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INNOVATION

INTERNATIONAL PROPERTY RIGHTS INDEX 2023

ASSESSING THE STATE OF PROPERTY RIGHTS PROTECTIONS IN CANADA

CASE STUDY BY: **FRONTIER CENTRE FOR PUBLIC POLICY (CANADA)**

JOSEPH QUESNEL
Author



INTRODUCTION

Measuring property rights protections is important because secure property rights are central to our economic system. The economic literature confirms the connection between a country's economic wellbeing and robust property rights protections. A lack of property rights is demonstrably linked to low productivity and poverty around the world. For these reasons, the Frontier Centre for Public Policy decided in 2013 that a comparative ranking of property rights protections within Canada would be useful for policy makers, journalists, and the public.

The inspiration for the Index came from the International Property Rights Index (IPRI), which measures most countries in the world against a battery of indicators on their legal environment, as well as physical and intellectual property protections. Back in 2013, the Frontier Centre for Public Policy collaborated with the Washington, D.C.-based Property Rights Alliance in releasing of the IPRI. For three years, the Frontier Centre contributed Canadian property rights case studies. During the release of the 2011 IPRI, reporters questioned this author about how each Canadian province scored on the IPRI. The author was not able to provide an answer, as the IPRI ranks each country in a general aggregate sense. Thus, this index came about in the attempt to provide that answer.

The Canadian Property Rights Index is not intended to be exhaustive or offer the last word on property rights in Canada. Instead, it is meant to provide a comparative measure of how the provinces and territories have responded to some of the most significant challenges to property rights in this country. Thousands of laws and regulations limit the rights of property owners. It would indeed be difficult and unmanageable to quantify and measure them all; therefore, the Index focuses on eight areas in which one finds the most common and significant threats to property.

Provincial and territorial governments in Canada have jurisdiction over property and civil rights under The Constitution Act, so an index at that level makes sense. Some important differences from the IPRI should be noted. First, we decided to exclude intellectual property rights in the Index because they are under federal jurisdiction, so they fall outside the scope of this analysis. We excluded natural resources also because they are in public hands. Individuals and companies use and benefit from these resources through grants, permits, licences, and leases, but these people and companies lack proprietary title to these resources. Taxation (although there is the exception in the land transfer tax) is not part of the Index, as it could form its own index. Landlord-tenant relations are also not included. The focus of the Index is on real and personal property.

This Canadian Property Rights Index represents an updating of this project from 2013. Sufficient years have passed, and Canadians have dealt with threats to their right to secure property rights over the last few years. It was time for a new and improved Index. As we stated in our original report, we take the position that property rights are not absolute and that sometimes regulating property for the common good is necessary, although we insist that individual property rights owners not bear the burden of regulating property in the name of protecting public goods. We believe the benefits of public goods should be spread out evenly among the public. This belief, of course, influenced decisions on how to create a scoring system for jurisdictions across Canada.





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SITUATING THE CASE AND RESEARCH QUESTIONS

Research for the Index involved an exhaustive search through relevant legislation in each of the seven indicator areas. These were laws that were identified in the 2013 index. Care was taken to determine if any of these laws had changed since 2013.

The fundamental research questions were:

1. Can we determine – based on these seven dimensions of property rights – which jurisdiction adheres closer to property rights than others?
2. Which jurisdictions performed higher and lower? Why?
3. The 2013 index revealed some underlying patterns were evident in the results. Would those patterns be maintained through some methodological tweaking in the 2023 index?
4. What can the rank outcomes tell us about the state of property rights throughout Canada in 2023?

This index is a composite measure of one element of economic freedom. In this respect, it enjoys company amongst other index measures such as the Fraser Institute's Economic Freedom of the World Index, although the Property Rights Index only focuses on one component of economic freedom – property rights, albeit in seven dimensions. Thus, in this case it is closer to the Fraser Institute's Annual Survey of Mining Companies. The only difference is the Canadian Property Rights Index largely includes objective measures and avoids subjective ones. For example, on expropriation, whether a jurisdiction requires an inquiry report is an objective yes-no question. By and large, each indicator asks whether a province or territory has a certain procedural safeguard or if it does not. We are making a normative or evaluative judg-



ment on whether that means property rights are respected or not.

