Property, Planning and the *Charter*

Robert G. Doumani*
Jane Matthews Glenn**

The authors examine the impact of the *Canadian Charter of Rights and Freedoms* upon the powers of municipalities to control the use of land. Despite the absence of specific entrenchment of property rights in the *Charter*, the authors contend that these rights are nevertheless significantly protected in pre-*Charter* constitutional and administrative law. Entrenchment of a protection-of-property clause in the *Charter* would make little difference to the effective protection of property rights, particularly in light of the moderating effect of s. 1 of the *Charter*, the possibility of s. 33 overrides of *Charter* rights, and the pre-existing protection of property rights in other human rights instruments recognized in Canadian law. They argue, further, that existing provisions of the *Charter* do serve to enhance indirectly the protection of property rights insofar as property concerns may relate to life, liberty and security of the person (s. 7) and equality (s. 15).

Les auteurs étudient l'impact de la *Charte canadienne des droits et libertés* sur les pouvoirs municipaux relatifs à l'usage des terrains. Même si la propriété n'est pas constitutionnellement enchâssée dans la *Charte*, les auteurs prétendent qu'elle a malgré tout été largement reconnue et protégée en droit constitutionnel et administratif avant l'apparition de la *Charte*. Compte tenu de l'effet modérateur de l'article 1 de la *Charte*, de la dérogation aux droits garantis rendue possible par l'article 33 de la *Charte* et de la protection accordée à la propriété par d'autres instruments de droit canadien, la mention de la propriété au sein de la *Charte* ne modifierait pas vraiment le statut de la propriété en pratique. Par ailleurs, les auteurs soutiennent que les dispositions de la *Charte* contribuent effectivement à accroître la protection de la propriété car celle-ci, sous certains aspects, affecte la vie, la liberté et la sécurité de la personne (article 7) et l'égalité (article 15).

* * *

*Of the firm of Gardiner, Roberts, Toronto, Canada

**Of the Faculty of Law and the School of Urban Planning, McGill University, Montreal, Canada. This article is a revised version of a paper on the subject "The Canadian Charter of Rights and Freedoms and Municipal Planning" presented to the Canadian Urban and Housing Studies Conference, University of Winnipeg, February 1988.

Introdnction

As finally adopted, the *Canadian Charter of Rights and Freedoms*[1] does not specifically recognize a right to property. In this, it differs from such international documents as the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human Rights,[2] as well as such domestic models as the American Bill of Rights,[3] the *Canadian Bill of Rights*[4] (a simple federal statute) and various provincial Bills of Rights such as Quebec's *Charter of Human Rights and Freedoms.*[5]

Earlier versions of the Canadian *Charter* did include a guarantee of property rights within its ambit, either as part and parcel of the guarantee of life and liberty (following the earlier Canadian and American examples), or as part of the mobility rights section (that is, the right of Canadian citizens and permanent residents to acquire and hold property in any province), or as a separate right in itself.[6] However, any reference to property rights dis-

[1]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*] . See P.W. Augustine, "Protection of the Right to Property under the Canadian Charter of Rights and Freedoms" (1986) 18 Ottawa L. Rev. 55.

[2]Art. 17, Universal Declaration of Human Rights, U.N.G.A. Res. 217 (III), 3 U.N. G.A.O.R. Supp. (No. 13), 71 U.N. Doc. A/810 (1948); Art. 1 of the First Protocol to the European Convention for the Protection of Human Rights and Freedoms, 4 Nov. 1950, (in force 3 Sep. 1953), Europe T.S. No. 5, art. 1 (Inter-American).

[3]U.S. Const. amend. v, xiv.

[4]Appendix III to R.S.C. 1985, s. 1(a) [adopted S.C. 1960, c. 44].

[5]R.S.Q., c. C-12 [first adopted S.Q. 1975, c. 6], s. 6.

[6]R. Romanow, J. Whyte & H. Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 229-46; R. Elliot, "Interpreting the Charter — Use of the Earlier Versions as an Aid" (1982) U.B.C.L. Rev. 11 [Charter Edition].

appeared from the draft *Charter* in late 1980 and a Progressive Conservative suggestion (made before the Joint Parliamentary Committee, which held public hearings on the *Charter* in the fall of 1980) to include one was not taken up by the then Liberal government. This resulted partially from the New Democratic Party's opposition to any entrenchment of property rights on the grounds that it might jeopardize nationalization efforts.[7] It also reflected the objections of the governments of Saskatchewan and P.E.I. to the inclusion of property rights as an element of mobility rights, which, it was felt, would threaten recently adopted legislation restricting non-resident ownership of land.[8] Since the adoption of the *Charter*, calls for the entrenchment of property rights from such bodies as the National Citizens Coalition, The Canadian Chamber of Commerce, the Canadian and various provincial Real Estate Associations, and the Canadian Bar Association have gone largely unheeded. The Canadian Institute of Planners has counselled caution in this regard.[9]

The purpose of this paper is to examine the impact of the *Charter* upon a municipality's power to control the use of land. Its thesis, simply put, is that the *Charter*, as drafted, has only limited effect in this regard and that any specific entrenchment of property rights would not particularly change this result. The reasons for adopting this admittedly bland stance are pursued in two sections, the first on the recognition of property rights and the second on their restriction. Throughout, the discussion of the *Charter* is preceded by a consideration of traditional (i.e. non-*Charter*) rules. It is important to approach the *Charter* in this way — in context and not in isolation — because, as the Supreme Court of Canada has indicated, if an impugned action is invalid on other grounds, "there is, of course, no basis for resort to the *Charter*".[10] As Mr. Justice Estey expressed it in another case:

> The development of the Charter as it takes place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new Charter provisions, none should be undertaken...[11]

---

[7]R. Piché, "Saskatchewan Realtors Urge Property Rights Be Entrenched in Charter" [C.B.A.] *National* (November 1987) 16.

[8]Romanow, Whyte & Leeson, *supra*, note 6 at 242-43.

[9]J. McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 Alta L. Rev. 548 at 549; 'Property Rights and Canada's Charter of Rights and Freedoms: A Brief by the Canadian Institute of Planners', April 1985.The Canadian Advisory Council on the Status of Women is opposed because of possible effect upon matrimonial property legislation: McBean at 578.

[10] *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 188, 17 D.L.R. (4th) 422, 14 C.R.R. 13, Wilson J. [hereinafter cited to S.C.R.].

[11]*Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357 at 383, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 9 D.L.R. (4th) 161, Estey J. See also *Hamilton Independent Variety and Confectionary Stores Inc.* v. *Hamilton (City of)* (1982), 143 D.L.R. (3d) 498, 20 M.P.L.R. 241 at 256 (Ont. C.A.) (Court "refraining" from basing judgment on *Charter* when by-law invalid under tradional rules).

Before proceeding, however, one further remark is in order, concerning the applicability of the *Charter* to municipal actions.[12] This issue was fully argued in *Re McCutcheon and City of Toronto et al.*,[13] where the High Court of Ontario decided in favour of applicability by virtue of section 52(1) of the *Constitution Act, 1982* and section 32 of the *Charter*. The former declares that the Constitution (including the *Charter*) prevails over any "law" inconsistent with it. This was held to include municipal by-laws. The latter section provides that the *Charter* applies to the Parliament and government of Canada and to the legislature and the government of each province. In the words of the Court in *McCutcheon*:

> Municipalities, though a distinct level of government for some purposes, have no constitutional status; they are merely "creatures of the legislature", with no existence independent of the legislature or government of each province. Hence, just as the provincial legislatures and governments are bound by the Charter, so too are municipalities, whose by-laws and other actions must be considered, for the purposes of s. 32(1), as actions of the provincial government, which gave them birth.[14]

Applicability of the *Charter* was also assumed in a number of other cases[15] and the issue would probably not merit much discussion were it not for the somewhat disturbing observation of the Supreme Court of Canada in *Dolphin Delivery*, made admittedly in *obiter* and apparently without the benefit of argument, that the *Charter* only "possibly" applies to municipal by-laws.[16] This issue can be finessed to a certain extent by recourse to the traditional rules respecting delegated legislative competence: if the enabling legislation itself does not offend the *Charter*, the municipality may be held to be acting outside its jurisdiction in adopting a by-law that does so offend; or if the municipality is held to be acting within its jurisdiction in adopting the offensive by-law, the enabling legislation itself may be struck down as contrary to the *Charter*. However, it may not always be possible to frame the argument in terms of the traditional rules (if, for example, the definition of

---

[12]See D. Gibson, "Distinguishing the Governors from the Governed: The Meaning of 'Government' under Section 32(1) of the Charter" (1983) 13 Man. L.J. 505 at 510-11.

