6-1-1985

The Impact on Women of Entrenchment of Property Rights in the Canadian Charter of Rights and Freedoms

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I. Introduction
On Friday, 29 April 1983 the Progressive Conservative opposition in Parliament proposed an amendment to the constitution which would change section 7 of the existing Charter to read:

Everyone has the right to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(emphasis added to identify amendment)

The language used to present this amendment shows that its proponents were espousing a very traditional view of property. For example, Jake Epp said:

The principle that property belongs to men or women is steeped in British Common Law. . . . In the British context, private property has always historically been associated with the development of free institutions. It goes back to 1215 when the Magna Carta referred to it. It is referred to in the Bill of Rights of 1627. We can refer to the United States Constitution, if we want to draw on the experience to private ownership of land. All these documents have reference to private ownership of land. They recognized that not only should those rights be recognized in fact, they should also be a constitution reality.¹

The view expressed in this excerpt is not compatible with the modern welfare state. It stems from an era when land was most significant to the economic base of a nation and a person's liberty and status was dependant upon possession of real property. Canada is a welfare state where many depend for their livelihood upon government benefits and jobs, rather than on land ownership. To entrench an outdated view of property would not be beneficial to women nor to many men in our society. However, the statements of those initially proposing an amendment do not control it. The meaning or objects of the

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**This paper was originally prepared for the Canadian Advisory Council on the Status of Women. I am grateful for their permission to publish this work.
1. 126 House of Commons Debates, Friday, 29 April 1983; 24997.
proposed amendment could be clarified prior to entrenchment if it is considered to be a beneficial addition to the Charter.

In this article I propose to assess whether the entrenchment of property rights would be detrimental or beneficial to women in Canada. I will examine the philosophical theories of property, the American experience with guaranteed property rights and the implications of Canadian requirements for fairness and natural justice. In particular, how those guarantees and requirements have affected matrimonial property schemes and the division of pension rights in the United States will be examined, and how they will likely affect equivalent developments in Canada.

II. Philosophy
Property to the average person is a thing, but for legal purposes it is a right in the sense of an enforceable claim to the use or benefit from a thing. It extends beyond rights in private real property to encompass rights in intangible property. Property can also be described as a system of rights of each person in relation to other persons, this system being enforced or determined by the state.3

One of the earlier pervasive theories of property originated with John Locke. He argued that every individual had a natural right to an unlimited amount of property.4 Locke perceived the role of the government as guardian of this right to unlimited property with the power to take private property only when it was essential to protect property as an institution. In his theory Locke assumed that there was adequate property to satisfy all those who could through the fruits of their labour make use of it. At the time when he articulated this theory men were the primary landowners. In addition there were new lands waiting for those who wished to acquire real property. A number of constitutions, which guaranteed property rights such as that of the United States, were premised upon Locke’s theory.

Since the writings of Locke, new theories have developed concerning property rights. All subsequent theorists advocate property rights

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2. C.B. MacPherson, *Property*, Toronto, University of Toronto Press, (1978), p. 3. This has also been the position adopted by the American courts. For example see Board of Regents v. Roth (1971), 408 U.S. 564 at 572 where the court stated “The court also made clear that property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money.”


— it is the amount and kind of right that has changed. The different theories reflect the changing nature of our society, in particular the expectation surrounding the role of government.

The philosopher who departed most fundamentally from Locke's view was Jean Jacques Rousseau. He disagreed with Locke that every person had a right to unlimited property although he did agree that a right to property was founded in natural law. Rousseau's theory advocated a right to a limited amount of property, that being the amount that a person could work on. If an unlimited amount was guaranteed many would become propertyless and dependent upon those who controlled the property. It was still apparent in Rousseau's theory, however, that his emphasis was on private real property.

In wasn't until the development of the industrial society that the concept of property began to change. Karl Marx probably had the greatest influence in exposing the evils of the industrialized society which tended to treat the worker as a commodity. He argued that the development of a capitalistic society removed the existing basis of property. In his Communist Manifesto, Marx argued that the existing society concentrated wealth and property in the hands of a few at the expense of the remaining society. He advocated the abolition of private property and the formation of community property which would benefit everyone.

While Marx's theories were not generally accepted in democratic states, he was instrumental in disclosing some of the myths that permeated the current theories of property rights. Following Marx, John Stuart Mill and Thomas Green re-asserted the need for a guaranteed right of property. Mill's theory was based on a modified form of utilitarianism and Green's on the premise that property is an extension of human personality and is required to fully develop a person's moral personality. Green's theory therefore advocated an

6. See also Jeremy Bentham, The Theory of Legislation, C.K. Ogden (ed.), London, Kegan Paul 193. Bentham's theory of property was part of his overall theory of utilitarianism which required finding an allocation which brought the greatest happiness to the greatest number. However, his focus was primarily on private property — in particular land.
unlimited right to property.\(^9\)

During the 20th century the philosophers began to develop theories of property rights that were more reflective of the modern society. Two of the most heralded are Moris Cohen and Charles Reich. Cohen, while not opposed to property rights, recognized that property is a weapon of power.\(^10\) In spite of this, he still maintained that there should be a guaranteed right of property subject to the state's power to impose restrictions on its use or transfer or to confiscate it where the welfare of society demanded it. His theory expresses a new awareness that property is not unlimited and individuals must live in close contact, with its consequent risk that the actions of one may be harmful to the rights of another.

