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Property in the Welfare State

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I. Introduction

A primary goal of the welfare state is to promote individual dignity by guaranteeing a decent standard of living for all. The individual's ability to achieve a sense of self-worth turns on the opportunity to participate in, and contribute to, society in a meaningful fashion. Achievement of such goals is seriously undermined for those who do not have their basic needs guaranteed; shelter, food, health, and education are vital interests of the individual which, if not available in sufficient quantity or quality, hamper or make impossible the opportunity to achieve self-dignity and respect. The instruments for guaranteeing the substratum of support in a welfare state can be multilayered and variegated in nature. Ideally, all individuals would be able to look after their own needs by having access to work. However, it is clear that no modern society has ever been able to guarantee productive jobs for all. There are many who cannot work, such as the young, the infirm, and the elderly. During processes of rapid change, workers are forced out of jobs because they possess skills which are not readily adaptable to new environments, processes, and technologies.

The decline of the family as a support structure is intertwined with the growth of the modern welfare state as the primary source of support for individuals who are not able to care for their own needs.¹ In providing for these needs, the state is fulfilling the expectations, held by individuals, that the state itself has helped to create.² To achieve its goal, the state must act as a redistributor of wealth. Thus, one of the underlying imperatives of the welfare state is to work towards a greater sense of equality among individuals. It

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1. M. Glendon, *The New Family and the New Property* 111 (1981).

2. This may in many ways be a self-fulfilling function: the state created the expectations when it initiated its social welfare programs, and those expectations have been transformed into rights. The term "rights" is used in the sense suggested by Dworkin. It would be wrong for the government to deny to individuals those things to which they have rights, even though it would be in the general interest to do so (R. Dworkin, *Taking Rights Seriously* (1977)).

is a trite observation to state that we are not all born equal. We are the products of different cultures, having differing intelligence, looks, and talents. However, these innate inequalities should not provide the basis for justifying an unequal distribution of rights to respect and a share of resources.³ If there does exist a present inequality, as there clearly does in Canada,⁴ the state's attempt to reduce such inequality means that, in serving those with the greater need, the state must deny some an opportunity to accumulate greater wealth. One of the knotty problems that must be solved is the extent to which the state can interfere with the existing distribution of property:

The concept of property, the way in which it is legally defined and the extent to which it is legally, socially and politically protected raise immediately the most fundamental problems of political philosophy and social life — the relationship between the individual and his social environment, between citizens and the State — in modern society — between the personal and the commercial.⁵

There is an internal tension between the rights to property and the rights of individuals to a fair share of the resources which guarantee the necessities of life. The tension must be examined in more detail in any attempt to resolve the conflict. Thus, this paper will undertake a brief excursus on our notions of property and the extent and ways in which the law has protected property rights. Concepts of "new property" will be looked at as a means of reconciling the

3. See Rawls, *A Theory of Justice* (1971), in which it is argued that there must be equality of rights to liberty and equal opportunity of access to offices and work. Departures from the equality of distribution of wealth are justified to the extent that basic equality of liberty and opportunity are not impinged upon, and only if such departure is to the advantage of the least well-off group in society. This, then, provides an incentive to those with special unearned gifts to use them to benefit both themselves and those less well-off. This may still lead to gross inequalities of distribution. Thus, special emphasis must be placed on creating the equal opportunities envisioned. The institutions of the state must be so structured as to guarantee equal access to education and assure minimum standards of well-being, so that individuals are not overwhelmed by the mere struggle for survival. Those who would place self-respect higher on the scale of desirable goals might want to establish a more egalitarian society (N. Furniss, T. Tilton, *The Case for the Welfare State* 27 (1977)).

4. See, for example, Gillespie, I., *The Redistribution of Income in Canada* (1980).

5. Tay, "Property and Law in the Society of Mass Production, Mass Consumption and Mass Allocation", in *A Revolution in Our Age, The Transformation of Law, Justice and Morals* 19 (1975).

tension. The paper will look at specific developments in landlord-tenant and employment law to demonstrate the changing nature of legal protection for vital interests.

