

PROPERTY RIGHTS

LIVING IN A MATERIAL WORLD: PROPERTY RIGHTS IN THE CHARTER

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The federal government's proposals in *Shaping Canada's Future Together* suggest an amendment to our constitution that would provide a "guarantee of a right to property".¹ This suggestion is Delphic. It is unaccompanied by any discussion attempting to justify or elucidate this particular proposal. It remains for us to conjecture what might be the extent of such a right, where it might be placed in the *Canadian Charter of Rights and Freedoms*,² and why this right merits constitutional protection as a fundamental value in our society. Questions about the nature of property and how it ought to be weighed against other social instruments and ideals are fraught with economic and political controversy. The federal government has revived the issue of property rights in the current round of constitutional deliberations in Canada, even though this issue had apparently been exhausted in numerous discussions over the past two decades.

WHAT IS A RIGHT TO PROPERTY?

The discussion of the proposed right to property under the *Charter* is frustratingly spare. There is no elaboration of how to recognize property when we encounter it, or what elements or dimensions this right could conceivably include.³ Nor do we learn about the degree of protection envisioned in the *Charter*, what problems such an entrenched right would prevent, or what kinds of government action might be circumscribed by entrenching such a right. Such failures leave a host of unanswered questions about the scope and importance that this new legal right might attain.

First, property itself is not a single, corporeal thing. It has come to be viewed as a congeries or "bundle" of rights that the law at a given time recognizes as belonging to persons who own, possess, or use things that are capable of having property interests attach to them.⁴ Property consists in rights in or to things that the law will enforce.⁵ In some cases, the property right in question is a right to exclusive use or possession. In another case, it might be a right to the profits from a venture or compensation for its loss or conversion. Property rights can attach to real estate, to personal goods, to products of one's labour, to technology, to commercial enterprises, to trade names or brands, to original ideas, to images, even to a person's own body.

A catalogue of property rights or "incidents" (the term favoured by A. M. Honoré)⁶ would be open-ended. At law, such rights or incidents, in absolute or qualified form, are constantly being created. Not all legal systems recognize the same relations as forms of property rights.⁷ A simply worded "right to property" in the *Charter* would amount to an apparently unqualified constitutional protection of an indefinite number of rights to the ownership and use of an indeterminate number of tangible and intangible things. The proposal by the federal government is impressive for its simplicity and absoluteness. Regrettably, it does not help us understand either how property rights are created, qualified, or altered by law, or the policy reasons for limiting the rights of property owners in the service of overall social welfare or the common good.

Second, a undelineated constitutionally protected right to property is liable to cause confusion. For example, it should not be interpreted as a constitutionally protected right to acquire or own some minimal amount of property. This is a possible, though implausible, interpretation of a guaranteed right to property. The more likely purpose of any property right added to the *Charter* would be to protect those persons who already have or will obtain property against depredations by government.⁸ It would not be instrumentally useful as a legal guarantee to persons who are propertyless. To borrow the language used by Frank Michelman, property rights in a constitutional setting usually provide for a "derivative", rather than a "direct", right.⁹ A constitution does not provide some kind of private entitlement that *must* be established and maintained in the general laws of the country. Rather, the derivative right attaches only to:

such instances of entitlement as happen to arise, under such standing laws as do happen to provide for them, protecting these contingent but actual entitlement relations against certain kinds of governmental impairment.¹⁰

Third, while the debate around property rights typically is illustrated by references to real estate, it is arguable that a broad range of different economic rights or advantages may be construed as a type of property that is recognized under an amended *Charter*. For

example, any attempt by a legislature to impose a regulatory regime on an industrial sector, such as the exploration for valuable minerals, could be construed as an interference with an enterprise's property rights. On this interpretation, an aggrieved corporation could bring a *Charter* action to have a court declare invalid the offending legislative act.¹¹

EXISTING CONSTITUTIONAL PROTECTION OF PROPERTY IN CANADA

The *Canadian Bill of Rights*, enacted originally in 1960, contains specific protection for property.¹² It provides in s. 1(a) a right to the "enjoyment of property" and the right not to be deprived of it "except by due process of law". This measure closely resembles the due process clause contained in both the Fifth and the Fourteenth amendments of the U. S. Constitution.¹³

