and improvements will not be arbitrarily lost. When people know they can retain the fruits of their labour, they are more likely to cultivate land, build enterprises, and innovate. Reliable

property systems also reduce the costs of guarding possessions and vetting trading partners, freeing capital for more productive uses and enabling markets to allocate resources to their highest-value employments.

Property rights also support the social fabric. They foster autonomy by giving individuals and families stable zones of authority and self-determination – some say that property permits self-expression (Hegel [1821] 1967). Property rights also lower the temptation to resort to violence or self-help, because people can rely on trusted legal and social mechanisms to protect their holdings. As economist Armen Alchian observed, individuals will not stand idly by while their possessions are taken – they will mobilize various forms of resistance and protection (Alchian 1965, 817). Communities in which property is secure tend to display higher levels of cooperation, mutual trust, and long-term planning – all foundations of social order and civic peace.

Yet the natural-law tradition has never regarded property as absolute. Thomas Aquinas affirmed private ownership because it encourages responsibility and good stewardship, but he stressed that ownership carries moral responsibilities: in cases of urgent necessity – such as famine or disaster – others may rightly use what is needed to survive, and civil authority may tax or regulate for public purposes, provided it acts justly and proportionately (Aquinas [1265–1274] 1947, II-II, q. 66, aa. 2, 7; I-II, q. 96, a. 1). For Aquinas, property is a right of stewardship within an ordered community, not an unqualified license.

Later natural-law thinkers such as Hugo Grotius, Samuel von Pufendorf, and Emmerich de Vattel developed this balanced vision (Grotius [1625] 1925, Pufendorf [1672]; Vattel [1758] 1834). They agreed that the public good can require expropriation, but argued that fairness demands just compensation so that the costs of public projects are shared by society as a whole (Grotius [1625] 1925, 2:385, 797, 807; Pufendorf [1672] 1934, 1285, 1326; Vattel [1758] 1834, 112). Their writings shaped the now-familiar legal principle that when property is taken for public purposes, compensation is owed (Bynkershoek [1737] 1930, 218–24; France 1789, art. 17). In this way the natural-law tradition combines Locke's insistence on strong property rights with Aquinas's recognition of social obligations, concluding that the most natural and just way to reconcile private ownership with public necessity is through fair process and compensation.

Legal protection of property rights in Canada

The common law has long served as a vigilant guardian of property, carefully defining ownership entitlements and supplying a rich arsenal of remedies to protect them. Medieval writs evolved into modern actions that safeguard both land and movables. For real property, the common law provides remedies for possession, trespass (protecting against unauthorized entry or injury to land, including removal of resources), and nuisance (providing damages for indirect interferences like pollution, noise, or contamination that disturb use and enjoyment) (Baker 2019, 254–57, 452–60). Protection of movables is equally robust, with detinue (for recovery of wrongfully detained goods), replevin (for restoration pending trial), and conversion (providing damages when recovery is impossible) (Baker 2019, 416–418 and 423–25).

In theory, the common law protects property owners against incursions by private persons and government officials alike. In the seminal case of *Entick v. Carrington*, government agents who searched and seized without a warrant were liable in trespass just like private trespassers (*Entick v. Carrington* (1765) 2 Wils. KB 275, 95 ER 807 (CP); 19 Howell's State Trials 1029). Yet this protection has a critical limitation. Where statute authorizes interference with property, common law causes of action provide no remedy. In such cases, courts have long held that the owner's only recourse lies in whatever procedures and compensation the statute itself provides (*The Sisters of Charity of Rockingham v. The King (Canada)* [1922] 2 AC 315 (UKPC)).

Still, courts do not look upon statutorily authorized interferences lightly. As Justice Cory of the Supreme Court of Canada explained (*Toronto Area Transit Operating Authority v. Dell Holdings Ltd*, [1997] 1 SCR 32 at para 20):

> The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected.

This principle manifests in a strong interpretive presumption: courts refuse to construe legislation to authorize the taking of property without compensation unless that intention is expressed in the clearest terms. As Lord

Atkinson put it in *Attorney-General v. De Keyser's Royal Hotel*, "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation" ([1920] AC 508 at 542; see also, *BC Electric Railway Co Ltd v. Public Utilities Commission of BC et al.*, [1960] SCR 837 at 846).

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In *Manitoba Fisheries Ltd v. The Queen*, the Supreme Court went further, holding that it could award damages where a statute explicitly authorized a taking but remained silent on compensation ([1979] 1 SCR 101). The Court found that the federal government had taken the company's goodwill and ordered full market-value compensation despite the absence of any statutory compensation clause. More recently, a majority of the Supreme Court affirmed that the state may be liable for a constructive taking, even where no title formally passes to the state (*Annapolis Group Inc v. Halifax Regional Municipality*, 2022 SCC 36, [2022] 2 SCR 772). Such an action requires the plaintiff to prove that the public authority acquired a "beneficial interest in the property or flowing from it (i.e. an advantage)", and that all reasonable uses of the property have been removed. Constructive taking thus occurs when regulatory measures confer on the state an advantage tantamount to an acquisition and leave the owner with no practical use, even if legal title remains.

Beyond the common law, property rights depend on statutory protections. Although Section 8 of the *Canadian Charter of Rights and Freedoms* protects against "unreasonable search or seizure", Canadian courts have held that its primary purpose is to protect privacy and informational interests, not property (*Hunter v. Southam Inc*, [1984] 2 SCR 145 at 159). Thus, "where property is taken by governmental action for reasons other than administrative or criminal investigation a 'seizure' under the *Charter* has not occurred" (*Quebec (Attorney General) v. Laroche*, 2002 SCC 72, [2002] 3 SCR 708 at para 53).[1]

The *Canadian Bill of Rights*, a federal statute enacted in 1960, recognizes the right to "enjoyment of property, and the right not to be deprived thereof except by due process of law" (SC 1960, c 44, s 1(a)). Despite its initial promise of protecting property from statutory interference, across six decades of case law, the *Bill of Rights* has not produced a single successful property rights claim.