[13](1983), 41 O.R. (2d) 652, 147 D.L.R. (3d) 193, 22 M.P.L.R. 139 (H.C.) [hereinafter cited to O.R.] (municipal by-law parking offence). See also *Re Hardie and District of Summerland* (1985), 24 D.L.R. (4th) 257, 68 B.C.L.R. 244, 22 C.R.R. 204 (S.C.) (compulsory retirement of municipal employee).

[14]*McCutcheon, ibid.* at 663, Linden J.

[15]See, for example, *Re Red Hot Video Ltd. and City of Vancouver* (1983), 5 D.L.R. (4th) 61, 24 M.P.L.R. 60, 48 B.C.L.R. 381 (S.C.); *Re Information Retailers Association of Metropolitan Toronto Inc. et al. and Metropolitan Toronto* (1985), 52 O.R. (2d) 449, 22 D.L.R. (4th) 161, 32 M.P.L.R. 49 (C.A.); *Re Francen et al. and City of Winnipeg* (1986), 28 D.L.R. (4th) 81, [1986] 4 W.W.R. 193 (Man. C.A.); *Lanoraie d'Autray* v. *Pelletier* (1986), 32 M.P.L.R. 25 (Que. S.C.); *Re Allen and City of Hamilton* (1987), 59 O.R. (2d) 498, 38 D.L.R. (4th) 303 (C.A.).

[16]*Retail, Wholesale and Department Store Union, Local 580 et al.* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 583 at 602, 33 D.L.R. (4th) 174, McIntyre J.

discrimination is different under section 15 of the *Charter* than under the traditional rules, as we shall suggest),[17] in which case the issue will be squarely put.[18] We shall assume in the following discussion that municipalities are subject to the *Charter*.

I. Recognition of Property Rights

As inheritors of the Western European legal tradition, Canadians as a whole, and the Canadian legal community in particular, have long recognized the basic sanctity of private property.

> Those who struggled to wrest power from the Stuart kings and placed it in the hands of the elected representatives of the people were not of a mind to replace one despot by another. Rather they were guided by a philosophy that placed a high premium on individual liberty and private property and that philosophy continues to inform our fundamental political arrangements — our Constitution.[19]

This tradition of respect for the institution of private property is reflected in recognition by both the legislature and the judiciary of rights of land ownership and of land use.

A. Land Ownership

1. Traditional Rules

The question of land ownership involves a consideration of the right to acquire property and the right not to have property taken away. At the risk of over-generalization, it is fair to say that protection of the right to acquire property has been traditionally left to private law, and that private law has been concerned with the reverse side of the coin — the right to alienate property — striking down restraints on alienation as contrary to public policy. A detailed consideration of such private law mechanisms is outside the scope of this paper, especially as the *Charter* would not appear to apply in disputes between individuals involving questions of private

---

[17]See, *infra*, text following note 79.

[18]For a general discussion of the relationship between delegation and the *Charter*, see *Davidson* v. *Slaight Communications* (1989), 93 N.R. 183 (S.C.C.) at 225 ff., Lamer J., as approved by Dickson J. at 189.

[19]*New Brunswick* v. *Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201 at 210, 144 D.L.R. (3d) 21 (C.A.), LaForest J.A.

law.[20] Such protective public intervention as did occur took place in the nineteenth century and was directed at reversing the general private law rules which severely restricted the extent to which foreigners could own real property.[21]

The right not to have property taken away, or expropriated, on the other hand, is protected by traditional public law rules in two different ways. Firstly, most expropriations are not effected by the legislature itself, but rather by subordinate bodies acting under authority given to them in their enabling legislation. As delegates of the legislature, these subordinate bodies have only those powers specifically given to them, which must be exercised in the manner indicated. Otherwise, their action will be struck down as outside their jurisdiction, or *ultra vires*. Secondly, the "strict construction" approach to expropriation statutes dictates that individuals shall not be deprived of their property without compensation unless the words of the statute clearly so demand. This has been used, for example, to deny that a statute required a taking[22] or to determine that it required compensation to be paid.[23]

It follows, therefore, that private property cannot be taken, or expropriated, in the absence of specific statutory authority. Admittedly, each province, and the federal government, has one or more expropriation statutes,[24] but the authority to expropriate therein recognized is surrounded by limitations as to who can expropriate, the purposes (normally public) for which property can be expropriated,[25] the procedure by which it can be expro-

[20]*Dolphin Delivery, supra*, note 16. This question is in fact hotly disputed: see, for example, D. Gibson, "The Charter and the Private Sector" (1982) 12 Man. L.J. 213; D. Lluelles & P. Trudel, "L'application de la Charte canadienne des droits et libertés aux rapports de droit privé" (1984) 18 R.J.T. 219; J. Whyte, "Is the Private Sector Affected by the Charter?" in L. Smith, ed., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 145; B. Slattery, "The *Charter*'s Relevance to Private Litigation: Does *Dolphin* Deliver?" (1987) 32 McGill L.J. 905.

[21]J. Spencer, "The Alien Landowner in Canada" (1973) 51 Can. Bar Rev. 389.

[22]*Estabrooks Pontiac, supra*, note 19 (seizure of property belonging to third party pursuant to tax lien).

[23]*Manitoba Fisheries Ltd.* v. *R.*, [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462. See, D.P. Jones, Case Comment (1978) 24 McGill L.J. 627 (compensation payable for loss of goodwill).

[24]See, for example, *Expropriation Act*, R.S.C. 1985, c. E-21; *Expropriation Act*, R.S.O. 1980, c. 148; *Expropriation Act*, R.S.Q. c. E-24.

[25]See, for example, *McIntyre Ranching Co. Ltd.* v. *Municipal District of Cardston No. 6* (1982), 20 M.P.L.R. 49 (Alta. Q.B.).

priated — including ample opportunity for affected individuals to be heard[26] — and the basis upon which compensation is to be calculated.[27] If the statutory requirements are not honoured, the expropriation in question will be struck down as *ultra vires.*

Looking more closely at the question of compensation, the statutes require that it be paid both for property actually taken and, in appropriate cases, for property remaining in the hands of the owner by way of damages for injurious affection. The compensation for property taken is calculated on the basis of "value to the owner" or, more recently and more generally, "market value" as of the date of possession. Courts have occasionally interpreted this latter phrase so as to award the expropriated party what might be termed "value to the taker", that is, a value higher than might otherwise have been obtained on the open market on the grounds that the use to which the expropriating party wished to put the property represented a "realized potentiality" for the property.[28] As well, in spite of the *Pointe Gourde* rule,[29] compensation awards have tended to include an amount representing a plus-value resulting from knowledge of the expropriation while at the same time disregarding any decrease in value that might be attributable to the aetions of the expropriating party itself, such as "planning blight" resulting from rumours of expropriation[30] or a down-zoning by the municipality.[31] In short,

---

[26]See, for example, *Costello* v. *Calgary (City of)*, [1983] 1 S.C.R. 14, 143 D.L.R. (3d) 385, [1983] 2 W.W.R. 673, 20 M.P.L.R. 170 (strict construction approach means failure to give proper notice to one co-owner vitiates expropriation procedure). See also *Re Trustees of St. Peter's Evangelical Lutheran Church and City of Ottawa*, [1982] 2 S.C.R. 616, 140 D.L.R. (3d) 577, 20 M.P.L.R. 121 (notice requirements of heritage protection legislation must be strictly complied with, even under liberal construction approach). See generally W.A. Sullivan, "A Re-Assertion of Individual Property Rights" (1983) 13 Man. L.J. 389.

[27]See generally E. Todd, *The Law of Expropriation in Canada* (Toronto: Carswell, 1976).

[28]See, for example, *Fraser* v. *R.*,[1963] S.C.R. 455, 40 D.L.R. (2d) 707; *Saint John's Priory of Canada Properties* v. *The City of Saint John*, [1972] S.C.R. 746, 27 D.L.R. (3d) 459, 4 N.B.R. (2d) 344.

[29]Named after a decision of the Privy Council in *Point Gourde Quarrying and Transport Co.* v. *Sub-Intendant of Crown Lands*, [1947] A.C. 565 (on appeal from the Supreme Court of Trinidad and Tobago), to the effect that compensation should not reflect increases in value resulting from prior knowledge of an expropriation, which does not appear to be generally followed in Canada. Note that some statutes specifically direct that any increase or decrease in value resulting from the proposed development itself be disregarded: see, for example, *Expropriation Act*, R.S.O. 1980, c.148, s. 14(4)(b).

