

Actions by government that have anything to do with property would come under increasing scrutiny, and there are two bases for the concern. One is that at the end of the day courts would actually strike down the governmental initiatives that were aimed at protecting the environment. The other is that there would be court challenges and years of court battles over government action to protect the environment, based on such a Charter right. It could be years or even decades before we know the extent to which the courts will draw the line in order to protect government's ability to deal with environmental problems. That is why we call it the "chilling effect".³⁰

3.24 The President of Inuit Tapirisat of Canada advised the Committee that her organization is concerned that resource development corporations may use constitutionally-guaranteed property rights to challenge certain aspects of aboriginal title to land. Chief Wilson, representing the Assembly of First Nations, also opposed the entrenchment of property rights in the Charter. He indicated to the Committee that a right to property may run "right in the face of regulations that are designed to protect that property."³¹

3.25 Although a substantial number of other countries have entrenched property rights in their national constitutions, witnesses who appeared before the Committee were only able to speak to the American experience. Some³² felt that the experience with the provision protecting property rights in the United States Constitution should reassure Canadians, because Americans have nevertheless developed an environmental protection that is in many respects more stringent and more effective than Canada's. Other witnesses however cited American experience as an indication of the ways in which property rights can interfere with government efforts to protect the environment.

3.26 According to Mr Futrell of the Environmental Law Institute in Washington, D.C., the U.S. Supreme Court has never struck down a regulation made by the federal Environmental Protection Agency as being a violation of the property right.³³ At the state government level, however,

The federal private property clause can sometimes trump state actions and state efforts to protect the environment.³⁴

He suggested that the "takings clause" (the property rights provision in the Bill of Rights) can have a chilling effect:

This clause does not necessarily undermine environmental regulation; however, in a number of state legislatures, especially in the south and mountain west, it has been used as a powerful argument to stymie legislation in committee. It has tremendous prestige.³⁵

³⁰ Issue 13, p. 48.

³¹ Issue 13, p. 29.

³² See, for example, the comments by the Minister of the Environment, Issue 15, p. 11.

³³ Issue 9, p. 23.

³⁴ Issue 9, p. 10.

³⁵ Issue 9, p. 13.