Public Interest, Private Property

Law and Planning Policy in Canada

Edited by
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Foreword

The intersection of private and public property interests is at the heart of modern municipal government, especially its planning authority. This important book explores aspects of this fascinating issue from a variety of perspectives.

The essential question is this: What does the private ownership of property allow an owner to do without consideration of the public interest and, conversely, what action is a public interest sufficient to justify? It's both a legal and ideological question, to which there are a variety of answers – as shown by the book. Except perhaps for the royal family, private property rights have never been absolute in the Anglo-Canadian common law tradition. For example, the common law historically protected riparian rights to quality and quality of water. That meant an upstream owner could not do as he wished with his land – he could not build dams, or pollute, for example. (It would be interesting to have seen the shape of nineteenth- and twentieth-century development if those principles had remained the law!)

It is in the planning process that these interests are most finely balanced, although, in principle, the philosophical debate has been long settled in common law jurisdictions in Canada, expressed through zoning, official plans, and provincial laws and regulations. There is no absolute right for an owner to do as she wishes with her land, and her rights to change the use are subject to the collective interest. In cities today, that means considerations

related to intensification, economic development, the environment, and urban design, among others, take precedence over the individual desire of the landowner to change the use of his or her land. In fact, it could be argued that neglect of the broader public interest and too much deference to the interests of land speculators in converting arable land to housing has caused the urban sprawl that now is challenging our urban regions, as it is not environmentally, economically, or socially sustainable.

While the legal questions regarding public versus private interests in a development application are generally settled in principle, this is less true when a municipality asserts its jurisdiction in other areas. For example, the town of Hudson, Quebec, had to fight all the way to the Supreme Court in 2001 to establish its right to regulate the amount and kinds of noxious poisons a landowner was allowed to use on his land. Applications under the City of Toronto's tree bylaw – and the creation of the bylaw itself – are interesting examples of an issue where the debate often included discussion of the extent of the interests of a private landowner. The bylaw attempts to ensure that healthy grown trees, which have important environmental and health benefits for the community as a whole, are not cut down at the whim of a landowner (who, after all, will have a far shorter ownership of the land than the life of most important tree species). In the debates, arguments were often made about the (limited in Canada) right to property, thus justifying any desire to remove a tree for any reason whatsoever (including, literally, "we don't like the black walnut tree"). Collective rights have generally won out, particularly since a healthy urban forest's importance as a bulwark against climate change has been realized. However, in a well-judged Canadian compromise, private interests are recognized through an appeal process that gives a full chance for private interests to be heard, and succeed, when they are serious and show that the collective interest must give way – if a tree is damaging the house, and there is no realistic alternative but to cut it down, for example.

Another area where the conflict is in sharp relief is in the contentious issue of expropriation. There is a high threshold for when a government can expropriate, but as the examples of the failed Mirabel and Pickering Airport expropriations show, our institutions do not always get this right. Mirabel was built, and failed. Pickering was unnecessary, and we are still seeing the human (and political) consequences today. Although absolute private property rights should not be a substitute for good and well-considered public policy, in this case they would have been. This is a clear lesson for planners about the fallibility of predictions and seemingly intelligent policies.

Tree bylaws and expropriation are among the important topics discussed in this book. Others include the ongoing relevance of private land-use planning tools (covenants, for example), the interaction of public and private in smart growth and other forms of green development, and definitions of the public interest and (increasingly limited) procedural guarantees in Canadian planning law.

For advocates of modern urban cities, and for those interested in the ideological and legal debates about the limits of private and public property interests, this book is a must-read. I found it fascinating; like the best novels, you literally cannot put it down.

David Miller
Mayor of Toronto, 2003–10

Introduction

MARCIA VALIANTE AND ANNEKE SMIT

Interest in Canadian cities and urban planning might be at its highest point since the 1960s heyday epitomized by legendary urban activist Jane Jacobs.[1] Recent works by leading urban thinkers such as Richard Florida and Ken Greenberg (like Jacobs, both are American transplants to Toronto) have reached audiences far beyond the walls of academe in their considerations of the Canadian urban environment.[2] Magazines and newspapers, too, burst with stories of condo booms, increasing commuting times, infrastructure (including transit and highway) construction and financing deficits, migrations into "creative" cities, poverty and homelessness, and city-centre rejuvenations.[3] These writings both respond to and fuel interest in how we shape the urban areas in which we increasingly live. As of 2011, 27 million Canadians, or 85 percent of the Canadian population, resided in urban centres,[4] and 35 percent of Canadians lived in the three largest cities of Toronto, Montreal, and Vancouver.[5] As one reviewer of Greenberg's work notes, the positive glow around our urban areas is now such that "'[c]ity' is no longer a bad word."[6]

Even so, the future direction of urban development in Canada is hotly debated. Cities struggle to attract new investment in housing and employment opportunities while trying to find sources of funds to pay for infrastructure, services, and amenities and to maintain a high quality of life for all residents. An important influence on the future direction of Canadian cities is the country's planning law framework(s).[7] New priorities for planning

that is green and smart have come to the fore to counter policies fostering the automobile-dependent sprawl of previous generations. Other planning has the goal of encouraging economic stability and growth through infrastructure improvement or urban renewal projects. Although these projects are widely seen as being undertaken "in the public interest," there is also significant pushback against new approaches, which affected individuals and groups see as threatening their quality of life, their property values, or their right to do as they wish with the properties that they own.

Canadian planning scholars, geographers, and "law and space" theorists have written extensively about changing values in planning practice, focusing in particular on the regulation and use of public spaces and their relevance to planning and the development and redevelopment of Canadian cities.[8] However, the question of the role of *private* property rights and their regulation in this urban framework has received far less attention in Canada. Nicholas Blomley's seminal study of Vancouver's Downtown Eastside looks at gentrification and its role in effecting an increased privatization of much of the space in that neighbourhood.[9] Douglas Porteous and Sandra Smith's book *Domicide: The Global Destruction of Home* presents a series of studies on the loss of "home" (defined as including, but not limited to, owner-occupied property) due to factors including planning decisions and expropriation, with some Canadian examples included.[10] There is discussion of private property *prices,* of course, as well as – more occasionally – the changing form or size of properties that we acquire or inhabit (e.g., shrinking house or condo sizes[11]). However, sustained dialogue on how private property rights affect, and are affected by, the public interest across a spectrum of urban planning issues and decisions is far more limited in Canada than in the United States or United Kingdom.[12] Furthermore, with some notable exceptions, a number of which are referenced throughout this introduction, Canadian *legal* scholarship has traditionally paid even less attention to the intersection of property rights and urban planning (and, arguably, to private property rights in general).

