

OUTLINE: Law 311D Property Law & Theory
Regulatory Takings and NAFTA's Eclipse on Canada

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Introduction:

Canada does not have property rights entrenched in its constitution. A number of protections exist in statutes of some Canadian provinces that provide for greater protection of specific property rights, and international trade agreements also give some measure of protection to foreign investors' property rights. My paper will focus on regulatory takings and will comprise of three sections. In the first section, I will discuss the protections of property rights in Canada in general, as well as, the Canadian jurisprudence surrounding regulatory takings and the internal coherence resulting from it. Section II will provide an overview of the North American Free Trade Agreement's (NAFTA) law of takings and the protections NAFTA provides to foreign investors. I will discuss the key cases on regulatory expropriations of property. This will provide context to section III, concerning the effects of NAFTA and regulatory takings law in Canada.

Thesis:

- Based on this analysis, I argue that Canadian jurisprudence and the effects of NAFTA in the area of regulatory takings is innately incoherent and an unreasonable approach in Canadian jurisprudence, which may ultimately favor foreign investors over Canadian investors and create a "regulatory chill" that impedes public policy innovations.

I. Canada: Protection of Property Rights and the Law of Regulatory Takings

- There are two fundamental problems within Canada that have resulted in the incoherence of law in the realm of regulatory undertakings: 1) The lack of property rights enshrined in the Charter, and 2) the unwillingness to recognize the distinctness of regulatory takings from expropriation.

Indirect Property Rights:

- The Canadian Charter of Rights and Freedoms (Charter) does not expressly protect property rights.
- Section 8 of the Charter prohibits "unreasonable search and seizure." Canadian courts have narrowly interpreted this provision to include the taking of property solely during criminal investigations and they have not read into sections 7 and 8 property protections and rights as is protected in the Fourth and Fifth Amendments of the U.S. Bill of Rights.
- Section 11 prohibits "cruel and unusual treatment" and this is one of the Charter sections where property rights are indirectly protected. For example, excessive fines could be seen as being unreasonably harsh to the property owner.
- Despite the lack of expressed property rights in the Charter, there is an implicit constitutional right. In *A.G. (Can) v. Montreal*, the Court did reject the notion of an implicit bill of rights in Canada; however, they recognized that Canada's constitution does have certain unwritten principles. Nevertheless, the Court has placed more emphasis on the written constitution and the rights it confers more than the acceptance of the unwritten principles. Thus, the protection of property rights is minimally protected in Canada compared to other western nations.

Regulatory Takings Differ from Expropriation: Internal Incoherence

- A regulatory taking occurs when the government does not directly expropriate land through the appropriate statute; rather, they pass regulations which indirectly takes away an individual's rights to their property.
- In the absence of statutes which guide compensatory rights in direct expropriations, regulatory takings require the property owner to overcome three significant hurdles: 1) the owner must prove that the regulation has extinguished all reasonable use of the land, 2) the rights must be shown to benefit the government authority, and 3) the government authority did not intentionally deny compensation.
- Although the courts in Canada do make a distinction between expropriation and regulatory takings, they use the same legal concept relating to the actual expropriation of property as they do to regulatory takings – that an actual and tangible benefit flows to the public authority vis-à-vis the expropriation of the property.

- The Court, in *CPR v. Vancouver*, gave a two-part test for the establishing of a regulatory: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.
- Problem: First part of the test. There may be instances, as was in the case of *CPR v. Vancouver*, where there is not a “beneficial interest” to the public authority. A more appropriate test for regulatory takings ought to be the loss of property rights enjoyed by the plaintiff due to the severe regulatory impositions.
- After *CPR v. Vancouver*, Canadian law appears to require that the actual use and enjoyment of the property necessitate actual state acquisition of proprietary interest. Thus, such a thing as “regulatory taking” no longer exists in Canadian law, since the SCC has collapsed expropriation and regulatory takings distinctions into one category – *de jure* taking or actual expropriation.
- The idea of actual loss and gain that is a characteristic of *de jure* taking the SCC used in *CPR v. Vancouver* to reach its decision, suggests the incoherence of the law of regulatory takings.

II. NAFTA: External Incoherence

- Chapter 11 of NAFTA gives foreign investors and their investments protection.
- Article 1110 NAFTA provides that an “investor” from the United States or Mexico who has an “investment” in Canada may commence a claim through international arbitration which Canada has imposed a “measure” that is “tantamount to ...expropriation”, which prompts a compensatory right for the investor.
- *Metalclad Corporation v. United Mexican States* has been the pre-eminent case in demonstrating that Canadian law of takings is no longer what the domestic regulatory law of takings describes. It gives a broader protection against “incidental interference with the use of property [...] depriving the owner [...] of the use or reasonably-to-be-expected economic benefit of property”. This includes the rezoning of property by a municipality.
- Effectively, an American or Mexican investor can have stronger claims of protection from regulatory measures enforced by Canadian public authorities, than do Canadians property owners, since the Court has not extended them these broad protections from all kinds of regulatory takings. The judicial shaping of the common law of takings is now subject to NAFTA examination since, under NAFTA, compensatory rights are triggered by any measure adopted or sustained by any branch of government.
- Therefore, Canada lacks constitutional jurisprudence limiting regulatory takings, yet it has entered into NAFTA, whereby NAFTA limits Canada’s power to take. This suggests that Canada’s unbounded legislative power is now legally constrained. There is an inherent disconnect between domestic legal importance and Canada’s obligations vis-à-vis NAFTA.
- The principles of fairness should not give greater protection to non-Canadians; rather, Canadian law on regulatory takings should meet the same standard of protections afforded to American or Mexican investors in Canada.

III. Net Effects of NAFTA on Canada

- NAFTA’s explicit protection of foreign investment has initiated a “backdoor-type” of constitutional change.
- Perhaps Canada is aware of the incoherence? Canada has pressed the U.S. and Mexico for an interpretation of article 1110 that would narrowly define the grounds for finding an expropriation requiring compensation.
- Canada has also put forth the argument that NAFTA’s foreign investment provisions are extended to the point of preventing governments from enacting legitimate legislation. Canada is worried that a tribunal of non-elected, non-Canadian persons are in the position of reviewing Canadian legislature’s choice of policy instrument.” This particularly highlights the problem of incoherence of domestic regulatory taking law and NAFTA’s take on regulatory takings.
- NAFTA’s broad interpretation can create a regulatory chill; insofar as governments may be less willing to create regulations because they fear the broad interpretation of NAFTA’s Chapter 11 and its consequences. For example, environmental regulations that may be important may not be invoked.