

[A remedy for property rights horror stories: a constitutional amendment](#)

By: [Scott Reid](#) on June 28, 2011 | C2C Journal

Randy Hillier and I are, respectively, the members of the Ontario and Canadian parliaments for the rural electoral district of Lanark-Frontenac-Lennox and Addington. Earlier this year, we introduced identical resolutions in our two legislatures, to constitutionally entrench property rights in our province.



From one perspective, our goal is to correct a long-standing oversight. In Canada, property rights are famously absent from the [Charter of Rights and Freedoms](#). The result of this deficiency is that governments regularly enact new laws and regulations that require farmers and other landowners to make significant new expenditures in order to carry on existing activities. Other new laws forbid an ever-growing list of uses of the land, sharply reducing the resale value of the property. Such losses go entirely uncompensated. This amounts to a kind of theft, and it is wrong.

But from another point of view, our goal is simply to extend to small landowners a measure of the extensive protections already extended, by Canadian law, to the property rights of the great and the powerful.

Many Canadians are surprised to learn that individual landowners are subject to a form of mistreatment from which large American corporations operating in Canada are completely exempt. Under [Article 1110 of NAFTA](#) (a part of the infamous “Chapter XI”, so much despised by the [Council of Canadians](#)), American and Mexican businesses operating in Canada enjoy complete protection for all property rights. Specifically, sub-articles 2, 3 and 4 of Article 1110 offer the following protections:

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going

concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. [C]ompensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

These compensation provisions serve their purpose very efficiently, as witnessed by the fallout from then-Newfoundland Premier Danny Williams' high-profile seizure of the assets of AbitibiBowater in the Grand Falls region in 2009. The company, which is incorporated in Delaware, was able to seek Chapter XI protection through the courts, and as a result was able to extract \$130 million in compensation.

NAFTA is only the start of the property rights protections enjoyed by big business. Thanks to many of the international trade agreements to which Canada is a signatory, property in the form of copyright and patents is perhaps too well-protected, insofar as it creates artificial monopolies in easily replicated goods. This enriches a small number of wealthy interests at the expense of everybody else—the source of much of the popular frustration that we politicians hear on the campaign trail, in the form of rants against “Big Pharma,” privately-owned and genetically-modified “Frankenfoods,” and so on.

Less controversially, Canada has a long-standing legal framework designed to protect the rights of individual landowners. Each province has an expropriations act guaranteeing full, just and timely compensation to landowners when the province or a municipality takes away the title to their land. For example, [subsection 13\(1\)](#) of [Ontario's Expropriations Act](#) states:

Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,

- (a) the market value of the land;
- (b) the damages attributable to disturbance;
- (c) damages for injurious affection; and
- (d) any special difficulties in relocation,

but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use.

If such outright expropriations were the only way in which governments deprive landowners of their right to use and enjoy their property, the rights of Canadian landowners would be as well protected as any on Earth.

Unfortunately, outright seizure of title to land is only one of many government-sponsored intrusions on private property rights. Governments regularly impose new restrictions on the use of land, or impose regulations on the use of land, that require individuals to spend large amounts of money in regulatory compliance costs, in order to continue using the land in the same manner they have always used it.

Property, properly understood, is never simply a physical object such as a piece of land. Rather, it is the bundle of rights associated with that object. The owner of a piece of land typically has the right to keep other people off his or her land, and if it is a farm, the right to keep livestock on it or to grow crops. Normally, this includes the right to erect fences and outbuildings. Usually, there is a right to build on any piece of land—although, after decades of hyperactive zoning rules, all kinds of limitations restrict these rights. Further restrictions exist for the purpose of ensuring that my use of my property does no harm to the ability of my neighbours to use and enjoy their property. This is the reason why I can't build a ten-storey building where my house now stands, thereby ruining my neighbours' views (and why my neighbours face reciprocal restrictions).

When such restrictions are pre-existing, an owner suffers no loss. When I buy a piece of property knowing that a series of rights—such as constructing a ten-storey building—have already been excluded from the bundle of rights that I am acquiring through my purchase of the land, I have no cause to complain, as nothing has been taken from me (it simply was never mine in the first place). But when such rights are stripped away from a person after the fact of their ownership of the land, part of the value of the land is also effectively taken.