This edited collection is an effort to begin to fill this gap in the (particularly legal) academic literature. The collection grew out of a seminal conference held in 2010 at the University of Windsor. The conference brought together legal and planning scholars and practitioners to consider private property and public policy in the context of urban development in Canada. In its study of a number of spheres of urban planning in which public values and private property rights collide – in what one commentator has termed the "ambivalent courtship of private property and public trust interests

since colonial times"[13] – the collection considers whether an appropriate balance is found in the unique Canadian legal and political contexts and which interest(s) such a balancing serves. Our aim with this book, as it was with the conference, is to encourage a more active debate in Canada on the appropriate parameters of the public planning power and role, the acceptable limitations on the enjoyment of private property rights, and the influence of both on the shape of urban Canada.[14]

The book brings together the work of a diverse group of contributors – lawyers and planners, academics and practitioners – whose research employs a variety of methodologies. Some approach their subjects from a theoretical standpoint, while others are more practically grounded. We see this as a strength of the book, since the varying viewpoints and approaches represented allow us to begin to sketch the broad issues that play out at the private-public interface in Canadian planning law. The volume is by no means comprehensive in its coverage of this important subject. The chapters point to more work to be done in areas relating to the public regulation of private property, for example, the protection of heritage buildings, brownfield redevelopment, and affordable housing policy. It is our hope that the chapters of this book will stimulate more research to enrich our understanding of more and varied areas of urban planning law and policy in Canada.

This introduction lays out a framework for the discussion in an effort to contextualize (theoretically, legally, and historically) the ten chapters of the book. The introduction begins with a short theoretical discussion of the tension between the enjoyment of private property rights and urban planning. The chapter by Harvey Jacobs, based on one of two keynote addresses at the Windsor conference, is introduced here as well. This discussion is followed by a brief overview of the development of planning powers in Canada and their interactions with, and limitations on, the enjoyment of private property rights. Bruce Ziff's chapter, based on the second keynote address, is introduced here. The remainder of the introduction then outlines some of the places in current approaches to planning where the tension between the public interest and the enjoyment of private property rights is most acute. The remaining eight chapters of the book are introduced in turn in this section; each addresses one of these areas of tension. The introduction concludes by drawing out some common themes from the chapters in an attempt to determine how effectively the public-private tension is addressed in Canada and to outline areas for future inquiry.

We should make a note on sources. Many of the contributors to this book have profitably referred to important US and UK sources; clearly, the Canadian

conversation bears similarity to the tensions related to private property and urban planning in other jurisdictions, and these sources are therefore useful to the discussion, just as we hope that the chapters of this volume will be to those in jurisdictions outside Canada. However, since our aim in this introduction is to lay out what we maintain is the uniquely *Canadian* landscape of research on private property and planning, we have relied where possible on work by Canadian writers writing about the Canadian context. Other than Jane Matthews Glenn's chapter, this book does not focus on Quebec, nor is there widespread reference to French-language writing on the subjects explored here. A next step in continuing this Canadian discussion on planning and property should necessarily engage both French- and English-speaking experts and both civil and common law contexts.

Private Property and Public Planning: A Theoretical and Practical Intertwining

It is tempting to theorize the protection of private property rights and the regulation of land development in the public interest as separate concepts that inevitably conflict. In their purest forms, laws protecting private property might be seen to have the goal of establishing and protecting the rights of owners, including their rights to develop their lands and perhaps exclude others. The literature on the origins and justifications of a system of private property is vast, reflecting many different schools of thought. As Abraham Bell and Gideon Parchomovsky have written, "[n]otwithstanding its importance, property law has eluded both a consistent definition and a unified conceptual framework. Indeed, modern property scholarship has utterly splintered the field."[15] One particularly popular idea, the modern liberal concept of property, is grounded in the influential work of political philosophers such as Locke, Bentham, and Hegel[16] and carries through to modern scholars such as Robert Nozick, Richard Posner, Thomas Merrill, and Hernando de Soto.[17] Liberal property scholars have maintained that allocation of valuable resources to individuals through a system of private property ownership serves multiple economic and political purposes, including personal liberty and economic efficiency. In fact, the "right to exclude" traditionally has been considered by many scholars as an immutable part, and perhaps the only required aspect, of the "bundle of sticks" concept of property rights that has long dominated common law understandings of property rights.[18]

On the other hand, urban planning law establishes a *public* process by which decisions are made about the character of an urban area and how, if

at all, it should grow, in order to achieve a range of public policies. Planning laws necessarily regulate the uses to which private property can be put and the form of buildings that can be constructed thereon. In this sense, private property rights can be viewed as inherently in conflict with the public interest.

Yet, in both theory and practice, public and private interests have long been more appropriately seen as tied together through a complex relationship. Although the eighteenth-century English legal scholar William Blackstone famously described property rights as being absolute in the sense of "sole and despotic dominion … in total exclusion of the right to any other individual in the universe,"[19] he himself referred elsewhere to this position as a "trope, a rhetorical figure describing an extreme of ideal type rather than reality."[20]

In fact, in a system of formalized property rights,[21] public and private intertwine from the moment of formal recognition of a right in property. The creation of a legal framework that recognizes and protects property rights through public registration of those rights can further the common good by providing transparency and predictability in the recognition and transfer of property rights.[22] Whether through deeds registration or land titles, the protection of private property rights against other interests, both private and public, depends largely on the ability of the party claiming the right to show that this right has been recognized publicly through registration. The security of those interests further advances the liberal goals of exclusive possession and use by making clear who holds the right to exclude.

Limitations Inherent in the Notion of Property?

Furthermore, explorations by a number of property law theorists in recent years have argued that inherent in the right to property itself is a balancing that must consider the rights of others and, indeed, obligations toward society as a whole. For this group of theorists, the right to exclude is not the core of the right to property. Rather, property tells us about relationships between individuals and between individuals and the larger society. As Joseph Singer has argued, "[a] property system is not merely an aggregation of individual entitlements. It is an institutional structure that sets the ground rules for human interaction to ensure that the exercise of entitlements by some can peaceably coexist with like entitlements in others."[23] Inherent in many such theories is the notion that property is not only about rights but also about obligations. Jeremy Waldron argues that obligations are inherent in a right of property, thereby strengthening the position that a property right should not be seen as an unfettered private right even in a state of nature.[24] In a

2009 treatise, leading American property law scholars Gregory Alexander, Joseph Singer, Eduardo Peñalver, and Laura Underkuffler coined the term "progressive property" to refer to the school of scholars seeking to create a theory of property that would incorporate notions of social obligation and social justice.[25] The school would provide a counterpoint to those who focus on the right to exclude (what Singer refers to as the "ownership model"[26]).

