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ONE HUNDRED YEARS OF SOLICITUDE—JUDICIAL RESISTANCE TO REFORM OF MARRIED WOMEN'S PROPERTY LAW IN THE WEST

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The evolution of the right of married women to own and control property in the western provinces was marked by an ongoing struggle between the legislatures and the judiciary. The legislatures in each of the western provinces were prompt to grant property rights to married women in an effort to respond to social and economic change. However, the judiciary continued to limit the property women could own. This paper reviews the married women's property legislation in British Columbia, the North-West Territories, Alberta, and Saskatchewan and examines the major cases defining separate property, the scope of liability of husbands and wives, and associated property issues. While successive statutes prescribed the incremental abolishment of the common law doctrine of marital unity, judges adhered to common law notions of family and steadfastly resisted giving full effect to these laws until the 1920s.

L'évolution du droit des femmes mariées de posséder et diriger la propriété dans les provinces de l'ouest est caractérisé par un combat entre les parlements et les juges. Les parlements de chacune des provinces n'hésitèrent pas à accorder les droits de propriété aux femmes mariées pour répondre aux changements sociaux et économiques. Cependant, les juges continuèrent à limiter la propriété que les femmes pouvaient posséder. Cet article revoit les lois concernant la propriété des femmes mariées de la Colombie Britanique, de l'Alberta, des Territoires du Nord-Ouest, et de la Saskatchewan et examine les causes principaux qui définissent l'idée de la propriété séparée, l'étendue de la responsabilité des femmes et des maris, et d'autres questions liées aux droits de la propriété. Bien que des lois successives aient commencé l'abolition du principe de l'unité des époux, les juges ne laissèrent pas les notions du droit commun concernant la famille et refusèrent fortement jusqu'aux années 1920 à réaliser complètement les buts de ces lois.

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The western provinces have enjoyed a reputation as pioneers of social reform in Canada, and it is logical to assume that this progressive attitude would also be manifested in the judicial and legislative approach to reforming the property rights of married women. Indeed, one might think that the valuable role pioneer women played in the prairie provinces would have justified reform of property laws sooner than in the rest of the country. It is true that in some respects, the women of British Columbia, Alberta, and Saskatchewan secured legal rights more rapidly than did women in central Canada and the Maritimes. Political equality, for example, was won by women in the West at an early date; as far back as 1873 both married and single women in what is now British Columbia had a vote in municipal affairs, and Alberta and Saskatchewan were two of the first provinces to grant women the right to vote in provincial elections.

However, despite relatively early legislative efforts to reform married women's property rights, substantive change did not come quickly or easily in the West. This paper provides an overview of the evolution of married women's property reform in the provinces of British Columbia, Alberta, and Saskatchewan, and charts the changes which took place. The factors which motivated legislatures to institute incremental change in the statutory law are identified, as well as those factors which galvanized the judiciary in all three provinces against giving effect to the legislation.

In documenting married women's property reform, most historians proceed upon the assumption that the common law doctrine of marital unity imposed extreme hardships on nineteenth-century women. Married women's property laws are said to have reduced women to a state of "virtual slavery," putting women in the same category with criminals, lunatics, and minors as being legally incompetent and irresponsible.³ It is true that the common law did have negative effects, including bringing about extreme hardship for deserted women and presenting often insurmountable barriers

¹ C. Cleverdon, *The Woman Suffrage Movement in Canada* (Toronto: University of Toronto Press, 1974) at 87.

² This right was granted in 1916; British Columbia & Ontario followed suit the following year. S. Altschul & C. Carron, "Chronology of Some Legal Landmarks in the History of Canadian Women" (1975) 21 McGill L.J. 476 at 480.

³ L. Holcombe, Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England (Toronto: University of Toronto Press, 1983) at 36.

to participation in commercial activities. However, analysis of married women's property reform is hampered by a twentieth-century aversion to the very notion of marital unity, in which "husband and wife are one person, and the husband is that person." As a result, it is generally assumed that the gradual recognition of the injustices occasioned by the common law necessitated and motivated the reform of married women's property law.

However, this approach has recently been challenged. Historians have suggested that in fact, the common law doctrine of marital unity continued to regulate domestic relations in some Canadian jurisdictions as effectively as it had in medieval times. The common law was based upon the notion that the family was a "community," and some have argued that the responsibilities owed by a husband to his wife tempered the loss of legal rights which women suffered upon marriage. These scholars caution against presuming that defects in the common law were obvious at the time and that this sentiment fuelled the reform of married women's property laws.

It is as yet unclear whether there was general dissatisfaction among women in the western provinces about the ability of the common law to govern marital affairs. Determining whether the common law regime was acceptable to women and whether the introduction of separate property rights resulted in a net improvement in the quality of their lives is beyond the scope of this paper. Instead, by necessity, this analysis is largely confined to sources created by formal legal institutions. What is clear from the following analysis is that the opinion of the judiciary on the merits of the common law was very different from that of the provincial legislatures, and that this disagreement determined the responses of these institutions to social and legal change.

An examination of the common law rules regarding married women's property is necessary in order to assess subsequent legislative developments and judicial interpretations. Norma Basch summarizes the common law conception of marriage this way:

The husband adopts his wife together with her assets and liabilities. Taking responsibility for her maintenance and

⁴ This expression is generally ascribed to the eighteenth-century jurist Sir William Blackstone.

⁵ P. Girard & R. Veinott, "Married Women's Property Law in Nova Scotia, 1850–1910" in J. Guildford & S. Morton, eds., Separate Spheres: Women's Worlds in the 19th Century Maritimes (Fredericton: Acadiensis Press, 1994) at 67.

protection, he enjoys her property and the products of her labor. The wife assumes her husband's name and by extension his rank in the social order. Giving up her own surname and coming under his wing or protective cover, she acquires a cloak of legal invisibility. Her legal personality is submerged in her husband's. With their identities fused and their assets combined, the husband and wife are in an incomparable position to produce legitimate heirs, thereby fulfilling the true function of marriage.⁶

At common law, all personal property owned by a woman at the time of marriage and all that she acquired thereafter became her husband's absolutely, with the exception of the wife's clothing and personal ornaments. He could use and dispose of this property in any way during his lifetime, including bequeathing it by will, without his wife's consent. A married woman did not lose ownership rights over real estate, but her husband gained the authority to manage the property and receive the rents and profits from it. On the death of her husband, a woman was entitled to the use of one-third of the lands and tenements her husband had possessed during marriage as a tenant in dower. If a husband survived his wife, her property passed to her heirs at law, subject to her husband's right to hold her land as a tenant by curtesy if the wife had at least one surviving child.

As a corollary to the limitations placed upon women, husbands were burdened with considerable responsibilities. Since a woman's legal existence was incorporated into that of her husband, in practice he acted as her legal representative. He assumed legal responsibility for all actions involving his wife, including recovering any money owed to her, paying any debts she had incurred, and paying damages for her torts or breaches of contract. In these actions the husband could be sued alone or jointly with his wife and was liable to the full extent of his own property.

The doctrine of marital unity restricted not only the property rights of married women, but also their legal rights. Married women were legally incapable of suing or of being sued in their own names. A married woman could not enter into contracts in her own name because she had no property with which to satisfy her debts,

⁷ Holcombe, *supra* note 3 at 25–26.

⁶ N. Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (Ithaca: Cornell University Press, 1982) at 53–54.

although from the fifteenth century a married woman could enter into contracts in her husband's name as his agent where she had his express or implied consent. A husband could escape responsibility for these contracts by rebutting the presumption of agency.⁸ Women could engage in business separately from their husbands, but only if they had his consent to do so.⁹ As well, since the husband and wife were considered one person at law, they could not contract with each other, sue each other in tort, nor give gifts to one another.

In England, a body of equitable principles had evolved to respond to the omissions and injustices of the common law. Although also based upon the assumption that married women needed protection, equity provided a useful mechanism to protect property from one's husband by allowing property to be conveyed to a married woman's separate use. The principles of equity are generally thought to have had little effect on married women's property rights in Canada, 10 although there is some indication that marriage settlements were used in Nova Scotia. 11 In any case, it was this mechanism of owning property to one's "separate use" which the late nineteenth-century married women's property legislation attempted to make available to the general population of married women.

I. British Columbia

1. Married Women's Property Legislation in British Columbia

The government of present-day British Columbia first addressed the issue of the property rights of married women in 1862. The colony of Vancouver Island, then a thirteen-year old member of the British empire, passed *An Act to Protect the Property of a Wife*

⁸ Holcombe, *supra* note 3 at 27.

⁹ C. Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6 Law and History Review 211 at 213.

¹⁰ M. Ormsby, British Columbia: A History (Toronto: Macmillan, 1958) at 215.

¹¹ Girard & Veinott, *supra* note 5 at 73. A "marriage settlement" was an antenuptial or post-nuptial trust in which nominal ownership was conveyed to a trustee who managed the property for the benefit of the married woman: see Backhouse, *supra* note 9 at 215.