There are several reasons for the *Bill of Rights*' limited success in protecting property. First, the statute only applies to federal government action and can be superseded where Parliament declares that a law operates notwithstanding the *Bill of Rights* (s 2). Second, the prevailing judicial philosophy of the 1960s and 1970s was to read the *Bill of Rights* cautiously to avoid entrenching rights that might fetter social or economic legislation (Hogg and Wright 2025, § 35:8). As a result, courts interpreted due process narrowly to mean "according to the legal processes recognized by Parliament and the courts in Canada" (*Curr v. The Queen*, [1972] SCR 889 at 916). This narrow interpretation of due process eliminated the possibility of compensation or rigorous procedural requirements. In *Authorson v. Canada (Attorney General)*, the Supreme Court upheld legislation that retroactively extinguished the Crown's billion-dollar debt to disabled veterans, on the basis that "the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent" ([2003] 2 SCR 40, 2003 SCC 39 at para 37). Similarly, the Federal Court of Appeal affirmed "the due process clause does not apply to executive acts or processes before the Minister and the GIC", thus allowing a regulation to prohibit firearms without consultation or compensation to owners (*Canadian Coalition for Firearm Rights v. Canada (Attorney General)*, 2025 FCA 82 at para 103).

Provincial human rights instruments provide stronger protection in some jurisdictions. Alberta's *Bill of Rights* contains two relevant provisions. Section 1(a.1) protects "the right to the enjoyment of property and the right not to be deprived thereof except to the extent authorized by law and except by due process of law." As part of a major revision to the *Bill of Rights* in 2024, Alberta added section 1(a.2), which guarantees "the right not to be subject to a taking of property except to the extent authorized by law and where just compensation is provided." Taking of property is defined to include either, "a transfer of ownership of the property without the consent of the owner" or "an owner of property being deprived of all reasonable uses of that property" (*Alberta Bill of Rights*, RSA 2000, c A-14).

Quebec also maintains a developed statutory framework for property protection. Section 6 of Québec's *Charter of Human Rights and Freedoms* provides that "[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law." (CQLR c C-12, s 6) It is currently uncertain what effect the phrase "except to the extent provided by law" has on s. 6, particularly regarding whether it permits courts to strike down legislation that violates property rights—a question currently being litigated in cases involving hydrocarbon rights (*Procureur général du Québec c Gaspé Énergies inc*, 2025 QCCA 629). Article 952 of the *Civil Code of Québec* reinforces Section 6 by stipulating that "[n]o owner may be compelled to transfer his property, except by expropriation according to law for public utility and in return for a just and prior indemnity." The Supreme Court has interpreted this provision to encompass claims for "disguised expropriation," which occurs "where a municipal government improperly exercises its power to regulate the uses permitted within its territory in order to expropriate property without paying an indemnity" (*Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, [2018] 2 SCR 577 at para 2).

State interference with property rights

Legislation overrides the common law. While common law doctrines protect property rights, federal Parliament and provincial legislatures can enact statutes that authorize state interference with those rights. These legislative interferences can be categorized into three groups: takings for public benefit, seizures and forfeitures, and regulatory interference with property.

Takings for public benefit

Takings for public benefit occur when the state takes property in the name of the public interest. The most common occurrences are taxation and expropriation. Taxation functions as a taking because it compels the transfer of a portion of an owner's property without the owner's direct consent. The only protection that Canadians have against taxation is the principle of no taxation without representation (*Constitution Act, 1867*, s 53). This principle requires that all taxes must be imposed with the consent of the House of Commons or elected provincial legislature (*Eurig Estate (Re),* [1998] 2 SCR 565).

Expropriation allows government or specified third parties (railways, telecoms, etc.) to take private land without consent. Every jurisdiction in Canada has an expropriation statute that establishes: (i) who may expropriate, (ii) procedural steps to be followed (notice, plan filings, hearings, etc.), and (iii) compensation (typically the market value of the land taken, injurious affection to remaining property and certain relocation expenses). Owners generally have opportunities to contest both the necessity of the taking and the amount of compensation, but those opportunities are narrower than they appear.

Although expropriation is supposed to be limited to circumstances where it is necessary for the public good, the sole judge of necessity is the expropriating authority. Hearing bodies have no power to inquire into whether the expropriating authority's goal is in the public interest. Rather, "the necessity of the work should be assumed and treated as being beyond comment" and "the merits of the expropriating authority's general policy should not be considered relevant" (Ontario 1969). Hearing bodies are limited to inquiring into whether it is "reasonably necessary in the achievement of the objectives of the expropriating authority" (*Expropriations Act* (Ontario), RSO 1990, c E26, s 7(5)). Furthermore, the resulting hearing report is only advisory to the approving authority, which retains the final say.

This deference has enabled large "land-banking" programs where authorities assembled vast tracts without any realistic public need for the land. In 1972, the federal government expropriated 18,600 acres for the Pickering Airport that went largely unused for decades until the federal government finally cancelled the airport in January 2025. Similarly, the federal government took 97,000 acres for the Montréal–Mirabel airport, the vast majority of which has never been used for operations. The federal government expropriated in 1962 roughly 53 acres in Ottawa's LeBreton Flats from about 240 landowners as part of a ~154-acre urban-renewal scheme, displacing thousands of residents; the planned federal office campus never materialized and the site sat vacant for decades before piecemeal redevelopment resumed recently. Together these cases show how "necessity screens" often fail to prevent disruptive takings absent imminent public works.

The second issue is with the adequacy of compensation. Early Canadian practice aimed to leave owners no worse off by awarding compensation based on the value to the owner – generally, the value most advantageous to the owner. However, this standard proved contentious in the courts, with expropriating

authorities arguing it was too generous and difficult to calculate precisely (Todd 1992, 109–130). Gradually, provinces shifted to a market value standard that focused on what a willing buyer would pay a willing seller in the current market, based on the property's authorized uses at the time of taking. However, market-based values omit idiosyncratic or strategic value. Quebec was the final province to maintain the value-to-the-owner principle, but ultimately replaced it in December 2023 (*An Act respecting expropriation*, SQ 2023, c 27).