Another decision from the 2013 index that was maintained in the 2023 index was the decision to focus solely on personal and real property, although regulatory procedures extend beyond those categories into the economic uses of land. It was discussed whether it was desirable to produce an index solely on regulatory decisions. One of the reasons for this procedure was some jurisdictions have very serious regulatory takings, such as the Greenbelt in Ontario or the Agricultural Land Reserve (ALR) in British Columbia. It was thought that this might be missed in the way the index currently measures regulatory takings. Also, the equal weighting also may be masking important trends in land use policies. Of course, changing the weighting system was also discussed and will be considered again in the next index.

We decided in the first index and continued into the second one that all the indicators would be weighted equally. The justification for that decision was to attempt to capture different dimensions to property rights and to resist judging which ones were more important than others.

As we proceed, we will first provide some definitions for all seven indicators. Then we will outline the specific methodology we employed for the index in 2023. Then, we will provide a wider discussion on that methodology as well as the data used. In this section, we will identify any critical analyses of the methodology, especially from credible outside sources. Next, we will outline the results, including a chart showing the rankings. Then, we will include a discussion of those results. Finally, we will round things off with a conclusion and a list of recommendations for each of the seven indicators and then a list of overall policy recommendations.

For this revised version, there are seven indicators, and they are as follows:

1. **Land Title System** – The original Index recognized that the provinces and territories have different systems to register land title. This current version recognizes that the Torrens system is superior to the older deeds system. For simplicity, we have eliminated the presence of a property transfer tax as part of this indicator. Even though it was included in the 2013 index. The land transfer tax also has more to do with economic development and taxation issues than security of property per se.

2. **Expropriation** – All the provinces and territories have laws governing expropriation processes. Again, we have evaluated these laws against a series of procedural safeguards that are designed to protect individual landowners.
3. **Regulatory Takings ('downzoning')** – As before, we have included land use planning processes that interferes with property use and restricts its use which often reduces land values. This indicator will look at whether or not there are provisions for compensation. Some land use regulations — such as the Greenbelt in Ontario and the Agricultural Land Reserve (ALR) in British Columbia — will reduce a jurisdiction's score in regulatory takings in the long term if they are not adjusted.
4. **Civil Forfeiture** – Again, this indicator assesses provinces and territories on the ability people have to gain title to property that is used in unlawful activity. However, there are safeguards protecting property owners, which this indicator also measures.
5. **Endangered Species** – Governments may designate land that contains endangered species to protect these species. However, this provision affects property rights. This indicator assesses the presence of safeguards in the different jurisdictions.
6. **Heritage Property** – Governments designate certain property to be of important heritage or cultural significance. This indicator looks at procedural safeguards to protect property owners who face having their property designated as heritage.
7. **Municipal Power of Entry** – Provincial and territorial governments have laws allowing municipalities to permit officials to enter and inspect private premises to enforce certain bylaws. This indicator assesses the jurisdictions that allow for procedural safeguards for property owners.

METHODOLOGY

Each jurisdiction receives “points” for certain procedural safeguards. Next, each score is converted into a percentage to indicate variation across Canada. All the indicators are then divided by seven. Provinces and territories lacking civil forfeiture are given a score of 30 to recognize their strong property rights protection. It is to a province or territory’s credit that it lacks civil forfeiture because they are open to property rights abuses. Jurisdictions with procedural safeguards of civil forfeiture receive a higher score.

Some jurisdictions clearly have stronger protection in certain areas. This is to be expected. Back in 2013 and again in 2023, we subjected our methodology and data collection to the careful advice of a respected social scientist. We submitted our work to Dr. Tom Flanagan, at the time a professor at the University of Calgary. As the note on data that was provided by Dr.

Tom Flanagan mentions, Canadian jurisdictions do not necessarily have a consistent approach toward property rights, or as he put it, “The absence of internal data structure suggests that legislatures, when they act in this field, view the issues in isolation rather than seeing them as belonging to a broader field on which they should strive for consistency.”