II. *Property in the Welfare State*

The first question to be asked is what the nature of property is. The answer may differ, depending on whether it is given by a layman, a philosopher, an economist, or a lawyer. For the layman, the concept of property is intimately linked with ownership. Property is a "thing" which can be owned. Ownership involves, as the layman might perceive it, the rights to control the thing free of restrictions or obligations to another. The layman is thus interested in identifying who the owner of the property is, and will speak of ownership of property as the right to be free of interference from nonowners, be it other individuals or government. For the economist, property rights serve as a mechanism to delimit alternatives open to choice-making individuals in a society.⁶ Viewed another way, the "owner" of property possesses the consent of fellow citizens to permit him or her to act in particular ways.⁷ This concept of property rights is very broad and enables the economist to speak of the right not to be injured by the negligent conduct of another or the right to pollute as property rights. The allocation of property rights is of great interest to the economist in determining whether it promotes the most efficient use of resources. The growth of studies in economics and law⁸ is fuelled by an underlying belief that the distribution of legal rights should be designed to promote the most efficient use of scarce resources.⁹

6. Stubblebine, "On Property Rights and Institutions", in G. Tullock, ed., *Explorations in the Theory of Anarchy* 39 (1972).

7. Demsetz, "Toward a Theory of Property Rights" (1967), 57 *Am. Ec. Rev. Proceedings* 347.

8. For recent works on economics and property law, see B. Ackerman, ed., *Economic Foundations of Property Law* (1975); Manne, H., *The Economics of Legal Relationships: Readings in the Theory of Property Rights* (1975).

9. Efficiency is defined by Posner in terms of wealth maximization, which draws on concepts of the Kantian tradition of individual autonomy, as well as on principles of utilitarianism. One means of testing whether or not there is an efficient allocation is to determine if there is a state of Pareto optimality. If it is not possible to change a particular equilibrium without making at least one person worse off than previously, then the allocation is efficient. That, of course, still leaves the question of whether a particular distribution is just. See Posner, R., *Economic Analysis of Law* (2nd ed., 1977); Posner, R., *The Economics of Justice* (1981).

One of the first principles a student of the law of property has drummed into his or her consciousness is that there is no such thing as absolute ownership of property:

Instead of defining the relationship between a person and "his" things, property law discusses the relationships that arise *between people* with respect to things. More precisely the law of property considers the way rights to use things may be parceled out among a host of competing resource users. Each resource user is conceived as holding a bundle of rights vis-à-vis other potential users; indeed in the American system, the ways in which user rights may be legally packaged and distributed are wondrously diverse. And it is probably never true that the law assigns to any single person the right to use any thing in absolutely any way he pleases. Hence it risks serious confusion to identify any particular individual as *the* owner of any particular thing.¹⁰

What types of rights are being spoken of here? If there is no such thing as an owner, why, then, do even lawyers talk about the "owners" of property?

The traditional difference between the economist and the lawyer in the use of the term "property" is that the former used it in respect to any relationship having an exchange value, while the latter used it to denote legal relations between persons, with respect to a thing. The thing could be either an object having physical existence or it could be any kind of an intangible, such as a patent right or a chose in action.¹¹ The recent development of law and economics studies has, however, tended to lead to a greater uniformity of approach by lawyers and economists.¹² Although the law does not recognize such a creature as the absolute owner, it compares the bundles of rights which persons may have vis-à-vis each other and designates the person with the greatest bundle or with the bundle containing certain

10. Ackerman, B., *Private Property and the Constitution* (1977).

11. American Law Institute, *1 Restatement of the Law of Property* 3 (1936).

12. See Calabresi and Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral* (1972), 85 Harv. L. Rev. 1089. These commentators write of entitlements and the various ways in which the state can protect them: property rights protect entitlements to the extent that someone who wishes to remove the entitlement must buy it in a voluntary transaction; liability rules protect an entitlement whenever persons are forced to compensate in accordance with an objectively determined value if they have destroyed an initial entitlement; an entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller. Thus, the state must determine both who has the initial entitlement and how it is to be protected.

key rights as the owner.¹³ It may still be difficult to decide whether a person is an owner.¹⁴ For our purposes, it is sufficient to realize that there are a variety of rights which can be defined as property rights, and the extent to which these are protected will have a direct bearing on the mechanisms that will be used by the state to distribute wealth and on the extent to which this will be accomplished.