Reich, however, has the most developed theory of the nature of property in the modern society.\(^11\) While others such as Cohen were evolving theories concerning basically the changing nature of real property,\(^12\) Reich struck at the fundamental nature of the welfare state and its property concepts. His thesis begins with the premise that the growth of government largesse and power has created a society in which the individual is dependent upon the state for much of his or her well-being; as a result of his dependence upon the government largesse, the individual feels the government power. Reich considers this growing dependence endangers individual self-development and growth. He asserts this new form of property, which is linked to status, should be held as of right. Thus benefits, such as unemployment and public assistance, should be guaranteed rights. Deprivation of them would be justifiable not for reasons of fault of the individual claimant, but only for overriding demands of public policy. Thus everyone would be permitted to remain self-sufficient and to develop as an individual. In essence forms of government largesse have, for many, replaced the kind of property initially contemplated by the United States Constitution and it is essential that this new property be secure from unwarranted government intervention.

While Reich's theory has not been totally accepted by the courts in the United States it has been accepted in part with the recent developments pursuant to the due process guarantees.

In summation, it can be said the newer philosophers have departed from Locke's concept of guaranteed right to unlimited property, in favour of a new theory which recognizes government largesse as property. If there are to be any benefits to women from entrenchment of property rights, they cannot arise from the outdated property concepts that are made the foundation for the proposed amendment to section 7 of the Canadian Charter.

In analysing the potential impact of an entrenched property right, it is useful to look at the United State's constitutional guarantee of the right to property. It is helpful to point out that while Locke's theories formed the basis for those property guarantees, the courts have interpreted them in a manner that has been consistent with society as it has changed. In fact, in recent times the degree of protection has been minimal as it relates to the substantive right.

III. The United States Approach

Property rights were perceived as essential by the drafters of the American constitution since it was to achieve economic as well as political ends. In fact it was apparent that many believed the entire constitution revolved around the protection of property rights. This sentiment was partially echoed by the United States Supreme Court in Ochoa v. Hernandez when it declared:

Without the guarantee of due process the right of private property cannot be said to exist in the sense in which it is known to our laws. The principle... has been recognized since the Revolution as among the safest foundation of our institutions.

The primary property guarantees are contained in the Fifth and Fourteenth Amendments. The Fifth guarantees that with reference to the Federal government,

No person... nor be deprived of life, liberty or property without due process of law nor shall private property be taken for public use without just compensation.

The Fourteenth guarantees that

... nor shall any state deprive any person of life, liberty, or property without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

While it was intended that the fourteenth amendment would be the only one applicable to the states, the courts have made most of the amendments guaranteeing essential rights applicable to them.

While both the fifth and fourteenth amendments guarantee the right not to be deprived of property except by due process of law, for many years the Supreme Court assumed that it had an inherent right to review the substance of legislation which either the Congress or the states had enacted. This view stemmed in part from the then prevailing natural law theory that certain rights existed for all persons and that the government could not override these rights. The principle of substantive due process was explicitly articulated in *Mugler v. Kansas*\(^1\) where the court upheld a statute that prohibited the sale of alcoholic beverages. While the statute was valid, the court made it clear that there were limits upon legislative action and it was the courts that would determine if the state had exceeded its authority. For an enactment interfering with property rights or the right to contract to be valid it had to have a substantial relation to the protection of the public health, morals or safety of the state. This test was a recognition of the fact that the government must have the power to protect its citizens. It became known as the state's police power. Justice Taney articulated it well:

While the rights of private property are sacredly guarded we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.\(^15\)

By the beginning of the twentieth century the Supreme Court had indicated its willingness to strike down any economic or social legislation which interfered with freedom to contract.\(^16\) The consequence was that only legislation which the members of the court felt served

\(^{14}\) (1887) 123 U.D. 623.
\(^{15}\) *Charles River Bridge v. Warren Bridge* (1837), 11 Pet. 420, 548; also for a modern statement see *Berman v. Parker* (1954), 348 U.S. 26, 32 where the court said "It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. It is the governmental power of self-protection."
\(^{16}\) *Allgeyer v. Louisiana* (1897), 165 U.S. 578.
legitimate public interests could withstand their scrutiny. The evolution of substantive due process reached its height in the now infamous decision in *Lochner v. New York*\(^\text{17}\) where the court invalidated a New York law which would have limited the hours that a baker could work to sixty per week. The majority held the statute was unconstitutional because it was an arbitrary and unnecessary infringement on freedom of contract and the liberty of the person. While the court was willing to allow the regulation for health reasons, they were quick to point out that the bakers were not in need of such protection since their job posed no more danger to health than many other jobs. It was apparent from the majority decision that they simply disagreed with the economic theories that were developing at that time. Justice Holmes, in his famous dissent, castigated the majority for their view.