An index is a social scientific tool that acts as “a composite measure of variables, or a way of measuring a construct using more than one data item.”

There are typically two considerations when creating an index. First, does it have validity? Do the indicators in fact measure what they are supposed to measure? Second, do the items chosen to measure a concept have unidimensionality? That is, each item must measure only one concept and not others. For example, to

ALL THE INDICATORS HAVE EQUAL WEIGHT INDICATOR	MAXIMUM POSSIBLE SCORE
LAND TITLE SYSTEM	3
EXPROPRIATION (PROCEDURAL SAFEGUARDS)	11
REGULATORY TAKINGS	6
MUNICIPAL POWER OF ENTRY	9
CIVIL FORFEITURE	27 (or 30 if lack civil forfeiture laws)
ENDANGERED SPECIES	12
HERITAGE PROPERTY	15

Table 1. Methodology

measure depression, one should not include items that measure anxiety, even though the concepts are similar. But they are not identical.

In the case of property rights protection, it is important that each item or indicator is unique. As will be discussed in the methodology section below, the Index was subjected to proper social scientific tests to ensure that the categories' measures do not overlap. As stated above, our initial 2013 data set was subjected to empirical analysis by Dr. Tom Flanagan, a political scientist at the University of Calgary, and PhD student Julie Croskill. These researchers produced a matrix of all original eight dimensions correlated against each other.

They determined that "there was not a pattern of significant correlations, either positive or negative." Results of a Cronbach's Alpha test was small and negative. As such, Flanagan and Croskill concluded that the indicators were not empirically related to one another. In other words, how a jurisdiction scores in one area does not predict performance in another. Flanagan concluded, however, that the Index is useful in another aspect, or as he put it: "Aggregating these eight dimensions into a single Property Rights Index is, therefore, not based on the structure of the data but on the conceptual insight that these dimensions are all aspects of what theorists normally consider property rights."

Flanagan did not view this as a problem but rather suggested that "the absence of internal data structure suggests that legislatures, when they act in this field, view the issues in isolation rather than seeing them as belonging to a broader field on which they should strive for consistency."

For the 2023 index, Dr. Flanagan again reviewed our data and results. He again confirmed that the methodology was sound. In an email from June 2, 2023, Flanagan said: "I think the overall approach is valid. The rankings and the index are, in a sense, arbitrary, but the same could be said of most measuring tools in the social sciences."

Dr. Flanagan also made some suggestions for improvements. For example, on the civil forfeiture indicator, he wrote that the treatment of civil forfeiture seemed somewhat inconsistent given that we had mentioned that "any civil forfeiture is worse than none at all." He mentioned that we "eliminate the weight of this observation by dividing by six rather than seven when you calculate the overall index for jurisdictions without civil forfeiture." In response to this observation, we made the decision to give jurisdictions without any civil forfeiture regime a full score of 30 points to reflect this.

Dr. Flanagan made two other observations. One was that the inclusion of archaeological artifacts – primarily Indigenous ones – might be good to include within the heritage property indicator. This was a good suggestion, but one that we could do not act on because of time required. We will consider this for including in a future index. Lastly, Dr. Flanagan mentioned that it might be useful to include a "rank-order correlation" with the rankings of the provinces in the Fraser Institute's freedom ranking of North American jurisdictions as a check on the validity of the index. Given the close connection between economic freedom, prosperity and property rights, this might be a useful comparison. Again, we could not add this into the index for reasons of time, but we will consider this in the future.