The progressive property school and its adherents argue that to focus only on individual rights to property as absolutes, or even solely as private rights to be negotiated between individual rights holders, ignores that property law is a system with important social consequences for the well-being of society as a whole. Kevin Gray has written that "[d]eep at the heart of the property concept lies a fusion of individual rights and social responsibility."[27] Notably, Canadian scholars have been active in the progressive property movement and its offshoots. David Lametti argues that the particular object of property will determine the precise social relationship of property and that property in certain types of objects will give rise to obligations by the title holder.[28] Larissa Katz posits that private property ownership foists responsibilities on owners that would otherwise be the bastion of the state.[29] Blomley, meanwhile, describes property rights as "not absolute and unyielding, but contingent and contextual, being shaped by social conditions."[30]

From this perspective, state-imposed limits on the enjoyment of private property rights can be seen as a natural outgrowth or formalization of what is already inherent in the character of a right in property. Such limitations occur in a variety of spheres. The right of an owner to exclude others from entering his or her land is limited by the public interest in facilitating police investigations or allowing police to intervene in situations of domestic violence. Anti-discrimination laws temper the right of an owner freely to sell or lease land in order to promote public values of equality. Limitations for land-use planning purposes that promote public policies and objectives are therefore just one, though a substantial, class of formal limitations on the enjoyment of private property rights in present-day Canadian cities and one that can be reconciled with at least some popular notions of the content of a right in private property.

As this volume explores, public planning is a primary modern avenue through which public-private tensions in the realm of land use are balanced. Yet public-private tensions and, indeed, private-private tensions in land ownership and use predate public planning powers. The common law has long recognized limits on property rights depending on the physical characteristics and context of the land and stemming from the rights of other

individuals either in the same property or in neighbouring lands. For example, land held in a lease or for life could not be "wasted," owners could control future use through defeasible grants, and adjacent owners had a right to the physical support of their lands.[31] Under the law of nuisance, land could not be used in ways that would interfere with the reasonable uses of neighbouring lands or with public rights.[32] Similarly, in the riparian law tradition, water rights had to be exercised with reference to the corresponding rights of other riparian owners.[33] These historical understandings of the limits on property rights carry through to modern times. As Sax has noted, "[f]requently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user."[34]

Beyond these types of limitations arguably inherent in a right to private property, private land-use planning tools have historically had some role to play in controlling how land is used on a neighbourhood or community scale: the cumulative effect of individual choices across a large area over time creates a particular physical character, defines a community, and creates a coordinated "whole that is greater than the sum of its parts."[35] As the chapter by Bruce Ziff discusses, covenants are one of the prime examples of private land-use planning that continues to be used. The character of an area affects, and in turn is affected by, the values of individual properties, as indicated by the popular real estate salesperson's aphorism "location, location, location."

The Need for Public Planning

Particularly in urban settings with fragmented land ownership and small lot sizes, coordinated collective action is difficult, and the need for a more uniform and predictable system might become more apparent. Herein lies the role for a public planning system that regulates land use and building construction. Public planning can exist to the exclusion of private planning in a particular sphere, or, more often, it can complement it. What distinguishes public planning from private planning is its base in the power of the state to impose restrictions to achieve goals determined, through public deliberation, to be of benefit to the community as a whole. These goals can be narrow, of the type described above (e.g., encouraging consistency of character across a neighbourhood or community), or they can exist to further a broader policy (e.g., the preservation of agricultural land, the protection of water resources, or the creation, re-creation, or maintenance of a vibrant urban area in line with a particular vision).

Although public plans and zoning laws generally stop short of affecting title to land, they can dramatically restrict the uses to which land in private

ownership can be put, the scale and type of development allowed, and the form of and materials used in building construction. Beyond simply restricting how land is used, planning laws might demand that landowners provide certain amenities, such as preserving a heritage building or wetland, for the benefit of the community. Subdivision regulations go further and restrict an owner's ability to divide and sell land without government approval.

Finally, it would be a mistake to view planning laws directed at the achievement of public goals as having only negative effects on landowners. Landowners, as members of the community, do benefit directly from planning restrictions. As part of their planning efforts, municipalities also provide public goods and amenities, such as parks and transportation networks, that positively impact the land values of nearby landowners. Restrictions on property use for reasons of environmental protection benefit affected property owners along with all other members of society. In addition, zoning bylaws affect the market for land, and the value of land often increases as a result of exclusionary zoning limits. In fact, one of the goals of Canadian zoning laws has always been to exclude land uses that could undermine the values of existing uses, particularly in residential neighbourhoods.[36] Controlling lot size and physical character helps to determine the economics of development, which in turn helps to control the class composition of a neighbourhood.[37] Thus, in addition to the understanding that taking on obligations or withstanding a publicly imposed restriction on a private property right is an inherent part of holding a private property right, such restrictions can in fact enhance the value of the property right in some circumstances. Indeed, as can be seen in some of the chapters in this volume, determining in whose interest(s) planning laws are being created can be challenging and is part of the public-private tension in land-use planning law.

In the first chapter, "Private Property in Historical and Global Contexts and Its Lessons for Planning," Harvey Jacobs contextualizes the Canada-focused discussion that follows by addressing the relationship between land-use planning and private property and the importance for planners of understanding this relationship from an international perspective. Jacobs argues that changes in the global political economy (including the end of the Soviet Union and postcolonial societies seeking their places on the international stage) have created an era of unprecedented and universal interest in private property. From this basis, he addresses the long-standing and continuing tension over the appropriate balance between fundamental private property rights and public authority to regulate privately held lands to achieve planning objectives, citing examples from the United States, China,

and Cuba, among others. In response to current trends that vilify restrictions on private property rights, Jacobs, a planner, takes the position (like the progressive property theorists, among others) that such restrictions are justifiable and necessary because individuals, acting in their own interests, do not always realize the greater social good. In addition, he argues that the planning profession has a responsibility to help articulate the *duties* and rights of property owners, as well as the *benefits* and costs of planning, so that a more balanced debate is possible.

Moving from this international perspective, the remainder of the book focuses on the Canadian context. The chapters that follow take as their starting point the tangled intertwining of private property rights and public goals in the sphere of urban planning in Canada. Each, either explicitly or implicitly, recognizes the importance and perhaps inevitability of public limitations on private property rights. The chapters then consider, in nine different contexts, whether an appropriate private-public balance has been struck in Canada. The chapters are contextualized below through a brief overview of historical and current issues in Canadian property law and urban planning.

Private Property and Public Planning: A Canadian Perspective

Although the public interest–private property tension described above exists across common law jurisdictions, each legal system addresses the tension in unique ways. Canada might be unique for reasons that relate largely to the lack of constitutionalization of private property rights. This section provides a brief historical overview of the public-private balance in Canadian planning and property law.