Deserted by her Husband ¹² very early in comparison to many provinces. This period is described as the first wave of reform in which most Canadian jurisdictions created legislation to deal with emergency situations of marital breakdown. The legislators in New Brunswick and Prince Edward Island had enacted similar statutes by 1862, but Ontario and Nova Scotia had not yet taken such steps.¹³

The act was clearly designed to protect married women rather than extend greater property rights to them. The preamble states that the "expediency" of protecting the property of deserted women was the motivating factor behind the legislation. Modelled after the British *Matrimonial Causes Act* of 1857,¹⁴ the statute enabled a married woman to apply to the authorities upon desertion for an order to protect her future earnings and property from her husband and his creditors. Thereafter, the property and earnings would belong to her as though she were a *feme sole*.

Although it is obvious that protection was the focus of the act, it is not clear what induced the colonial government to turn their attention from building roads and raising capital to the plight of women so promptly. Constance Backhouse has speculated that the legislation was passed in reaction to the collapse in the economy and consequent decreasing population of Victoria which followed the rapid growth during the gold rush. In fact, the *Act to Protect Deserted Wives* was passed in a year of great optimism and economic activity. The Fraser River gold mines were still thriving in 1862, and Governor James Douglas was preoccupied with accumulating money to build the Great Northern Road to improve access

¹² An Act to Protect the Property of a Wife Deserted by her Husband; Public General statutes of the colony of Vancouver Island 1859–1863, 26 Vict. (1862) No. 9.

¹³ However, there had been attempts to do so in Nova Scotia. The earliest example is an unsuccessful bill introduced in the Nova Scotia legislature in 1855, which sought not only to protect deserted women, but also proposed improved property rights to protect married women from economic insecurity. Nova Scotia eventually enacted a first-wave style statute in 1866. See P. Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia 1820–1867" in P. Girard & J. Phillips, eds., *Essays in the History of Canadian Law: Vol III, Nova Scotia* (Toronto: University of Toronto Press, 1990) 80 at 85–86.

¹⁴ Matrimonial Causes Act (U.K.), 20 & 21 Vict. (1857), c. 85.

¹⁵ Backhouse, *supra* note 9 at 218–219.

to them.¹⁶ It appears more likely therefore that the women about whom Douglas and his parliament were concerned had been abandoned during the gold rush rather than after it, since many men used Victoria as a home base, leaving their families behind and going off to seek their fortunes.¹⁷

It should be noted that Victoria was not a typical North American frontier settlement, where pioneers struggled against a harsh environment. It was in fact a place of leisure and sophistication, referred to as "a second England on the shores of the Pacific." The Governor's officials and the men who made up the Legislative Council were aristocratic, wealthy landowners of British origin, in contrast to the rougher and more adventurous lot who sought riches in the Cariboo. Presumably these gentlemen were motivated by a chivalrous desire to protect the women left behind by fortune seekers, and for this reason were inclined to follow England's legislative lead.

The impact of the legislation is difficult to assess. It has been suggested elsewhere that this type of legislation would have only affected a small number of women, since availing oneself of the statutory protection required obtaining a court order. Moreover, the act required that the authority in question be satisfied that the woman was truly deserted, that she was maintaining herself by her own industry or property, and that the desertion was without reasonable cause. It is perhaps noteworthy that women's economic status appeared to be improving in the late 1870s, but it is unclear whether married women benefited from these advances. Whether a significant number of women applied for orders under the Act would more accurately indicate the effect of the legislation, but this research has not been undertaken.

¹⁶ Ormsby, supra note 10 at 188.

¹⁷ J. Gould, Women of British Columbia (Saanichton, British Columbia: Hancock House, 1975) at 91.

¹⁸ Ormsby, supra note 10 at 257.

¹⁹ Girard & Veinott, *supra* note 5 at 75.

²⁰ Women's participation in the land market marginally increased between 1863 and 1871. In 1863, only four percent of property holders were women; but eight years later, that number had increased to 7 percent. See P. Baskerville, *She Has Already Hinted at "Board": Enterprising Urban Women in British Columbia* 1863–1896 (Faculty of B.C. Studies, University of Victoria, 1992) [unpublished] at 7.

The two colonies of Vancouver Island and New Westminster became the province of British Columbia and entered the Dominion of Canada on July 19, 1871. Joining Confederation brought responsible government, and, much more popular at the time, the promise of a railway link to the rest of Canada. Within two years of joining Canada, the Legislative Assembly in Victoria passed legislation which allowed married women to own real estate and to transact business on the basis of that ownership free from control by their husbands.²¹ The legislators turned from Britain as a guide and instead copied Ontario's Married Women's Property Act of 1872²² almost verbatim. The purpose of the legislation was no longer merely to respond to marriage breakdown and can be said to fall into the third, "egalitarian" wave of married women's property reform. Third-wave statutes generally granted women the right to dispose of their real and personal property, to control their own wages, and to contract, sue, and conduct business.23

The 1873 statute provided that all wages and earnings, and all profits from an occupation or trade carried on separately from one's husband were deemed to be a married woman's own property as fully as if she were a *feme sole*.²⁴ In addition, a married woman gained the abilities enjoyed by a *feme sole* to insure her own life (or that of her husband with his consent), to become a stockholder or voting member of an incorporated company, to make deposits in her own name in a bank, and to sue and be sued.²⁵ Married women also became legally capable of contracting upon, and enjoying to separate use, real estate acquired in any manner before or during marriage, as fully as a *feme sole*.²⁶ It was not until an amendment in 1887 that personal property could also be held to separate use.²⁷

²¹ An Act to Extend the Rights of Property of Married Women, 36 Vict. (1873), c. 29 (B.C.) [hereinafter Rights of Property of Married Women Act 1873]. An Act to amend and consolidate the Laws respecting the North-West Territories Act, 38 Vict. (1875), c. 49, ss. 48–53 [hereinafter North-West Territories Act 1875] was based upon this statute.

¹ 22 An Act to Extend the Rights of Property of Married Women, 35 Vict. (1871-72), c. 16 (Ont..).

²³ Backhouse, *supra* note 9 at 230–231.

²⁴ Rights of Property of Married Women Act 1873, s. 2.

²⁵ Supra note 24, ss. 3, 5, 6, 8.

²⁶ Supra note 24, s.1.

²⁷ Married Women's Property Act, S.B.C. 50 Vict. (1887), c. 20 [hereinafter Married Women's Property Act 1887].

The Married Women's Property Act 1887 abrogated the common law rule that husbands be held liable for their wives' ante-nuptial debts, post-nuptial contracts, and those post-nuptial debts arising through their wives' employment or business.²⁸ Instead, a married woman was liable for her own separate ante-nuptial debts, torts, and contracts, with property belonging to her for her separate use available to satisfy her liabilities. By relieving husbands from liability, the statute dealt a potentially substantial blow to the doctrine of marital unity, extinguishing the husband's traditional role as legal representative of the marital unit.

What compelled the Legislative Assembly to grant these significant property and legal rights to women in 1873? Constance Backhouse has hypothesized that in Ontario, the third-wave statutes were a response both to "the recalcitrant behaviour of Canadian judges, who had robbed earlier statutes of much of their reform potential," and to the economic and legal impasse that had been created by judicial rulings, since no one knew who had the absolute dispositive control over married women's property.²⁹ Regularizing credit relations in a modernizing economy required clarification of the law regarding married women's property.

This theory is borne out by the events taking place in British Columbia at this time. Economically, the 1870s were a time of depression and diversification in British Columbia. The Cariboo gold rush was over, and other sources of wealth and employment were being developed, including agriculture, coal mining, salmon packing, and lumber exporting.³⁰ A great deal of the law in colonial British Columbia at this time concerned bankruptcy and small debts. As one historian has noted, the colony's high-risk, credit-based economy resulted in a need for efficiency and order in business as well as social relations.³¹

In other Canadian jurisdictions there was a suggested link between an emerging female suffrage movement and the expansion of

²⁸ *Supra* note 27, s. 7.

²⁹ Backhouse, *supra* note 9 at 231.

³⁰ F. W. Howay, "The Settlement and Progress of British Columbia, 1871–1914" in J. Friesen & H. K. Ralston, eds., *Historical Essays on British Columbia* (Ottawa: McClelland and Stewart, 1976) 23 at 23.

³¹ H. Foster, English Law, British Columbia: Establishing Legal Institutions West of the Rockies (Faculty of Law, University of Manitoba, 1992) [unpublished] at 36.

married women's property rights.³² There is some indication that the issue of female political rights was surfacing in British Columbia in the early 1870s, but the notion of extending the vote to women was still unpopular with the legislators. In fact, a bill for women's suffrage introduced in the legislature in 1872 had the support of only two members.³³

Regardless of what the motivation may have been in enacting the statute, it is unlikely that it changed the legal status of British Columbian women in any material way. Although there are no reported cases in that province, the Ontario judiciary's interpretation of identical provisions indicates that the British Columbia statute probably had very little positive impact. Ontario judges rarely found that goods or real estate belonged to a married woman, and in those cases where the facts clearly demanded acknowledgment of ownership, the Ontario judiciary consistently refused to construe the statute in a manner that would grant women an absolute power of disposition.³⁴ The fact that the statute stated quite clearly that this was the legislative intent did not divert judges in Ontario from their path of adherence to the pre-existing common law.