RESULTS

TOP RANKED JURISDICTIONS	BOTTOM RANKED JURISDICTIONS
BRITISH COLUMBIA (79%)	ONTARIO (62%)
NOVA SCOTIA (71%)	NEW BRUNSWICK (53%)
NUNAVUT (71%)	QUEBEC (50%)
ALBERTA (70%)	NEWFOUNDLAND AND LABRADOR (50%)
MANITOBA (69%)	PRINCE EDWARD ISLAND (47%)

COMPARATIVE RANKINGS IN 2023 AND 2013	
TOP FIVE JURISDICTIONS (2023)	TOP FIVE JURISDICTIONS (2013)
BRITISH COLUMBIA (79%)	NOVA SCOTIA (68%)
NOVA SCOTIA (71%)	NUNAVUT (67%)
NUNAVUT (71%)	ALBERTA (66%)
ALBERTA (70%)	BRITISH COLUMBIA (65%)
MANITOBA (69%)	MANITOBA/SASKATCHEWAN (60.5%)

COMPARATIVE RANKINGS IN 2023 AND 2013	
BOTTOM FIVE JURISDICTIONS (2023)	BOTTOM FIVE JURISDICTIONS (2013)
ONTARIO (62%)	QUEBEC (54.6%)
NEW BRUNSWICK (53%)	YUKON (54%)
QUEBEC (50%)	NEWFOUNDLAND AND LABRADOR (52.5%)
NEWFOUNDLAND AND LABRADOR (50%)	NORTHWEST TERRITORIES (52%)
PRINCE EDWARD ISLAND (47%)	PRINCE EDWARD ISLAND (47%)

Table 2. Final Rankings.

DISCUSSION

Although the provinces and territories that make up the top five jurisdictions were the same, the scores and the rankings were indeed different. British Columbia leads the country this time, instead of being ranked fourth as it was in the 2013 index. Nova Scotia is second as opposed to first place in 2013. Nova Scotia continues to be an anomaly among the Maritime provinces. Alberta and Manitoba remain in the 2023 top five jurisdiction. Overall, provinces in the West performed better than those in the East. Who knows? These are subject to legislation. Why do you make the East West comparison? It does not mean anything.

How much the changes are due to some of the methodological tweaks is uncertain, but we believe that we have improved the index. Accounting for jurisdictions without civil forfeiture did not alter the rankings. *The fact that the methodology was changed did not alter the results shows that those methodological changes did not cause any significant changes.* Unfortunately, the Atlantic provinces are at the bottom again, especially Prince Edward Island. British Columbia comes out on top, rather than Nova Scotia.

Nunavut also performed strongly again. How much of this has to do with the exclusion of an indicator as well some streamlining the other indicators is not known. But the basic pattern

remained--the dominance of the west over the east. Although not as low as some Atlantic provinces, Ontario and Quebec continue to lag behind others. Quebec performs well on regulatory takings due to its civil code system but did not perform well in other areas. Quebec needs to be monitored over time.

Unfortunately, this time Ontario ends up in the bottom five jurisdictions, whereas in 2013 it was in the top five jurisdictions. Ontario property rights deserve to be regularly examined to see if these results are an anomaly.

In the east, part of the problem is some Atlantic jurisdictions still retain the older deeds system of title registration. Nova Scotia distinguishes itself once again (but going from first last time to second place now), but this province again has a Torrens title registration system and stronger scores in endangered species, civil forfeiture and heritage property.

Nunavut also distinguishes itself by placing in the top five ranked jurisdictions. However, one change from the 2013 index was that the other two Northern territories did not place in the bottom five. This may represent a shift, but only time will tell. In the next index, one measure that may affect final rankings is the conversion of some jurisdictions to a Torrens title system.

CONCLUSION

Without constitutional protection for property rights, Canadians in all provinces and territories are at the mercy of legislative activism. As in the first Index, the problem is the growth of the state and regulation. Increasingly, provincial and territorial lawmakers make laws and regulations that erode property rights. The ideal way forward is to codify certain laws in the constitution (although even in the United States where rights to compensation are enshrined, governments find ways around that to limit property rights).

The best solution is an informed and vigilant public that demands an end to overregulation that limits property rights. The answer is a commitment to limited government and a public pledged to freedom can, perhaps, achieve that in the end. There are many other variables measuring economic freedom (such as taxation levels, level of bureaucratic red tape, etc.) that affect the level of economic liberty and pros-

perity. Although property rights are foundational to economic freedom, that is not the end of the story when it comes to determining if a jurisdiction is economically free. This Index shows that even absent constitutional protection there are still provinces and territories doing a better job of protecting individual property rights than others. This allows Canadians in different provinces and territories to learn from those who are doing the best job at safeguarding property rights.