But a constitution is not intended to embody a particular economic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question of whether statutes embodying them conflict with the Constitution of the United States.\(^\text{18}\)

In assessing the likelihood of an interpretation such as *Lochner* in Canada under an amended section 7 it must be kept in mind that even in the early twentieth century the *laissez faire* concept was the predominate philosophy. The transition to substantially increased government regulation of the economy was just beginning. Furthermore, as more governmental intervention became essential the court retreated from their position of reviewing the substance of economic and social regulation. The transformation began following the Supreme Court's invalidation of much of Roosevelt's New Deal legislation on the assumption that this represented the greatest threat so far to the free enterprise system.\(^\text{19}\) Following an attempt by Roosevelt to pack the court, it began to abandon its substantive due process review of economic and welfare legislation.

While the court retreated from the exercise of substantive due

17. (1905), 198 U.S. 45.  
18. *Id.*, at 75-76.  
process with respect to social and economic measures, it clearly indicated that it would continue to exercise such a review to protect other constitutional guarantees and liberties. In *Stanton v. Stanton*\(^{20}\) the Supreme court invalidated a Utah statute which specified that for child support purposes the age of majority for women was eighteen but twenty-one for men. The basis of the decision was that for a classification to be constitutional:

\[
\ldots \text{[I]t must be reasonable not arbitrary and must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.}^{21}
\]

In this case the court said the assumption that women matured earlier and married earlier was not a sufficient nor a satisfactory ground for differentiating between boys and girls. In *Califano v. Westcott*\(^{22}\) the Court took a similar position. That issue was section 407 of the California Social Securities Act which provided benefits to families whose dependent children had been deprived of parental support because of the unemployment of the father but provided no benefits if the unemployed person was the mother. Mrs. Westcott had been the primary breadwinner prior to her unemployment and would have qualified for relief had she been the father. The court invalidated the legislation on the basis that the gender classification was not substantially related to the attainment of any important and valid statutory goal but was rather part of the baggage of sexual stereotyping that presumed the father had the primary responsibility to provide for the family.

There are a number of other decisions where the court has reinforced their position that when the state gives to or deprives an individual of benefits, they must not only comply with the principles of procedural due process but must not infringe upon any of the other

\[\text{21. Id., at 14.}\]
\[\text{22. (1979), 99 S.CT. 2655.}\]
rights guaranteed in the Bill of Rights. While these decisions are premised upon the guarantees in the equal protection clause, they are significant for the interpretation of rights because they make it clear that, while the states have the ability to define what constitutes property, they must do so in accordance with other fundamental values protected by the constitution.

IV. Procedural Due Process

When the United States Supreme Court retreated from its general substantive due process doctrine, a multiplicity of cases arose under procedural due process. Of concern to us are the cases on due process as it relates to the property guarantees in the fourteenth amendment. It is the fourteenth amendment which applies to the states and it is the states who are most involved with private property and welfare. However, the principles can also be applied under the fifth amendment when the federal government is involved.

Two basic issues arise. The first is what constitutes property and the second is when is the state depriving someone of property? The latter question involves the state action doctrine, which will be of concern under section 32 of the Canadian Charter since it arguably only applies to governmental action. In the American context it is quite clear that governmental enforcement of private claims to property by one person against another is a deprivation of property which invokes the application of the due process clause. Matrimonial property legislation could be viewed in this context as a resolution of claims between individuals, although it may be more accurate to regard it as a process for ensuring that family members and society are protected upon dissolution of a union.

23. Also see Orr v. Orr (1979), 99 S. Ct. 1102 where an Alabama statute which only permitted alimony payments to be imposed upon husbands was struck down on the basis that there was no rational basis for this classification. In Frontiero v. Richardson (1973), 411 U.S. 677 a statute which provided the wife of a male serviceman with dependent's benefits but not the husband of a servicewoman unless she proved that she supplied more than one half of her husband's support was rendered void on the basis that the classification was based on the over broad generalization that female spouses would normally be dependent but not vice-versa. Weinberger v. Wiesenfeld (1974), 420 U.S. 636 involved a social security Act where contributions were made by a wage earner. Benefits were granted on the earnings of a deceased husband and father to his widow and minor children but granted only to a deceased wife's minor children. The court held that this was unconstitutional because it was based upon the invalid generalization that a wife's income was not vital to her family's support.

What tends to be the more important question is what constitutes property. If Reich’s theory were to be accepted, most essential forms of government largesse would be guaranteed property rights. The American courts, however, have never fully adopted Reich’s theory. In their earlier interpretations the courts classified the recipients of welfare payments or public education as having no property interest since the government had no obligation to provide these benefits. In fact, a system of rights and privileges existed by which benefits like licenses were regarded as privileges and, as such, not subject to the limitations imposed by the due process clause.  \(^5\)

However, in 1971 the Supreme Court clearly repudiated the doctrine that procedural due process application was to be determined by the right-privilege dichotomy. In *Graham v. Richardson*, Mr. Justice Blackman wrote for the court: “This court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a ‘right’ of ‘or as a privilege.’”  \(^6\) One of the reasons for the court’s recognition that the state should not have an unfettered discretion to withhold even “privileges” appears to have been the extensive amount of literature criticizing this dichotomy in the context of the new concept of property.