A provision similar to s. 1(a) was not carried forward into the *Charter* in 1982, despite the recurrent efforts of Prime Minister Trudeau to see the entrenchment of this legal right. The matter was vigorously contested and, partly owing to the opposition of the New Democratic Party and of some provincial governments, particularly those of Saskatchewan and Prince Edward Island, the right to property was omitted from the *Charter*.¹⁴ Subsequent attempts to introduce an entrenched right to property, initiated by resolutions in the B.C., New Brunswick, and Ontario legislatures, as well as in the House of Commons, never succeeded in gaining the requisite support before they expired.¹⁵

The explicit protection in the *Bill of Rights* of a right to property remains in force today. Several features make this a relatively feeble and underemployed right.¹⁶ First, the right provided by the *Bill of Rights* is not entrenched in the sense in which legal rights contained in the *Charter* are entrenched: courts have been extremely reluctant to invalidate laws that infringe this right. Second, s. 1(a) of the *Bill of Rights* applies only to laws made by the federal Parliament. Third, s. 1 of the *Bill of Rights* refers only to "the right of the individual". This would appear to exclude as claimants all non-natural persons, such as corporations.

There have been few cases interpreting s. 1(a). It remains unclear, for example, whether the due process exception in the *Bill of Rights* should be interpreted as requiring simply a fair procedure to be followed by the government, or whether it actually guarantees compensation for owners of property who have been deprived of it. Nor is it obvious that the Supreme Court, in interpreting s. 1(a), would invariably treat the right to property as subject to a "procedural", but not a "substantive", form of due process. There have been

hints in this direction, but the courts have not conclusively settled whether s. 1(a) entitles them to review an impugned law only for the propriety of the procedures that led up to its adoption, or whether they can judge the contents of the law against a standard of justice.¹⁷ Issues such as this would become acutely relevant if the recent federal proposals led to the addition of a right to property in the *Charter*.

Property rights are also specifically protected in various provincial bills of rights. For example, the *Alberta Bill of Rights*, first enacted in 1972, recognizes every person's right to the enjoyment of property.¹⁸

Although a right to property was omitted from the *Charter*, this does not mean that a person's property is perennially at risk to being taken away by governmental action. The jurisdiction of each province over "property and civil rights" underpins the ability of provincial governments to expropriate private property from its owners.¹⁹ In every Canadian jurisdiction procedural guarantees exist to ensure that the owner receives timely notice and a fair hearing before the expropriation of land can be carried out.²⁰ In addition, the exercise of the power of expropriation usually is accompanied by payment of adequate compensation for the property affected.²¹

Expropriation or land use regulation are among the more visible instances of an individual property-owner confronting the awesome power of the state. It should not, however, be forgotten that many of the principles developed at common law provide considerable protection of settled expectations in relation to property rights.²² Whether the law provides protection in the form of property rules or liability rules, the point is that state action is often devoted to securing reliance interests, facilitating the transfer of private property, and resolving disputes over ownership and use.²³

WHY DOES A RIGHT TO PROPERTY REQUIRE *CHARTER* PROTECTION?

A common starting place for justifying the inclusion of property rights in the *Charter* is the matter of Anglo-Canadian constitutional history. The *Magna Carta*, signed by King John in 1215, referred specifically to restraints on the power of the monarch to usurp the property rights of his subjects. The *Constitution Act, 1867* similarly presents an image of political legitimacy and stability that is built on the continuity and respectability of propertied legislators.²⁵ To include property rights in the *Charter* would only extend a time-honoured tradition.

A second source of support for entrenching property

rights is the existence of similar guarantees in major international agreements which Canada has signed. For example, the *Universal Declaration of Human Rights* includes a right not to be arbitrarily deprived of one's property.²⁶ The *European Convention for the Protection of Human Rights and Fundamental Freedoms*,²⁷ which served as one model for the *Charter*, protects property rights in Article 1.