Most of common law (i.e., outside Quebec) Canada's system of land ownership finds its origins in the property law as practised in England at the time of settlement.[38] English law, for the most part, including both statute and common law, was received into the legal regimes of the new Canadian provinces. In Quebec, of course, the situation was different: the law of French origin applicable in the territory at the time of conquest by the English was largely retained.[39] As such, the system of land ownership in English Canada is based on the English tenurial system. The legal framework consists of a series of ancient but still applicable common law doctrines and the statutory amendments that have moulded them for modern use both in England and in common law Canada.[40] In addition, a variety of local conditions in Canada, including those related to geography, climate, and culture, required

the fine-tuning of English property laws for the Canadian context.[41] The property law of common law Canada therefore remains grounded in the English system of property ownership but has its own peculiarities.[42]

Like the system of property ownership itself, early Canadian approaches to urban land-use planning also predictably followed the English experience, in which public planning largely developed out of, and built on, the experience with private planning and its limitations. In England, land development was controlled at first by owners of large landed estates through lease covenants and other tools on subdivided lots. Following the break-up of the landed estates and the urbanization and industrialization of the early nineteenth century, building schemes evolved, often using restrictive covenants, a primary tool of private planning, which allowed developers to control freehold lands in England. Similar patterns emerged in common law Canada.

To contextualize urban planning in Canada, Bruce Ziff provides a detailed and colourful historical study of the restrictive covenant in his chapter, "Bumble Bees Cannot Fly, and Restrictive Covenants Cannot Run." Enforceable by other owners within a building scheme, these covenants were used to determine allowable uses of land, density of development and design of buildings, and whether development could take place at all.[43] Ziff posits that restrictive covenants are a legal, social, and economic impossibility because they allow greater freedom to owners to create new property rights than would be allowed under classic real property law doctrine, despite having developed within a socio-economic setting hostile to restrictions on the alienation of property. He goes on to discuss the use of covenants in contemporary Canadian cities and the interplay between private covenants and planning laws. Public controls on development, discussed in more detail below and indeed throughout this volume, have not displaced private law planning methods. Ziff suggests that the empirical evidence demonstrates the continued viability of covenants, allowing individual owners to control use and development of land far into the future. He concludes that extensive use of covenants creates tensions between private property rights and the public interest that are complex and difficult to resolve, with private planning sometimes thwarting the public interest goals of land-use planning.

The Origin and Development of Public Planning Law Frameworks

An exhaustive survey of public planning history in Canada is beyond the scope of this introduction.[44] Briefly, however, public laws promoting urban planning in Canada can be traced back to the late nineteenth century. At

that time, as Fischler discusses, laws restricting materials and methods of construction and locations of land uses in Canada were deemed necessary to overcome the failure of the market and the inability of real property law doctrines (in particular nuisance law and the law of restrictive covenants) to protect urban neighbourhoods from the risks of fire and disease and from the externalities of incompatible noxious uses.[45] By the early twentieth century, the tools of private planning and enforcement came widely to be seen as having reached their practical limits in controlling the face of urban development in Canada. In Canada, as in the United States, dramatic growth in urban population, because of immigration and rural in-migration, put significant stress on existing housing stock.[46] Overcrowding in poorly constructed tenements in urban centres, expansion of industrial sites into residential areas, and uncontrolled and speculative construction on the outskirts of cities led to pressure on governments to act.[47]

Restrictions such as municipal zoning bylaws and controls on the subdivision of land therefore became important tools for ensuring orderly development in the face of explosive population growth and rapid urbanization. However, planning for the future development of Canadian communities was not widely practised. As Peter Moore has noted, planning and zoning derive from different traditions and values, and it was not until the 1950s in Ontario, for example, that master plans became widely used and comprehensive zoning bylaws became the central tool to implement those plans.[48] Today, all provinces have planning legislation, and the range of tools to achieve the goals of land-use planning has expanded well beyond simple zoning bylaws.

The first comprehensive zoning code in Canada was passed in Kitchener, Ontario, in 1924.[49] It followed the adoption of a similar bylaw in New York City in 1916, upheld in the landmark US Supreme Court case *Euclid v Ambler Realty*.[50] *Euclid* upheld the constitutional authority for municipalities to impose zoning restrictions and set out the legal justification. Justice Sutherland used the analogy of nuisance law to characterize the appropriate scope of the zoning power. The importance of nuisance is that it is defined in the context of particular circumstances, so that "a nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." Likewise, "a regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities."

As in the United States, in Canada the authority for zoning was delegated – from the provinces to local municipalities – and motivated by changing social conditions. However, as Leo Longo writes, in Canada "there

is no … equivalent to *Euclid v Ambler*"; given the different constitutional footing on which the protection of private property rests in Canada, "the constitutionality of the municipal exercise of the zoning power granted by the Province [of Ontario] never appears to have been in doubt."[51] A series of early judicial decisions confirmed the legitimacy of zoning bylaws and accepted their potential for infringement on property rights as "one of the effects of advancing civic life and amenity … for the sake of preponderating advantages to the whole locality."[52]

At the same time as recognizing public welfare in zoning, courts and tribunals in Canada were at pains in early zoning decisions to ensure that private rights were not lost to arbitrary municipal government decisions.[53] Another theme of the early cases that has continued is the importance of preserving the density and character of existing residential neighbourhoods from intrusions such as apartment buildings.[54] On the other hand, as discussed further below, the possibility of challenging restrictive bylaws or demanding compensation on the basis that they merely infringe on private property rights has always been narrow in Canada, creating an ongoing tension in planning law practice. That tension has only increased as provinces and municipalities have expanded the goals that they seek to achieve through the planning process.

The Right to Property and (Non-)Effect of the *Canadian Charter of Rights and Freedoms*

The private property–public interest tension reached a pinnacle in 1982 in the lead-up to passage of the *Canadian Charter of Rights and Freedoms* as a constitutional instrument. Hanging in the air was the question of whether this legal balancing act would gain a constitutional grounding. After much debate,[55] the *Charter* was ultimately passed without inclusion of the right to private property. This omission continued Canadian planning law on a different legal footing than those of the United States and United Kingdom and in fact makes Canada an anomaly, as virtually all other states with functioning systems of private property include a protection for private property in their national constitutions.[56]

The lack of *Charter* protection does not suggest that private property is not a fundamental value in the Canadian legal system. Indeed, Canadian courts have often found infringements on property and related rights based on common law protections,[57] and the 1960 *Bill of Rights,*[58] which preceded the *Charter,* does include an enumeration of the right to property. However, the constitutionalization of other rights that can be balanced against the right

to property, and the fact that – unlike the *Charter* – the *Bill of Rights* can be amended like any other piece of legislation, might weaken the power of these other legal tools to ensure the same level of protection of private property rights as they might have received through inclusion in the *Charter.* Furthermore, Canadian courts have consistently refused to interpret existing provisions of the *Charter* to include the right to property,[59] and to date occasional renewed calls for a constitutional amendment to include the right to property in the *Charter* (normally from the political right) have failed to gain much traction.[60] The result, arguably, is a wider latitude for planning decisions that affect property rights in Canada than in many other states.

