

US Court finds proposed vacant home tax law unconstitutional

Constitutionality | Litigation | Litigation & Dispute Resolution | Tax

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To combat shortages of housing and housing affordability, some governments in Canada have introduced a tax on vacant or unoccupied homes as a way to deter property owners from leaving their homes empty. Although such a tax has been shown to improve housing availability, critics suggest that it does not improve housing affordability. As well, as seen in Toronto in early 2024, the roll out of its vacant tax, first adopted in 2021, was chaotic, generating more than 169,000 complaints for the 2023 tax year. According to mainstream media sources, a City report indicated that 108,000 vacant home charges on property tax bills were reversed by early spring of 2024.

In British Columbia, vacant home taxes have generated litigation, which have included allegations that such a tax breaches the *Canadian Charter of Rights and Freedoms* (the “**Charter**”).

Although no Canadian court has found that a vacant home tax violates the *Charter*, the US Court decision in *Debbane v. San Francisco (City & County)*, Superior Court of the State of California, 26 November 2024, Case No. CGC-23-604600, raises the spectre that vacant home taxes are unconstitutional.

In this US case, a small group of property owners challenged San Francisco’s proposed bill to implement a vacant home tax. The bill, described as Proposition M, had been submitted to voters at the November 2022 general election. Over 54% of voters voted in favour of Proposition M.

Under the legislation that would take effect in 2025, property owners were to be charged an escalating amount for each “Residential Unit” that was vacant during the preceding calendar year. “Residential Unit” was defined to include a house, an apartment, a mobile home, a group of homes, or a single room that was designed as separate living quarters, but did not include units occupied or intended for travelers, vacationers or other transient occupants.

Furthermore, among other things, the legislation provided that a Residential Unit would be deemed “vacant” if it was “unoccupied, uninhabited, or unused, for more than 182 days, whether consecutive or non-consecutive, in a tax year.”

Property owners challenged Proposition M on multiple grounds, including that it violated the Takings Clause of the Fifth Amendment of the US Constitution, the fundamental liberty interests in familial living arrangements protected by the due process and equal protection clauses and the right to privacy under the California Constitution because the law sought to compel property owners to share the property on which they resided with others, against their will.

Under the Takings Clause, private property cannot be taken for public use, without just compensation.

Each of the property owners who challenged Proposition M had different factual circumstances.

For example, two of the property owners were brothers who co-owned several small residential buildings. One of the buildings that they co-owned had five units. The brothers lived in this building, along with their respective wife and girlfriend. Otherwise the building was kept empty and they had no desire to share it with anyone else. Yet, vacant units in the building would be subject to the proposed vacant home tax.

Another property owner owned a four-unit building. This property owner lived in one of the units and had rented the other three units. However, as this property owner got older and he began to suffer from significant health issues, he no longer wanted to be a landlord. Accordingly, as each of the other units became vacant he declined to re-rent them. The unrented units would be subject to the proposed tax.

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A third property owner owned a micro-condominium in San Francisco and in Boston. She maintained both of these condominiums for her own use and never rented them out. In 2022, she spent 126 days in San Francisco and more than 183 days in Boston. Prior to her retirement, this property owner worked on temporary contracts at various sites across the United States. Since she used her San Francisco micro-condominium for less than 182 days a year, it would be subject to the proposed vacant home tax.

Some of the property owners also complained that if Proposition M was implemented they would be unable to afford to pay the high taxes charged to them and that they would be forced to sell their long-time homes.

While the court noted that Proposition M would raise revenue that would be spent on (1) rent subsidies for individuals 60 and older or low-income households or (2) acquiring, rehabilitating, and operating multi-unit buildings for affordable housing, the court ruled in favour of the property owners on all counts raised and granted them summary judgment.

The court simply found that the City had failed to create any triable issues of fact with competent admissible evidence.

Although the decision does not provide elaborate reasons for finding in favour of the property owners, it is clear that the constitutional protections afforded to the property owners underpinned their victory.

In Canada, however, a different result may have been rendered because the Charter does not protect economic interests or property rights.

Indeed, in *Bacon v. British Columbia (Minister of Finance)*, 2020 BCSC 578, appeal quashed 2020 BCCA 218, the court refused to grant an injunction against the province's *Speculation and Vacancy Tax Act* despite arguments made by property owners that the legislation breached sections 6(2), 7 and 15 of the Charter.

With respect to section 6(2), which protected the movement into another province either for the taking up of residence or to work without establishing residence, the property owners argued that the legislation treated British Columbia residents differently than other residents who made their tax filings in other Canadian provinces.

With respect to section 7, which states that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, the property owners argued that this section protected their rights to establish a home and to enjoy individual dignity and independence. As well, the property owners argued that section 7 protected their privacy rights as it related to the use of their respective homes.

Under section 15, the property owners alleged that the legislation:

1. Created an adverse distinction (based on marital status, gender and residency);
2. Perpetuated prejudice historically suffered by women because it discriminated against Canadian women who were married to non-residents who earned more income outside of Canada by taxing married women who are otherwise eligible for a principal residence exemption but for their non-resident husband's higher income; and
3. Perpetuated stereotypes about married women who made less than their husbands.

The Minister disputed any violation of the equality provisions of the Charter.

In analyzing whether an injunction should be granted to the property owners, the court was required to assess whether there was a serious issue to be tried. Although the court did not dismiss the application for an injunction based on this part of the tripartite test for an injunction, it stated that the Charter analysis of the property owners was flawed.

Essentially, the property owners framed their submissions as a claim for protection of economic rights and property rights, which were excluded from Charter protection.

The court found that it was unclear how the legislation impeded mobility rights, that the property owners had not advanced any position to support a deprivation of their section 7 rights that was not in accordance with principles of fundamental justice, and that there was insufficient evidence to establish that the legislation had caused any adverse effects or indirect discrimination against the property owners.

The court also found that the property owners had failed to establish that they would suffer any irreparable harm and that the balance of convenience favoured allowing the government to impose and collect the vacant home tax. The court accepted that granting an injunction to the property owners would create actual

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harm to the public interest.

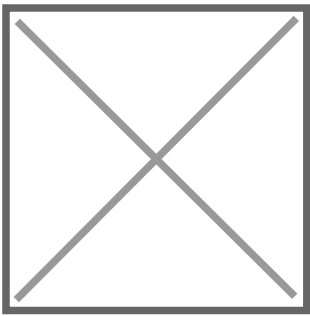
As can be seen, United States and Canadian courts have dealt differently with vacant home tax legislation. The key difference between the two jurisdictions is that the US Constitution has strong protections for property rights whereas Canada's [Charter](#) does not protect economic interests or property rights. Accordingly, as it relates to vacant home tax legislation, the victory of the property owners in San Francisco will unlikely assist property owners in Canada.

The decision of the San Francisco court is under appeal. A PDF version is available to download [here](#).

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