A third, more powerful line of argument in favour of constitutionalizing property rights derives from those political and legal theorists who have treated property as a core idea of modern liberal government. According to John Locke in the seventeenth century, the foundation of political societies can be traced to the need to protect established property interests.²⁸ The just acquisition of property by an individual is a primary activity that Locke thinks governments must respect, even if it took place in a pre-political era. Without settled entitlements, government would be neither desirable nor possible. On this view, property rights, largely based on appropriation in a pre-market setting, become the paradigm of all legal rights in a society.²⁹ The *Charter*, as we have it today, is devoted to the ideal that individuals should be autonomous moral creatures. Their zone of personal space, involving freedom of belief and mobility, should not suffer unwarranted government intrusion. Without the protection of constitutional guarantees, individuals and their private interests are placed at the mercy of an overweening state power that will invariably invoke the justification of a "public" use or purpose in overriding settled interests. This may be done arbitrarily or without adequate compensation. A guarantee of property rights is one means to require governments to act fairly towards its citizens.

Those who, before 1982, favoured the inclusion of a constitutionally guaranteed right to property might have assuaged their disappointment by the argument that this kind of right was implicitly contained in s. 7. From the *Charter* jurisprudence that has developed, it is now clear that the Supreme Court of Canada has rejected the idea that s. 7 of the *Charter* includes many of the economic rights traditionally associated with property.³⁰ This is perhaps a major reason that the debate over the need for an explicit *Charter* guarantee has been revitalized.

The extension of legal rights under the *Charter* to include the right to property can also be viewed as part of the ideological tilt that is evident in other aspects of the federal government's proposals. The economic philosophy that underlies the proposal for a more efficient, market-based economic union, with constitutional protection for business against legislative intervention, is strikingly libertarian.

WHAT MIGHT BE THE IMPACT OF ENTRENCHING PROPERTY RIGHTS?

From the perspective of those who advocate including property rights in the *Charter*, the main advantage to be gained is the added assurance that governments will be restrained from taking property without serious safeguards. The courts in Canada will be empowered to act as sentinels, always vigilant to descry state action that directly or indirectly diminishes or terminates the social or economic rights attached to a person's property. Courts are already practised in this area. According to some legal theorists, most common law adjudication, including the development of property doctrines, can best be analyzed as economic decision-making concerning the distribution of resources within a society.³¹

Though the federal proposals do not mention how property rights would interplay with the rest of the *Charter*, it should be kept in mind that those rights likely would be subject to the limitations imposed by the presence of s. 1 in the *Charter*. This saving provision, which allows the government to justify a law that otherwise infringes a legal right or freedom, would permit the courts to assess whether the infringement is "demonstrably justified in a free and democratic society".³² It is not clear also whether the proposed property guarantee would be subject to s.33. This would permit a government to declare, for a limited period, that a law operates notwithstanding the guarantees contained in the *Charter*.

Adding property as a protected legal right in the *Charter*, in or about s. 7, could create interpretive difficulties in respect of aboriginal and treaty rights. On one hand, the added right to property could be construed as reinforcing aboriginal rights to land. On the other hand, the courts in Canada are still reluctant to characterize aboriginal rights as ownership of the land in question.³⁴ The entrenchment of property rights would create a further constitutional barrier for establishing aboriginal title. The property rights of intervening parties would be constitutionally protected against any aboriginal claim. Perhaps we would be creating a situation in which we can foresee a clash of constitutional rights.

The opponents of a *Charter* property right have contended that many desirable types of legislation will be dangerously exposed to constitutional attack. In particular, they draw our attention to the interpretation of the due process clauses by the U.S. Supreme Court in one of its reactionary phases. For over a generation, the approach of the majority of that Court was to interpret the due process clauses as more than simply procedural limits on the deprivation of life, liberty, or property.

Instead, the Court deployed a concept of "substantive" due process and succeeded in striking down state laws providing for minimum wages, for maximum hours of work, and for sanctions against anti-union activities.³³ These measures were characterized as state interference with the right to contract or the right to use of one's own property. This trend was not reversed until 1937.³⁴ From time to time, there have been alarms sounded in the U.S. that the Supreme Court could relapse into a *Lochner* approach.³⁵

The opponents of entrenching property rights are fearful of the spectre that the Supreme Court of Canada will ultimately adopt an approach involving a review of the substantive content of legislation.³⁶ Among the programs and policies that might be at risk under an entrenched property right are the following: rent control legislation; minimum wage and pay equity plans; occupational health and safety regulation; matrimonial property regimes that provide for the division of property on separation or divorce; environmental controls; and natural resource management schemes.