The judges in Ontario also ensured that the assets of married women continued to be immune from claims by applying the English rule that a woman could not make a binding contract unless she had separate property, and there is some indication that this "separate estate rule" was also applied in British Columbia.³⁵ Before a creditor could recover against a married woman, it was necessary to show that at the time the contract was made she had a separate estate, and that at the time the action was tried, she still had the same separate estate. The separate estate rule was another example of a rationale used to avoid the clear legislative intent that women

³² See for example Girard and Veinott, *supra* note 5 at 82-88; Backhouse, *supra* note 9 at 223.

³³ Daily Colonist (23 June 1872) 2.

³⁴ Backhouse, *supra* note 9 at 233.

³⁵ Reference to the separate estate rule was made in *Mylius v. Jackson* (1894), 3 B.C.R. 149 (S.C.T.D.), rev'd (1894), 23 S.C.R. 485. The defendant Margaret Jackson raised the separate estate rule in defence to a creditor's claim against her. The British Columbia Court of Appeal noted that the point had been raised at the Appeal level but would not consider it because it had not been raised in the pleadings or in the Court below, but the dissenting Judge would have set the judgement against Margaret Jackson aside on the basis of the rule.

would be liable to be sued separately from their husbands as if they were unmarried.

The propensity of the courts to avoid holding married women liable for their debts was a blow to their legal status, making it virtually impossible for married women to get personal credit or transact many types of business on their own.³⁶ This protection was fortified by an amendment in 1883³⁷ which expanded the liability of husbands. The 1883 legislation repealed the provisions in the 1873 Act and deemed that husband and wife could once again be jointly sued for the wife's separate ante-nuptial debts, torts, and contracts, as well as post-nuptial torts.³⁸ However, the Act was not a full-scale return to the common law. Section 5 of the Act provided that the husband would only be liable to the extent of the value of assets and property he had received from his wife by way of marriage. This included, for example, the wife's personal estate which had vested in the husband, profits the husband had received from his wife's real estate, and the wife's chattels which had vested in husband and wife.

The preamble reveals that rationalizing the laws of debtor-creditor³⁹ relations was the driving force behind the 1883 legislation:

Whereas it is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment

In fact, although there are no reported cases from the 1880s in British Columbia, the majority of the Ontario cases decided during this period were launched not by women, but by creditors. Credit companies in British Columbia were becoming more powerful as a result of increasing economic modernization and industrialization. The province enjoyed a boom in the 1880s as the long-awaited construction of the railway on the mainland and Vancouver Island be-

³⁶ The effect of continuing protection of women from liability in British Columbia has not been reviewed. However, the New York position is assessed in detail in Basch, *supra* note 6 at 215.

³⁷ An Act to amend the Married Women's Property Act 1873, S.B.C. 46 Vict. (1883), c. 18 [hereinafter Married Women's Property Act 1883].

³⁸ Ibid. s. 1.

³⁹ This theme is discussed in Girard and Veinott, *supra* note 5 at 81-82.

gan. The population doubled in this decade, with families of new-comers arriving where individuals had come before. As a result, agricultural land in the province was being occupied and cultivated, and land values increased sixfold. The Victoria government's sympathy for the concerns of creditors can perhaps be explained by the fact that the legislators continued to be drawn from the elite class, and were primarily merchants, lawyers, industrialists and landed proprietors who had prospered during the days of railway construction. 42

The modernization of the province also had an effect on attitudes toward the role of women, who became increasingly involved in non-traditional occupations and businesses and began to agitate for legal and political rights. Although the women's rights movement in British Columbia did not become powerful until the early 1900s, there are frequent reports of attempts by British Columbian women to secure suffrage and other rights in the 1880s. For example, the first suffrage petition was presented to the Premier of British Columbia in Victoria in 1883.⁴³ The combination of the growing power of the credit institutions and the changing attitudes toward the appropriate role of women may have been the impetus for the 1883 legislation.

The next legislative event was the Married Women's Property Act 1887,44 the chief feature of which was the addition of personal property to the types of property women could hold to their separate use. Continuing the practice of borrowing from the central Canadian model, the statute was a close copy of the 1884 Ontario legislation. The similarity of the statutes leads one to conclude that the Act was merely another step in a continuing policy of following Ontario's legislative developments to address the needs brought about by British Columbia's economic modernization.

⁴⁰ In 1881, the population of British Columbia was 49,459, an increase of 13,000 since 1871: Howay, *supra* note 30 at 27.

⁴¹ Baskerville, *supra* note 20 at 5–6.

⁴² Ormsby, supra note 10 at 304.

⁴³ Michael H. Cramer, "Public and Political: Documents of the Woman's Suffrage Campaign in British Columbia, 1871–1917" in Barbara Latham & Cathy Kess, eds., *In Her Own Right: Selected Essays on Women's History in B.C.* (Victoria: Camosun College, 1980) 79 at 80.

⁴⁴ Supra note 27.

The Ontario Act Respecting the Property of Married Women 188445 is considered to have been a response to the continuing judicial refusal to give effect to that province's existing legislation.46 As did the Ontario Act, the British Columbian statute explicitly stated that married women were capable of acquiring, holding, and disposing of both real and personal property acquired before or after marriage as separate property, in the same manner as a feme sole, without the intervention of a trustee. The legislation continued to define personal property as it had been defined in the 1873 statute, 47 and husbands continued to be liable for the pre-nuptial liabilities of their wives. As under the 1883 amendment, husbands were only liable to the extent that they benefited from the receipt of property from their wives upon marriage. After marriage, a husband was liable for his wife's torts, but his wife was fully responsible for her post-nuptial debts and breaches of contract. Only if the plaintiff sought to establish the claim against both of them could husbands and wives be jointly sued for ante-nuptial liabilities other than torts.48

Despite the incremental strengthening of the statutory rights and liabilities of married women, it appears that their actual creditobtaining capacity continued to be restricted in the late nineteenth
century. An example is Margarette Boechofsky, a married woman
in British Columbia who applied for a loan in 1892 in order to buy
a home. Although Mrs. Boechofsky offered security appraised at
three times the value of the loan and although the property and
house were very desirable, the general manager of the credit company declined the loan on the basis that her husband had an undesirable credit rating.⁴⁹ This example indicates that women continued to be viewed as an extension of their husbands, just as they had
been at common law.

⁴⁵ An Act Respecting the Property of Married Women, S.O. 47 Vict. (1884), c. 19 (Ont.).

⁴⁶ Backhouse, *supra* note 9 at 235–236.

⁴⁷ Section 3 of the *Married Women's Property Act 1873* provided that separate property included "any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

⁴⁸ Married Women's Property Act 1887, ss. 13–15.

⁴⁹ Baskerville, *supra* note 20 at 18.

The Supreme Court of Canada recognized in 1892 that the equivalent Ontario legislation had brought about significant change and had rendered married women able to enjoy and dispose of their real estate.⁵⁰ Despite this ruling, courts in Ontario continued to restrict the effect of the Act by adhering to the separate estate rule described above, necessitating legislation in 1897 which explicitly renounced the rule.⁵¹

Apparently, a similar concern motivated the legislators in British Columbia to review the *Married Women's Property Act* in the same year.⁵² A provision from a British statute which had also been borrowed by the Ontario legislation was adopted.⁵³ This provision clearly renounced the separate property rule, stating that every contract entered into by a married woman bound all her present and future separate property, even if she ceased to be a married woman, whether or not she had any separate property at the time of entering the contract.

The choice to adopt an imperial model may have been an attempt to ensure that the provision would be passed in the Legislature. As Philip Girard and Rebecca Veinott have noted, in the late Victorian era, "the easiest way to ensure assent to a piece of legislation was to suggest that it was modeled so closely on the relevant English act that any difficulties in its interpretation could be eased by reference to the English cases decided under it."⁵⁴ The return to imperial models may also have been a result of the increasing professionalism of the bar and admiration for the English bar and judiciary.⁵⁵

2. Judicial Interpretation in the Early Twentieth Century

The early 1900s was a time of rapid change. Women entered the work force in ever greater numbers in response to robust economic growth. As well, the suffrage movement was gaining strength, and it is likely that this activism had a significant impact upon social at-

⁵⁰ Moore v. Jackson (1892), 22 S.C.R. 210 at 223.

⁵¹ Backhouse, *supra* note 9 at 236.

⁵² Married Women's Property Act, R.S.B.C. 1897, c. 130 [hereinafter Married Women's Property Act, 1897].

⁵³ An Act to amend the Married Women's Property Act 1882 (U.K.), 56 & 57 Vict. (1893) c. 63, s. 1.

⁵⁴ S*upra* note 5 at 89.

⁵⁵ *Ibid.* at 89.

titudes about not only the political status of women but also their other legal rights. Many historians have concluded that the suffrage movement was motivated less by a sense of political injustice than by a desire to improve inequitable legislation, and to ameliorate women's legal status vis-à-vis the family. For example, the Political Equality Action League, founded in 1910, rationalized the suffrage movement this way: "As a matter of indisputable fact . . . politics have invaded the home, and women, if they would defend and safeguard their homes, must invade politics." 57

Voting rights were won in British Columbia in 1916, and women soon began to participate in politics. Legislation addressing issues of concern to women such as female minimum wages, mother's pensions, and deserted wives were put in place in the 1920s, and British Columbia boasted that it was the national leader in social legislation.⁵⁸

In this context, the continuing judicial restrictions on the property rights of married women must have appeared, even to the judiciary, to be increasingly anomalous. Three main issues arose in the interpretation of the married women's property legislation between 1897 and the mid-1920s: the scope of a married woman's separate property, the degree of her ability to control it, and the extent to which her husband remained liable for her debts.⁵⁹ Case law in these areas reveals a gradual but inexorable acceptance of the changing status of married women.

i. The Right to Own Property and Extent of Liability of Married Women in British Columbia

There are only two reported British Columbia cases in the late nineteenth and early twentieth centuries that directly consider the rights

⁵⁶ E.g. C. L. Bacchi, Liberation Deferred? The Ideas of the English Canadian Suffragists, 1877–1918 (Toronto: University of Toronto Press, 1983) at 12.