De Facto Expropriation in Canada

The wide latitude generally granted to Canadian government bodies to regulate the use of land through planning tools can be seen most dramatically in Canadian courts' limited acceptance of the principle of *de facto* expropriation. This is deemed to have occurred when a property owner has been deprived of virtually all of his or her interest in property by the state without formal expropriation or taking of title to the property. Although mere regulation of private land use does not ordinarily give rise to a right to compensation in Canada, if *de facto* expropriation is deemed to have occurred, then the state is obliged by common law principles and provincial or federal expropriation legislation to compensate the property owner.

In the United States, the notion of *de facto* expropriation, or "regulatory taking" as it is known in that jurisdiction, was developed in the US Supreme Court decision in *Pennsylvania Coal v Mahon* in 1922.[61] In that case, the court "declared that when government regulation of property goes 'too far,' a taking may result despite the absence of formal appropriation or physical invasion."[62] Determining when a regulation goes too far is difficult and is left to the courts on the individual facts of each case. In the United States, regulations that eliminate the economic use of land have been held to effect a taking.[63] Short of that, a balancing test, as articulated in the *Penn Central* case, is applied.[64] Thus, planning regulations are always subject to possible challenge on this ground, and the case law is extensive. As seen in Alterman's recent comprehensive international study on regulatory takings, though the details vary, many other states follow similar patterns of extensive use of regulatory takings principles and regular compensation awards for infringements on private property rights.[65]

Although Canadian courts have considered US case law, *de facto* expropriation rests on a much more limited foundation in Canada. Rachelle Alterman

categorizes Canada as a country with "minimal" compensation rights for planning-based property rights infringements. Indeed, Canadian courts have rarely held regulation to amount to a taking.[66] In its most recent decision on this issue, *Canadian Pacific Railway Co. v Vancouver (City),* the Supreme Court of Canada held that, for a *de facto* expropriation to have occurred, there must be both the elimination of all reasonable uses of the land and the acquisition of the beneficial interest in the property by the expropriating authority itself.[67] Loss of the economic value of the land alone is not enough to constitute the loss of all reasonable uses of the land.[68] In his historical and legal analysis of the *Canadian Pacific Railway* case, Doug Harris writes that the decision confirms the limited role of the Canadian judiciary in determining the appropriate level of interference with property rights for the purposes of land-use regulation in Canada: "[T]he non-constitutional nature of property rights in Canada has situated the balancing of public regulation and private property in legislatures and the democratic process, and not in the courts."[69]

In an era of globalization (as Harris and Russell Brown, among others, have argued[70]), Canadian courts' position with respect to compensation for infringement on private property rights might eventually be forced to change because of Canada's obligations under Chapter 11 of the *North American Free Trade Agreement* (*NAFTA*). Under the current legal framework, American- or Mexican-owned companies operating in Canada might be entitled to compensation for property rights infringements that Canadian individuals or companies are not. However, this change, if it does occur, is likely to be long in coming. In the meantime, few interferences by Canadian public bodies with private property rights will be found by the courts to constitute *de facto* expropriation, and compensation for interferences with property rights not amounting to expropriation will be available only if specifically provided for in the relevant legislation.

Although, as Harris suggests, the restrictive test for *de facto* expropriation in Canada might largely be a reflection of an inclination among Canadian courts to leave the balancing of public interests and private property rights to the legislature, it also sends a message about the wide berth for planning in Canada.

Current Tensions between Private Property and Public Planning

This is the legal environment in which urban land-use planning currently functions in Canada. Since planning regulations do not usually give rise

to the loss of all reasonable uses to which a property owner might put a property, and they are almost never deemed to have resulted in the acquisition of the beneficial interest in the property by the regulating authority, Canadian governments at federal, provincial, and municipal levels have extensive space within which to regulate the use of land and be accorded judicial deference. This is not to say that land-use regulation short of *de facto* expropriation can never be overturned judicially in Canada. For example, zoning bylaws can be struck down as *ultra vires* on many grounds. Examples include bylaws that are adopted in bad faith or for improper purposes (such as driving down the value of land prior to its acquisition by a public body), those that prohibit all uses of land or regulate who can use land, those that conflict with federal or provincial legislation, or those that are unduly discriminatory, vague, or contravene human rights laws.[71]

Furthermore, despite the wide power to legislate, it is difficult to determine the extent to which the Canadian public believes that heavy government interference with private property rights for planning purposes is legitimate. In her empirical study of attitudes toward private property, Metcalf concludes that the lack of constitutionalization of private property rights has not resulted in higher tolerance for interference with private property in Canada than in the United States.[72] Canada has a healthy (if somewhat less vocal) property rights lobby that, as in the United States, is generally led by those on the political right in favour of minimal state intervention in many facets of life.[73]

A recent example of strong opposition to legislation perceived to have an excessive impact on private property rights was the response to the adoption of the 2009 *Alberta Land Stewardship Act.* The *Act* gave the cabinet of the Alberta government sweeping authority to adopt land- and natural resource–use plans affecting public and private lands in seven broad regions of the province.[74] Implementation was to be via municipal planning instruments and other tools such as conservation easements and transferable development rights. A political storm instigated by property rights groups led the government to amend the *Act* in 2011 before it was implemented. The amendments expanded compensation rights, opportunities for consultation, and appeals for landowners.[75] Opposition continued, however, and in response, in the fall of 2011, the Alberta government appointed a Property Rights Task Force to conduct public consultation on how to balance private property rights and infringements necessary for development. As a result of the task force's report, in February 2012 the province introduced legislation establishing the position of property rights advocate to represent the

interests of property owners implicated in decisions on land-use planning,[76] and in December 2013 the first property rights advocate was appointed.[77]

Alberta's experience is not necessarily indicative of sentiments across the country: the province's political climate is arguably the most likely in Canada to produce a strong property rights lobby, given its libertarian orientation and decades-long conservative political leadership. Yet it is evidence that the courts' stance on *de facto* expropriation does not necessarily reflect a widespread acceptance of government interference with private property rights in Canada. Rather, the push-pull of the public interest versus private property rights is constantly being negotiated in a wide variety of land-use and urban planning contexts. Each of the remaining chapters in this volume, introduced below, takes on one of these sites of tension.

Procedural Rights

The rule of law is a foundational principle of the Canadian legal system. It is the protection that citizens have against arbitrary and discriminatory decisions by governments. It requires that planning decisions be adopted by elected local councils acting within their statutory mandates and following fair and open processes. Accountability is ensured by legal rights afforded to citizens, including affected landowners, to challenge these decisions in the courts and before tribunals. In addition, broad rights of public participation have been a hallmark of planning processes for decades. In his chapter, "The Disappearance of Planning Law in Ontario," Stanley Makuch argues that these procedural safeguards are being eroded in Ontario. Discussing changes in Ontario's planning law framework, he argues that these "rule of law values" have been supplanted by "planning values" in order for the province to advance its policies more easily. Makuch suggests that the result of this erosion of procedural safeguards has been an increase in the risk of arbitrary and unaccountable decisions that impinge on private property rights, without any recourse for owners.