The first serious efforts to deal with issues about the new property came in the Supreme Court decision of *Goldberg v. Kelly*.  \(^7\) The issue in *Goldberg* was whether a state, which terminated public assistance payments without giving the recipient an evidentiary hearing, denied the recipient due process. Although the parties conceded the due process clause was applicable, Justice Brennan examined the issue of whether welfare benefits fell within the definition of property. As the criteria for determination, he considered the importance of the benefit to the individual and the likely grievousness of its loss.  \(^8\)

This test was rejected shortly after by the Supreme Court in two significant decisions, *Board of Regents v. Roth*  \(^9\) and *Perry v. Sind-
Roth, who was hired for a fixed term of one academic year to teach at a state university, was informed without explanation that he would not be rehired for the following year. In assessing whether he was entitled to due process, the court said that one must look to the nature of the interest at stake and not to its weight. The court stated, "to have a property interest in a benefit... he must... have a legitimate claim of entitlement to it." It was the court’s opinion that the concepts and scope of property rights are defined by existing rules or understandings "that secure certain benefits and that support claims of entitlement to those benefits."

In Sinderman the respondent was employed for ten years as a professor under a series of one year contracts. The Regents terminated his appointment for the following year without an explanation or a prior hearing. The court in ascertaining whether he had an entitlement stated:

A person’s interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understanding that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Sinderman’s expectation of tenure was enough of an entitlement to make him subject to due process protections.

Sinderman and Roth were a retrenchment from the position initially adopted by the court in Goldberg to the effect that the importance of the benefit to the individual determined whether there were due process rights. The impact of these decisions was the creation of a doctrine which permits the states to determine what property rights they will establish but leaves it to the courts to determine if the procedures are adequate to protect an expectation that has risen to the level of a property interest. The approach in both cases has been subject to extensive debate and criticism. Some critics do so on the

30. (1972), 408 U.S. 593.
31. Supra, note 27, at 571.
32. Id., at 577.
33. Id.
34. Supra, note 28, at 601.
basis that the courts should not rely on the state to create the interest, but should, instead, re-instate the doctrine of substantive due process. Others focus their criticism on the test that the courts use to ascertain if an individual is entitled to protection. Basically, it states that entitlement only arises when a benefit has been granted in such a manner that it creates an expectation that an individual will continue to receive it, unless it is removed according to fair procedure.

The courts since Roth have continued to invalidate legislation or to render unconstitutional activities of state officials where they have found a "property" interest. The cases demonstrate the diversity of interests that will be classified as property by the courts. In 1970, for example, the Supreme Court invalidated a Georgia motor vehicle provision which required that the registration and licence of an uninsured motorist, who was involved in an accident, be suspended unless the owner posted security to cover the amount of damages claimed by aggrieved parties in respect of the accident, irrespective of fault.\footnote{Belly v. Burson (1970), 402 U.S. 535.}

The court said that the state action infringed upon important interests of a licensee because, once a license is issued, continued possession may become essential in the pursuit of a livelihood.

In Mathews v. Eldridge, the Supreme Court held that disability payments were a statutorily created "property" interest which was protected by the due process clause.\footnote{(1975), 424 U.S. 319.} Finally in Logan v. Zimmerman Brush Co., the Supreme Court held that an employee's right to the use of the Fair Employment Practices Act's adjudicatory procedures was a species of property protected by the due process clause.\footnote{(1982), 102 S. Ct. 1148.}

The court held that, while the state had the power to create substantive defences or immunities in the adjudication or to eliminate the statutorily created cause of action altogether, it could not arbitrarily destroy an employee's property at will. In this recent decision the court re-affirmed the principle that once a right of action or a legitimate expectation of entitlement is created, then it cannot be removed except in accordance with due process protections. These decisions tend to focus on the "new property" since there is no doubt that traditional forms of property qualify for due process protection.
In summation, the American position appears to be that even though the government is not required to give benefits, such as welfare and public housing, if it distributes them, it must do so in accordance with constitutional principles such as equal protection. Once a system has been established which creates a claim of entitlement for an individual, the due process clause will apply. A claim of entitlement arises if the law establishes criteria for continued receipt of benefits and the individual appears to meet these criteria. If in fact the law creates no claim to future payments, then an individual has no claim. Furthermore, until an individual is in receipt of benefits, the courts do not seem to require fair procedures, however, this point has not been put truly to the test since the Supreme Court has never been asked to determine if denial of access to a right, such as public education, requires fair procedures.