This paper will not undertake an extensive analysis of the justification for property rights¹⁵ or of the anti-property arguments.¹⁶ What does bear examination, however, is the conflict between property rights and other fundamental rights. The extent to which one can claim a right to protection of property interests will have a crucial impact on such other rights as equality, liberty, freedom of speech, and association. Furthermore, there is the underlying question of whether or not one is entitled to the wealth that may be generated from the arbitrary, unmerited, random

13. Honoré characterizes the standard incidents of ownership as (1) the right to possess; (2) the right to use; (3) the right to manage; (4) the right to income; (5) the right to the capital; (6) the right to security; (7) the incident of transmissibility; (8) the incidence of absence of term; (9) the prohibition of harmful use; and (10) liability to execution. See Honoré, "Ownership", in A. G. Guest, ed., *Oxford Essays in Jurisprudence*. Of these, the last two incidents are limits on the right of ownership while the right to security is the means of protecting the other five rights. Thus, if one has any of these five rights and the right to security, then one can be said to have a property right. See Becker, "The Moral Basis of Property Rights", in J. Pennock and J. Chapman, eds., *Property: Nomos XXII* 187 (1980).

14. See, for example, *Bird Construction Co. Ltd. v. Ownix Developments Ltd., et al* (1981), 33 O. R. (2d) 807 (C.A.), on deciding whether a company, following a complicated series of transactions, could be designated as the owner of a building in accordance with the *Mechanics' Lien Act*, R.S.O. 1980, c. 261.

15. For a recent treatment of the subject, see Becker, L., *Property Rights: Philosophical Foundations* (1977). Becker considers that there are three types of maintainable arguments justifying property rights: (1) labour theory of property acquisition; (2) arguments from utility; and (3) an argument from political liberty. He dismisses an argument based on first occupancy, so that the claim that "I am entitled because I had it first" is not maintainable. For a criticism of Becker's approach, see Flatham, "On the alleged Impossibility of an Unqualified Disjustificatory Theory of Property Rights", in J. Pennock, J. Chapman, eds., *Property: Nomos XXII* 221 (1980).

16. J. J. Rousseau, *Discourse on the Origins and Foundations of Inequality Among Men*; P. Proudhon, *What is Property?*; H. George, *Progress and Poverty*; K. Marx, *Capital: A Critical Analysis of Capitalist Production*.

distribution of wealth-creating endowments such as talent, beauty, and intelligence.

At one end of the range of attitudes regarding property rights is the libertarian argument, exemplified by Nozick's claim that, insofar as a particular distribution of holdings is property generated, there is no argument for an extensive state with a mandate for redistribution.¹⁷ Furthermore, although advantages in natural assets may be undeserved and arbitrary, individuals are nevertheless entitled to such assets and therefore to any holdings acquired through the use of such assets, despite any gross inequality that may arise from such a distribution.¹⁸ Towards the other end of the range of attitudes are those who, without calling for complete equality, argue that equality must be given greater weight. Thus Rawls' maximin principle states that inequalities are permitted only when they maximize or at least contribute to the long-term expectations of the least fortunate group in society.¹⁹ Equality of opportunity and of basic rights and duties is an equilibrium that rational individuals are likely to choose in a situation where they are unaware of the distribution of natural assets, that is, if they were choosing from behind a veil of ignorance. Undeserved inequalities call for redress, and inequalities of birth and natural endowment, being undeserved, cannot serve as the basis for a claim to an unequal distribution of property.²⁰ Finally, there are those who would give greater weight to the claim of equality. They argue that a much greater equality of distribution than that demanded by Rawls is required if power is not to become unduly concentrated, to the detriment of rights to respect and dignity.

Clearly, equality has a strong claim as a fundamental value worthy of protection; at the least it is a means of guaranteeing individual autonomy. To the extent that property rights are permitted to infringe on claims to equality, there is justifiable concern about the ranking of property rights in a hierarchy of fundamental values. One demonstration of the way in which rights to property may conflict with what others perceive to be fundamental rights is the decision of the Supreme Court of Canada

17. Nozick, R., *Anarchy, State and Utopia* 230 (1974).

18. *Ibid.*, at pp. 213-227.