In contrast to Canada, Sweden and Finland add 25 per cent to market value; Australia provides solatium compensation (compensation for emotional distress, grief, or loss of comfort) of up to 10 per cent of market value; the UK pays a home loss payment of up to 10 per cent of market value (capped at £15,000); and New Zealand provides solatium payments of up to NZ$50,000 for home acquisitions (plus up to NZ$100,000 in incentive payments for early agreement) (Alterman 2010).

Takings may also take the form of destruction for the public good. In a famous case, the British army destroyed an oilfield to prevent it from falling into enemy hands (*Burmah Oil Co. (Burma Trading) Ltd v. Lord Advocate*, [1965] AC 75 (HL)). However, more frequently this occurs with livestock. The *Health of Animals* Act authorizes CFIA to order the destruction of poultry and livestock to prevent disease spread.

For takings in this category, it appears the norm is for legislation to provide for some form of compensation. Again, however, complaints usually centre on the adequacy of compensation. For instance, the Federal Court of Appeal acknowledged that the destruction of 400 ostriches on Universal Ostrich Farms "will undoubtedly seriously disrupt the appellant's business operations and cause the appellant severe economic loss" as "compensation for an ostrich is limited to a maximum of $3,000 per animal, an amount that is lower than the alleged average price of approximately $7,500 per ostrich" (*Universal Ostrich Farms Inc v. Canada (Food Inspection Agency)*, 2025 FCA 122 at para 8).

Seizures and forfeitures

This category encompasses government takings that function primarily as punishment rather than for public benefit. The most common takings in this category are seizures of prohibited items or forfeiture of property linked to criminal activity. Unlike expropriations for public purposes, these takings are not intended to transfer property to public use but rather to

punish the owner by permanent deprivation. Accordingly, no compensation is provided.

Canadian criminal forfeiture law illustrates how punitive takings can operate legitimately within robust procedural frameworks. Under the *Criminal Code*, courts may order forfeiture of property that constitutes the "proceeds of crime" after a person is convicted of a designated offence. Historically, the legitimacy of such takings rested on these strong safeguards: the Crown secured a conviction based on proof beyond reasonable doubt and then proved the property's connection to the offence on a balance of probabilities (*Criminal Code*, RSC 1985, c C–46, s 462.37(1); see also s 462.37(2)).

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Increasingly, however, governments are departing from this framework through the use of civil forfeiture. Since Ontario pioneered the model in 2001, eight provinces – Ontario, Alberta, Manitoba, Saskatchewan, British Columbia, Québec, Nova Scotia, and New Brunswick – have enacted civil forfeiture regimes. These regimes share common features that distinguish them sharply from criminal forfeiture. Proceedings are *in rem* – against the property itself, require no criminal charge or conviction, and are decided on a balance of probabilities rather than proof beyond reasonable doubt. Every regime targets both "proceeds" (property derived from unlawful activity) and "instruments" (property used to facilitate unlawful activity), with unlawful activity defined broadly to include any federal or provincial offence. With such broad definitions, great discretion is conferred upon the agencies responsible for enforcement. However, they have used their powers to try to seize vehicles for ordinary traffic violations like speeding, as well as more dangerous activities like street racing (*British Columbia (Director of Civil Forfeiture) v. Dery*, 2013 BCSC 1643).

While civil forfeiture can serve as an important tool for combatting organized crime and money laundering, these expanded powers require careful

safeguards to prevent overreach. The effectiveness of civil forfeiture in disrupting criminal enterprises must be balanced against the risk of unjust deprivations when procedural protections are weakened. As provinces continue to refine these mechanisms, maintaining robust due process requirements – including notice, impartial hearings, and a proper allocation of the burden of proof – becomes essential to ensuring that legitimate law enforcement objectives do not come at the cost of fundamental fairness to property owners.

The 2022 Freedom Convoy demonstrated what happens when due process safeguards are abandoned entirely. On February 14, 2022, the federal government declared a public order emergency and immediately implemented the Emergency Measures Regulations and Emergency Economic Measures Order (SOR/2022–21; SOR/2022–22). The measures granted government sweeping powers to freeze private property owned by any individual or entity participating in or financially supporting assemblies that disrupted the movement of persons or goods. These freezes were implemented without judicial authorization or due process. They compelled banks and credit unions to freeze 246 accounts and cryptocurrency exchanges to freeze 253 wallets, and to disclose private financial information to CSIS and the RCMP based solely on the RCMP's bare belief without any objective standard or opportunity for the account holder to challenge the designation before seizure. The freezing orders extended to joint account holders and family members who had no involvement in the protests, depriving them of access to their own money without any process to contest their inclusion. For those affected, the financial freezes meant an inability to pay rent, buy groceries, or access their own savings – a complete deprivation of property based on suspicion alone.

In January 2024, Federal Court Justice Richard Mosley ruled the government's invocation was unreasonable and violated the *Charter* (*Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42). The court found the measures unjustifiably infringed freedom of expression owing to not being a reasonable limitation and violated section 8 through unreasonable search and seizure of financial information and account freezing without any objective standard. Yet by the time the court ruled, the damage was done: accounts had been frozen, financial records disclosed, and individuals denied access to their property for weeks based on measures a court ultimately found unconstitutional. These seizures, done under the pretense of an emergency –

like Canada's wartime seizure of Japanese Canadian property – remind us how governments can use emergency powers to justify property deprivation without meaningful due process.

Taken together, these regimes trace an unmistakable arc of steadily widening state power and steadily thinning procedural protections. Each step – while often defended as necessary for crime control, national security, or emergency management – erodes the inherited presumption that no one should lose property without clear legal authority, fair process, and just compensation.

Regulatory interference

The most pervasive state incursions on property today are not outright expropriations or forfeitures but regulatory measures that limit what an owner can do with property, sometimes so severely that the property loses all or most of its practical value. Because no formal taking occurs, compensation is rarely provided. As we have already seen, regulatory bans can eliminate entire industries. More commonly, regulations do not ban activities outright but impose restrictions that severely diminish property value or utility.