Defining the Public Interest

As discussed above, planning regulations that restrict property rights are justified as necessary to achieve broad public objectives. Yet even the seemingly simple task of defining what is meant by the term "public interest" is problematic and a matter of continuing debate in Canada.[78] New sites of potential conflict arise almost daily. One particularly heated debate now under way in many parts of the country pertains to the siting of "wind farms." As Canadian governments seek to replace highly polluting sources of electricity

with renewable sources, they grant wind generation preferential prices for the power sold into the grid and other subsidies. However, the location of such a farm creates conflict between landowners who receive revenue from leasing their land and their neighbours, whose consent is not necessary. Nuisance actions have been brought by neighbouring landowners on the grounds that the effects on their property values and their health and quality of life are excessive.[79] In addition, those affected by government approvals have challenged those decisions and the underlying regulations.[80]

This is just one instance of differing views over what truly lies in the public interest. Tensions also arise over which limits are necessary or desirable, over whether there is a fair balance between public and private interests, and over whose interests are in fact being served. In her chapter, "In Search of the 'Public Interest' in Ontario Planning Decisions," Marcia Valiante reviews Ontario legislation and planning decisions to uncover how different conceptions of the public interest are identified and applied. There, the public interest is identified at a broad scale through provincial policies directing local governments toward certain objectives – such as public safety, "smart growth," agricultural land preservation, and so on. The public interest is also one of the criteria for making decisions on individual, site-specific projects. Planning theorists no longer accept that there is a single public interest that can be objectively identified. Instead, effort goes into identifying diverse interests and seeking ways to arrive at some consensus on or rough balance among them. Decision makers use procedural opportunities to identify those whose interests might be affected by their decisions, but they are given little guidance on how to reconcile competing interests. As a result, institutions, procedures, and policies have grown up that in practice have privileged certain interests over others, for example, homeowners over tenants, developers over non-governmental organizations, and local elites over more marginalized residents, such as youth or recent immigrants, in defining the public interest, and that often have protected private rights over community benefits. Debates about which interests should prevail also engage differing views about the appropriate balance between technical and political aspects of planning.[81] Although the focus of the chapter is Ontario, many of the conclusions apply equally to other Canadian jurisdictions.

Smart Growth

It is trite to say that planning is about change – about how communities should respond to change and about how to manage change in an orderly way. Canadian cities today face significant changes: economic

(e.g., economic globalization, loss of manufacturing industries, growth of the service sector), social (e.g., growing income disparity, demographic shifts), and environmental (e.g., climate change). Some cities are growing rapidly, while others are in decline. Canadian planners, motivated by a range of concerns (fiscal, social, environmental, and health among them), have come to a general consensus that the prevailing pattern is unsustainable. A recent article on growth in Halifax quotes two growth experts as saying that the city has a "world-class" urban sprawl problem, a pattern repeated in many Canadian cities.[82] Planners have increasingly come to champion alternatives to the prevailing form of development. The most significant trends have been toward "new urbanism" and "smart growth," both of which stress a form of intensified, mixed-use development that contrasts with the low-density, functionally segregated, suburban norm of earlier decades. These new approaches encourage walkability, accessibility of stores and services to residential areas, and use of public transit. This movement can be seen as falling into a larger category of sustainability-driven planning, fuelled by the global sustainability movement.[83] Although there is broad support for these planning trends, there is opposition too, in particular against the constraints that they place on private property rights holders within urban areas subject to these approaches.

In their chapter, "Transforming Toronto: Implementation and Impacts of Metropolitan-Scale Plans," planning scholars Pierre Filion and Anna Kramer address smart growth, its key ingredients of population intensification and transit-oriented development in the context of the Toronto-centred metropolitan region, and the input of and impact on property owners in the metropolitan region. They explore the factors and conditions that will determine whether successful implementation of the preferred strategies, as set out in the Ontario government's Growth Plan for the Greater Golden Horseshoe (the area around the western end of Lake Ontario), occurs and whether the vision of healthy, sustainable communities will ultimately be achieved. The authors identify the key factors of success for the planning processes, organizational frameworks – including the governmental context – and alignment of key public and private constituencies. Not only will property owners be indirectly regulated by the Growth Plan, but also their support for the process will be critical for its success. Yet, as the authors point out, planners' vision too often does not include a consideration of the impacts of planning strategies on property owners. In Filion and Kramer's assessment of these factors in the context of the provincially mandated Growth Plan, several possible scenarios could unfold, with

significantly different results for the pattern of development in the future. They conclude that the uncertainties around key factors make it difficult to predict whether Ontario's vision will be realized and what the impact on private property ownership will be.

Although some of Canada's urban centres face significant growth, other cities, including Windsor, Thunder Bay, and parts of Atlantic Canada, have recently faced declining populations and loss of employment opportunities. This situation creates different pressures for planning.[84] "Smart shrinkage" is a term that has been used in this context.[85] Although city decline has not yet become the problem in Canada that it is in parts of the United States, the urban population in Canada is concentrating in an ever-smaller number of large urban centres (as mentioned above, more than a third of Canadians now live in Toronto, Montreal, and Vancouver). Smart shrinkage as a planning philosophy will therefore become even more relevant in years to come. In the context of smart shrinkage, property rights issues are different from those for smart growth. Large numbers of foreclosures on, and/or abandonments of, privately owned lands adversely affect property values and quality of life.[86] Municipalities struggle to attract new investment as reduced tax bases lead to service reductions and less maintenance of infrastructure. In extreme cases, remaining homeowners can find themselves required to move, either formally expropriated as neighbourhoods are essentially closed down or taken off the grid because of the expense of service provision, which makes remaining in their homes all but impossible.[87]

Other Green or Environmental Planning

Beyond smart growth, sustainable planning in Canada emphasizes the protection of natural heritage resources from development and the protection of agricultural lands for continued use in agriculture. One manifestation of this in law has been the creation of greenbelts and agricultural land reserves and zones in Quebec and British Columbia, and around major urban centres in Ontario, with plans under way for other cities.[88] Within a greenbelt, the uses to which private property can be put are restricted in order to achieve a policy that benefits the public as a whole. Although significant, the restrictions on use are unlikely – based on existing case law – to constitute a *de facto* expropriation, and short of that there is no obligation to compensate property owners unless provided for in the legislation (neither Ontario nor British Columbia greenbelt legislation so provides).