V. Fairness and Natural Justice in Canada
At present the Canadian law does not differ substantially from American except in the history of its evolution and the titles used. In Canada natural justice and fairness have evolved in the absence of constitutional due process guarantees. The principles underlying the Canadian system of judicial review of administrative action seem to be that an individual is entitled to be treated with respect and to be fairly treated by the state. The process of determination of rights is similar to that used by American courts. In deciding whether the principles of natural justice have been complied with, the courts have started with issues of entitlement and followed them with assessment of the adequacy of the procedure itself. The British and Canadian courts have tended to focus on the nature of the function being exercised pursuant to statutory power; if it was a judicial or quasi-judicial function, the claimant was entitled to a fair hearing. The courts assumed in those situations that an individual’s rights would be affected and therefore he or she had a right to be heard. Cooper v. Board of Works for the Wandsworth District is an expression of the oft-cited principle that there is a right to property which can only be removed by clear statutory language or following a fair hearing.

40. For example, see Cooper v. The Board of Works for the Wandsworth District (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (Eng. C.P.).
There appears to be no doubt that the courts sanction infringements on property rights provided they are effected through the principles of natural justice.

When the courts were faced with a decision-maker exercising a purely administrative function they took the view that there was no entitlement to a fair hearing.\(^4\) However, in recent years the courts have developed the doctrine of fairness which seems to require some form of procedural entitlement even when the function exercised is purely administrative. The new approach seems to recognise that the classification of an official's function is difficult and to endow some claimants with procedural protection but others with none is to work an injustice. Furthermore, it may reflect an awareness by the courts of the often serious impact on an individual of the exercise of even a purely administrative function. Chief Justice Laskin made this clear in \textit{Re Nicholson and Haldiman and Norfolk Regional Board of Commissioners of Police} when he stated that even though the statute did not provide procedural protection for a probationary constable, fairness required that he be told why his services were no longer required and be given an opportunity to reply.\(^3\) While not bestowing upon him the rigours of the procedural entitlements of natural justice, the court made it clear that the board could not act in an arbitrary manner. Therefore, in the end result Nicholson was entitled to more procedural fairness than \textit{Roth}, who had the existence of due process guarantees to rely upon.

The fairness doctrine is new and still developing in Canada. Many issues remain unresolved with respect to the extent to which the fairness doctrine applies and its procedural content.\(^4\) It is clear that fairness will apply to a question of terminating benefits once received,\(^4\) but not necessarily to the initial question of entitlement to benefits, such as welfare, if the statute granting it does not specify the

\(^{42}\) \textit{Calgary Power Ltd. v. Copithorne}, [1959] S.C.R. 24, 16 D.L.R. (2d) 24. This case dealt with a ministerial expropriation. The court made it clear that since the minister was not exercising a judicial or quasi-judicial function his decision was administrative and was to be made in accordance with the statutory requirements to be guided by his own views.


procedure to be followed. It does seem, however, from the flood of recent decisions that the courts have been moving closer to a requirement that most administrative functions must be exercised fairly, although short of a full trial-type hearing. In determining the applicable procedure, the courts try to assess the nature of the power, the consequences of its exercise, and the relationship between the individual and the authority.\(^6\)

Thus, since their retrenchment from substantive due process, the American courts by relying upon a guaranteed right to property, and the Canadian courts, even in the absence of constitutional guarantees, have created similar rules for the protection of individuals from arbitrary administrative action. Many of the natural justice and fairness cases in Canada involved government largesse. Part of the similarity of development stems from the changing nature of North American society as a result of the growing dependence of the individual upon government distribution of monetary resources. The courts of both countries have attached procedural protection to this new property, although they have never compelled the government to create such programmes.

These developments are particularly important in any assessment of the impact on women of constitutionally entrenching rights to property. Mary Ann Glendon makes this point when she says:

The new family law reflects a world where traditional forms of property are often less important than what have come to be known as entitlements and it manifests a new concern with the family property of groups of the population whose principle wealth is apt to be composed of such assets as wages, pension rights, households goods and a lease, or perhaps some equity in a mortgaged home. In public family law, the lack of property rather than its possession claims attention.\(^7\)

If Mary Ann Glendon is right, then real property becomes less important. Certainly, if the assumption that women are largely a propertyless class refers to their lack of real property, then it becomes apparent that women may need more protection with respect to the new forms of property such as jobs, government benefits and pension rights. Certainly it is essential to ensure that access to these benefits are not unfairly denied to women.

\(^6\) Ibid.
VI. *Section 7 of the Charter*

How then would an entrenched property right affect women? The suggested amendment to Section 7 of the Charter would guarantee both the right to enjoyment of property and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

An initial problem is attempting to ascertain how the courts will define property. If it is interpreted to mean the traditional form of property, then it will not be a meaningful guarantee to many who do not own anything beyond their personal possessions. If it is interpreted in the new property sense, it has the potential to benefit women who do not own real property. However, that potential benefit must be balanced against its potential to harm women’s attempts to acquire real property.

There are also other problems of interpretation with an amended section 7. One is whether the section embodies procedural guarantees only or whether it also imparts substantive protection. Commentators differ while the Ontario Court of Appeal has taken the view that section 7 is procedural only. If in fact the courts accept a substantive interpretation, then the rights could still be limited in accordance with section 1. Under such an interpretation, it may be possible for the courts to assess the wisdom of legislation which purports to limit those rights.