As regulatory controls are enacted in many different sectors and for diverse policy reasons, an exhaustive list is impossible. However, a few examples illustrate the breadth of regulatory interference. Municipal zoning and provincial land-use planning can dictate whether land may be subdivided, built upon, or developed at all. Down-zonings, subdivision freezes, growth-management boundaries, heritage listings, and agricultural or greenbelt reserves can sterilize development potential and reduce property value. Environmental designations may similarly foreclose or prohibit development (to protect source-water, wetlands, or critical-habitat) or impose heavy cleanup and remediation costs that exceed the property's value. Health and safety regulations – such as building and fire codes – can impose mandatory retrofits or impose premises shutdown orders that can transform income-producing assets into money pits. Other economic regulations such as rent controls and business licensing can also severely limit how owners use or profit from their assets.

Of course, most would agree that some degree of regulation is necessary in the modern world. Zoning laws, environmental protections, and safety standards serve legitimate public purposes. The question is not whether to

prohibit this type of regulation, but when government should compensate individual owners because the regulation unfairly burdens them with the costs of public policy. Almost all peer democracies provide some form of compensation when land-use regulations effectively sterilize property, though they differ in the threshold for compensable interference and the remedies available.

In US takings law, regulatory restrictions that eliminate all economically beneficial use are generally considered categorical takings requiring compensation (*Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992)). Otherwise most regulatory claims are assessed under *Penn Central*'s framework, which considers (1) economic impact; (2) interference with distinct investment-backed expectations; and (3) the character of the government action (*Penn Central Transportation Co v. New York City*, 438 US 104 (1978)). When a taking is found, the usual remedy is just compensation. Owners generally cannot force the government to take title.

In contrast, the ordinary remedy in the United Kingdom is to compel the government authority to acquire the depreciated property. Where land is "blighted" by a planning change related to public functions, and that change substantially reduces the value of a property, the owner may serve a blight notice on the public authority to force them to acquire the property. Similarly, if a landowner's request for planning permission is refused, revoked or granted subject to onerous conditions, and the property is "incapable of reasonably beneficial use," the landowner can serve a purchase notice on the government to acquire the land (Purdue 2010, 119–137).

Germany and Sweden have developed even more comprehensive frameworks. German law grants compensation for any diminution in property value beyond a *de minimis* threshold when planning decisions designate land for specific public uses. Sweden employs a similar model, allowing owners to demand transfer of title when regulation sterilizes land for public purposes, with mandatory compensation set at 25 per cent above market value to account for disruption. Both Germany and Sweden distinguish between designations for private versus public land uses. Where property is rezoned to permit private development (such as residential housing), there is generally a special time limit for compensation claims (Alterman 2010, 30–50).

Canadian law has seen some recent positive developments. As discussed above, Canadian common law will hold that compensation is owed where a beneficial interest accrues to the state and the regulation removes all reasonable

uses of the private property. The Supreme Court's 2022 decision in *Annapolis Group* relaxed the stringent beneficial interest test by clarifying that the state merely needed to obtain an "advantage" in respect of the property.

Yet the requirement to show that the state acquired some advantage from the property leaves many owners without recourse. British Columbia's mink farming ban illustrates the limitation: the regulation destroyed the farms' going-concern value and eliminated all reasonable uses, yet the province obtained no advantage from the businesses. Under *Annapolis*, such regulations escape compensation despite their devastating effect on owners.

Alberta's 2024 amendments to its *Bill of Rights* chart a better course. Section 1(a.2) now guarantees just compensation for "an owner of property being deprived of all reasonable uses of that property." There is no requirement that government obtain any advantage or benefit. The focus shifts entirely to the deprivation suffered by the owner rather than any corresponding gain to the state. This approach correctly recognizes that the harm to property owners is the same whether government benefits from the restriction or not.

It is arguable that Alberta's approach also remains incomplete. Several other countries (Finland, Austria, United States, Poland, Germany, Sweden, Israel, and the Netherlands) provide compensation for partial takings that reduce the value of a property without removing all reasonable uses (Alterman 2010). A regulation that eliminates 75 per cent of a property's value still leaves the owner bearing enormous losses without compensation so long as some marginal use remains theoretically possible. The principle that animates constructive takings doctrine is fairness: public regulatory costs should not fall disproportionately on unlucky individual owners. That principle applies with equal force whether regulation eliminates 100 per cent of value or a significant portion that is less than 100 per cent.

A comprehensive property rights framework should build on Alberta's approach while extending protection to cover substantial deprivations that fall short of total sterilization. Where regulation reduces property value by some threshold percentage – whether 75 per cent, 80 per cent, or 90 per cent – compensation should be triggered regardless of whether any theoretical use remains. This recognizes the economic reality that owners suffer confiscatory losses well before the final dollar of value disappears, and ensures that the burden of achieving public objectives through regulation is shared across society rather than concentrated on individual property holders.

Strengthening property rights

The current patchwork of common law property protections has created a system where property rights are systematically eroded through incremental encroachments. This fragmented approach has allowed each sector to develop its own culture of property interference without reference to overarching principles like necessity, proportionality, or compensation. To address these systemic weaknesses, Canada must move beyond ad hoc common law protections toward comprehensive safeguards that establish clear, consistent standards across all government actions affecting property.

Based on the vulnerabilities previously identified, a robust property rights framework should provide the following core protections:

1. **Fair compensation for all takings:** When government directly expropriates property or a regulation removes all reasonable uses of property, owners must receive fair compensation that reflects the full value lost.
2. **Legitimate public purpose:** Property deprivations must serve a valid public purpose. Government interference with property rights cannot be justified solely by administrative convenience, but must advance genuine public objectives such as public safety, health, environmental protection or infrastructure development.
3. **Due process before deprivation:** No property should be seized, frozen, or forfeited without notice to the owner and a meaningful opportunity to be heard before an impartial decision maker. At that hearing, government must bear the burden of proving that the specific property was derived from or used in unlawful activity, and the owner knowingly participated in, consented to, or was willfully blind to the unlawful activity involving their property.
4. **Proportionality:** Property deprivations must be proportionate to legitimate government objectives. Minor regulatory violations should not trigger forfeiture of major assets, and the severity of any interference must be demonstrably necessary to achieve the government's stated purpose.