⁵⁷ D. M. Davis & M. Gordon Grant, eds., *The Champion*, The Political Equity League, Newsletter, in vol. 2 (January–April 1914, cited in Cramer, *Supra* note 43 at 86.

⁵⁸ E. Norcross, "Mary Ellen Smith: The right woman in the right place at the right time" in B. K. Latham & R. J. Pazdro, eds., *Not Just Pin Money: selected essays on the History of Women's Work in British Columbia* (Victoria: Camosun College, 1984) at 362.

⁵⁹ The next legislation passed was the *Married Women's Property Act*, R.S.B.C. 1911, c. 152 [hereinafter *Married Women's Property Act 1911*], which was identical to the *Married Women's Property Act of 1897*, supra note 52.

and liabilities of married women. The first, decided in 1923,60 concerned the ownership of household goods seized by a creditor from a home jointly occupied by a husband and wife. At common law, goods seized from a jointly occupied home would be *prima facie* subject to seizure under execution against the husband. However, following English authority, the *Married Women's Property Act* was held to render a husband and wife "two persons just as if they were two men,"61 and therefore the common law presumption no longer applied. As a result, the court accepted the statements of the couple that the husband had given the goods to his wife as a precondition to her promising to marry him, despite the fact that there was nothing in writing to prove this transaction had taken place.

In one unusual case decided in 1920,62 the court had occasion to flatly reject the common law principle that the husband and wife became one legal entity upon marriage. The plaintiff, Mrs. Hawks, claimed she had a right to land bought by her husband. The property in question was Crown land that the husband had put in her name, because he had exhausted his own right of requirement. Mrs. Hawks claimed rights to the land relying upon the doctrine of marital unity. Since husband and wife are one, she reasoned, her husband's property was also hers.

The British Columbia Court of Appeal rejected this submission and found Mr. Hawks to be the true owner; Mrs. Hawks was deemed to have merely held the land for her husband in trust. In hindsight, it is ironic that after decades of Canadian decisions which enforced creditors' claims against the husbands of female property owners merely on the basis of their marriage, the Court would have no doubts about refusing a married woman's claim to an interest in this property, which was in the wife's name, on the same basis.

ii. The Scope of Separate Property

Aside from the barriers to recognition of women's rights and liabilities with respect to their property, women were hard-pressed to convince the courts that assets belonged to them at all. Burdens of proof were resurrected from the common law and consistently

⁶⁰ North v. Siciliano et al., [1923] 1 W.W.R. 551 (B.C. S.C.T.D.).

⁶¹ *Ibid.* at 552.

⁶² Hawks v. Hawks (1920), 29 B.C.R. 64 (B.C.C.A.).

placed upon the women who attempted to avail themselves of the legislation. An example is *Dudgeon* v. *Dudgeon and Parsons*, decided in 1907.⁶³ According to the findings of fact, Mr. and Mrs. Dudgeon had planned to buy a piece of property together, but the deed was made out in the name of the wife. They built a small house, paid for by Mr. Dudgeon, which Mrs. Dudgeon subsequently sold to the other defendant without the consent of her husband.

Mr. Dudgeon launched an action against his wife and the purchaser, claiming that the house belonged to him because he had advanced the entire \$600 purchase money and that his wife was merely his trustee. Mrs. Dudgeon claimed that her husband had only given her part of the purchase money, that this money was a gift, and that she had supplemented it with money of her own received from her father and other sources to buy the land for herself.

The Court noted that at common law, there is a presumption that conveyances made to one's wife are by way of advancement, and therefore the husband had the burden of rebutting the presumption with evidence showing such a gift was not made. Despite this requirement, the Trial Judge decided that Mrs. Dudgeon's argument that the couple's intention was that the property be hers absolutely, and that she should be in a position to sell it without regard to his wishes, "went too far." 64 Although the Judge found it not at all unlikely that some of her money was used for the purchase, her claim to absolute rights to the property rendered her evidence so unreliable that he could not accept it. The Judge therefore presumed that the money belonged to the husband, and that it was intended that the house be held by her in trust for her husband and his family. Clearly, the evidentiary hurdles a married woman had to overcome in order to convince the courts that property belonged to her were very high indeed.

Canary v. Cohn, 65 decided in 1925, was one rare example of a case in which a married woman launched an action against a judgment creditor and sought to enforce her statutory rights. Nellie Cohn, who was an equal business partner with her husband, sued an

⁶³ Dudgeon v. Dudgeon and Parsons (1907), 6 W.L.R. 346 (S.C.T.D.) [hereinafter Dudgeon].

⁶⁴ Ibid. at 352.

⁶⁵ Canary v. Cohn (1925), 35 B.C.R. 478 (S.C.T.D.).

execution creditor for household furniture, a car, a phonograph, and a piano which had been seized to satisfy her husband's debts.

The Trial Judge was pressed to clarify the meaning of the ambiguous definition of separate property which had first been introduced in 1873 as "any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband." 66 As will be discussed below, the task of interpreting similar provisions had arisen earlier and more often in the prairie jurisdictions than in British Columbia, since in those provinces crops from land owned by married women were often seized by the husband's execution creditors.

The defendant argued that the "or" in the provision implied that a married woman's separate property did not include earnings acquired in partnership with her husband. However, the Court decided that "separate property" included any earnings acquired in any employment, regardless of whether it was carried on separately from one's husband. Therefore, since Mrs. Cohn's uncontested testimony was that the furniture and phonograph were purchased using money from her wages in this business, the Court held that they belonged to her. No authority was cited to justify this radical departure from the common judicial approach, instead, the judge merely stated that based on a plain understanding, he was "unable to read any other meaning into the words used in the statute."

The approach to determining the owner of the car in question was also progressive. The car was purchased under a conditional agreement signed by both the plaintiff and her husband, but the actual sale was made to the plaintiff. Although Nellie Cohn made the cash payment, signed promissory notes for the deferred payments, and had the license and insurance policy in her name, her husband paid the installments. Mrs. Cohn argued that these payments were made under an agreement with her husband to repay her for a previous loan. Although courts had traditionally refused to recognize any debtor—creditor arrangements between husband and wife on the basis of the doctrine of marital unity, the court in this case held that the car was her property.

Clearly by 1925 the British Columbia judiciary had greatly expanded the scope of separate property from the position in the

⁶⁶ Married Women's Property Act 1911, supra note 59, s. 7.

⁶⁷Supra note 65 at 479.

1907 case of *Dudgeon* above, where a woman's testimony that she bought a house with her own money and with money she acquired by gift from her husband did not convince the Court that the house belonged to her. The Trial Judge's willingness to give effect to the plain meaning of the statute in *Canary* v. *Cohn* was a radical change from the approach taken in the past, a shift which can perhaps be explained by a judicial acknowledgment of the significant social changes taking place in the early twentieth century.

iii. The Liability of Husbands

The judiciary resisted interpreting the married women's property legislation in a way which would support an economic or contractual view of marriage. In *Re Sea*,⁶⁸ decided in 1905, the husband of a woman who died intestate was appointed administrator and sought to charge the burying expenses against her estate. Justice Duff (as he then was) declined to follow American authority and held that even though the *Married Woman's Property Act 1897* reduced the *jus mariti*, it did not affect marriage status nor the husband's duty to bury his dead wife. This "last act of piety and charity" was said to be an obligation founded in the marriage relationship itself.

In addition, the judiciary continued in the early twentieth century to maintain that the purpose of the married women's property legislation was to "relieve" and protect wives. Under the statute, a husband continued to be liable for his wife's ante-nuptial debts, contracts and torts, and post-nuptial torts, to the extent of property acquired from his wife under the marriage. The separate property of married women was liable to satisfy all of these obligations, as well as any damages or costs recovered against her in any proceeding. However, reluctance to enforce liability against married women was illustrated by the decision in 1901 that a husband was not only jointly liable for damages arising from the torts of his wife, but was also liable for costs in any such action, on the basis that the act was not intended to protect husbands.

However, by 1919 the judiciary was less wedded to notions of protection and marital unity than it had been at the turn of the cen-

⁶⁸ Re Sea (1905) 1 W.L.R. 460 (Chambers).

⁶⁹ Married Women's Property Act 1911, supra note 59, s. 31.

⁷⁰ Married Women's Property Act 1911, supra note 59, s. 5.