[30]See, for example, *Kraft Construction Company Ltd.* v. *Metropolitan Corporation of Greater Winnipeg*, [1972] S.C.R. 289, 21 D.L.R. (2d) 677.

[31]D.F. Potter, "Compensation on Expropriation: The Effect of Zoning and Other Land Use Restrictions on the Award" (1977) 3 Dalhousie L.J. 775. See, for example, *Hauff* v. *Vancouver (City of)* (1981), 28 B.C.L.R. 276 (C.A.). But see *Vancouver (City of)* v. *Simpson* (1976), [1977] 1 S.C.R. 71, 65 D.L.R. (3d) 669, [1975] 1 W.W.R. 207.

the approach in almost every case would appear to favour the individual property owner.[32]

Moreover, the courts have on occasion admitted that regulation of the use of property can be so restrictive as to amount to an expropriation for which compensation must be paid,[33] although for most, if not all, land use control decisions this would not be the case.[34] As well, a zoning by-law cannot take effect retroactively so as to interfere with a property owner's acquired rights under existing zoning (non-conforming use) in the absence of some specific statutory provision to the contrary. In other words, while there are no acquired rights to existing zoning, there are acquired rights under it; if such rights are interfered with, this constitutes an expropriation for which, as a general rule, compensation must be paid.[35]

2. The Charter

The fact that any mention of the right to property was explicitly omitted from the final draft of the *Charter* makes it difficult to argue in favour of an implicit guarantee of such a right. Nevertheless, certain provisions of the *Charter* arguably afford a limited protection of the right to ownership.

One such possibility is section 6, which protects mobility rights. However, it has been held that the recognition therein of the right "to pursue the gaining of a livelihood in any province" is not directed towards the protection or preservation of property rights,[36] a conclusion which is supported by the legislative history of the section.[37]

---

[32]One notable exception denies compensation for injurious affection resulting from construction or use of public works on adjoining property when no land of the complainant has been expropriated: see, for example, *St. Pierre* v. *Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906, 39 D.L.R. (4th) 10; E. Todd, Case Comment (1988) 67 Can. Bar Rev. 357.

[33]*British Columbia* v. *Tener*, [1985] 1 S.C.R. 533, 17 D.L.R. (4th) 1; B. Barton, Case Comment (1987) 66 Can. Bar Rev. 145.

[34]Putting it more directly, a down-zoning is not a "taking" for which compensation must be paid. See, for example, *Re Salvation Army Canada East and Minister of Government Services* (1986), 53 O.R. 704, 42 R.P.R. 142 (C.A.). But see, *infra*, the text at note 61ff. Nor, on the other hand, is a property owner required to account for any "betterment" resulting from an up-zoning, although this attitude might change as a result of more frequent recourse to such techniques as bonus zoning, transfer of development rights and lot levies.

[35]See, for example, the *Charter of the City of Montreal*, S.Q. 1959-60, c. 102, s. 524(2)(b). But see *Oshawa (City of)* v. *505191 Ontario Ltd.* (1985), 54 O.R. 632 at 641, 32 M.P.L.R. 158 (C.A.) (legislation making "crystal clear" existing rights to be taken away without compensation), Goodman J.A.

[36]*Reference re Prince Edward Island Land Protection Act* (1987), 40 D.L.R. (4th) 1 at 15, 197 A.P.R. 249 (P.E.I.S.C., *in banco*), Mitchell J. [hereinafter cited to D.L.R.]. He also felt that the section did not protect economic rights.

[37]See text accompanying note 8, *supra*.

Another limited possibility is section 8, which protects against unreasonable search and seizure. The reference to unreasonable "search" could affect the way in which property inspectors, for example, must go about their tasks,[38] but the protection against unreasonable "seizure" has been held not to extend to the taking of property by expropriation.[39] Had the drafters wished to include a general guarantee of property, it was felt that they probably would have done so in section 7.[40]

Section 7 is the one most often referred to in connection with a right to property. It reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The immediate Canadian precursor of section 7 is section 1(a) of the *Canadian Bill of Rights*,[41] which recognizes without discrimination "the right of the individual to life, liberty, security of the person *and the enjoyment of property* [emphasis added], and the right not to be deprived thereof except by due process of law". Section 1(a), in turn, was modelled on the American Bill of Rights, the Fourteenth Amendment of which provides:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws... [42]

(The Fifth Amendment, which applies at the federal level, is to substantially the same effect.) As we have seen, various drafts of the *Charter* did include a guarantee of the right to property in section 7, following these earlier models, but this was consciously omitted from the final version.

Given this legislative history, it is difficult to affirm that the guarantee in section 7 of the right to "life, liberty and security of the person" includes

---

[38]*R.* v. *Bichel* (1986), 33 D.L.R. (4th) 254, [1986] 5 W.W.R. 262 (B.C.C.A.) (building by-law authorizing inspector to enter at all reasonable times to inspect for compliance with by-law not in contravention of s. 8). See generally *Hunter et al.* v. *Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

[39]*Re Becker and Alberta* (1983), 45 A.R. 36, 148 D.L.R. (3d) 539 (C.A.). It has also been held not to prevent a municipality from causing the removal of a number of scrap objects left on a lot in contravention of a zoning by-law:see *Re Allen and City of Hamilton, supra*, note 15.

[40]*Becker, ibid.*, at 543 citing F. Chevrette in W.S. Tarnapolsky & G.A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) at 298.

[41]*Supra*, note 4.

[42]*Supra*, note 3.

property rights *per se*, although that position was taken on one occasion.[43] And after some initial hesitation, most courts also now recognize that it does not encompass the broader proprietary notion of commercial or economic rights, such as the right to operate amusement devices.[44]

Nevertheless, it might very well be that section 7 does protect a more limited right to property which would come into play in certain circumstances.[45] This possibility was recognized by Mr. Justice Mitchell in *Reference re Prince Edward Island Lands Protection Act*.[46] While he agreed with the other members of the Court of Appeal that section 7 is not concerned with economic rights and does not protect a right to acquire property for its own sake, in his opinion:

> That does not mean that s. 7 has no property content at all but it does mean that any such content must fall within the context of one or another of the expressed rights. Any rights respecting property must be found within one or another of the concepts of "life", "liberty" or "security of the person".[47]

In this way, the right to "liberty" would include some measure of protection in regard to property already acquired so that, for example, the list of prop-

---

[43]*New Brunswick* v. *Fisherman's Wharf Ltd.* (1982), 135 D.L.R. (3d) 307, 105 A.P.R. 42 (N.B.Q.B.) (right to "security" includes property rights); aff'd on other grounds *sub nom. New Brunswick* v. *Estabrooks Pontiac Buick Ltd.*, *supra*, note 19. But see *contra*, particularly *Manicom* v. *County of Oxford* (1985), 52 O.R. 137, 21 D.L.R. (4th) 611 (Div. Ct.) (objection to proposed landfill waste disposal site involved claim to property rights not protected by s. 7); *Re Appotive and City of Ottawa* (1985), 16 O.M.B.R. 316 (Ont. H.C.) (interim control zoning by-law not offending *Charter* as s. 7 probably does not include property rights and in any event restrictions reasonable). See also *Qually* v. *Qually*, [1987] 2 W.W.R. 553 at 558 (Sask. Unif. Fam. Ct.), (aff'd [1989] 2 W.W.R. 268 (Sask. C.A.)) (matrimonial property statute not offending s. 7) in which Dickson J., in commenting on the *Fisherman's Wharf* decision, observed: "In my opinion, Parliament did not intend that the courts should be free to expand the list of rights protected by the Charter by giving a broad interpretation to the words chosen by the drafters. ... The words of Parliament must be given their ordinary meaning, not some fanciful and imaginative scope that would encourage resourceful counsel and sympathetic judges to make up whatever deficiencies they perceive in the existing list of protected rights".

[44]*Re Francen*, *supra*, note 15. But see *contra*, for example, *Re D. & H. Holdings Ltd. and City of Vancouver* (1985), 21 D.L.R. (4th) 230, 64 B.C.L.R. 102 (S.C.) (failure to issue business licences to hotel proprietor held infringement of liberty under s. 7). For a full discussion of the relationship between property rights, economic rights and s. 7, see *Wilson* v. *Medical Services Com'n of B.C.* (1989), 53 D.L.R. (4th) 171, [1989] 2 W.W.R. 1, 30 B.C.L.R. (2d) 1 (C.A.), and the cases cited therein.

[45]J. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983) 13 Man. L.J. 455.