CONCLUSION

This modest discussion is intended to provide some oracular guidance on the ambit and effect of an entrenched right to property. Much more discussion is required before we can fully understand the public policy advantages and costs of enshrining property as a category of constitutional protection. As this discussion has sought to demonstrate, we have still to investigate thoroughly the nature and range of the interests and parties that might benefit from constitutional recognition. We can be sure that rights associated with property are in constant evolution. They will reflect the contingent, particular background political morality on which legislators and judges base their work.³⁷ Placing property rights under the protection of our constitution will require judges and lawyers to construct tests to determine when there has been a deprivation of property outside the procedural or substantive requirements that might be set down in the *Charter*. The activity of developing and applying different kinds of tests or standards has given rise to a considerable body of constitutional doctrine in the U.S.³⁸ It also has stimulated academic controversy whether the resulting body of doctrine is coherent or principled.³⁹

Finally, it should be recognized that, at a theoretical level, constitutional entrenchment of property rights can be used to achieve contrasting purposes. Some theorists would argue that this form of constitutional protection should be used to shield the holders of entitlements against a patterned redistribution that is meant to achieve a projected form of social justice. One of the most

eloquent defenders of property rights against such efforts to use the law to promote a desirable end-state pattern of property ownership is Robert Nozick.⁴⁰ He questions, for example, the legitimacy of taxation measures, which he characterizes as "on a par with forced labor".⁴¹

In another direction, it has been argued that the constitutional interpretation of the idea of property permits lawmakers to reconsider the justifications for and limitations on private property. Under this political and moral theory, constitutional construction of a right to property should be guided by a triad of principles. These include the principle of efficiency and utility, the principle of desert based on labour, and the principle of justice and equality.⁴² This avowedly "pluralist" theory of property would both shape, and be constrained by, any constitutional doctrine that has already emerged or that would follow from an amended *Charter*.

The discussion here is cautionary. Many people will feel that respect for an important class of rights is tenuously dependent on a government's sense of fairness, which may vary from time to time. There are dangers on all sides, though, once we adopt a constitutional guarantee of property rights. The consequences are unpredictable, incalculable, and difficult to reverse. The federal proposal to entrench a right to property is an invitation to serious rethinking — from a political as well as from a legal perspective — about whether property is a fundamental value, and about the role of principles and the role of courts.

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1. Government of Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services Canada, 1991) 3.
2. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11.
3. One possibility would be to resort to the common understanding of what ordinary people mean by "property" when they use that term. This is the theory of meaning, credited to Ludwig Wittgenstein, that frames the analysis in Bruce A. Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977).
4. See Thomas C. Grey, "The Disintegration of Property" in *NOMOS XXII: Property*, ed. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1980) 69.
5. See C. B. Macpherson, "The Meaning of Property" in *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 1.
6. A. M. Honoré, "Ownership" in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961) 107.