The primary goal of these enhanced protections is to promote fairness by preventing unjust deprivations of property. As discussed earlier, humans have

deep psychological attachments to their possessions. When government action strips away property rights, whether through outright seizure, civil forfeiture, or regulation that destroys most reasonable uses, owners experience profound violations that trigger strong reactions of injustice. These deprivations are especially unfair when they concentrate the costs of achieving public objectives on a few unlucky property owners while the broader public enjoys the benefits.

> *When government action strips away property rights … owners experience profound violations that trigger strong reactions of injustice.*

Another aspect of fairness is equal treatment. As Justice Russell Brown explained before his Supreme Court appointment, most Foreign Investment Promotion and Protection Agreements protect foreign investors against constructive takings in Canada, creating the anomaly that foreign investors enjoy better protection than Canadian citizens (Brown 2007, 335–37). At the very least, Canadian residents should be given the protections already enjoyed by foreign investors.

Beyond fairness, enhanced property protections also improve government accountability and policy-making. By forcing governments to internalize the true costs of interference with property – costs currently hidden because they are imposed on private owners – the framework prevents adoption of policies where costs far outweigh benefits. When governments must budget for compensation or justify deprivations through rigorous due process, they face stronger incentives to find more creative and less burdensome ways to achieve their goals. This leads to better-designed policies that accomplish public purposes while minimizing unnecessary interference with property rights.

Two primary avenues exist for achieving these changes: enacting comprehensive property rights through ordinary legislation, or entrenching them in the *Charter of Rights and Freedoms*.

Statutory protection

Property rights protection could be enacted as a stand-alone comprehensive property rights act, or integrated into existing legislation such as an expropriation act or the *Canadian Bill of Rights*. Either approach would allow for legislatures to enact enhanced protections and consolidate existing property protections into a coherent framework. The primary advantage of statutory protection is its feasibility.

Unlike the onerous constitutional amendment process, statutory reform can be accomplished through ordinary legislative processes, without federal co-operation or support from other provinces. As an ordinary statute, property rights protections could always be overridden by future statutes. This does not, however, severely diminish a statute's capacity to provide robust protection. Ordinary legislation can establish meaningful safeguards through clear compensation requirements, mandatory procedural protections, explicit limitations on government authority and independent oversight mechanisms. More importantly, while future legislatures retain the power to depart from such protections, the statute would bind all subordinate authorities exercising delegated power – including municipalities, administrative agencies and tribunals – unless explicitly overridden by subsequent legislation. This forces future legislatures to directly confront the fact that they are violating property rights, rather than allowing erosion through administrative action or regulatory creep.

In the UK, this concept is known as the principle of legality: "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process" (*Ex parte Simms* [2000] 2 AC 115 (HL) at 131 and *HM Treasury v. Ahmed* [2010] UKSC 2 at paras 111–17). A comprehensive property rights statute would similarly require any future departures to be express and visible, raising both the political cost and public accountability of interfering with property rights.

Another advantage of the statutory approach over constitutional entrenchment is that it permits legislators to work out the details of property rights with more precision. Constitutional provisions are written at a high level of generality, which inevitably pushes key design choices to the courts: when

compensation is owed for regulatory or constructive takings, how to measure loss, what processes and timelines apply, etc.

A statute, by contrast, can address this work upfront. The legislature can also tailor frameworks to contemporary governance tools like asset freezes, civil recovery, and unexplained wealth orders, rather than leaving such elaboration to years of judicial development. And it opens the door to create solutions, like establishing an independent Property Rights Advocate, modelled on Alberta's successful example. Alberta's Property Rights Advocate Office listens to concerns about property rights, communicates them to government, identifies systemic issues for resolution, and submits annual reports to the legislature containing recommendations on property rights matters. Such an advocate would provide an institutional voice for property owners, maintain ongoing oversight of government compliance, and serve as an early warning system for problematic regulatory trends.

Even if the substantive increases in protection are rejected, a codification of the existing common law could still prove beneficial. It would bring certainty to an area marked by uncertainty, particularly following *Annapolis*. Clearer standards would create a more predictable environment for both property owners and governments. By gathering rules in one place, such legislation would also stop the quiet chipping away that occurs through piecemeal exceptions across sectoral regimes – land use, environmental orders, civil forfeiture, sanctions, and licensing. Most present harms arise not from classic expropriation but from these dispersed regimes, each with its own culture and incentives. A single statute would supply common principles – procedural fairness, lawful purpose, necessity, proportionality, and compensation where burdens concentrate on specific owners – that apply across all areas.

A final question for the statutory approach is: which level of government should pursue the reforms? Under the *Constitution Act, 1867*, provinces have legislative power over "property and civil rights" (s 92(13)). This means that more state action affecting property rights occurs at the provincial level, including expropriation, land-use and planning laws, licensing regimes, and civil forfeiture. Federal jurisdiction over property is comparatively narrow, limited to matters within federal legislative competence such as federal expropriations, criminal forfeiture and CFIA seizures. Nonetheless, modernizing the *Canadian Bill of Rights* in a manner similar to how Alberta amended the *Bill of Rights* in 2024 would address federal overreach and establish a coherent baseline

that could inspire or guide provinces in designing their own complementary statutes. Thus, reform at either level would be welcome, though the most effective strategy would be to pursue both tracks simultaneously.

Constitutional protection

Constitutional entrenchment of property rights would provide the strongest and most durable protection against government interference with property, while delivering broader systemic benefits through cultural and judicial transformation. Canada's failure to include property rights in its constitution places it as a significant outlier among liberal democratic nations; virtually all major international and national human rights instruments recognize and protect property rights as fundamental to human dignity and democratic governance. For instance, the Universal Declaration of Human Rights establishes the foundational principle in Article 17, which states: "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property." The European Convention on Human Rights, American Convention on Human Rights, and African Charter on Human and Peoples' Rights also contain similar protections.