The impact of a procedural approach, arguably, is to constitutionalize aspects of the current administrative law which deal with natural justice and fairness. Prior to the Charter, the courts could only assess the actions of the administrators or interpret statutes to ascertain what procedures were required for compliance with the principles of natural justice and fairness. A court could fill in procedures when they were lacking but, if procedures were specifically denied by a statute, it could not require them. Under the Charter, however, on a procedural interpretation, the courts could assess the statutes to ascertain if procedurally they are in compliance with section 7 guar-

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rantees, and could invalidate them if they are in breach, in the same manner as the American courts. Since there is a past history of judicial development to rely on, the courts are likely to move in this direction.

A further problem concerns the effect of the placement of section 7 under the rubric of legal rights. This location seems to suggest that any procedural guarantee would require a court-type hearing. Certainly such an interpretation would not be beneficial to those whose rights are infringed by bodies not exercising court-like functions and where a trial-type hearing would be inappropriate. In fact the courts could exclude from the guarantees the exercise of purely administrative functions.

It seems highly likely that the courts will read section 7 in the context of the other guarantees in the charter. Thus a deprivation would not be in accordance with the principles of fundamental justice if it were to be made on a discriminatory basis or for reasons that would infringe on freedom of expression or religion and the like. For example, an individual should not lose his/her liberty for freely expressing views about the current government.

The term "security of the person" warrants further examination. The Law Reform Commission of Canada defined it as meaning "not only protection of one’s physical integrity but the provision of necessaries for its support." Article 25 of the Universal Declaration of Human Rights states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.

While it may be desirable, it is unlikely, even given a substantive interpretation, that the courts would read into section 7 a positive right to government benefits; such a stance would impose a positive obligation on the governments which would have the effect of determining government policy, rather than assessing its effects on guaranteed rights. However, if section 7 is to be given a procedural interpretation, the courts may well interpret this provision to include government benefits which are essential to the security of the person,

such as welfare, unemployment and old age payments. The procedural approach would only involve courts in assessing whether appropriate procedural safeguards had been observed in the course of denying or depriving an individual of entitlements. On the other hand, the court may well interpret section 7 simply to mean physical security of the person, for example, protection from interference by compulsory sterilization.

The term “fundamental justice” also raises problems. It could be argued, as has been the position taken by some of the provincial court judges, that its inclusion in section 7 simply raises to the level of constitutional status the principles of fairness and natural justice. Now the procedure would have to comply with the guarantees in the Charter and any limitations upon them would have to be reasonable, prescribed by law and demonstrably justifiable in a free and democratic society. “Fundamental justice” is not a term that has been widely used in Canadian law so its meaning is obscure at the present time. It could also be used to import a form of substantive due process, although few courts have yet adopted this approach.

Section 7, then, is rife with interpretation problems since the courts have never dealt with a similar clause under the previous constitution. The Supreme Court has not yet made any decisions on section 7 although cases have been argued before it. If the courts choose, they could look at the recent American jurisprudence for guidance. This uncertainty of interpretation makes it more difficult to assess the impact of adding a property guarantee to the current section. Before drawing any general conclusions I will examine its potential impact on matrimonial property laws and on pension rights.

VII. Women and Matrimonial Property

One of the concerns expressed by women about guaranteed property rights, is that their entrenchment would have a significant detrimental impact on the type of legislation that may be enacted, especially as it relates to women. In particular, concern may be expressed for the advances that have been attained by the enactment of matrimonial property legislation in every province. These statutes have created new schemes for the division of assets upon divorce or separation. While most would agree that these schemes are a great advance for women, it is generally accepted that there is still a need for improve-

50. Supra, note 48.
ment. Fears have been expressed that entrenchment of property rights will jeopardize these advances made by women.

In the United States, even with the constitution's guarantees of property rights in the fifth and fourteenth amendments, the courts were of the view early in their interpretation of these provisions, that the state had an interest in maintenance of its important social institutions through the exercise of the police power. With the expansion of the police power, a list of interests developed that would justify it use.\textsuperscript{51} These included economic interests of the society, security of social institutions, preservation of social resources, concern for general progress and interest in the individual life.\textsuperscript{52} In fact, since \textit{Lochner} was repudiated, the Supreme Court has maintained basically that the states can regulate through the exercise of their police powers unless they are abrogating other fundamental rights in the constitution.\textsuperscript{53} The division of matrimonial property is simply part of the state's larger concern for the maintenance of social institutions such as marriage and for the regulation of the parties upon divorce in the interest of the welfare of the society as a whole.\textsuperscript{54} In the United States, the individual states have legal authority over the family and therefore they bear the onus to enact divorce laws and rules relating to division of property. There are two different kinds of régimes among the states. Eight states have community property régimes.\textsuperscript{55} In the other forty-two states, while common law gave most of the matrimonial property to the husband upon divorce, recent legislative changes have incorporated sharing principles into thirty nine of them.\textsuperscript{56} The constitution has not precluded the legislatures from amending legislation and empowering the courts to divide and to compel transfer of assets upon the dissolution of a marriage. This authority is considered to be part of a state's concern for the protection of its citizens. A 1960 decision of the Supreme Court of Louisiana is typical of the approach taken to the constitutionality of legislation relating to domestic relations. In \textit{Hays v. Hays}\textsuperscript{57} the husband