19. J. Rawls, *supra*, note 3.

20. *Ibid.*, at pp. 100-107. For an application of this principle to contractual analysis, see Kronman, *Contract Law and Distributive Justice* (1980), 89 *Yale L.J.* 472.

in *Harrison v. Carswell*.²¹ In that case, an employee, while on a lawful strike against one of the tenants of the shopping centre, picketed peacefully on the sidewalk in front of the tenant's premises. The owner of the shopping centre brought a charge against the picketer under the Manitoba *Petty Trespass Act*.²² The issue was whether the private character of the ownership of the shopping centre was justification for prohibiting the carrying out of what would clearly be a legitimate activity if done on public property. Dickson J., speaking for the majority, emphasized that "Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of an individual to the enjoyment of property, and the right not to be deprived thereof, or any interest therein, save by due process of law." This prevented Dickson from finding that a person would be privileged to enter the shopping centre against the owner's will in order to conduct an otherwise permitted activity which was necessary to enhance the right to associate and bargain through a union.

Laskin, in a dissenting opinion, would have found that the defendant was entitled to a privilege of entry to carry on as she did in the quasi-public areas of the shopping centre. To determine the issue on the basis of the property rights of the owner presupposed the content of those rights. Instead, those rights should have been examined. They are a creature of the state and its laws, and whether it makes sense to decide that the owner has the same rights to prevent trespass in the twentieth century as he did in the eighteenth century should have been the matter of extensive consideration.²³ The danger is that ownership of property may become the precondition to the exercise of other rights. What is the value of freedom of speech if the only place where it might be effective is put out of bounds by the owner of the property who retains residual

21. (1975), 62 D.L.R. (3d) 68 (S.C.C.).

22. R.S.M. 1970, c. P-50.

23. Manitoba amended its Petty Trespass Act to overrule the Supreme Court decision (S.M. 1976, s. 87 s 2); British Columbia Labour Code, R.S.B.C. 1979, c. 212, s. 87, provides that no action lies in respect of picketing permitted under the act for trespass to real property to which members of the public ordinarily have access. In *Bramlea Ltd. v. Stevens* (1979), 80 C.L.L.C. 14,019 (Sask. Q.B.), it was held that, in the absence of a statute making trespassing an offence, no action can be maintained in trespass for a person entering a shopping mall. See also *Grosvenor Park Shopping Centre Limited v. Waloshin et al* (1964), 49 W.W.R. 237; 64 C.L.L.C. 14,008.

discretion to bar certain members of the public whose views he does not want publicly aired?²⁴

Another aspect of property rights as a barrier to the full realization of other values is apparent when one speaks of the right to hold property free of expropriation, unless there is compensation. While there is much to be said for the protection of the individual from injury by the state through the taking of property, it becomes very difficult to define those situations where compensation should be required and those where it should not.²⁵ Justification for compensation may be based on political pragmatism, economic efficiency, or concepts of moral relations between the individual and the state.²⁶ In Canada, we have not embedded a right to compensation as part of the Constitution. Statutory protection is provided to owners of land through expropriation statutes enacted throughout the country.²⁷ Other types of property have less protection. Unless a statute clearly states otherwise, the courts will construe the statute so as to entitle the government to take the property of an individual only if compensation is paid.²⁸ The limitation on government's expropriation power protects property rights which the courts view as an important guarantee of individual liberty.²⁹

24. On this point, consider the recent decision of the Ontario Labour Relations Board in *United Steelworkers of America v. The Adams Mine, Cliffs of Canada Ltd., Manager* (1982), 83 C.L.L.C. 16,011, which held that a union was prohibited from campaigning for a political party on the job site. While the decision was made in the context of whether or not political campaigning was a legitimate union activity, the analysis is forced into that framework by the initial premise that an employer has the right, because of property ownership, to control activities on the site. The Labour Relations Act, R.S.O. 1980, c. 228, ss. 3, 11, 64, 66, 70, and 71 modify this only to the extent that protection is given to lawful activities of a trade union.