[46]*Supra*, note 36. The *Prince Edward Island Lands Protection Act*, S.P.E.I. 1982, c. 16, limits the aggregate land holdings that may be acquired as of right by individuals (1000 acres) and corporations (3000 acres) within the province to avoid concentration of lands, particularly agricultural lands.

[47]*Ibid.* at 16.

erty exempt from seizure for debt could not be overly restrictive.[48] As well, the concept of "security" of the person would include the right "to acquire such property, including land, as becomes necessary ... to enjoy in full measure the guaranteed right to security of the person".[49]

The Supreme Court of Canada has made it clear that the expression "fundamental justice" in the phrase "except in accordance with the principals of fundamental justice" has a substantive as well as a procedural element.[50] Assuming that section 7 does afford an admittedly circumscribed measure of protection to land ownership, this means that this section does more than constitutionally entrench, say, a right to a hearing. It also gives the courts an opportunity to evaluate the content of legislation and related enactments to determine, for example, whether or not they offend the limited recognition of property rights outlined above.

A final possible *Charter* source protective of property rights is section 26, which provides as follows:

> The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada.

This "undeclared rights" section was included to make it clear that the *Charter* does not take away existing rights or freedoms not specifically mentioned in it, such as the right to property. While it is true that this section does not operate so as to give such rights a more extensive guarantee than they might otherwise have,[51] it has had the effect of enhancing the status of other human rights instruments which themselves guarantee the undeclared rights. As Beetz J. remarked in *Re Singh and Minister of Employment and Immigration:*

> Thus, [section 26 ensures that] the *Canadian Bill of Rights* retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or *quasi*-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights

---

[48]Ontario's *Execution Act*, R.S.O. 1980, c. 146, s.2, for example, currently exempts $1000 clothing, and $2000 of furniture, food, fuel and other household goods for the debtor and family.

[49]*Reference re Prince Edward Island Lands Protection Act, supra*, note 36, at 17.

[50]*Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, 24 D.L.R (4th) 536, [1986] 1 W.W.R. 481. The drafters of the Charter clearly intended the more restrictive interpretation: see Whyte, *supra*, note 45, at 456-62.

[51]P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 703-04. But see, *contra*, *New Brunswick* v. *Fisherman's Wharf, supra*, note 43, criticized G.J. Brandt, Comment (1983) 61 Can. Bar Rev. 398.

> and freedoms. But this beneficial result will be lost if these instruments fall into neglect. It is particularly so where they contain provisions not to be found in the *Canadian Charter of Rights and Freedoms* ...[52]

Section 26 thus affords an indirect, and admittedly attenuated, protection of the right to property to the extent that such a right is enshrined in these other human rights instruments.[53]

B. Land Use

1. Traditional Rules

A number of private law mechanisms protect an individual landowner's use of land by limiting the extent to which other persons may interfere with it. Nuisance (a precursor of zoning), trespass and, in the civil law system, abuse of rights are examples but, again, their consideration is beyond the scope of this paper.

More important for present purposes are the range of public law rules that limit and control the extent to which public officials can interfere with an owner's rights of user. Some of these rules are statutory and others judicial. As with expropriations,[54] judicial intervention is grounded in two separate notions. The first is the concept of *ultra vires*. Municipal governments, although democratically elected, are technically subordinate bodies and their actions are subject to the same scrutiny as other subordinate bodies to ensure that they are acting within their jurisdiction, or *intra vires*. The concept of *ultra vires* is reinforced by the second notion, the "strict construction" approach, which treats land use control decisions as limitations on the rights of property owners, to be construed so as to interfere as little as possible with such rights. Although the strict construction approach is invoked less uniformly in regard to land use control decisions than to other municipal actions that interfere more directly with property rights (such as expropriation or demolition orders), recourse to it increases the chances that a land use control decision will be held *ultra vires* or at least inapplicable.[55]

The extent to which both legislation and judicial decisions respect private property rights can be illustrated by a number of procedural and substantive examples.

---

[52]*Supra*, note 10, at 224, Beetz J.

[53]See, *supra*, the text at notes 4 *ff.* and 41 *ff.*

[54]See *supra*, the text following note 21.

[55]See, for example, *Oakwood Development Ltd.* v. *Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164, 20 D.L.R. (4th) 641, 31 M.P.L.R. 1 (subdivision control curtailment of common law rights).

(i) Procedural protection

Land use control legislation of all provinces gives ample opportunity to be heard to individuals affected by a planning decision, especially the owners of property directly affected but also, more recently and more generally, the residents of the area in question or the community as a whole. A particularly vivid example is Quebec's referendum procedure, which gives individuals a collective veto over zoning decisions affecting them. Such individuals may request that a zoning amendment be put to a public vote, and if enough of them do so, then the by-law must be approved by the majority of those voting before it is effective. This procedural protection was originally reserved to property owners, but in 1979 it was extended to include tenants.[56]

Statutory procedural protection is jealously guarded by the courts, which strike down instruments that have been adopted in disregard of either their letter[57] or their spirit.[58] As well, courts have been quick to import a right to be heard in situations in which the statute is silent: more traditionally, when the decision-making body is acting in a quasi-judicial capacity and is bound therefore to follow the rules of natural justice, including the rule *audi alteram partem*;[59] or more recently and more generally, when an individual's rights are being interfered with (whether or not the decision-making body in question is acting quasi-judicially) so as to require that it act with procedural "fairness" which, at a minimum, includes the right to be heard.[60]

---

[56]See previously *Cities and towns act*, R.S.Q. 1964, c. 193, s. 426(1); replaced by *Act respecting land use planning and development*, R.S.Q., c. A-19.1, s. 131. See now *Act respecting elections and referendums in municipalities*, S.Q. 1987, c. 57, s. 514ff. The Ontario Municipal Board also serves to protect the interests of surrounding property owners.

[57]See, for example, *Re Little and Cowichan Valley Regional District* (1978), 94 D.L.R. (3d) 417, 8 B.C.L.R. 369 (C.A.) (statutory requirement that notice of zoning by-law public hearing be published in "newspaper" not satisfied by publication in weekly news publication without regular subscription list).

[58]See, for example, *Legault* v. *Ville de Fabreville et Fury Speed Way Co. Ltd* [1963] C.S. 166 (statutory requirement of presenting by-law to public meeting not satisfied by simple reading of same without discussion).

[59]See, for example, *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512, 51 D.L.R. (2d) 754.

[60]*"The Village" Mobile Home Estate Ltd.* v. *British Columbia* (1982), 142 D.L.R. (3d) 742, 41 B.C.L.R. 189 (C.A.) (procedural fairness gives owner of land proposed for inclusion in already established agricultural land reserve right to be heard); but see *Delsom Estates Limited* v. *Corporation of Delta* (1981), 26 B.C.L.R. 263 (S.C., in Chambers) (concept of proccdural fairness inapplicable to legislative function of adopting development cost charges by-law of general application). See generally R.A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law", Part I (1980) 25 McGill L.J. 520, Part II (1981) 26 McGill L.J. 1.

(ii) Substantive protection

A number of traditional rules restrict the extent to which an owner's rights over land can be restricted by a decision of a public authority, the most important of which is the rule already canvassed that a subordinate decision-making body, which includes a municipality, cannot exceed the powers delegated to it in its enabling legislation. One good example of this is the rule that a power to regulate does not include a power to prohibit, so that a municipality cannot use its zoning power, which is normally couched in terms of regulation, to prohibit the use of land in the absence of specific statutory authority to this effect.[61] Nor will the courts normally uphold by-laws that are prohibitory in effect although regulatory in form.[62] In the same vein, courts have usually, but not always, struck down by-laws zoning land for a public purpose, such as a park, on the ground that this represents "disguised expropriation" and hence is an invalid exercise of the zoning power.[63] Another example is the acknowledgement that by-laws can be struck down as unreasonable[64] or, in what is perhaps just another way of expressing the same thing, are arguably subject to a general requirement of "substantive fairness".[65]

---

[61]See, for example, *R.* v. *Gibson; Ex parte Cromiller*, [1959] O.W.N. 254; *Labelle* v. *St-Laurent (Cité de)* (1979), 10 M.P.L.R. 251 (Que. S.C.) (by-law enacted under regulatory power prohibiting use of trailers as homes invalid); *Duquette* v. *Port Alberni* (1977), 3 M.P.L.R. 177 (B.C.S.C.) (by-law prohibiting any building within 100 feet of river on land otherwise zoned residential invalid). This argument is often used in regard to licensing powers: see *Toronto (City of)* v. *Virgo*, [1896] A.C. 88 (J.C.P.C.) (by-law restricting street peddlers from central business district prohibitory in effect) and, for a more modern application, *Prince George (City of)* v. *Payne* (1977), [1979] 1 S.C.R. 458, 75 D.L.R. (3d) 1, [1977] 4 W.W.R. 275 (refusal of business license for adult boutique prohibitory).