Canadians need to become more vigilant and care more about property rights. In closing, the hope is that Canadians in all jurisdictions can learn from this Index and improve their property rights. It is hoped that citizens hold their legislators accountable for improving property rights in their jurisdictions. But even more important is a sincere desire that these rankings will serve as a springboard for a broader movement among Canadians to preserve, protect, and enhance property rights across the country.

RECOMMENDATIONS

The following are some recommendations for each property rights indicator in the Index:

REGISTERING AND/OR TRANSFERRING PROPERTY

- » All jurisdictions must be informed about the advantages of the Torrens system over the deeds registration system. These jurisdictions could receive government funds to help with the transition costs.

EXPROPRIATION

- » Each jurisdiction must bring all expropriation powers and processes under one statute. This way, everything is clearer and easier to locate.
- » All jurisdictions must move toward clarifying the purposes of expropriation and the powers granted in their statutes. The grounds for expropriation must be reduced and enumerated clearly in binding legislation. Vaguely defined municipal purposes must be clarified. Expropriation must return to clearly defined public purposes such as the building of necessary infrastructure.
- » All jurisdictions should curb the ability of governments to expropriate for economic development purposes. Governments should not be in the business of business.

LAND-USE PLANNING AND/OR CONSTRUCTIVE TAKINGS

- » All jurisdictions need to expand the right to compensation for those affected by land-use policies that downzone. Restrictions on compensation should be severely limited.
- » Putting compensation provisions in the Constitution would force politicians who lack the incentive to do so, to write these measures into relevant statutes.

MUNICIPAL POWER OF ENTRY

- » At minimum, all jurisdictions should require notice and a warrant before allowing municipal officials onto private property.
- » Tighten up regulations to ensure that officials only enter property under serious circumstances.

CIVIL FORFEITURE

- » Provinces with civil forfeiture must tighten up the definitions of property and the scope of unlawful activity.
- » More classes of offences must be excluded from the purview of civil forfeiture, not added.
- » Courts must be given considerably more discretionary authority regarding whether to

issue a forfeiture order based on the circumstances of the case and how it affects the owner.

- » Where possible, more jurisdictions need to eliminate civil forfeiture regimes altogether in favour of federal criminal forfeiture.
- » B.C. must abandon its plans to introduce “unexplained wealth orders.” This is a system ripe for abuse. Indeed, all jurisdictions must not consider these measures.

ENDANGERED SPECIES

- » All remaining jurisdictions should move toward full compensation for designations.
- » Governments should devote much more money toward conservation agreements and other partnerships with private landowners, as these will increase landowner buy-in for these measures. Heritage Property
- » The compensation for designations should be full and timely.
- » There ought to be more partnerships with private landowners and more tax relief schemes.

POLICY RECOMMENDATIONS

1. The federal government and the provinces and territories need to enshrine property rights or the right to timely and full compensation in

the Constitution. Canada—due largely to pressure from the New Democratic Party—resisted calls to put property rights in the patriated constitution. As stated in the first Index, there is an amending formula in our constitution that can insert property rights in the document.

2. Provinces and territories must control regulatory takings. Provincial and territorial governments can follow the lead of Europe and other parts of the world and place significant measures to compensate landowners for regulations and measures that reduce economic value of land (so-called regulatory takings) or limit economic uses of land. Canadians need to be informed that we are outliers in the world on this issue.
3. Governments need to strive for consistency in area of government policy that affect property rights. For example, expropriation laws, civil forfeiture laws (if they exist), and heritage laws need to provide robust protections for individual landowners.
4. As stated in first Index, Canada needs a research organization or advocacy group that is completely devoted to property rights education and protection. This will inform Canadians how much behind we are on property rights education and how to reform our laws to give us maximum property rights protections. Jurisdictions can share best practices at this level. This would enhance Canada's economic wellbeing.



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