25. See Ackerman, *supra*, note 10; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1968), 80 Harv. L. Rev. 100; Sax, *Takings, Private Property and Public Rights* (1971), 81 Yale L.J. 149; Quinn, Trebilcock, *Compensation, Transition Costs, and Regulatory Change* (1982), 32 U.T.L.J. 117.

26. Tullock, "Achieving Regulation — A public choice perspective," [1978] Regulation. While these criteria were initially suggested in the context of compensating those injured by regulatory change, they are also useful in the context of the more particular problem of property taking.

27. For example, *Expropriation Act*, R.S.O. 1980, c. 148.

28. *Attorney General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508, 542 (H.L.).

29. *Belfast Corporation v. O.D. Cars Ltd.*, [1960] A.C. 490, 523, (H.L.).

This court attitude has important ramifications when one considers the extent to which regulation and creation of government monopolies might effectively cut off a person from his or her livelihood. In *Manitoba Fisheries v. The Queen*,³⁰ the Supreme Court of Canada considered a situation where the federal government set up a crown corporation with exclusive rights to export freshwater fish from Canada. This legislation caused the plaintiff, a corporation, to be totally deprived of its business. In requiring the government to compensate the plaintiff, the court characterized the goodwill of a business as being, while intangible in character, as much a part of the property of the business as the premises, machinery, and equipment used in production. The difficulty with the decision was the finding that the obliteration of the goodwill amounted to a taking of property by the government. While it was true that customers of the plaintiff would have to now deal with the crown corporation, it was not because the goodwill was transferred, but because the customers had no choice but to deal with the monopoly.

It is clear that the Crown can expropriate property without compensation, provided the empowering statute clearly states so.³¹ But not every interference with property rights is a taking.³² There

30. (1978), 88 D.L.R. (3d) 462. The case is commented upon by Bucknall, *Developments in Property Law: the 1978-79 and 1979-80 Terms* (1981), 2 Sup. Ct. L.R. 279.

31. See, for example, The National Library Act, R.S.C. 1970, c. N-11, s.11, which provides that a publisher of a book shall, at his own expense, send two copies of the book to the National Librarian. See also *The Queen v. Appleby et al* (1980), 114 D.L.R. (3d) 341 (Fed. Ct., T.D.).

32. Hence, in *La Ferme Filibier Ltée v. The Queen*, [1980] F.C. 128 (T.D.), when a person who had operated a fish hatchery for a number of years was prohibited from doing so any longer because of a change in regulations, he was unable to maintain an action for compensation. This raises fundamental questions about the extent to which the government should be able to deny entitlements it has granted which form an essential part of the economic well-being of a person. See Reich, *The New Property* (1964) 73 Yale L.J. 733. Administrative discretion to deny or revoke entitlements must be exercised in accordance with the purpose and object of the statutes. The revocation may not be used as a means of restricting a citizen's exercise of rights or privileges unrelated to the statute creating the entitlement. See *Roncarelli v. Duplessis*, [1959] S.C.R. 129. Does it make a difference whether the entitlement is taken away pursuant to a regulation, rather than merely by administrative action? Persons who are granted licences by statutory tribunal have the natural justice right to a hearing before the licence is annulled, or at least to some form of procedural justice. See J. Evans, ed., *deSmith's Judicial Review of Administrative Action* 222 (4th ed., 1980).

is a wide range of government activities which have an impact on one's property or on the extent to which one can obtain revenue from property. Rental controls, export restrictions, communications policies, environmental control, land-use planning, and health and safety regulation will all in some way limit the full use and enjoyment of property by individuals. Nevertheless, to require compensation for every such decrease in the revenue potential of property would stifle the full potential of government to redistribute wealth in such a way as to equalize the opportunities of the least well-off groups in society.