[62]See, for example, *Dorval* v. *Sanguinet Automobile Ltée*, [1960] B.R. 706 (general zoning by-law making property unusable inapplicable). But see *contra, Soo Mill and Lumber Co. Ltd.* v. *Sault Ste Marie (City of)*, [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1 (by-law upheld even though prohibitory in effect).

[63]See, for example, *Sula* v. *Duvernay (Citê de)*, [1970] C.A. 234 ; *Aubry* v. *Trois-Rivières Ouest (Ville de)* (1978), 4 M.P.L.R. 62 (Que. C.A.). See *contra, Regina Auto Court* v. *Regina (City)* (1958), 58 W.W.R. 167 (Sask. Q.B.); *Barrett Lumber Co. Ltd.* v. *Halifax County*, (1975) 19 N.S.R. (2d) 594 (S.C., T. D.) (rezoning land for garbage dump valid). See also *Vancouver (City of)* v. *Simpson, supra*, note 31 (upholding officer's refusal to approve subdivision proposal on ground that against public interest as would render later acquisition of land for park more costly - valid exercise of discretion).

[64]*Bell* v. *R.*, [1979] 2 S.C.R. 212 at 222, 98 D.L.R. (3d) 255, Spence J.:"I also realize that the doctrine of unreasonableness permitting the declaration of invalidity as to municipal by-laws has, by virtue of the provisions set out in the *Municipal Act*, lately been very much limited but I point out that even as limited the doctrine still exists . . .". But see *Re Francen, supra*, note 15 at 91, Matas J.A.

[65]See generally D. Mullan, "Natural Justice and Fairness — Substantive as well as Procedural Standards for the Review of Administrative Decision-Making" (1982) 27 McGill L.J. 250, who counsels caution in regard to the notion of "substantive fairness".

Yet another example is the extent to which courts will strike down zoning by-laws as discriminatory. As a general rule, a municipality cannot discriminate in the exercise of its regulatory powers; it must exercise them by enacting general regulations of uniform application.[66] The difficulty in applying this rule to zoning by-laws, however, is that discrimination is the essence of zoning.

> The mere delimitation of the boundaries of the area affected by such a by-law involves an element of discrimination. On one side of an arbitrary line an owner may be prevented from doing something with his property which another owner, on the other side of the line, with a property which corresponds in all respects except location, is free to do.[67]

For this reason, comprehensive or general zoning by-laws covering a wide area of a municipality are not regarded as discriminatory so long as each property within the zone is treated in the same way. Spot zonings which single out, explicitly or even implicitly, one or more lots owned by the same person for unfavourable treatment (a down-zoning), on the other hand, can be struck down as discriminatory if other similar property in the vicinity is not down-zoned at the same time[68] or if there are no proper planning grounds to warrant the down-zoning.[69] On the other hand, spot up-zonings are generally free from attack by neighbouring landowners or commercial rivals.[70]

2. The *Charter*

Most commentators agree that the equality rights provision of the *Charter* is the most likely source of challenge to municipal action in the field of land use planning, particularly in view of the fact that in both the

---

[66]See, for example, *Re Dickie Dee Ice Cream Ltd. and City of Winnipeg* (1985), 28 D.L.R. (4th) 33, 40 Man. R. (2d) 72, 31 M.P.L.R. 109 (C.A.) (by-law permitting food hawkers in all areas of municipality except one discriminatory); *Re Francen, supra*, note 15 (by-law exempting amusement devices in beer parlours etc. from general licensing requirements discriminatory).

[67]*Townships of Scarborough* v. *Bondi*, [1959] S.C.R. 444 at 451, 18 D.L.R. 161, Judson J.

[68]See, for example, *Re Dillabough and Township of Esquimalt* (1967), 62 D.L.R. (2d) 653 (B.C.S.C.).

[69]See, for example, *Re H.G. Winton Ltd. and Borough of North York* (1978), 20 O.R. (2d) 737, 88 D.L.R. (3d) 733, 6 M.P.L.R. 1 (Div. Ct) (by-law prohibiting use of Mazo de la Roche mansion as Zoroastrian temple).

[70]See, for example, *Re North York Township*, [1960] O.R. 374, 24 D.L.R. (2d) 12 (C.A.); *Re Mississauga Golf and Country Club* (1963), 2 O.R. 625, 40 D.L.R. (2d) 673 (C.A.); *Cohen* v. *Calgary and Carma Developers* (1967), 64 D.L.R. (2d) 238, 60 W.W.R. (N.S.) 720 (Alta S.C., Trial Div.).

American and Canadian Bills of Rights, the guarantee of property rights is textually linked to equality rights.[71]

Equality rights are guaranteed under section 15 of the *Charter*, subsection (1) of which provides as follows:

> Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Its application requires a two-step analysis: a determination , firstly, that the distinction in question results in a violation of at least one of the equality rights and, secondly, that the distinction is discriminatory in purpose or effect.[72]

The wide-ranging, albeit somewhat cumbersone, articulation of the equality rights ("equal before the law and under the law", "equal protection and equal benefit of the law") means that the protection afforded by section 15 extends to substantive as well as procedural matters. This conclusion was easier to reach in regard to this section than to section 7, as the legislative history of the later section makes it clear that the phrase "equal under the law" was added to "before the law" to ensure equality in respect of the substance of the law as well as its administration.[73]

The second requirement, that the distinction be discriminatory in purpose and effect, is the more difficult one. It emphasizes that not every distinction, no matter how reasonable, constitutes "discrimination" under section 15: the word must be understood in its pejorative sense, so as to limit application of the section to those distinctions which involve prejudice or disadvantage.[74] This would be most obviously the case where the distinction is based on one of the express grounds enumerated in the section itself (race, national or ethnic origin, colour, religion, sex, age or mental or

---

[71]See *supra*, the text at note 41ff. Arguments based on s. 7 might also be advanced, but they face the objection canvassed earlier (*supra*, the text at note 43ff.) that this section does not protect property rights: see, for example, *Alcoholism Foundation of Manitoba* v. *Winnipeg (City of)*, [1988] 6 W.W.R. 440 (Man. Q.B.).

[72]*Turpin* v. *R.*, [1989] 1 S.C.R. 1296 at 1330; *Andrews* v. *Law Society of British Columbia* [1989], 1 S.C.R. 143 at 181, 56 D.L.R. (4th) 1, 91 N.R. 255 [hereinafter *Andrews*, cited to S.C.R.].

[73]Hogg, *supra*, note 47 at 798. The expression 'equality before the law" found in s. 1(b) of the *Canadian Bill of Rights*, the forerunner of s. 15, had been held by the Supreme Court of Canada to guarantee equality in the administration of law only: *Attorney-General of Canada* v. *Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481.

[74]*Andrews*, *supra*, note 72 at 180-81, McIntyre J. The Court in that case rejected an approach involving a consideration of the unreasonableness or unfairness of the provision in question, which was felt would unduly restrict the role of section 1: 179-80. See the text accompanying note 99, *infra*.

physical disability). In the field of land-use planning, section 15 thus supplements similar protection usually afforded under the traditional rules except where the discrimination is the direct result of legislation. As one Court has observed:

> [O]ur law does not permit municipal by-laws to be used as instruments of intolerance and oppression. ... It is not the function of municipal councils through the medium of zoning by-laws, or otherwise, to strive to forestall the practices of a particular religious faith.[75]

Other land use decisions might be open to attack under section 15 as constituting discrimination on implied grounds, since the words "in particular" make it clear that the list of express grounds in the section is illustrative and not exhaustive. Even under the limited notion suggested by Mr. Justice McIntyre in the *Andrews* case[76] that such grounds must be analogous to the enumerated grounds, in the sense of being based on grounds relating to personal characteristics of the individual or group affected, it is arguable that non-resident ownership legislation offends section 15 as constituting discrimination on grounds of "residence", for example;[77] or that legislation restricting to property owners a right to vote on a municipal by-law offends section 15 as constituting discrimination on grounds of "property-ownership";[78] or that zoning by-laws limiting occupancy to persons related by marriage or consanguinity discriminate on the grounds of "family status". Similar protection is obviously not available under traditional rules where the discrimination is legislative in origin. Nor would it appear to be readily available, unlike discrimination on the express grounds, where it flows from actions of subordinate authorities. The last example, for instance, was struck down by the Court not on grounds of discrimination, but on