⁷¹ MacKenzie v. Cunningham & Wife (1901), 8 B.C.R. 206 at 207 (S.C.T.D.).

tury. In that year, a married woman sued the British Columbia Electric Railway Company for personal injuries sustained in an accident in which her husband was driving their car and hit a train. The husband was found contributorily negligent. At common law, this would have been lethal to her claim; the fact that a husband was a necessary party to an action for injuries to his wife and was entitled to the damages recovered would have made his contributory negligence a bar to recovery. The Court of Appeal held that in this circumstance the common law doctrine of marital unity was rendered non-existent by the *Married Women's Property Act 1911*, and the wife had the right to sue the Company as would a *feme sole*.⁷²

iv. British Columbia Case Law: Conclusion

By the mid 1920s, the common law doctrine of marital unity had been truly laid to rest in British Columbia. Property seized from a jointly owned home was no longer presumed to belong to a husband rather than a wife, a married woman's separate property included earnings acquired from employment not carried on separately from her husband, and the contributory negligence of one's spouse was not a bar to a negligence action. However, the evolution of married women's property rights in British Columbia occurred slowly; substantive progress was not achieved until more than fifty years after the first egalitarian legislation was passed.

II. ALBERTA AND SASKATCHEWAN

1. Married Women's Property Legislation in the North-West Territories

The present-day provinces of Alberta and Saskatchewan were, until 1905, part of an immense area originally called the North-West Territories. The Hudson's Bay Company was considered to have "owned" all of this area, as well as a great deal of the rest of British North America, beginning in the early 1600s. In 1869, Prime Minister Macdonald concluded an agreement with the Hudson's Bay Company, under which the company was to receive a cash payment in return for most of the land. Canada attempted to take over these lands, without consulting the 11,500 Metis settlers in

⁷² Brooks v. B.C. Electric Railway, [1919] 3 W.W.R. 109 (B.C. S.C.C.A.).

Red River, which was the location of the rebellion led by Louis Riel which lasted throughout the winter of 1869–1870 and later to become Manitoba. After order was restored, the prairies were legally transferred to Canada in 1870.

The *Manitoba Act* of 1870⁷³ defined the boundaries of the province of Manitoba, which was at that time much smaller than its present size. The act also created the North-West Territories, which included the remaining land of western Canada and the territory north of the then smaller provinces of Ontario and Quebec. Canada now extended from Halifax to the Rockies.

The Canadian government took three major steps in anticipation of a rush of settlers to the North-West Territories.⁷⁴ First, surveyors were sent out to sub-divide the prairies into sections; present-day Alberta and Saskatchewan were divided into the districts of Alberta, Assiniboia, Athabasca, and Saskatchewan. Second, policies were adopted to enable prospective farmers to obtain parcels of land. The last task of the federal government was to create the political framework to take care of the needs of settlers, to which end the *North-West Territories Act* of 1875⁷⁵ was enacted.

This legislation provided for the appointment of a lieutenant-governor and a five-person council. The North-West Territories Act also affected the legal capacity and status of married women, modifying the English common law adopted in the North-West Territories as it had stood in 1870. The federal government apparently did not think it necessary to enact first-wave style legislation to deal with the problem of deserted wives. Instead, the provisions of the North-West Territories Act, 1875, which pertained to women duplicated the 1873 British Columbian Married Women's Property Act, which had been largely borrowed from the 1872 Ontario legislation. The Act did not give women separate property rights over personal property, but rather section 48 enabled them to hold any real estate owned or acquired during marriage to their own separate use.

⁷³ Manitoba Act, 33 Vict. (1870), c. 3.

⁷⁴ J. MacGregor, A History of Alberta (Edmonton: John Deyell Co., 1981) at 114.

⁷⁵ An Act to amend and Consolidate the Laws respecting the North-West Territories Act, 38 Vict. (1875), c.49 [hereinafter North-West Territories Act 1875].

⁷⁶ The *North-West Territories Act 1875* omitted the provisions in the British Columbia and Ontario legislation concerning life insurance and stock-holding.

Section 49 defined "separate property" as earnings, profits from a separate occupation or skill, and acquisitions or investments purchased with this money. Section 50 gave married women the right to have their own independent bank accounts, subject to the proviso in section 51 that any deposits of the husband's money made in fraud of his creditors could be followed. Husbands ceased to be liable, by virtue of section 52, for their wives' pre-nuptial debts and ante-nuptial debts incurred through their own separate employment or business. Instead, property belonging to the wife for her separate use became subject to the satisfaction of these debts. Section 53 granted a married woman the right to maintain an action in her own name, and stated once again that a married woman could be sued separately from her husband in respect of her separate property for her separate debts, engagements, contracts, or torts, as if she were unmarried.

Married women's legal status as defined by this statute was later modified by the 1886 Territories Real Property Act,⁷⁷ which established a Torrens system of title registration in order to facilitate efficient land transfer. The Act abolished dower and curtesy, which had imposed invisible encumbrances on titles and were therefore inconsistent with a land registration system. Although the abolition is sometimes characterized as a regressive step in the evolution of married women's property rights,⁷⁸ the extent to which the right of dower actually existed in the West is open to debate.⁷⁹ Section 13 effectively repealed section 48 of the North-West Territories Act 1875,⁸⁰ by providing that

A married woman shall, in respect of land acquired by her after the coming into force of this Act, have all the rights and be subject to all the liabilities of a *feme sole*, and may alienate and, by will or otherwise, deal with land as if she were unmarried.

⁷⁷ Territories Real Property Act, S.C. 49 Vict. (1886) c. 26, ss. 8, 9, 13.

⁷⁸ J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992) at 103.

⁷⁹ M. A. Wilkinson & R. E. Hawkins, "The Abolition of Dower in Western Canada: How the Early Law Reform Process Failed Pioneer Women" (Faculty of Law, University of Western Ontario, 1993) [unpublished] at 7.

⁸⁰ North-West Territories Act 1875, supra note 75, s. 48. This Act was consolidated in S.C. 43 Vict. (1880), c. 25, s. 57.

Since the purpose of the statute was to introduce a Torrens system, it may be safe to surmise that this provision was merely an attempt to avoid clouded titles, rather than to grant further property rights to married women. Certainly the prevailing attitude to marriage at the time was that it was a working partnership based on equal contributions, but with the husband as the head of the producing unit. As one pioneer woman remembers,

My parents were equal partners always. There was no feeling that women were inferior as far as our dad was concerned.... I think perhaps they taught us leadership for men, but they never made any difference between male and female otherwise. But they expected a man to take the lead. It didn't make the woman an inferior being as far as my family was concerned. God meant them to work together.⁸¹

The judiciary appear to have subscribed to a similar opinion. Despite the fact that section 13 could be interpreted to extend married women's property rights beyond the right merely to hold property to "separate" use, it was not until 1924 that the Supreme Court of Alberta reassessed the impact of section 13 and declared that it conferred the right to own "individual" property. This case will be discussed below.⁸²

The four sections from the *North-West Territories Act 1875*, which remained were carried forward in the North-West Territories Acts of 1880 and 1886.⁸³ The territorial government was granted the power to legislate in respect to property and civil rights when it became part of Canada in 1875; however, aside from minor changes brought about by territorial ordinances, the laws relating to married women's property changed little before Alberta and Saskatchewan became provinces in 1905. Therefore, judicial interpretation over the next fifty years can be analyzed in comparison to

⁸¹ E. L. Silverman, *The Last Best West: Women on the Alberta Frontier 1880–1930* (Montreal: Eden Press, 1984) at 56.

⁸² See text accompanying note 113.

⁸³ North-West Territories Act, S.C. 43 Vict. (1880), c. 25, ss. 57–62 [hereinafter North-West Territories Act 1880]; North-West Territories Act S.C 49 Vict. (1886), c. 50, ss. 36–40 [hereinafter North-West Territories Act 1886].

the static template of the four provisions in the North-West Territories Act 1875.84

The Territories first exercised their jurisdiction to legislate in relation to married women's property rights in 1886. An Ordinance to Facilitate the Conveyance of Real Estate by Married Women⁸⁵ granted a married woman the right to convey her real estate as fully and effectively as if she were a feme sole, with no requirement that this real estate be "separate" property. However, since this legal right had already been granted by the federal North-West Territories Act 1875, the statute did not change the existing law.

2. Case Law in the North-West Territories

i. The Scope of Separate Property

Three years after the Ordinance was enacted, the first legal issue concerning married women's property rights came before the North-West Territories courts. In 1889, the case of *Brittlebank* v. *Gray-Jones* ⁸⁶ required determination of the scope of "separate property" in section 49 of the *North-West Territories Act* 1875, ⁸⁷ which provided that

All the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic or scientific skill, and all investments of such wages, earnings, moneys or property, shall hereafter be free from the debts or dispositions of the husband, and shall be held and enjoyed by such married woman, and disposed of without her husband's consent, as fully as if she were a *feme sole*, and no order for protection shall hereafter become necessary in respect of any such earnings or acquisitions; and the possession, whether actual or

⁸⁴ Since the provisions in the *North-West Territories Act*, 1875, were not amended in any way from 1875 to 1886, for the purpose of convenience they will be referred to throughout by their original numbers.

⁸⁵ An Ordinance to Facilitate the Conveyance of Real Estate by Married Women (N.W.T.), No. 6, 1886.

⁸⁶ Brittlebank v. Gray-Jones (1888), 5 M.L.R. 33, (1887), 1 Terr L.R. 70 (Man. Ct. Q.B.).

⁸⁷ The Court considered the equivalent of s. 49, which was *North-West Territories Act 1880, supra* note 83, s. 57.

constructive, of the husband, of any personal property of any married woman, shall not render the same liable for his debts.