Other strong environmental planning trends in Canada, as elsewhere, include movements toward individual projects and buildings that are green

and toward legislative frameworks that encourage the protection of natural heritage. These issues are addressed in three of the book's chapters.

"Green buildings" are constructed of non-toxic and recycled materials, use less water and energy in their operation, use alternative sources of energy, and protect local ecological function through landscaping, storm water management, and reduced car-parking facilities. The Leadership in Energy and Environmental Design (LEED) Green Building Rating System is a certification program that promotes high-performance green design, construction, and operation of new buildings.[89] Although LEED is voluntary, new legislation, building code regulations, municipal bylaws, design guidelines, and incentive programs also mandate or encourage sustainable design, such as green roofs on new buildings of a particular size, placing greater restrictions on property owners in the name of environmental design and protection.[90]

The emerging complexity of legal instruments needed to establish and maintain a large-scale "green development" is the subject of Deborah Curran's chapter, "Green Developments: New Entanglements of Property, Planning, and the Public Interest." Curran studies two major new developments in British Columbia: UniverCity in Burnaby and Dockside Green in Victoria. As she outlines, a web of both public and private instruments – easements, covenants, agreements, and statutory instruments – is required to achieve the green goals of the developments within the framework of private ownership. Pursuit of the public objective of green buildings restricts private titles and challenges traditional legal categories. The chapter harkens back to Ziff's description of the interface between private and public planning, though on a positive note, in that tools of private property ownership and private planning can be used to effect environmental planning in the public interest. It might also be that new forms of property relationships and regulations will be required to manage this public/private dichotomy as green development becomes more common.

Another form of green planning that has become increasingly popular is municipal adoption of tree protection bylaws that limit landowners' ability to cut down trees on private property. These measures are justified as providing a community benefit in preserving the "urban forest," which provides a number of ecological services, such as habitat, better air quality, reduced "heat island" effects, and better storm water management, as well as aesthetic value. In his chapter, "Private Tree Protection Bylaws: In the Public Interest?," Eran Kaplinsky considers a variety of such bylaws. He questions whether they are the most cost-effective way to achieve their stated objective

in light of their impacts on private property rights. He argues that the justification given does not support the design of these bylaws. Like zoning laws, Kaplinsky concludes, tree bylaws are most equitable when they impose similar burdens on all landowners in an area and most efficient when the benefit for all is of enough value to individual landowners to justify ceding control over the fate of their trees to the municipality. This is most likely to be the case in homogeneous (well-treed residential) neighbourhoods.

As cities expand, demands on natural resources, including water, intensify. In addition, urban development often adversely affects both the availability and the quality of water resources and destroys or fragments natural habitats such as wetlands. Provinces have expanded regulations for the use of water and increased restrictions on land use in order to maintain important wetlands and other natural heritage features and to protect local sources of drinking water. For example, in Ontario the Provincial Policy Statement prohibits all development in significant wetlands on private property, and watershed plans being developed under the *Clean Water Act* will result in restrictions akin to zoning on the use of private property, where deemed necessary to protect communal supplies of potable water. Another way to temper the adverse impact of development on water resources is through the use of green development standards, as Curran points out in her chapter.

As development pressure increases, access to sufficient water supplies for new residents acts as a constraint on development. Municipalities are obliged to provide potable water to their residents. As Jane Matthews Glenn discusses in her chapter, "Planning for Potable Water: Public Interest and Property Rights," access to water resources by municipalities must take account of private property rights as well as regulatory regimes that build on different property law traditions. Generally speaking, municipalities have no priority of access under common law and civil law rules, and they have only limited priority of access under public law rules in Canadian provinces. Matthews Glenn also considers the question of whether creating a statutory priority for municipal access would require compensation for the "taking" of property rights.

Formal Expropriation

The most radical juxtaposition of private rights and public interest in Canadian planning law arguably might be in the process of formal expropriation. It is therefore appropriate for this volume on private property, planning, and public interest to conclude with two studies of formal

expropriation in Canada. As discussed earlier in this introduction, regulatory taking or *de facto* expropriation is a limited concept in Canadian law. In contrast, formal expropriations of privately owned land by government bodies play a major role in the development and redevelopment of Canada's cities. Perhaps the most draconian of public powers over private property, the law of expropriation provides a mechanism for a government to "take" title to land from a private owner, when the land is deemed to be in the public interest, provided that adequate compensation is paid. Such actions are extreme. Yet some, including Waldron, argue that such extreme public interference with private property rights is sometimes necessary, assuming that it follows due process:

> It is inevitable in the world we live in that the nature and legitimacy of property rights will be affected over time by changes in circumstances, both in their character and in their distribution. The exploitation of land and other natural resources in a way that ignores public goods or the prospect of great public evils is not always tolerable.[91]

Even if it is accepted that expropriation is sometimes necessary and that it can only be done for public purposes or in the public interest, it is not always clear what these terms entail in Canada. They are not explicitly defined in any expropriation legislation in Canada (and do not even appear in most expropriation legislation in Canada). Expropriation regularly takes place in Canada for purposes ranging from infrastructure improvements – the building of highways and airports, for instance, or the provision of utilities – to public services such as schools and hospitals.

Most controversial is expropriation for urban renewal in economically depressed or blighted areas, in large part because such projects often involve property being taken from one or several private owners and ultimately transferred to another private owner (often a developer).[92] Such issues came to the fore in the internationally observed 2005 US Supreme Court decision in *Kelo v City of New London* (discussed in more detail in Jacobs's chapter).[93] In *Kelo,* the Court upheld a municipal decision to expropriate homes for a local redevelopment scheme that would benefit private businesses but provide economic benefits to the community in terms of jobs and an improved tax base. The decision unleashed unprecedented public outrage on a national scale that cut across political lines. The Court was widely accused of undermining deeply held cultural values regarding property rights and the sanctity of people's homes. This in turn triggered legislative measures in a

majority of US states tempering the impact of the decision by limiting the scope of the taking power to certain types of "public uses," usually excluding economic development schemes. Legislative reforms since then have been adopted to stem the potential for abuse of the expropriation power.[94] Although conflicts continue to arise, the breadth of expropriating authorities' power has been limited by these legislative amendments.

Canadian courts have consistently upheld the validity of *Kelo*-style expropriation for economic redevelopment,[95] but no case in Canada has given rise to the same degree of public fervour witnessed in the United States or precipitated legislative amendments to economic taking powers. Nevertheless, there are examples of high-profile proposals that have galvanized public opinion, including the proposed (but subsequently abandoned) plans for a Spadina Expressway in Toronto and the Mirabel Airport project in Montreal in the late 1960s, the Pickering Airport project of the 1970s (which has not been built to date), and the Toronto Yonge and Dundas Square rejuvenation of the past decade. In many of these cases, landowners have argued that their rights have been insufficiently considered in favour of an uncertain public interest justification.