---

[75]*Re Hutterian Bretheren Church of Eagle Creek Inc. and Rural Municipality of Eagle Creek No 376* (1983), 144 D.L.R. (3d) 685 at 700, 21 M.P.L.R. 108, 21 Sask. R. 361 (C.A.), Tallis and Cameron JJ.A. (by-law permitting maximum of two single-family dwellings on one agricultural holding interpreted to permit establishment of communal farm). See also *Re H.G. Winton Ltd. and Borough of North York, supra*, note 69 (by-law designed to prohibit Zoroastrian temple void as adopted in bad faith). But see, for example, *The Communal Property Act*, S.A. 1947, c. 16 (limiting extent of landholdings of especially Hutterite and Doukhobor colonies); upheld *Walter* v. *A.G. Alberta*, [1969] S.C.R. 383, 3 D.L.R. (3d) 1, 66 W.W.R. 513; repealed S.A. 1972, c. 103 for reason that probably contravening *Alberta Bill of Rights*, S.A. 1972, c. 103 for reason that probably contravening *Alberta Bill of Rights*, S.A. 1972, c. 1 (now R.S.A. 1980, c. A-16).

[76]*Supra*, note 72 at 182.

[77]See, for example, *Act respecting the acquisition of farm land by non-residents*, R.S.Q., c. A-4.1; *Prince Edward Island Lands Protection Act*, S.P.E.I. 1982, c. 16; *The Saskatchewan Farm Ownership Act*, R.S.S., c. S-17; *Farm Lands Ownership Act*, S.M. 1982-83-84, c. 22.

[78]Note in this regard that art. 26 of the United Nations Covenant on Civil and Political Rights, of which Canada is a signatory, prohibits discrimination on the grounds of "property" [but in French "*fortune*"]; an Optional Protocol to which Canada adheres permits individual petitions (complaints) to an international enforcement agency.

grounds of unreasonableness — and only then after considerable hesitation.[79]

Still other land use decisions might constitute examples of what has been termed "freestanding" discrimination, that is, discrimination unrelated to any particular ground.[80] This possibility was explicitly left open by Mr. Justice La Forest in the *Andrews* case (although he counselled caution in regard to its use):

> I realize that it is no easy task to distinguish between what is fundamental and what is not and that in this context this may demand consideration of abstruse theories of equality. *For example, there may well be legislative or governmental differentiation between individuals or groups that is so grossly unfair to an individual or group and so devoid of any rational relationship to a legitimate state purpose as to offend against the principle of equality before and under the law as to merit intervention pursuant to s. 15.* ... Assuming there is room under s. 15 for judicial intervention beyond the traditionally established and analogous policies against discrimination discussed by my colleagues, it bears repeating that considerations of institutional functions and resources should make courts extremely wary about questioning legislative and governmental choices in such areas.[81]

This is probably the most important way in which the protection afforded by section 15 would be wider than that available under the traditional rules, and could result in municipal actions being attacked in situations the traditional rules do not reach.

Freestanding discrimination is said to be present either where some members of a class are treated differently from other members of the same class, without any apparent reason for the distinction,[82] or where the entire class is treated similarly but the class itself is singled out for special treatment for reasons based upon an unwarranted stereotype about the capacities and

---

[79]*Bell* v. *R.*, *supra*, note 64.

[80]M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Sup. Ct L. Rev. 131 at 145-46.

[81]*Andrews, supra*, note 72 at 194 [emphasis added]. The other members of the Court also cautioned against unduly restricting the definition of discrimination so as to prejudice decisions in future cases: at 153, Wilson, J. and at 175, McIntyre, J.

[82]The difficulty, of course, is the definition of the class, as cases dealing with the three-month limitation period in tort actions against a municipality attest: the limitation period was struck down as discriminatory when the class was defined widely ("plaintiffs in a negligence action"), but upheld when it was defined narrowly ("plaintiffs in a negligence action against a municipality"): *Streng* v. *Winchester (Township of)* (1986), 56 O.R. (2nd) 649, 31 D.L.R. (4th) 734 (H.C.) (legislation discriminatory); *Meldrum* v. *Saskatoon (City of) et al.* (1986), 46 Sask. R. 239 (Q.B.); *Mirhadizadeh* v. *Ontario* (1986), 57 O.R. (2d) 441, 33 D.L.R. (4th) 314 (H.C.); *Rosati* v. *Niagara Falls (City of)* (1987), 60 O.R. 474, 35 M.P.L.R. 86 (Dist. Ct) *Colangelo* v. *Mississauga (City of)* (1988), 53 D.L.R. (4th) 283, 39 M.P.L.R. 209 (Ont. C.A.) (legislation valid). See also *Re 538745 Ontario Inc. and City of Windsor* (1988), 49 D.L.R. (4th) 108 (Ont. C.A.) (by-law restricting location of adult boutiques not offending s. 15).

roles of members of that class.[83] An example of the latter might be the Court's classification of Ontario's rent-control legislation as "anti-gouging" legislation, thereby implicitly labelling the class of "landlords" as "gougers".[84] The word "developer" can also on occasion have a similar pejorative ring. The former — that is, differing treatment of members of a same class — is present when the class is designated in such a way that there is not an appropriate concordance, or "fit", between the class as designated and the legislative purpose to be attained. This occurs when the class is designated in either an "underinclusive" or an "overinclusive" fashion.[85]

"Underinclusiveness" occurs when the class as defined is too small to attain the purpose in question. One example relates to discrimination in the application of by-laws. Applying traditional rules, a decision not to enforce a zoning by-law against some persons does not preclude its enforcement against others.[86] Under the *Charter*, however, the discriminatory enforcement itself may be held to offend section 15; conversely, the decision not to enforce it may be so held in that it denies others (neighbours or commercial rivals) the right to equal protection under the law.

Another example involves spot up-zonings, which, as we have seen, usually escape the administrative law label of discriminatory. Section 15 could require the courts to be more sensitive to the objections of neighbours who bear the externalities of the spot zoning (such as noise and litter from a fast-food operation) or those of other owners of similarly situated properties who may complain that they were not afforded similar benefit (such as the so-called "store wars" cases relating to the location of regional shopping centres).[87]

Other examples of this second type of freestanding discrimination result from the class being drawn in an "overinclusive" fashion. Section 15 could apply to strike down a comprehensive zoning by-law, which has traditionally

---

[83]Gold, *supra*, note 80 at 147. Stereotyping as a possible ground for a section 15 challenge was accepted by McIntyre J., in the *Andrews* case at 309, citing Hugessen J.A. in *Smith, Kline & French Laboratories Ltd.* v. *A. G. Canada* (1986), [1987] 2 F.C. 359 at 369, 34 D.L.R. (4th) 584 [hereinafter cited to F.C.].

[84]*Triassic Holdings Ltd.* v. *Muirhead* (1983), 40 O.R. (2d) 651 (Div. Ct).

[85]J. Tussman & J. tenBroek, "The Equal Protection of the Laws" (1948-49) 37 Calif. L. Rev. 341. Mr. Justice McIntyre's discussion of this article in the *Andrews* case (at pp. 291 ff.) relates to the similarly situated test (that persons who are "similarly situated be similarly treated"). He rightly warns against a mechanical application of this test and stresses (at p. 294) the need to consider the content of the law, its purpose, its impact on those to whom it applies and those whom it excludes from its application. On the need to place the disposition in its larger context, see also *Turpin* v. *R.*, *supra*, note 72 at 1325. See, *supra*, the text at note 82.

[86]*Polai* v. *Toronto (City of)* (1972), [1973] S.C.R. 38, 28 D.L.R. (3d) 638 (existence of preferred list of persons against whom no action to be taken no bar in action against another).

[87]See, for example, *Cohen* v. *Calgary (City of) and Carma Developers*, *supra*, note 70.

been immune from attack on the grounds of discrimination, if its application to a particular piece of property results in the owner being denied equal benefit of the law. A good example of this is *City of Sillery* v. *Sun Oil Co. Ltd.*[88] In that case, the municipality wished to preserve the residential character of the shoreline and adopted a general zoning by-law designating all lands as residential except those lands acually being used for industrial uses, which were zoned industrial. The property in question, being vacant land and accordingly zoned residential, was sandwiched between two industrial lots, so that a residential use, although possible, was highly inappropriate. Nevertheless, the Court refused to interfere. Under the *Charter*, the zoning by-law would arguably be held invalid as discriminatory in that its effect was to treat similarly situated property differently without sufficient grounds for the difference — in other words, the class was designated in an over-inclusive manner so that there was not a "reasonable fit" between the class as designated and the purpose to be served.