The defendant, Mrs. Gray-Jones, had money settled upon her to her own separate use by her marriage settlement in England. In 1883 she went to the North-West Territories, bought a farm, and began to live on it. Her husband was carrying on business in Winnipeg at this time. In the spring of 1884, Mrs. Gray-Jones bought farm stock including horses, cattle, and pigs. Her husband then came to live with her on the farm, and according to the findings of fact, it was he who carried on the farming operations. The farm stock were later seized under an execution order against the husband, and Mrs. Gray-Jones claimed them as her separate property in an interpleader motion against the execution creditor.

The decision of a magistrate in the North-West Territories that the right to hold separate property did not extend to general personal property was upheld by the Manitoba Queen's Bench, the appeal court for the North-West Territories until 1887. The references to "personal property" in section 49 and to "chattels" in section 53 did not convince the Court that the legislature intended to bring about such a significant legal change. Professing themselves bound by the rule of interpretation that a statute that is a departure from the common law must be construed narrowly, the Court held that a married woman's separate personal property only included earnings and personal property used for carrying on a separate trade or business. Since Mr. Gray-Jones carried on the farming, the livestock did not constitute "separate" property, but merely personal property. The husband therefore was the owner on the basis that, at common law, any personal property bought by a married woman immediately became the property of her husband by way of an absolute legal gift. The Court relied on English authority for this common law rule, which had also been utilized in Ontario since 1860 to neutralize the effect of that jurisdiction's married women's property legislation.88

The territorial government may have been responding to this judicial obstinance in passing An Ordinance Respecting the Personal Property of Married Women⁸⁹ the year after Brittlebank v. Gray-

⁸⁸ Kraemer v. Gless (1860), 10 U.C.C.P 470.

⁸⁹ An Ordinance Respecting the Personal Property of Married Women, Ord. no. 16 of 1889 (N.W.T.) [hereinafter Ordinance of 1889].

Jones was decided. This ordinance explicitly extended property rights to include personal property:

A married woman shall, in respect of her personal property, have all the rights and be subject to all the liabilities of a *feme sole* and may alienate and by will, or otherwise, deal with personal property, as if she were unmarried

A literal reading of the provision indicates that the legislature intended to bring about a significant expansion of the scope married women's property rights. One author has speculated that such egalitarian legislation was passed because the harshness of pioneering conditions, in which wives "struggled shoulder to shoulder with their husbands on the untamed land in the harshness of frontier life," made it obvious that depriving a wife of all rights in respect of property held by her husband was inequitable.⁹⁰

If it is true that this discovery influenced the legislature, the inequity was certainly not as obvious to the judiciary. The Ordinance did not define what constituted separate property, but the fact that it made reference to "her" personal property was considered determinative by the North-West Territories Court of Appeal in Conger v. Kennedy, decided in 1895.91 The case concerned the ownership of furniture which had belonged to Mrs. Conger before her marriage. While her husband was still living, Mrs. Conger executed a bill of sale whereby she assigned and conveyed the goods in question to her son. After her husband's death, the administrator of the husband's estate took possession of the furniture, and Mrs. Conger's son claimed the goods.

The Court considered whether the *Ordinance of 1889* broadened the scope of married women's rights over personal property. As in *Brittlebank* v. *Gray-Jones*, the Court adhered to the principle that statutes in derogation of the common law are to be construed strictly. As a result, the mere presence of the word "her" in the Ordinance was not strong enough to abrogate the common law rule that a woman's personal property passed by way of gift to her husband upon marriage. The Court followed the rule from *Brittlebank* v. *Gray-Jones* that the words "her personal property" are intended to

⁹⁰ O. M. Stone, "Canadian Women as Legal Persons: How Alberta combined Judicial, Executive and Legislative powers to win full legal personality for all Canadian women" (1979) 17 Alta. L. Rev. 331 at 347–8.

⁹¹ Conger v. Kennedy, (1895) 2 Terr. L. R. 186, rev'd (1896) 26 S.C.R. 397.

refer only to particular types of property defined in section 49 of the *North-West Territories Act 1875*, namely, separate earnings. Since the Court felt compelled to interpret the Ordinance as having changed the law in some way, they stated that it modified a married woman's rights and liabilities in respect of an unchanged definition of personal property from the *North-West Territories Act 1875*.

Although the court professed to be merely applying the law from *Brittlebank* v. *Gray-Jones*, in fact, the Court of Appeal's decision in *Conger* v. *Kennedy* was considerably more unjust. In *Brittlebank* v. *Gray-Jones*, goods bought with money owned separately by a married woman became the property of her husband on the basis that he took part in the farming operations. In contrast, Mrs. and Mr. Conger were not involved in any joint business venture; she lost the ownership rights to her furniture purely on the basis of the legal effects of marriage. Moreover, the words "her personal property" in the *Ordinance of 1889* were not ambiguous, and indicate quite unequivocally that it was the intent of the legislature that the law be expanded.

Justice Wetmore dissented. He was of the opinion that the Legislature must have had some objective in passing the Ordinance, and could not have merely intended to give property rights that had already been granted by the North-West Territories Act 1875. He placed importance on the word "all" in the phrase "all the rights and liabilities of a feme sole," interpreting the rights of a feme sole to be those of acquiring, holding, and disposing of property. Relying on a common sense approach to interpreting the words "her personal property," he held that

I have no moral doubt . . . that the legislature intended to make all personal property of every description that a married woman had at the time of her marriage, or which might come to her after marriage, her own to be enjoyed, used and disposed of as a *feme sole* could enjoy, use and dispose of it. 92

Justice Wetmore's approach was adopted by the Supreme Court of Canada when it decided the case on appeal in 1896. The court did not reverse *Brittlebank* v. *Gray-Jones*; in fact, the court affirmed that section 49 of the *North-West Territories Act 1875*, only granted

^{92 (1895) 2} Terr. L. R. 186 at 196.

married women control over their earnings and did not extend to their personal property. However, the *Ordinance of 1889* had changed the law. The Court held that the words "her personal property" in the Ordinance were not limited to separate property as defined in the *North-West Territories Act 1875*, but extended to all of a married woman's personal property. The rationale for this conclusion was that the legislature must be presumed to have intended some alteration of the law so far as is consistent with the language of the Act.

This decision was followed in *Harvey* v. *Silzer* ⁹³ in 1905 in chambers. In this case, wheat grown on the claimant's farm was seized by her husband's creditors. Both parties had considered the farm to belong to the wife, although the husband occasionally did farm work for her without being paid for his services. The wife owned the land, directed the work on it, and resided on it separately from her husband, who had his own homestead. She bought implements and horses jointly with her husband from the proceeds of the farm, paid for the threshing, and had her brother-in-law and her son do most of the work. Despite all this, the fact that the woman was not adequately supported by her alcoholic husband was apparently as important a factor as any other:

I do not think that the husband was working this land as the tenant of his wife or the head of his family, but that whatever work he did was under her direction, that the farm was worked by her for the maintenance of herself and family, on account of the drinking habits of her husband, who evidently did not provide sufficiently for the family.⁹⁴

The philosophy of protecting deserving wives deserted by their husbands appears to have been at least partially motivating the Judge's decision. Paternalism aside, *Harvey* v. *Silzer* established the rule subsequently adopted in Alberta and Saskatchewan that crops grown on land owned by a married woman, on which both she and her husband reside, *prima facie* belong to her and should only be found to be the husband's property when it is shown that he carried on the farming operations as the head of the family or as tenant of the land. After 1905, a woman enjoyed all the rights of a *feme sole*,

⁹³ Harvey v. Silzer (1905), 1 W.L.R. 360 (N.W.T. Chambers).

⁹⁴ Ibid. at 362.

not only to her land but also to the crops raised on it, unless her husband was the principal farmer.

ii. Rights Over Property in the North-West Territories

In contrast to their restrictive conception of separate property, the judges in the North-West Territories were expansive in assessing the rights and liabilities of married women. The right to dispose of property was enlarged in *Brooks* v. *Brooks et al.*, 95 decided in 1896. In interpreting the effect of the *Ordinance of 1890*, 96 Justice Richardson rejected the common law principle that upon marriage a woman's personal chattels passed by way of gift to her husband and she thereafter did not have the power to dispose of them. However, the Judge expressed some reluctance in reaching his decision:

But whether or not the Legislature has wisely ordained, they have so extended the right of married women over separate personal property as to give the wife the *jus disponendi* of it, in my humble opinion, by virtue of Ordinance 20 of 1890, when the wife here attained all the rights in respect thereof of a *feme sole*.⁹⁷

In the result, the defendant married woman had the right to alienate cattle derived from her occupation of cattle raising, which she carried on separately from her husband. Since the Supreme Court of Canada had decided in *Conger v. Kennedy* that "separate property" also included personal property, as of 1896 in the North-West Territories personal property ceased to pass automatically to husbands on marriage, and women enjoyed *jus disponendi* over their belongings.

iii. The Scope of Liability of Married Women in the North-West Territories

The first North-West Territories case to expand the liability of married women from their protected status at common law was

⁹⁵ Brooks v. Brooks et. al. (1896), 2 Terr L.R. 289 (S.C.T.D.).