The Canadian Charter of Rights and Freedoms³³ does not specifically include property rights in the class of fundamental rights meriting protection. There is still much lobbying taking place to have the Charter amended to include property rights.³⁴ Section 26 of the Charter provides that the guarantees included in it shall not be construed so as to deny the existence of any other freedoms that exist in Canada, thus leaving courts with room to continue their deference to property rights.³⁵

33. Canada Act, 1982; c. 11 (U.K.) Part I: Constitution Act 1982, Schedule B.

34. In the Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1, the right of the individual to enjoyment of property and the right not to be deprived thereof except by due process of law is expressly affirmed. Whether such a guarantee should be included in a Charter has been the subject of varying views. For example, the Victoria Charter of 1971 did not include a right to property. The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Final Report* (1972), recommended that the "right of the individual person to the enjoyment of property and the right not to be deprived thereof except in accordance with the public good and for just compensation" be recognized. The Canadian Bar Association Committee on the Constitution, *Towards a New Canada*, urged recognition of the right to enjoy property and not to be deprived of it except according to law. During the debates in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of the Proceedings and Evidence*, 44:12, (23 Jan. 1981), inclusion of property rights in section 7 was recommended and came very close to being accepted. Much of the objection came from the provinces which were concerned about its possible effect on zoning, environmental, and industrial development legislation. Another concern was whether only individuals, or corporations as well, would be entitled to such protection.

35. One decision which came immediately after the Charter was proclaimed suggests that the "right to . . . security of the person" in s. 7 extends to the right of enjoyment of property, and that s. 26 preserves the right to enjoyment of property free from the threat of confiscation without compensation. See *Melvin v. The Queen in Right of New Brunswick* (1982), 1 C.R.R. 307 (N.B.Q.B.).

There are several dangers in creating a specific form of property rights in the Charter. First, if compensation is required whenever a person is deprived of a property right, it would have to be made clear that the power of the government to tax or use forfeiture as a penalty is exempt. Second, if only due process protection is extended, as in the Canadian Bill of Rights, there is the danger that the courts could build a substantive doctrine to knock down regulatory and social welfare schemes, as occurred in the United States in such famous cases as *Lochner v. New York*,³⁶ *Adair v. The United States*,³⁷ and *Coppage v. Kansas*.³⁸ The more desirable form of protection would be to prohibit interference with the employment of property, except in accordance with law.³⁹ This would then leave the protection of such rights to the political process. Finally, it is worth noting the changing nature of property. When Locke was claiming that one of the ends of the state was to protect property, land was still the chief object of property and the most effective means of guaranteeing the realization of human potential was to provide rights with respect to the use and benefit of land.⁴⁰ However, with the coming of the Industrial Revolution, great numbers of individuals could no longer claim a subsistence from the cultivation of land and so the sale of one's labour became the main source of revenue for the individual. The inequality of bargaining power between the labourer and the owner of capital ensured that the labourer would not be able to develop any form of security with respect to access to work.⁴¹ The law which had developed the concept of property as a claim of an individual which was enforceable and backed by the coercive power of the state has

36. (1905), 198 U.S. 45.

37. (1908), 208 U.S. 161.

38. (1915), 236 U.S. 1.

39. Tarnopolsky, *A Bill of Rights and Future Constitutional Change* (1979), 57 Can. Bar Rev. 626.

40. MacPherson, "Liberal-Democracy and Property", in C.B. MacPherson, ed., *Property: Mainstream and Critical Positions* 199 (1978).

41. There existed two useful methods of control to reduce the bargaining power of labour. One set of measures served to keep unemployment high, thus reducing the bargaining position of those who did have work because their positions were continually in jeopardy from those who did not have work. Second, by restructuring the availability of public relief to the unemployed, they would be forced to accept whatever position was offered, no matter how demeaning or unacceptable the terms and conditions. See F. Fox and R. Cloward, *The New Class War* 55 (1982).

been slow in responding both to the dangers of permitting mass accumulations of property in a limited number of persons and to the demands to be secure in the means of a livelihood.

At present, the individual relies not only on his or her own labour as a source of sufficient revenue to provide for needs and wants, but also looks to the state as a source. Through a variety of social security and welfare mechanisms, the individual has come to rely on the state for support. In addition, the extensive forms of government regulation mean that a person must acquire government approval through licensing, contracts, and franchises in order to carry on many activities that provide a livelihood. These forms of "new property"⁴² are as deserving of protection as are our traditional forms of property.