In recent years, such restrictions on the use and enjoyment of property have often been set in place as a means to improve the quality of water in rivers and streams, or in order to protect some other aspect of the environment—preserving endangered species, creating attractive greenbelts around the perimeter of cities, ensuring that wetlands are not drained, protecting migratory flyways, and so on. Restrictions may include taking away the ability to spread liquid nutrients on fields, requiring farmers to build fences to keep their cattle from grazing (and therefore defecating) too close to the edge of a watercourse, or placing new restrictions on severances in order to preserve the rural character of a region.

Such restrictions on the right to use and enjoy one's property can result in significant reductions in a landowner's ability to generate income from his property. In the case of many restrictions that the province has imposed upon farmers, these restrictions can result in significant new costs being imposed in order to carry on existing agricultural activities. In many cases in both rural and residential areas, such restrictions can cause a significant drop in the resale value of the property, or even destroy its resale value entirely.

Still, the problem is not that these land-use restrictions are imposed, or that regulatory compliance can be costly, or that such new laws may lower the resale value of the land. The problem is that, unlike outright expropriation of title, these losses of the right to use and enjoy one's own property go entirely uncompensated.

What Randy Hillier and I are suggesting is that protections similar to those that exist under the *Expropriations Act* be extended to the property rights of landowners. Specifically, we propose to insert the following section into the *Canadian Charter of Rights and Freedoms*:

7.1 (1) In Ontario, everyone has the right not to be deprived, by any Act of the Legislative Assembly or by any action taken under authority of an Act of the

Legislative Assembly, of the title, use, or enjoyment of real property or of any right attached to real property, or of any improvement made to or upon real property, unless made whole by means of full, just and timely financial compensation.

(2) Subsection (1) refers to any Act of the Legislative Assembly made before or after the coming into force of this section.

This amendment refers only to Ontario, and is binding only upon the Ontario legislature and upon creatures of the Ontario legislature, such as municipalities and provincial crown corporations.

The notion of a one-province-only provision in the midst of the *Charter of Rights* may, at first glance, seem novel or even odd, but Canada's constitution is designed so as to permit single-province amendments to be added to the constitution as a step-by-step way of amending provincial constitutions. Indeed, in Canada the absence of the kind of stand-alone constitutions that exist for all American states means that the only way to create a *de facto* provincial bill of rights for any province is by means of amendments to the *Charter*.



A specific amending formula, to be used for the purpose of creating this kind of single-province amendments, is outlined in [section 43](#) of the *Constitution Act, 1982*. The section 43 amending formula requires that identical resolutions be approved by Parliament and the legislature of the relevant province. Section 43 has been used to add a section dealing with language rights, which applies only to New Brunswick, to the *Charter*. On several other occasions, section 43 has been used to make other one-province-only amendments to aspects of the Constitution that fall outside the *Charter*, including amendments affecting Quebec alone, PEI alone, and Newfoundland alone.

Our proposed amendment has been carefully crafted to be as limited as possible. The amendment deals only with real property (i.e. real estate) and improvements made to that property. It does not deal with patents, copyright, trademarks or any other form of non-material property. It also does nothing to protect property in moveable objects.

The amendment is also designed so as not to limit the ability of the Ontario legislature to pass laws that strip away property rights; both Randy and I believe that restrictions on

private property can, on many occasions, serve the public interest. Our only concern is that when an action is designed to benefit the public—by protecting watercourses or endangered species, by creating greenbelt areas, etc.—it is the public which should pay the associated costs, just as the public would pay if a direct expropriation of the title to the land were taking place.

On the other hand, we are careful to make it clear that compensation must be full, that it must be made in cash rather than in kind, and that it must be prompt. As well, the amendment contains a second subsection that serves as a signal to the courts that the amendment is meant to be construed broadly, rather than being seen only to apply to existing laws, or only to new laws. The danger of the courts giving a crippling narrow construction to the amendment, in the same manner as Diefenbaker's [Bill of Rights](#), was constantly on our minds as we crafted the wording.

The measure we propose is, we think, only fair. The days are long past when our rulers simply seized what they wanted. It is both more efficient and more just for government to raise revenues by means of the tax system, and then pay for what it sees fit to take from private owners. The notion that governments can strip away the value of private land without compensation is as medieval and outdated as the corvée and the peasant conscript army, and now there is a way to send this atavistic practice where it belongs, to the dustbin of history.

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About [Scott Reid](#)

Scott Reid has been a member of Parliament since 2000. He currently serves as the government's Deputy House Leader, and since 2008 he has served as the chair of the Commons subcommittee on International Human Rights. In 2003 he was one of the founders of the [Ontario Landowners' Association](#).