\begin{itemize}
\item \textsuperscript{52} \textit{Id.}, at 94.
\item \textsuperscript{53} \textit{Ferguson v. Skrupa} (1962), 372 U.S. 726.
\item \textsuperscript{54} \textit{Supra}, note 52.
\item \textsuperscript{55} Elizabeth Cheadle, "The Development of Sharing Principles in Common Law Marital Property States" (1981), 28 UCLA Law Review 1269.
\item \textsuperscript{56} \textit{Id.}, at 1280; fn. 63 lists all 42 states.
\item \textsuperscript{57} (1960), 124 Jo. 2d 917.
\end{itemize}
argued that the statute requiring him to pay alimony after his divorce was an unlawful taking of his property for private purposes. The court made it clear that the legislature had jurisdiction to enact divorce laws and impose conditions upon the attainment of divorce such as the possibility of paying alimony. Since it was done according to judicial procedure pursuant to a valid state law, it was not unconstitutional.

In all of these situations it is clear that the courts regard family legislation as being in the public interest. Furthermore, the legislatures are requiring a fair division of property in order to protect the interests of the parties to the marriage and of any children which may be part of the family. Such divisions are made in full in compliance with due process since any deprivation occurs through the most formal of hearings, — the judicial process itself.

In Canada, under section 92(13) of the Constitution Act 1867, the provinces are given authority over property and civil rights. It is pursuant to this power that all of the matrimonial property legislation has been enacted. The division of assets is normally triggered by the occurrence of divorce (as determined by the federal Divorce Act), or separation. The Charter does not affect the division of powers under the constitution so the provinces retain their authority to deal with property and civil rights within their territorial limits. The exercise of that authority is subject to the guarantees in the Charter, but it is highly unlikely that the courts will question the wisdom of the legislatures in enacting matrimonial property schemes.

Matrimonial property legislation and concepts are firmly embedded in the tradition not only of Canada but also of other free and democratic societies. Whatever limitations of the property rights occurring under such laws results after a full judicial hearing with the right to counsel and oral or written presentations. Even if the courts were to interpret property rights as substantive guarantees, they could still find matrimonial property legislation to be a reasonable limitation in a free and democratic society because it is necessary for the protection of the welfare of the society. If section 7 guarantees are to be regarded as procedural only, it would be difficult to maintain that the deprivation was not in accordance with the principles of fundamental justice. If the legislation created an unfavourable advantage for one spouse over another based solely on presumptions relating to sex, section 15 regarding equality may well provide a remedy unless the legislation was designed to achieve a correction of past discrimination and hence acceptable under section 15(2).
This argument does not deny that the courts could use the constitutional expression of property rights to entrench traditional property values in Canadian society, particularly if section 7 were to be taken to have substantive effect. Although the trend has been to create matrimonial schemes more equitable to women, it is entirely possible that in times of conservative governments and under pressure from strong lobbies a retrenchment could occur. However, even in the absence of a right to property, the same result could be achieved by legislative action. A strong constitution in the United States did not prevent internment of Japanese-Americans in the 1940's nor protection of those professing communist views in the early 1950's. Fears of this nature are legitimate in light of the past history of the Supreme Court of Canada's interpretation of equality rights under the Canadian Bill of Rights.

VIII. Division of Pension Rights
An important development in the realm of matrimonial property, which should also be examined in the context of property rights, is the division of pension rights. Some of the new matrimonial property schemes include pensions as part of the matrimonial assets to be divided. For example section 45(1)(d) of the Family Relations Act of British Columbia defines family assets so as to include "a right of a spouse under an annuity or a pension, home ownership or retirement savings plan." Rights to a pension may be one of the most important assets possessed by a family. Already the Federal government has made a provision in the Canada Pension Plan Act for the application by a divorced spouse for a share of her/his spouse's pension plan rights.

In applying the provisions of the new matrimonial legislation, the courts are beginning to grapple with the concept of pensions as matrimonial assets. A number of recent decisions have included pensions claims even when calculation of the spouse's portion would be

58. R.S.B.C. 1979, c. 121. Some Acts such as Alberta's leave the determination of matrimonial or family assets to the courts.
59. Glendon, supra note 47.
60. R.S.C. 1970, C.C.-5, s. 53.2(1) [en. 1976-77, C. 36]. For a detailed discussion of how this operates see Patricia Horsford, Division of Canada Pension Plan Credit on Termination of Marriage (1980), 13 R.F.L. (2d) 48.
difficult. In *Rutherford v. Rutherford*, the British Columbia Court of Appeal held that a family asset includes any pension rights, even those that are inchoate, contingent, immature or not vested. In that decision the court required the husband to be a trustee for the wife’s undivided interest until such time as the pension accrued and could be divided.