⁹⁶An Ordinance Respecting the Personal Property of Married Women, Ord. no. 20 of 1890 (N.W.T.), consolidated in C.O.N.W.T. (1898), c. 47 [hereinafter Ordinance of 1890]. Note that the Ordinance of 1890 repealed the Ordinance of 1889.

⁹⁷Supra, note 95 at 293.

Harris v. Harris, 98 in 1895. The decision was delivered by Justice Wetmore, who had been the dissenting voice in the North-West Territories Court of Appeal in Conger v. Kennedy. In deciding whether a married woman's liability was so broad that she should have to pay costs in an action she launched against her husband, Justice Wetmore relied on English precedents to support his conclusion that the Ordinance of 1890 rendered a husband and wife "in the same position as two men" formerly were. Justice Wetmore justified his reliance on the English law on the basis that even though the language differed, the effect of the said Ordinance was the same as the English Married Women's Property Act of 1882. In the result, the plaintiff was responsible for paying the costs of her dismissed action for alimony out of her separate property.

A second case on this topic was decided in 1901 by Justice Richardson, who had rendered the decision in *Brooks* v. *Brooks* in 1896. As in *Brooks* v. *Brooks*, Justice Richardson was asked to consider the effect of the *Ordinance of 1890*. The plaintiff, Mr. England, was suing his wife for rights to a house and furniture. Both spouses claimed ownership of the property, and Mrs. England further claimed that because plaintiff and defendant were "man and wife," the action was not maintainable. ⁹⁹ Justice Richardson based his decision as to whether a husband could sue his wife on an English legal text, and held that in respect of personal property a woman suffered no legal incapacity whatsoever and was subject to all the liabilities of a *feme sole*. Therefore, where real or personal property was in dispute between a husband and wife, the wife was liable to be sued just as if she were not married.

3. Case Law in Alberta and Saskatchewan

Alberta and Saskatchewan became provinces in 1905. During the next three decades, the right of married prairie women to control their property was significantly expanded. The judges in Alberta and Saskatchewan began to construe the legislation less narrowly, and by the early 1920s most of the laws which had been stifled for years were given effect. The change in judicial attitude can be explained by the radical changes taking place from 1905 to the early 1920s in many aspects of women's social status and legal rights. For

⁹⁸ Harris v. Harris (1895), 3 Terr. L.R. 289 (Chambers).

⁹⁹ England v. England (1901), 5 Terr. L.R. 204 (S.C.T.D.).

example, the expansion of property rights took place in a period when the public and women's groups were lobbying to secure women's rights to an interest in the family home based on the common law right of dower.¹⁰⁰ As well, the extension of the right to vote to women in Alberta and Saskatchewan in 1916 likely had an impact upon the judiciary's determination of the appropriate scope of women's property rights. An overview of the case law reveals the evolving attitudes of the judges in Alberta and Saskatchewan during this period.

i. The Scope of Separate Property

Despite the clear direction from the Supreme Court of Canada in Conger v. Kennedy, judges in Alberta and Saskatchewan were reluctant to abandon a narrow definition of "separate estate." In Fraser v. Kirkpatrick, decided in 1907,¹⁰¹ the Trial Division of the Alberta Supreme Court had to decide whether profits of a business in which a husband played some role constituted the wife's "separate property." The husband of the defendant, Mrs. Kirkpatrick, became insolvent in 1901. At about that time, presumably to secure an income for the household, Mrs. Kirkpatrick began working as a housekeeper. She subsequently leased a hotel, obtained a license, and carried on a hotel business in her name, with her husband assisting her in the business. Three years later, Mrs. Kirkpatrick became a partner in a real estate business. She used the money she had made in the hotel business to make a number of profitable investments.

At that point, execution creditors obtained a judgment against the husband in relation to a debt that he incurred before he became insolvent in 1901, and took action to realize their judgment. The Court therefore had to determine whether the profits acquired from the hotel business were the property of the husband, or if they became the separate personal property of Mrs. Kirkpatrick under *Ordinance of 1890*, which stated:

A married woman shall, in respect of personal property, be under no disabilities whatsoever heretofore existing by

¹⁰⁰ A public campaign for dower law, which was supported by a number of women's organizations, culminated in legislation in all three of the western provinces by 1920. See M. McCallum, *Prairie Women and the Struggle for Dower Law*, 1905-1920 (Faculty of Law, University of Manitoba, 1992) [unpublished] at 3.

¹⁰¹ Fraser v. Kirkpatrick (1907), 5 W.L.R. 581(Alta. S.C.T.D.)

reason of her coverture or otherwise, but shall, in respect of the same, have all the rights and be subject to all the liabilities of a *feme sole*. ¹⁰²

The Trial Judge reasoned that although the North-West Territories legislature did not have the jurisdiction to repeal or restrict the North-West Territories Act, they could have explicitly extended the law by drafting the Ordinance to state that all the earnings of a woman acquired in any way, whether in a business carried on by her apart from her husband or one in which a husband takes part, would be her separate property. Since the legislators did not explicitly do that, the Judge felt that the words of section 49, which provided that earnings were only separate personal property if acquired in a business carried on separately from one's husband, restricted women's property rights to earnings made in a manner which was absolutely and completely separate from their husbands. The execution creditors were able to enforce their claim against the husband and seize this property.

This result was fundamentally at odds with the law from the Supreme Court of Canada in *Conger v. Kennedy*, which held that the scope of separate property was *not* limited to the definition provided in the *North-West Territories Act*. The Trial Judge distinguished the Supreme Court ruling on the basis that it did not concern the definition of separate property, but instead only determined the rights of a woman over her personal property upon marriage, ¹⁰³ despite the fact that the Chief Justice had clearly stated in *Conger v. Kennedy* that

the words "her personal property" unconfined by any context, must be interpreted as having reference to all the personal property belonging to a married woman This is the plain *prima facie* meaning of the words in question taken in their ordinary sense, from which we have no authority to depart. 104

Even as late as 1907, therefore, the rights of married women in Alberta to control their property only extended to separate property, and separate property continued to be defined extremely narrowly.

¹⁰² Supra note 96.

¹⁰³ Fraser v. Kirkpatrick, supra note 101 at 583.

¹⁰⁴ Supra note 91 at 404.

The courts in Saskatchewan had numerous opportunities to decide whether the proceeds of a married woman's occupation were her separate property, since crops grown on land owned by married women were often seized by their husbands' creditors. Crops were generally the asset under dispute in the prairie provinces, rather than chattels as in British Columbia and Ontario. Courts in the early 1900s continued to follow the *Harvey* v. *Silzer* rule from the North-West Territories that when crops are grown on land owned by a married woman, on which both she and her husband reside, the crops *prima facie* belong to her, and should only be found to be the husband's property when it was shown that he carried on the farming operations as the head of the family or as tenant of the land.¹⁰⁵

After becoming a judge in the province of Saskatchewan, Justice Wetmore continued the liberal approach he had adopted on the bench in the North-West Territories. In 1910, he outlined the *Harvey v. Selzer* rule and stated in *obiter:*

Now, I agree with that only I do not wish to be understood as holding that if the husband carried on farming operations upon such land merely as the wife's manager, it would deprive her of the rights to her property, or to the proceeds of that property.¹⁰⁶

Thus Justice Wetmore gave support for an expansion of the scope of separate property even to assets acquired through farming operations in which a husband operated as his wife's manager.

The magnanimity of the Saskatchewan judiciary to the scope of separate property was illustrated yet again in 1923, when the Court of Appeal held that a car bought with money realized from the sale of crops *prima facie* belonged to the married woman who owned the land, despite the fact that her husband carried on the farming operations, and that the burden fell on the other party to show that the husband farmed as the head of the family or as a tenant.¹⁰⁷

It is somewhat surprising that there are no reported cases in the three most western provinces in which a business woman was sued by her own creditors seeking to prove that assets were her separate property and therefore liable to satisfy debts she had incurred. It

¹⁰⁵ This case was followed in Saskatchewan in *Lindsay* v. *Morrow* (1908), 1 Sask L.R. 516; *Moose Mountain Lumber and Hardware Co.* v. *Hunter et al.* (1911), 3 Sask L.R. 89, and *Minaker* v. *Hadden*, [1917] 3 W.W.R. 774.

¹⁰⁶ Karst v. Cook and Tait (1910), 3 Sask L.R. 406 at 411 (S.C.T.D.).