One last question concerning this section is whether or not it applies to protect corporations, as well as individuals, from discriminatory action. Courts have held on a number of occasions that it does not[89] because the legislative history of the English version of the section indicates that the expression "every individual" was substituted for the wider "everyone" in early 1981 to make it clear, according to the marginal notes, "that this right would apply to natural persons only".[90] However, no similar change was made to the French version, which retained the word "*personne*" (which normally includes "*personne morale*"), and the marginal notes of the French version make no reference to any intention on the part of the drafters in this regard.[91] If section 15 does provide additional protection against discriminatory land use decisions over and above that afforded under traditional rules, as we have suggested, a decision to restrict its scope to individual applicants would be unfortunate as it is largely a matter of chance whether land is owned by an individual or a corporation.

II. Restrictions to Property Rights

Every society accepts that rights are not absolute, that some restrictions must necessarily be placed on the exercise of rights in the interests of other individuals or groups, or of society as a whole. The advent of the *Charter* has not changed this basic need.

---

[88][1964] S.C.R. 552, 45 D.L.R. (2d) 541.

[89]See, for example, *Re NKH Ltd. and Township of Verulam* (1987) 40 D.L.R. (4th) 306 (Ont. H.C.); see also *Institute of Edible Oil Foods* v. *Ontario* (1987), 47 D.L.R. (4th) 368 (Ont. H.C.), and the cases cited therein.

[90]Elliot, *supra*, note 6 at 38.

[91]See generally, G.D. Chipeur, "Section 15 of the Charter Protects People and Corporations — Equally" (1985-86) 11 Can. Bus. L.J. 304.

Under both the traditional rules and the *Charter*, these restrictions are either reflected in judicial decisions or imposed by the legislature.

A. Judicial Interpretation

1. Traditional Rules

We have already made reference to the traditional attitude of the courts to decisions affecting land ownership and use as being limitations on rights of landowners and the importance attached to a restrictive interpretation of them.[92] The strict construction approach is thus protective of property rights.

The opposite approach is to regard such instruments as being adopted in the public interest and hence to be construed so as to be given effect as much as possible — to be construed, if not liberally,[93] at least neutrally.[94] The liberal construction approach, which we have suggested is invoked more often in regard to decisions relating to the use of land than to its ownership,[95] is thus restrictive of property rights.

Along the same line, some courts have recently adopted a policy of deferring where possible to the decisions of specialized agencies, which have a particular knowledge and experience that courts of general jurisdiction lack.[96] This attitude of "curial deference", as it is called, favours the upholding of administrative land use decisions and, correspondingly, a validation of restrictions on individual property rights.

2. The Charter

Despite their entrenchment, rights recognized in the *Charter* are not absolute. Their restricted nature is on occasion recognized in the definition itself, as in section 8 which protects only against "unreasonable" search and seizure. It can also result from judicial interpretation, as we have already noted in regard to section 15.[97] Courts are loathe, for example, to hold that

---

[92]See *supra*, the text at notes 22 and 55.

[93]*Soo Mills Lumber Co. Ltd.* v. *Sault Ste Marie (City of)*, *supra*, note 62.

[94]*Bayshore Shopping Centre Ltd.* v. *Nepean (Township of)*, [1972] S.C.R. 755, 25 D.L.R. (3d) 443; *Re Trustees of St. Peter's Evangelical Lutheran Church and City of Ottawa*, *supra*, note 25.

[95]See, *supra*, the text at note 55.

[96]See, for example, *Canadian Union of Public Employees Local 963* v. *New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417; *Re City of Whitehorse and Government of Yukon* (1988), 52 D.L.R. (4th) 749 (Y. T. C.A.).

[97]See, for example, *R.* v. *Century 21 Ramos Realty Inc.* (1987), 58 O.R. (2d) 737 at 760-62, 37 D.L.R. (4th) 649 (C.A.) at 672-674, and the cases cited therein.

any distinction, no matter how reasonable, violates section 15 and thus insist that the distinction be pejorative, or at least unfair and unreasonable, before holding it to be a violation of the right to equality. The difficulty with this approach, as the Supreme Court of Canada noted in the *Andrews* case,[98] is that if it is pursued with vigour, it leaves a very limited role for section 1 of the *Charter*.[99]

Section 1, which has no counterpart in the American Bill of Rights, is an explicit recognition of the need for moderation in the recognition of rights. It reads as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In suggesting that a limitation or restriction on rights is saved by section 1, the proponents of the provision must show both that the limitation is "demonstrably justified in a free and democratic society" and that it has been "prescribed by law".[100]

(i) Demonstrably justifiable in a free and democratic society

Obviously, legislative authorization does not of itself make a restriction "demonstrably justifiable in a free and democratic society", although this is undoubtedly a factor to be weighed.

> Where such a [freely and popularly elected] legislature has clearly and consciously made a deliberate choice, some degree of judicial deference and restraint is indicated. That degree will be greatest where the categories are found in the very text of the legislation and will diminish as they, and the alleged inequalities flowing from them, become further removed from the expression of legislative will, either by delegation or indirection. Even where the legislative will is clear and direct, room will, of course, remain for judicial intervention to prevent the tyranny of the majority, but the likelihood will surely be greater where the perceived injustice is the result of inadvertance, inattention or abuse by subordinates.[101]

This approach would suggest a hierarchy of land use controls: those imposed directly by legislation (such as Quebec's statutory delineation of the first

---

[98]*Supra*, note 72 at 181-82, McIntyre J.

[99]For a discussion of the relationship between "definitional balancing" and "*ad hoc* balancing" (or balancing under s. 1), see S.R. Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms" (1987) 25 Osgoode Hall L.J. 1 at 21ff.

[100]The tendency to import a notion of "reasonableness" into the definition of each right, thereby reducing the need to refer to s. 1, could result in these requirements, particularly the second, being overlooked.

[101]*Smith, Kline & French Laboratories Ltd.* v. *A. G. Canada, supra*, note 83 at 369, Huggessen J..

agricultural region)[102] would receive more sympathetic scrutiny than would zoning by-laws adopted under the authority of enabling legislation; comprehensive zoning by-laws, as legislative acts of an elected municipal council, would be more favourably received than spot amendments, often legislative in form alone; spot amendments in turn would benefit, because of their (admittedly limited) legislative nature, from a presumption in their favour more than would discretionary decisions by appointed officials.

On a less formalistic level, the "demonstrably justifiable" requirement implies an identification of the objective or purpose to be served by the provision in question, a consideration of whether such an objective is appropriate in a free and democratic society, and an evaluation of the reasonableness of the means chosen to achieve it.[103] It requires, in other words, a balancing of purpose and effect. Weak or marginal purposes with significant negative effects will fall whereas strong purposes may justify more drastic effects. To return to the *City of Sillery* v. *Sun Oil Co. Ltd.*[104] example, the purpose of protecting the residential character of a shoreline was laudable, but the obvious negative effect on the individual owner of a lot zoned residential sandwiched between two industrial uses would seem out of all proportion to the purpose to be served.

(ii) Prescribed by law

The second requirement under section 1 is that the restriction in question be "prescribed by law". This was introduced in the Charter specifically to limit the extent to which rights can be restricted.[105] While it has not been considered as extensively as the preceding requirement, it was invoked by the Ontario Divisional Court as a ground for striking down Ontario's film censorship scheme:

> The Charter requires reasonable limits that are prescribed by law; it is not enough to authorize a Board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as "law". It is accepted that law cannot be vague, undefined and totally discretionary. Any limits placed on the freedom of expression cannot be left

[102]*Act to preserve agricultural land*, R.S.Q., c. P-41.1.

[103]*R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 352, 18 D.L.R. (4th) 321, Dickson J. See also *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 138, 26 D.L.R. (4th) 200 and *Andrews*, *supra*, note 72 at pp. 153ff., Wilson J..

[104]See *supra*, note 88.

[105]Elliot, *supra*, note 6 at 24.