All other G7 nations have some form of constitutional protection for property rights, as do all other OECD nations with the exception of New Zealand.[2] The Fifth Amendment to the Constitution of the United States emphasizes due process and just compensation for public takings. Germany's Basic Law protects both acquisition and inheritance of property while requiring equitable balancing between public and private interests in expropriation cases. France's historic Declaration of the Rights of Man and of the Citizen treats property as inviolable and sacred, yet permits taking for public necessity with prior and equitable compensation. Italy's Costituzione della Repubblica Italiana likewise acknowledges private property while emphasizing its social function, stipulating that ownership must serve the common good and that expropriation for public purposes requires compensation determined by law. These varied approaches show that constitutional property protection is compatible with diverse governance philosophies and can be tailored to reflect national values while maintaining core safeguards against arbitrary deprivation.

Given this widespread international recognition of constitutional property rights and their demonstrated compatibility with diverse legal

systems, the exclusion of such protections from Canada's *Charter* is anomalous. Understanding how this exclusion came about assists in evaluating the case for constitutional reform today.

History of why property rights were excluded from the Charter

The exclusion of property rights from the *Charter* was not due to principled objection, but because of provincial fears about judicial interference with land-use planning, environmental regulation, and foreign ownership restrictions. Early *Charter* drafts repeatedly included property protections in various forms. Pierre Trudeau's 1968 proposal guaranteed "general security of life, liberty, and property", Bill C-60 (1978) affirmed "the right of the individual to the use and enjoyment of property, and the right not to be deprived thereof except in accordance with law" and a July 1980 draft proposed that "Everyone has the right to the use and enjoyment of property, individually or in association with others, and the right not to be deprived thereof except in accordance with law and for reasonable compensation" (Newman and Binnion 2014, 551–53, 560).

The federal government ultimately removed property rights to maintain provincial support during 1980–81 negotiations. The decisive moment came at the Special Joint Committee in January 1981(Newman and Binnion 2014, 555–56; Alvaro 1991, 321–22). Over a crucial weekend, NDP leader Ed Broadbent warned the Liberals that his caucus would withdraw support for the entire constitutional package if property rights were included. It was not just the NDP who was against property protections. Saskatchewan and PEI feared that constitutional property guarantees would imperil their restrictions on foreign or absentee ownership of farmland and erode provincial regulatory control over land use. Saskatchewan had also recently undertaken aggressive nationalization of potash operations.[3]

However, Dwight Newman and Lorelle Binnion argue that these fears were overstated as the *Charter's* built-in safeguards were not yet known. If a property clause had been included, it would be subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" and (possibly) the notwithstanding clause. Both of these options could have preserved ample policy space for the types of activities that Saskatchewan and PEI worried about (Newman and Binnion 2014, 558–60).

Arguments for a constitutional right to property today

Constitutional entrenchment of a right to property would not only bring Canada in line with its peers, but would make it more difficult for government to violate property rights, and strongly signal a commitment to respecting them. As *Charter* rights can only be overridden in specific circumstances, constitutional protection would offer more protection for vulnerable and unpopular property holders. While it is sometimes said that property holders are well-represented in legislatures (Allen 2020), many unjust takings have targeted vulnerable or unpopular groups. Consider, for example, the recent seizures of Russian assets from private companies without due process, freezing Freedom Convoy participants' assets without due process, and expanding civil forfeiture regimes that burden property holders to justify their ownership. Constitutional protection would provide consistent safeguards against such targeting.

Adding property rights to the *Charter* would also generate important cultural and judicial shifts. Although section 26 provides that *Charter* guarantees do not deny other existing rights and freedoms, judges have sometimes relied on the exclusion of property rights to limit their protection. Constitutional entrenchment would contribute to a culture that takes property rights seriously as fundamental rights, creating symbolic as well as substantive effects. These changes would have broader implications, as the Supreme Court has emphasized that values underlying *Charter* provisions should inform interpretation not only of other *Charter* sections but of legislation generally.

On the other hand, a key concern with constitutionalizing property rights centres on interpretive uncertainty and the resulting unpredictability of judicial application of rights written at a high level of generality. The history of section 7 of the Charter and its interpretation far beyond what was originally intended demonstrates that there is no reliable way to predict how Canadian courts would interpret constitutional property rights. This uncertainty is compounded by fundamental ambiguity about what "property" means in the constitutional context. Property is a complex bundle of rights created through centuries of common law evolution, raising difficult questions about which rights and which forms of property would receive constitutional protection. With no clear answer, there is significant risk that judges could define property expansively, potentially constitutionalizing government benefits, licences, or regulatory privileges in ways that would freeze benefit

schemes and inappropriately limit government flexibility. Alternatively, robust property protections could be used to challenge government social programs like rent control, affordable housing initiatives, and progressive taxation measures.

The American experience illustrates how judicial interpretation can produce outcomes that disappoint advocates on both sides. During the Lochner era, the Supreme Court of the United States famously relied on the Fifth Amendment's property protections to strike down minimum wage laws, maximum hour legislation and worker safety regulations (*Adkins v. Children's Hospital of the District of Columbia*, 261 US 525 (1923); *Lochner v. New York*, 198 US 45 (1905)). More recently, the Court interpreted the "public use" restriction in the Fifth Amendment to permit expropriation for the purpose of transferring the property to private developers as this was a public use: promoting economic development (*Kelo v. City of New London*, 545 US 469 (2005)). These contrasting expansive and narrow interpretations of property rights underscore the unpredictability inherent in constitutional entrenchment.

Finally, the relationship between constitutional property rights and Aboriginal rights presents both challenges and opportunities. Critics worry that individual property rights could conflict with Aboriginal title to land, which is recognized under section 35 of the *Constitution Act, 1982*. Recent trial-level decisions in New Brunswick and British Columbia have found that Aboriginal title can extinguish or supersede private interests in land (*Cowichan Tribes v. Canada (AG)*, 2025 BCSC 1490 and *Wolastoqey Nations v. New Brunswick and Canada, et al.*, 2024 NBKB 203). Constitutional entrenchment would provide an opportunity for elected representatives to address these complex questions through democratic negotiation rather than leaving the details entirely to judicial determination. By bringing property rights into the constitutional framework, Parliament and the provinces could establish clear principles for reconciling these interests through the amendment process – determining where lines should be drawn, what compensation mechanisms apply, and how to balance competing claims. This democratic approach would be preferable to a purely judge-made framework that evolves case-by-case without legislative input.