7. See Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 24-61 for an attempt to find an organizing idea that will permit one to generalize about the diversity of private property rights created in different legal systems.
8. This leaves it open to debate whether various forms of what has been termed "the new property", such as welfare benefits or unemployment insurance, would qualify for protection under a *Charter* guarantee: see Charles A. Reich, "The New Property" (1964) 73 Yale L. J. 733, Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 Alta. L. Rev. 548, and Akhil Reed Amar, "Forty Acres and a Mule: A Republican Theory of Minimal Entitlements" (1990) 13 Harv. J. L. & Pub. Pol'y 37.
9. Frank I. Michelman, "Property as a Constitutional Right" (1981) 38 Wash. & Lee L. Rev. 1097.
10. *Ibid.* at 1099.
11. For an example, see *Rybachek v. U.S.*, 33 E.R.C. 1473 (1991) (U.S. Claims Court), where an Alaskan gold miner sued the federal government for financial losses incurred as a result of regulations made by the Environmental Protection Agency. This example is drawn from the Canadian Bar Association's *Rebuilding a Canadian Consensus: An Analysis of the Federal Government's Proposals for a Renewed Canada* (Ottawa, Canadian Bar Association, 1991).
12. R.S.C. 1985, App. III.
13. The Fifth Amendment, adopted in 1791, applies to federal laws and contains specific recognition of a right not to have private property taken for "public use" without "just compensation". The Fourteenth Amendment, adopted in 1868, extended the application of the right to property, subject to a due process clause, to laws made by the states.
14. For a chronology of the documents leading up to the deletion of property rights from the proposed *Charter*, see Roy Romanow, John Whyte, and Howard Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) 216-62.
15. Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 Can. J. Poli. Sci. 309.
16. For a good discussion of the enduring relevance of the *Bill of Rights* in this context, see Philip W. Augustine, "Protection of the Right to Property Under the Canadian Charter of Rights and Freedoms" (1986) 18 U. Ottawa L. Rev. 55 at 61-66.
17. See *Curr v. The Queen*, [1972] S.C.R. 889.
18. R.S.A. 1980, c. A-16, s. 1(a).
19. See *Constitution Act, 1982*, s. 92(13). The federal government's power of expropriation has been found in its residual power under s. 91: see *Munro v. National Capital Commission*, [1966] S.C.R. 663.
20. See, e.g., *Expropriation Act*, R.S.A. 1980, c. E-16.
21. As Hogg notes, nothing in the *Charter* prohibits a taking by a provincial government without compensation, so long as an express legislative provides that no compensation is required: see Peter W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 746n.21.
22. Note s. 26 of the *Charter*, which states that the guarantee of certain rights and freedoms "shall not be construed as denying the existence of other rights and freedoms that exist in Canada".
23. See Guido Calabresi and Douglas Malamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv. L. Rev. 1089 and Joseph William Singer, "The Reliance Interest in Property" (1988) 40 Stan. L. Rev. 611.
24. *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
25. See Alvaro, *supra* n. 15 at 313-14.
26. U.N.G.A. Res. 217 (III), 3 U.N. G.A.O.R. Supp. (No. 13), 71 U.N. Doc. A/810 (1948).
27. 4 Nov. 1950 (in force 3 Sep. 1953), Europ. T.S. No. 5.
28. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).
29. For a discussion of the questionable steps in Locke's theory, see Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan. L. Rev. 957. The claim that the "consolidated property right" is paradigmatic is found in Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1986) at 98-99.
30. See *Reference re Section 94(2) of the Motor Vehicle Act*, R.S.B.C. 1979, c. 288, [1985] 2 S.C.R. 486 and *Irwin Toy Limited v. Québec (Attorney General)*, [1989] 1 S.C.R. 927. Early *Charter* decisions such as *New Brunswick v. Fisherman's Wharf* (1982), 135 D.L.R. (3d) 307 (N.B.Q.B.), which construed the right to "security" as a property right, have been criticized by academics and repudiated by subsequent courts.
31. Richard A. Posner, *Economic Analysis of Law*, 3rd ed. (Boston: Little, Brown, 1986) ch. 3.
32. *R. v. Oakes*, [1986] 1 S.C.R. 103.
33. Some of the leading cases in this vein are *Lochner v. New York*, 198 U.S. 45 (1905), *Coppage v. Kansas*, 236 U.S. 1 (1914), *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
34. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).
35. William Van Alstyne, "The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court" (1980) 43 Law & Contemp. Probs. 66.
36. For an assessment of the extent to which developed case law under the *Charter* supports the possibility of substantive review, see Eric Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 Can. Bar Rev. 560.
37. For a theory of this dimension of lawmaking, especially in a constitutional context, see Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) at 120-45 and Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 355-99.
38. See Laurence H. Tribe, *American Constitutional Law*, 2nd ed. (Mineola, N.Y.: Foundation Press, 1988) 567-628.
39. For contrasting views, see Richard A. Epstein, *Takings: Private Power and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985), Thomas C. Grey, "The Malthusian Constitution" (1986) U. Mia. L. Rev. 21, and Frank I. Michelman, "Takings, 1987" (1988) 88 Colum. L. Rev. 1600.
40. See *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 167-74.
41. *Ibid.* at 169.
42. For a detailed portrait of this theory, and some indications how it would work in relation to typical "takings" cases, see Stephen Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990) esp. 442-69.