In *Re Fischer and Fischer*, the Saskatchewan Court also stated that pension rights, whether or not vested, represented a property interest at least to the extent that such rights are derived from employment during the marriage. It seems, from the increasing number of decisions, that the courts are beginning to view pension rights as a form of property rights. As such, they would fall under the amended section 7.

The recent United States’ decisions and their new matrimonial property legislation also indicate a trend toward regarding pension rights as matrimonial property despite the difficulties that occur in valuation. The change partially results from the recognition that home-maker services are significant to a family’s welfare and to it’s ability to acquire economic assets. It may also reflect the changing concept of property resulting from increased dependence upon employment and government largesse for one’s livelihood. In a 1976 decision the California Supreme Court, (a community property state), made it clear that non-vested pension rights were not an expectancy but a contingent interest in property. These benefits were not gratuities but “part of the consideration earned by the employee.” A number of other community property states have also recognized an anticipated pension as a form of property. The significant factor in these developments is that they are occurring

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62. *Id.*

63. Fischer, supra, note 62, at 277.


66. 544 P. (2d) at 566.

within the guarantees of section five and fourteen of the American Bill of Rights. With the recognition of pension interests as property rights, a court is merely required to ascertain if their deprivation was in accordance with the principles of due process.

On the basis of this analysis, if the Canadian courts continue to follow their trend of treating pensions as part of matrimonial assets, they will likely be regarded as a form of property. In the American context, similar developments are occurring with no perceived interference with due process guarantees. Again, it could be surmised that the legal changes are due, in part, to the recognition of the significance of pensions to a family's assets and are included in the state's legitimate concern for protection of family members upon divorce or separation.

IX. Conclusions

Although there are many other areas pertaining to property that are of concern to women, such as public housing, rent control, and occupational health and safety regulations, the general principles discussed can be applied to them as well.

After an extensive examination of current Canadian law and American experience, it becomes apparent that there is no simple answer to the question of the impact of entrenched property rights on women. Given the current phraseology of section 7 and the history of judicial conservatism in Canada, it cannot be said with certainty what would be the ultimate impact on women of entrenchment of property rights in the way proposed.

It is certain that, although there may be a guarantee of enjoyment of property, under no interpretation could it be an absolute right. Section 1 of the Charter makes it clear that none of the guarantees contained therein are absolute, while section 7 itself makes it plain that deprivations are contemplated in accordance with the principles of fundamental justice. Though property rights have always been considered important in Canada, they have always been subject to overriding state interests.

Property is regarded by the majority of philosophers as essential to the liberty and growth of the individual, whether they have traditional or newer forms of property in mind. Also essential to an individual's growth and self-esteem is the knowledge that his or her property cannot be taken away by arbitrary action but only when other societal needs override. Women, as much or more than men, need to feel secure with respect to the property and benefits that they
have. If section 7 were to be treated as procedural and to have the effect of constitutionalizing the principles of natural justice and fairness, it could be beneficial to women since they tend on the whole to have a greater reliance on government largesse. If security of the person were to be interpreted in the manner suggested by the Law Reform Commission, then it could accomplish the same result. In fact this approach is preferable since it would no have the dangers associated with a property entrenchment because the courts are unlikely to interpret the concept in the same manner as the term property. There has been some suggestion that security of property could be extended to encompass traditional property but that would require a distortion of section 7. However, since section 7 is located in the legal rights section, it may be wishful thinking to anticipate an interpretation of security of the person which would extend protection to the new property.

American constitutional history since Lochner has not supported male vested property interests, at least in the area of matrimonial property, since community property and new division of property schemes have been enacted in an effort to ensure fairness in divorce situations. Lochner represented the culmination of the laissez faire doctrine which had prevailed prior to the welfare state. It is highly unlikely that our courts would return to this philosophy unless our society changes dramatically. Matrimonial property cases, at present, are decided in a similar manner in both Canada and the United States despite differences in our legal traditions.

There have been few challenges to the American Matrimonial property legislation under the due process clause. It seems to be generally accepted that the state has the power to interfere with or redistribute property where societal needs require it. In Canada, however, there would likely be challenges for several reasons. The first is that the Charter is new and many lawyers will use it as a last effort to win a case that they would otherwise lose under current matrimonial property legislation. Secondly, in the United States the police power was early recognized and clarified before matrimonial property legislation was truly significant. Canadian courts still must grapple with the limits of the state’s power plus ascertaining the values upon which these rights have been premised. This will involve many years and many decisions.

Since there are so many uncertainties, it can be said that entrenchment of property rights at the present time would not likely be beneficial to women. Since the battles were long to attain more
equal matrimonial property régimes, it is understandable that women would like to concentrate on redressing other inequities rather than facing challenges to the existing legislation in the courts. If the courts will act creatively they could interpret section 7 as it now stands to protect the new forms of property to the very great benefit of women. There is no need, at present, to provide property guarantees which could potentially have the effect of protecting vested interests in Canada — many of which do not accrue to women.