Evaluation and recommendation

While constitutional entrenchment may appear to offer the strongest protection, practical experience shows that comprehensive statutory reform provides a more realistic and effective path. Alberta's 2024 amendments to its *Bill of Rights* demonstrate this potential. By guaranteeing compensation when owners are deprived of all reasonable uses of property and establishing a Property Rights Advocate Office, Alberta created enforceable rights and institutional oversight. This model shows how statutory frameworks can shift legal culture toward greater respect for property rights while remaining adaptable to changing policy needs.

Constitutional protection is possible – many democracies entrench property rights – but Canada's political reality makes amendment nearly unattainable. The amending formula has repeatedly proven unworkable, and past efforts from Meech Lake to Charlottetown collapsed under provincial bargaining. Property rights faced strong opposition during the 1981 Charter debates, and those political obstacles remain.

Constitutionalization also carries a degree of uncertainty as the details will be left to courts to fill in. Courts might interpret "property" too broadly, freezing benefit schemes, or too aggressively, as in the US Lochner era, striking down labour and safety laws.

Statutory reform avoids these pitfalls. Legislatures can define compensation triggers, timelines, and proof burdens with precision that constitutional text cannot match. They can also tailor protections to modern governance tools such as asset freezes and unexplained wealth orders. Statutes allow provinces to experiment with different approaches, raising the political cost of interference through the principle of legality, while building momentum toward federal or interprovincial standards.

Both the federal government and provinces should therefore prioritize statutory reform. It offers meaningful protection without the political deadlock and interpretive risks of constitutional entrenchment.

The road to adoption

Proposed draft provisions

Any comprehensive property rights statute – whether enacted federally or provincially – should put into practice the four core principles identified at the beginning of Part II: fair compensation for all takings, legitimate public purpose, due process before deprivation, and proportionality. The challenge lies in translating these principles into concrete legal requirements that bind government actors while preserving necessary flexibility for legitimate regulation.

To achieve this change, reform should proceed along two tracks. Provinces should enact comprehensive property rights statutes that codify the four core principles. And Parliament should apply the same principles to federal action by modernizing the *Canadian Bill of Rights* to require fair process and just compensation across federal takings.

Fair compensation for all takings

The legislation should establish clear triggers for compensation that go beyond traditional expropriation. Building on Alberta's approach in section 1(a.2) of its *Bill of Rights*, the legislation should guarantee just compensation whenever an owner is deprived of all reasonable uses of property, regardless of whether government obtains any corresponding advantage. The statute should also provide compensation for substantial partial takings that fall short of complete deprivation. Where regulation reduces property value by a specified threshold – such as 75 per cent or 80 per cent – compensation should be triggered regardless of whether some marginal use remains theoretically possible.

While this paper does not attempt to resolve the complex question of how compensation ought to be measured, the statute may provide an opportunity for policymakers to reconsider the narrow market-value standard used today. International models demonstrate that fair compensation can be structured more broadly, incorporating not only the property's authorized-use value but also investment-backed expectations, going-concern value for businesses, and reasonable relocation and disturbance costs. Many jurisdictions go further,

adding a solatium or premium above market value to reflect the non-economic harms of dispossession and the personal attachments people have to their property. Although there are many possible approaches, the key point is that compensation in Canada should be more generous than current practice, ensuring that owners bear neither hidden costs nor disproportionate burdens when property is taken for public purposes.

Legitimate public purpose

Each framework should require that any deprivation of property serve a legitimate public purpose. The central reason for including a public-purpose requirement is to give owners, particularly homeowners, a meaningful opportunity to contest whether an expropriation is necessary. Recent developments in administrative law support such a standard. Whereas courts once avoided reviewing policy decisions, except on narrow grounds, they now review policy decisions on the same reasonableness standard as other administrative decisions (*Catalyst Paper Corp v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 at paras 14–15; *Universal Ostrich Farms Inc v. Canada (Food Inspection Agency)*, 2025 FCA 147 at para 49). Thus, requiring an authority to justify the necessity of a taking would be a natural extension of existing judicial oversight into the property domain.

To implement this requirement, the statute should require government authorities to explain the specific public purpose in writing before depriving property and demonstrate a rational connection between the deprivation and that purpose. This would prevent pretextual takings where stated justifications mask other motives, while preserving legitimate government flexibility to advance important public objectives.

Due process before deprivation

Procedural protections must be robust and clearly specified. The statute should guarantee that no property may be seized, frozen, or forfeited without advance notice to the owner and a meaningful opportunity to be heard before an impartial decisionmaker – except in genuine emergencies where immediate action is necessary to prevent imminent harm. Even in emergency situations, the legislation should require post-deprivation hearings within strict timelines, such as 72 hours or seven days, to ensure that temporary measures do not become indefinite.

At any hearing, government must bear the burden of proving by clear and convincing evidence that the specific property was derived from or used in unlawful activity. The statute should explicitly reject the burden-shifting approach of unexplained wealth orders, which compel owners to prove the legitimacy of their property or forfeit it. Where property is seized based on alleged connection to another person's criminal activity – as with Margaret and Terry Reilly's rental properties – government must prove that the owner knowingly participated in, consented to, or was willfully blind to the unlawful activity. Mere ownership of property used by others for illegal purposes cannot justify forfeiture.

The legislation should also mandate independent review mechanisms. Decisions affecting property rights should be subject to merit-based appeals before tribunals with genuine power to overturn government action, not merely advisory bodies whose recommendations the expropriating authority can ignore. The statute should specify timelines for decisions, require written reasons, and establish clear standards of review that courts must apply when evaluating government interference with property.