¹⁰⁷ Pierce v. Thompson et. al, [1921] 3 W.W.R. 573 (Sask. S.C.C.A.).

would have been to an individual business woman's advantage to rely upon the narrow definition of separate property which the judiciary had traditionally maintained. For example, she could argue that her husband had some hand in the business, so that it was not a "separate" occupation. Or, as did a woman in Manitoba in 1884, she could contract for goods to run her business and then avoid liability by arguing that she could only be held liable to the extent of her separate property.¹⁰⁸ Whether or not any individual women benefited from the narrow judicial interpretations in this way is unclear. It can be inferred, however, that the decisions which narrowly defined separate property had a detrimental effect upon the economic status of married women as a whole in the prairies, since, as discussed above, their continued legal disabilities would have impeded their ability to secure credit and enter into contracts. Unfortunately, the full impact of this legal and economic disability in Alberta and Saskatchewan is not clear.

ii. Rights of Married Women to Own Property in Alberta and Saskatchewan

As late as 1922 in Alberta, the common law concerning the right of a married woman to sue for a tort inflicted upon her had not been altered by statute. Therefore, it was necessary that her husband be joined in any such action. Some hope for change was given by the Trial Judge in *Bennett* v. *Edmonton*.¹⁰⁹ A recent Alberta case had held that the courts of Alberta were not strictly bound by the decisions of English courts as to the state of the common law of England in 1870.¹¹⁰ On that basis, the Trial Judge questioned in *obiter* whether under the common law of Alberta as of that date it was still necessary for the husband to be joined, but determining this issue was not necessary to decide the case.

iii. Liability of Married Women in Alberta and Saskatchewan

The doctrine of marital unity continued to provide protection for married women in the prairies until at least 1918, when *Gaetz* v. *Jarvis* ¹¹¹ was decided. The common law presumption that a married

¹⁰⁸ Wishart v. McManus (1884), 1 M.L.R. 213 (Q.B.).

¹⁰⁹ Bennett v. Edmonton, [1922] 1 W.W.R. 861 (Alta. S.C.T.D.).

¹¹⁰ Rex v. Cyr, [1917] 2 W.W.R. 1185 (Alta. S.C.A.D.).

¹¹¹ Gaetz v. Jarvis, [1918] 3 W.W.R. 888 (Alta. Dist. Ct.).

woman acts as agent for her husband when purchasing necessaries convinced the District Court Judge in this case that the defendant married woman would not be held personally liable for contracts into which she had entered.

However, by 1929 the Alberta judiciary had abandoned the doctrine of marital unity so completely that a married woman could now be sued by her husband for debts she owed to him. In Haugen v. Haugen,¹¹² the Court relied upon English case law interpreting that jurisdiction's Married Woman's Property Act and held that a husband could launch a claim against his wife for debts arising after the marriage. However, the common law rule survived that a husband could not recover from his wife a debt contracted before their marriage. Therefore a mechanic's lien filed by him before the marriage in respect of such a debt was held to be ineffective after the marriage.

iv. Liability of Husbands in Alberta and Saskatchewan

The two issues of the scope of married women's rights to separate property and the liability of husbands for their wives' torts under the *North-West Territories Act 1875*, were still contentious fifty years after the provisions were first enacted. When the question arose in Saskatchewan, the judges failed to even turn their minds to whether the *North-West Territories Act* had reduced the extent to which husbands were liable for their wives' torts. Although Saskatchewan passed a *Married Women's Property Act* ¹¹³ in 1907, the statute did not change the existing law. The Trial Judge in the 1915 case of *Hahn* v. *Gettel* ¹¹⁴ summarily applied the common law rule that husbands were responsible for the torts of their wives, without any consideration of whether this common law rule had been abrogated by legislation.

In stark contrast is the Alberta Supreme Court Appeal Division's approach in the 1924 case of *Quinn* v. *Beales*. 115 Section 53 of the *North-West Territories Act* was relied upon by the plaintiff, claimed to have been the victim of the tort of slander, to argue that women's property rights were limited to "separate estate" and that this by implication meant that the husband was still jointly li-

¹¹² Haugen v. Haugen (1929), 3 D.L.R. 16 (Alta. S.C.T.D.).

¹¹³ Married Women's Property Act, R.S.S. 1909, c. 45.

¹¹⁴ Hahn v. Gettel (1915), 9 W.W.R. 686 (Sask. S.C.T.D.).

^{115 [1924] 3} W.W.R. 337 (Alta., S.C.A.D.).

able for the torts of his wife. The Alberta Court of Appeal chose not to follow the English rule that notwithstanding equivalent English provisions, the husband was still a proper party in an action against the wife for her separate tort and a judgment could be given against both of them.

The Court surveyed the evolution of the law in the North-West Territories relating to the liability of husbands for the actions of their wives, and the rights of married women to hold property. At common law, as adopted in 1870 in the Territories, a husband was not liable for his wife's torts, in the sense that he could not be sued directly for them. However, he could be held liable if he was made a party in an action against her during the marriage. As described above, section 52 of the *North-West Territories Act* modified the law by providing that a husband would not be liable for his wife's ante-nuptial debts or any debts contracted during marriage in any business of her own. Section 53 provided that a married woman could sue or be sued separately from her husband for her *separate* debts, contracts or torts as if she were unmarried.¹¹⁶

As noted, the law had been amended yet again in 1886 by section 13 of the North-West Territories Real Property Act, which made no reference to "separate" property, and instead gave married women all the rights of a feme sole with respect to land. The Court reasoned that this section nullified the limitation of women's property rights to separate property, and in fact, separate property in the historical sense no longer existed. Therefore, all subsequent references to "separate" property would be interpreted to mean "individual" property. In the Court's view, from 1886, a married woman had the same degree of control over her property as did a married man over his.

As a result, after 1886, the federal government had no need to pass the re-statements of section 53 in subsequent enactments of the North-West Territories Act. The basis of section 53, which enabled a married woman to sue and be sued, was the continued existence of separate estate. Since separate estate had ceased to exist, the provision was no longer necessary, and therefore could not be said to continue to restrict a married woman's liability to her separate debts, contracts and torts. Instead, a married woman had become fully liable for any claims against her, whether or not she was pos-

¹¹⁶ Section 53 of the *North-West Territories Act 1875* was re-numbered in the *North-West Territories Act 1886* as s. 40.

sessed of property in her own right. The Court held that the implication of that finding was that the common law liability of a husband for his wife's torts had been abrogated.¹¹⁷

Based on these conclusions about the effect of section 13 of the 1886 *Real Property Act*, the Alberta *Married Women Property Act* ¹¹⁸ was also held to be redundant. This legislation, passed in 1922, was the first statute passed by the province of Alberta relating to married women's property. Section 2 of the act provided that:

A married woman shall be capable of acquiring, holding and disposing of or otherwise dealing with all classes of real and personal property, and of contracting, suing and being sued in any form of action or prosecution as if she were an unmarried woman.

The Court concluded that this legislation merely declared the law that existed at the time it was enacted.

Thus, at long last, by force of a statute passed in 1886, in 1924 the married women of Alberta had gained the right to own "individual" rather than merely separate property. They also became legally responsible for their own torts, a development which had not yet occurred in British Columbia.

III. CONCLUSION

The process of reform of married women's property law was remarkably similar across the western provinces. Although the colony of British Columbia was one of the first jurisdictions in the country to enact legislation, a reluctance on the part of the judiciary in that province to construe married women's property laws broadly ensured that significant change to women's legal status did not take place until the early twentieth century. Similarly, the judges in the North-West Territories, and later in Saskatchewan and Alberta, resisted participating in the dismantling of the institution of marital unity.

Married women's property reform in Canada has been explained as an effort by the state to restructure patriarchy to fit new

¹¹⁷ See Quinn v. Beales, Supra note 115 at 346.

¹¹⁸ An Act Respecting the Rights and Property of Married Women, R.S.A. 1922, c. 214 [hereinafter Married Women's Property Act 1922].

industrial economies. 119 The fact that the British Columbian economy was largely industrial may partly explain why legislative and substantive change followed a similar course to that in central Canada. However, it is less simple to explain why the agricultural economy of the prairies did not translate into an earlier judicial acceptance of the statutory property rights of married women. It may be that the belief that a greater acknowledgment of the value of women's work in an agricultural economy should lead to greater property rights is an inappropriately modern assumption. Women in the prairies may not have desired a restructuring of their property rights, if the important role they played in the survival of their families translated into equal power and control over family assets. Of course, even if it is true that women were considered equal partners in the marital unit, the common law imposed hardships upon those women who left their husbands, or were left by them, and those who wanted to participate in commercial activities. These women were presumably numerically in the minority.

Although the original focus of legislative reform in the west was assisting deserted women, subsequent legislation appears to have been designed largely to rationalize debtor–creditor relations. It must be acknowledged that a number of other factors likely contributed to the conviction on the part of the legislatures that change was necessary. Evolving attitudes about the roles of women, a desire to codify the law, and concern for the plight of families in times of economic instability played a part in the statutory reform. However, the fact remains that the issues most often arising under the statutes involved disputes between creditors and debtors rather than disputes between husbands and wives. Apparently, reforming the legal relationship between spouses was of more concern to creditors than it was to married women and men.

The resistance of the judges in all three provinces to give effect to the laws was based upon an adherence to the traditional notion of the family as a unit or "community." Recognition of the separate property interests of women or of contractual relationships between spouses was rejected as a threat to that institution. The pattern of judicial resistance in the west to modification of the marital relationship in the face of incremental change from the legislatures may be a result of the different roles played by these two bodies. The

¹¹⁹ This idea is explored in Ursel, *supra* note 78 at 123.

laws delineating the property within a creditor's reach were in need of reform from a politician or business-person's point of view, both in the industrial economy of British Columbia and in the agricultural provinces of Alberta and Saskatchewan. In contrast, these concerns were of little consequence to the judiciary, which was under less pressure to respond to social and economic change. However, by the end of the 1920s, the extent to which the legal and social position of women had been transformed convinced the judiciary that the doctrine of marital unity did not reflect reality. For better or for worse, married women had gained the right to control, dispose of, and be sued for all of their real and personal property.