> to the whim of an official; such limits must be articulated with some precision or they cannot considered to be law.[106]

In this light, the "prescribed by law" requirement suggests that the grounds upon which a municipality exercises its land use control powers must be set out in advance if any potentially discriminatory use of them is to be justified. This would appear to be done in regard to the more flexible "permit" (or development control) systems, which the legislatures, fearful of their potentially discriminatory or arbitrary nature, have surrounded with a number of explicit checks and balances. In most, if not all, cases, the grounds upon which an administrative official can exercise discretion are clearly articulated in the legislation itself or in supporting regulations. Ontario's *Planning Act*, for example, provides that when considering a draft plan of subdivision, the Minister shall consider: the effect of the development on matters of provincial interest; whether it is premature or in the public interest; its conformity to the official plan; suitability of the land; the public road pattern; the size and shape of lots; proposed building restrictions; natural resources conservation; municipal services; schools; park and other areas; and energy conservation in layout.[107] It was probably with this in mind, although the matter was not specifically referred to, that the Court in *Re Brown and City of Vancouver*[108] placed so much emphasis on the legislative requirements, the content of the official plan, and related regulations and guidelines in deciding that adoption of a development-by-permit system for an area in Shaunessy did not offend section 15 of the *Charter*.

On the other hand, more traditional spot zoning might be less easy to support in this regard in that the statutes themselves are usually less detailed in their requirements. They were drafted with less discriminatory, comprehensive or general zoning by-laws in mind, and the need to surround the exercise of an essentially legislative jurisdiction by a democratically elected body with a network of checks and balances was less apparent. This problem is particularly acute in Ontario where the Ontario Municipal Board has interpreted and applied the Court of Appeal's decision in *Re Hopedale and Town of Oakville*[109] as an absolute prohibition against the formulation of

---

[106]*Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 41 O.R. (2d) 583 at 592, 147 D.L.R. (3d) 158 (Div. Ct) (*per curiam*); aff'd (1984), 45 O.R. (2d) 80, 5 D.L.R. (4th) 766 (C.A.). See also Peck, *supra*, note 99 at 54ff.

[107]S.O. 1983, c. 1, s. 50(4).

[108](1986), 24 D.L.R. (4th) 434 (B.C.S.C., in Chambers). Similarly, the holding by-law mechanism at issue in *Soo Mills and Lumber Co. Ltd.* v. *Sault Ste-Marie (City of)*, *supra*, note 62, would probably also be upheld in an application under the *Charter*.

[109][1965] 1 O.R. 259 at 265, 47 D.L.R. (2d) 482 (C.A.). The Court in that case in fact said: " To lay them down as principles by which the Board would be guided may therefore be both reasonable and wise but to say that the appellant *must* comply with them before the Board will allow the application is clearly wrong and the Board, if it so fettered its jurisdiction, would be in error", McGillivray J.A.

general principles by which it and parties to land use controversies could be guided.[110]

B. Legislative Override

1. Traditional Rules

Under a regime of absolute parliamentary sovereignty, as existed in Canada before 1982, the traditional protection afforded to private property can be specifically overridden by statute. For example, statutory restrictions can be placed on the extent to which non-residents or, more recently, anyone at all might acquire prime agricultural or recreational land;[111] property can be expropriated by statute for a private purpose or without any compensation;[112] statutes can authorize a municipality to prohibit any use of private land;[113] or they can provide immunity from attack on substantive grounds[114] (although courts generally look with disfavour on such provisions).

We do not mean to suggest that each or any of the above statutory examples necessarily infringes the *Charter*; however, they serve to highlight the advantage of a constitutional recognition or "entrenchment" of rights. Such rights are no longer vulnerable to a legislative override as a matter of course. Quite the contrary, the override legislation would itself be overridden by the *Charter* provisions which it contravenes.

2. The Charter

Somewhat surprisingly, then, the *Charter* attenuates the advantage of entrenchment by specifically admitting of a legislative override. This is found in section 33, which provides:

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision

---

[110]See, for example, *Re City of Guelph Restricted Area By-Law (1977)-9960* (1979), 9 O.M.B.R. 353 (O.M.B.) at 353-54.

[111]J.M. Glenn, "L'intervention de l'État dans l'agriculture: Un aperçu législatif" (1983) 28 McGill L.J. 928 at 941-51.

[112]See, for example, *Act respecting Les Propriétés Cité Concordia Limitée — Concordia City Properties Limited*, S.Q. 1969, c. 126.

[113]See, for example, *Planning Act, 1983*, S.O. 1983, c. 1, s. 34(3) (authorizing prohibition of construction on land with steep slopes or subject to flooding).

[114]*Act to preserve agricultural land*, R.S.Q., c. P-41.1, s. 95: "No recourse may be exercised against the Gouvernement, the commission, a municipal corporation or one of their members or functionaries solely because a lot has been included in . . . an agricultural zone or has been excluded therefrom or merely because an authorization or a permit has been granted or refused under this act."

> thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

This uniquely Canadian "notwithstanding", or *nonobstante*, clause first appeared in a later draft of the *Charter* and was included as the price of substantial provincial support for the notion of entrenchment of rights. However, it differs from a traditional legislative override in three particular respects, each of which is designed to limit the scope of the clause. Firstly, whereas any unentrenched right may be limited by an exercise of parliamentary sovereignty, section 33 specifically excludes from its ambit democratic rights (section 3 to 5) and mobility rights (section 6). Secondly, a traditional override of rights may be implicit, although the legislative enactment itself must be clear, whereas an exercise of the notwithstanding clause requires an overt act: the override clause itself must specifically mention the rights being derogated from. This is to ensure that the decision to derogate is made consciously and publicly, after enlightened and serious examination.[115] Finally, a traditional override, once effected, is perpetual in the sense that it lasts until the overriding statute itself is repealed, whereas a section 33 override is subject to an automatic sunset clause of five years, or such earlier date as may be specified in the declaration. Admittedly, the notwithstanding declaration may then be reenacted (subject to the same obligatory sunset clause) but only after similar public scrutiny and debate. In this way, it was hoped to limit the occasions on which governments resort to the override clause.

Conclusion

The thesis of this paper has been that the *Charter*, as drafted, has only a limited effect on a municipality's powers to control the use of land and that any specific entrenchment of property rights would not particularly change this result.

Its effect is limited, firstly and most obviously, because the *Charter* does not specifically recognize a right to property, so that whatever protection it does afford is indirect. At present, it guarantees a right to property only to

[115]But see *A. G. Quebec* v. *La Chaussure Brown's Inc.* [indexed *sub nom Ford* v. *Quebec (Attorney General)*], [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, holding that a s. 33 declaration is sufficiently express if it simply refers by number to the provision or provisions of the *Charter* to be overridden, rather than specifying in words the particular rights or freedoms to be overridden, as the Quebec Court of Appeal had insisted upon in *Alliance des professeurs de Montréal* v. *A. G. Quebec* (1985), 21 D.L.R. (4th) 354, 9 C.C.C. (3d) 268 (Que. C.A.); leave to appeal to S.C.C. granted 30 Sept. 1985: 1985, 21 D.L.R. (4th) 354n, 21 C.C.C. (3d) 273n.(S.C.C).

the extent necessary to ensure the protection of the right to life, liberty and security of the person under section 7, for example; or it affords property owners some additional protection against discriminatory treatment under section 15. Its effect is limited, secondly, because a municipality's powers are already restricted by the traditional rules of judicial review based in the notion of *ultra vires* and, where invoked, in the strict construction approach to statutes and other provisions interfering with property rights.

Moreover, specific entrenchment of property rights in the *Charter* — whatever its symbolic value (or nuisance factor, depending on one's point of view) — would not particularly change the present situation, for three reasons. Firstly, the presence of section 33, the notwithstanding clause, limits whatever value entrenchment might have, in that it reaffirms the traditional role of parliamentary sovereignty in the Canadian constitution. Secondly, section 1, the reasonable limits clause, underlines the need for a balance between individual liberties and institutional restraints, a balance which is at the heart of the traditional rules for judicial review in the field of land use planning. Thirdly, the advent of the *Charter* has had the effect of enhancing the status of other human rights instruments which recognize rights, including the right to property, not contained in the *Charter*. The right to property is thus afforded a quasi-constitutional protection, and the need for its entrenchment in the *Charter* is less pressing.

A final observation can perhaps be made. The protection of rights, whether entrenched in a *Charter* or not, is only as strong as public opinion allows. Any constitutional regime can be made to accomodate what a society is prepared to tolerate.[116] As a noted American jurist has put it:

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.[117]

---

[116]Despite the provisions of the American Bill of Rights, for example, Japanese-Americans fared no better during the Second World War than their Canadian counterparts. See P. Irons, *Justice at War: The Story of the Japanese-American Internment Cases* (New York: Oxford University Press, 1983).

[117]Learned Hand, *Spirit of Liberty*, 3d. ed.(Chicago: University of Chicago Press, 1960) at 190.