In their chapter, "Expropriation: The Raw Edge of the Conflict between Public and Private Interests," Stephen Waqué and Ian Mathany outline a number of aspects of expropriation law and practice that demand reform to protect the interests of private property owners better. They argue that in Canada a particularly strong sense of unfairness can result when an owner is dispossessed in order to advance mixed public and private interests, perhaps because the "public interest" justification seems to be less clear in these circumstances. Other concerns include procedural issues. For example, Ontario expropriation legislation allows for the use of discretion to waive the "hearing of necessity" option for mass expropriations for large infrastructure projects, such as occurred with the Detroit River International Crossing project in Windsor and the Highway 407 extension near Peterborough. The hearing, a limited opportunity for the homeowner to challenge the legitimacy of the proposed expropriation, can be dispensed with relatively easily. Such increasingly common procedural shortcuts reduce the possibility of a meaningful public-private balancing in justification of the project.

Furthermore, though expropriation statutes in Canada require that fair compensation be paid, homeowners are not always left feeling that they have been sufficiently compensated for their losses. In her chapter, "Making Up for the Loss of 'Home': Compensation in Residential Property

Expropriation," Anneke Smit addresses the limited scope for recovery of subjective losses under Canadian expropriation law in the decades since the "fair market value" basis for valuing compensation was widely adopted in Canada. In particular, she argues, the loss of a sense of "home" suffered by residential property owners merits recognition, and some compensation, in Canadian law. Such a move in Canada would mirror approaches taken in some other common law jurisdictions and keep pace with developments in other areas of property law in which "home interests" are increasingly treated as worthy of legal protection. This would be another way to strengthen the protection of private property rights at a time when expropriation has become a widespread and relatively uncomplicated tool used by municipalities and provinces in Canada. Expropriation has an important role to play in Canadian urban planning, but, Smit argues, reforms are needed to ensure a more appropriate balance between public and private interests.

Conclusion

The appropriate relationship between the enjoyment of private property and public regulation of property rights through planning tools continues to be negotiated daily in Canada. While making for a powerful narrative, the boundaries of the public–private divide are not so clear in practice. In the end in Canada, public and private do not fit together neatly.

One does not want to encourage a strengthening of property rights at the expense of environmental, cultural heritage, affordable housing, and other "public interest" concerns. Furthermore, though the lack of a solid constitutional framework for the protection of property rights in Canada might have an influence on the courts, it might not be necessary (or, indeed, desirable or politically possible) to effect amendments to the *Charter* to include protection of private property rights. Still, the effect of planning decisions on private property rights must not be swept under the carpet as a non-issue.

Harvey Jacobs and Kurt Paulsen have written that

> [p]lanning cannot escape its relationship to property rights. Many conflicts arise because there is no consensus on the appropriate and fair use of property. Individuals rarely consider the interests of the community at large, the regional environment, and future generations when they make decisions about property management and land use change. Someone must represent

> the interests of present, future, and natural communities in the use of land as well as the interests of those traditionally excluded from decision-making.[96]

At the same time, when urban planning fails to sufficiently consider the interests of private property rights holders, it risks creating unnecessary tension and losing "buy-in" on projects or planning processes. Moreover, dismissing the interests of private property rights holders can ignore the public good that can come from the effective protection of private property rights, as discussed above.

Although the tension between the enjoyment of private property rights and the importance of urban planning is a common issue, the exact relationship between the two differs between jurisdictions. This book explores what that relationship looks like in parts of Canada today.

The chapters of this volume address discrete aspects of the private property and public planning nexus in Canada. Yet a number of recurring themes and issues emerge from the studies. Some have been mentioned above. In particular, the culture of a wide planning power in Canada is a critical starting point for many authors' considerations of the appropriate relationship among private property rights, planning, and public interest in Canada.

It is also clear that the lack of consensus on what constitutes "public interest" in Canadian planning law continues to be unsettling, as discussed in Valiante's, and Waqué and Mathany's, chapters. Planning bodies apply various conceptions of the term, and planning laws and policies often seem to work in furtherance of a particular set of private interests rather than an umbrella public interest. Although it was a US Supreme Court judgment, the *Kelo* decision and the type of planning that it represents loom large as Canadian lawyers and planners struggle with the appropriate role for expropriation tools and public-private partnerships in urban renewal processes. As a number of authors, including Jacobs, Smit, and Matthews Glenn, touch on, too, it is not always clear why private property rights are worthy of protection and which deprivations of private property rights are deserving of compensation. Furthermore, since substantive rights also emanate from procedural fairness, there is widespread concern that public participation in planning processes, including that by private property owners, is becoming more limited, as Makuch and Waqué and Mathany have argued.

The discussions by numerous authors indicate that the balance between public and private interests in Canadian planning law must be understood as evolving and continually in need of negotiation. When public goals shift, existing structures are challenged; this sometimes requires the development

of new instruments to accommodate the shift. Furthermore, we must be willing to regularly question whether the public or private interests meant to be served by a particular planning initiative actually benefit from it. The most recent shift toward smart growth and green building and development, along with protection and provision of natural heritage and natural resources in an urban setting, is an example. Filion and Kramer, Curran, Matthews Glenn, and Kaplinsky have all grappled with the effects of these trends on enjoyment of – and conceptions of – private property ownership. Although most agree that these are worthy goals, they have required changes to the legal framework that have pushed up against private property rights, creating disaffection. The difficulties inherent in the types of legislative shifts that we have seen will recur as priorities continue to change in the future. And, as Kaplinsky, Waqué and Mathany, and Smit have argued, in a context of broad planning powers, it is important not to lose sight of the what and why of private property rights – that protection of these rights is an important public interest value. Equally, as Ziff notes, private planning tools must also be kept in check lest they contribute to exclusivity and undo the public good that the public planning is meant to serve.

Finally, as discussed above, the very idea of a dichotomy between private property rights and public interest should be challenged. There is no clear line between the two. As the chapters of this volume illustrate, public and private interests come up against and reinforce each other, sometimes in unexpected ways. In some cases, it is through the reinforcement of private property rights that public interest can be served.

The authors of this book do not always agree, but the perspectives that they bring as lawyers and planners, academics and practitioners, together present a rich consideration of the topic. It is our hope that the chapters that follow will inform – and challenge – those working on planning and property issues in Canada and inspire more scholarship on these issues. Moreover, we hope that, for those in other jurisdictions, this analysis of the Canadian framework, with its strengths and foibles, will prove to be a useful reference.

Notes

1 See, e.g., Jane Jacobs, *The Death and Life of Great American Cities* (New York: Random House, 1961).

2 Richard L Florida, *Cities and the Creative Class* (New York: Routledge, 2004); Ken Greenberg, *Walking Home: The Life and Lessons of a City Builder* (New York: Random House, 2012).