Proportionality

Proportionality requirements must guard against excessive deprivations that bear no reasonable relationship to legitimate government objectives. The statute should establish that the severity of any interference with property must be demonstrably necessary to achieve the government's stated purpose, and that less restrictive alternatives must be considered before resorting to more severe measures.

For civil forfeiture, the legislation should mandate proportionality assessments that consider the seriousness of the alleged unlawful activity, the property's connection to that activity, the impact on innocent third parties, and the relationship between the property's value and the harm caused. Minor regulatory violations – such as ordinary traffic offences – should be explicitly excluded from forfeiture provisions, and the statute should establish maximum ratios between the value of forfeited property and the seriousness of the underlying conduct. The legislation should also prohibit forfeiture based on anticipated future use, rejecting the approach upheld in *Angel Acres* that allowed seizure of Hells Angels clubhouses worth over $3 million based on speculation that they would "likely be used" to facilitate future criminal activity.

For regulatory restrictions, proportionality requires that limitations on property use be tailored to achieving specific public objectives without unnecessarily destroying property value.

> *Proportionality requirements must guard against excessive deprivations that bear no reasonable relationship to legitimate government objectives.*

Bilateral constitutional amendment

While comprehensive ordinary legislation offers immediate protection, the Constitution also provides for a more achievable way to create stronger property rights frameworks without waiting for a broader national consensus: a bilateral federal-provincial amendment under section 43 of the *Constitution Act, 1982*.

Section 43 provides that "An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces ... may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies."

This bilateral process has proven workable – New Brunswick successfully used it to add section 16.1 to the *Charter*, guaranteeing equality of English and French linguistic communities within that province. A province could therefore negotiate with the federal government to add property rights protections applicable specifically within its boundaries through a new *Charter* section.

This approach creates constitutionally protected property rights binding on both the provincial legislature and federal Parliament as it applies in that province. Additionally, a provincial constitutional initiative could create a domino effect: once one province successfully entrenches property rights constitutionally, residents of other provinces would question why they deserve lesser protection. This competitive dynamic could drive broader adoption far

more effectively than advocacy for national *Charter* amendment. As multiple provinces adopted constitutional property rights, pressure would naturally build toward uniform national standards through general amendment under section 38, transforming what seems politically impossible today into an inevitable next step.

Constitutional amendment process

Full constitutional entrenchment of a new right in the *Charter of Rights and Freedoms* would proceed in accordance with the general amending formula set out in section 38 of the *Constitution Act, 1982*. It would require resolutions from both the House of Commons and Senate, plus resolutions from at least seven provincial legislatures representing at least fifty per cent of the Canadian population, with the entire process completed within three years from the initial resolution.

The political obstacles to this path are formidable and well-documented. Property rights faced determined opposition from the federal NDP and several provinces during the 1981 *Charter* negotiations, and while some original concerns have been addressed by subsequent jurisprudence, fundamental challenges remain. But a far greater challenge is that beginning constitutional negotiations of any kind opens the door to provinces seeking to advance their own priorities, which will likely create a complex web of demands that becomes impossible to satisfy, as happened with the failed Meech Lake and Charlottetown accords.

The path to constitutional amendment is long and uncertain, but it need not be pursued immediately or in isolation. By building from ordinary legislation through provincial constitutional entrenchment toward eventual *Charter* amendment, Canada can strengthen property rights protection incrementally while maintaining flexibility to adapt approaches based on experience. Each step creates stronger protection than the last while generating evidence and building consensus for the next stage, ultimately positioning Canada to join other developed democracies in constitutionally recognizing property as a fundamental right.

Conclusion

Canada's failure to protect property rights places it as an outlier among developed democracies and leaves its citizens vulnerable to government overreach. Without robust protection, property rights in Canada rest on a fragile patchwork of common law doctrines that governments can circumvent or override at will. The result is a system where unlucky property owners bear concentrated costs for achieving public objectives that should be shared by society, where innocent owners lose assets based on suspicion alone, and where entire industries can be destroyed overnight without remedy.

The four core principles identified in this paper – fair compensation for all takings, legitimate public purpose, due process before deprivation, and proportionality – provide the foundation for meaningful reform. Implementing these principles through legislation would force government accountability by making visible the true costs of regulation, while promoting fairness by preventing concentration of public burdens on individual owners.

Full constitutional entrenchment through the *Charter* remains the ultimate goal, but the political obstacles that defeated property rights in 1981 persist. Rather than immediately pursuing constitutional amendment, Canada should pursue incremental strengthening through ordinary legislation and bilateral amendments. This staged approach addresses concerns about judicial unpredictability by allowing statutory frameworks to evolve before constitutional language is fixed, builds public support by demonstrating benefits and provides immediate meaningful protection rather than waiting for political alignment necessary for constitutional reform.

Canada has the legal tools, successful models and compelling reasons to strengthen property rights protection. The question is not whether Canada should protect property rights more robustly, but when and how. The vulnerabilities documented in this paper persist because past generations failed to act decisively. Future generations will judge whether Canada finally chose to join other developed democracies in recognizing that property rights deserve explicit protection against government overreach. Comprehensive statutory reform can deliver immediate benefits while building toward stronger constitutional protection. MLI

About the author

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Endnotes

1 Note also that Section 35 of the *Constitution Act, 1982* protects Aboriginal title. Aboriginal title is a unique collective right to land held by Indigenous peoples based on their historic occupation and use of traditional territories prior to European assertion of sovereignty. Once recognized by a court, Aboriginal title confers the right to exclusive use and occupation of the land for purposes consistent with its prior occupation.

2 In the UK, the *Human Rights Act 1998 (UK), c 42* is generally considered to be part of the *Constitution (R (HS2 Action Alliance Ltd v. Secretary of State for Transport [2014] UKSC 3 at para 207; Cabinet Office, 2011, 2)*, which in turn incorporates the European Convention on Human Rights into British law.

3 The issue persisted in subsequent years: a B.C.-led revival in 1983, a federal-provincial working group and House of Commons resolution in May 1988, and a final three-year window for provincial endorsements that closed without success on May 2, 1991 (Newman and Binnion 2014, 557; Alvaro 1991, 310–11, 329).

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