The best way to approach the problem of defining what forms of property are deserving of protection is to realize that it is not only the rights of persons to exclude others from the use or benefit of a thing which should be protected. Equally, there should be a right not to be excluded by others from the use or benefit of some things.⁴³ The things from which persons should not be excluded are those achievements of society as a whole which provide individuals with an equal opportunity to develop their human capacities. This would then include an equal right of access to work and a right to an income from the whole produce of society, an income not necessarily related to work, but to what is needed for a fully human life.⁴⁴

In developing ways to protect rights to accommodation and work, the law is fundamentally changing the degree of respect accorded to traditional forms of property rights. There is a growing recognition that individuals have a right not to be arbitrarily deprived of certain vital scarce resources to which they have gained access. Thus, the state, through its creation of income maintenance programs, health and education benefits, and welfare and other forms of wealth transfers, is modifying our concept of entitlements. The law is used to create and guarantee rights to these services and payments with corresponding duties on the officials who administer the programs.⁴⁵ The remainder of this paper will look at two particular

42. Reich, *The New Property* (1964), 73 Yale L.J. 733.

43. MacPherson, *supra*, note 40 at p. 201.

44. *Ibid.*, at p. 206.

45. Raz, "On the Functions of Law", in Simpson, ed. *Oxford Essays in Jurisprudence* 278, 293-4 (Second Series, 1973). See also Hindle, *Information and*

areas in which the problems of security of access to vital needs is receiving considerable attention by both courts and legislatures.

III. *Protection for the Residential Tenant*

The landlord-tenant relationship is one where there is an enormous possibility for conflict between individuals with respect to control over an element necessary to the security of an individual — housing. The landlord, who is thought of by the ordinary person as the owner of the property, claims rights to deal with dwellings so as to protect his or her interests. Those interests include preventing deterioration, insuring a return on investment, and controlling the use of the premises as he or she thinks best. The tenant, on the other hand, has a need that is as compelling as that of the landlord — to have safe and healthy accommodations at a price that does not force the tenant to forgo a fair share of other necessities. The manner in which the law is regulating this relationship is indicative of the increasing emphasis on protecting the individual's right to enjoy security in the necessities of life.

The legal rules regulating the landlord-tenant relationship in Canada were founded upon English common law conceptions of rights in land. Although the relationship is normally created by contract, either express or implied, many of the incidents attaching to it are structurally dependant on notions of estates in land and nonfreehold tenure. In the terms of conventional property law, a leasehold estate always involved two proprietary interests — the current possessory estate of the tenant and the reversion of the landlord.⁴⁶ However, the interests of the landlord tended to predominate over those of the tenant. Many of the incidents associated with the relationship reflected the feudal structure out of which the modern doctrines grew, structures no longer suitable to either the commercial realities or the social and economic aspects of urban living.⁴⁷ Some of the doctrines which have given the landlord

the "Right" to Income Maintenance [1981] N.Z.L.J. 445; Michelman, *The Supreme Court, 1968 Term — Foreward: On Protecting the Poor Through the Fourteenth Amendment* (1969), 83 Harv. L. Rev. 7; Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services* (1977), 90 Harv. L. Rev. 1065.

46. Glendon, *The Transformation of American Landlord-Tenant Law* (1982), 23 B.C.L.R. 503, 522.

47. See Ontario Law Reform Commission, *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* 10 (1968). The extent to which

an enormous advantage in the tenancy relationship included the self-help remedy of distress, the principle that the covenants in a lease were to be considered to be independent so that a tenant would be forced to continue paying rent despite breaches by the landlord of covenants to repair, and the application of a principle of caveat lessee whereby, unless the lease specified otherwise, the landlord was not required to provide residential premises which were habitable. Whether these rules developed because the lease was seen primarily as a conveyance of an interest in land or because the contract in the lease reflected the special claims of the landlord for the protection of his or her interests,⁴⁸ it is clear that the tenant had very little protection through the legal system. For the large segment of the citizenry who had but little choice to live in rental accommodation, this imbalance could have created a sense of injustice.

Recent developments indicate considerable change in the way in which the legal system perceives the landlord-tenant relationship. There is a growing dichotomy in the treatment of commercial and residential tenancies. The courts are bringing the commercial tenancy increasingly more in line with contractual principles. Only twenty years ago, the Ontario Court of Appeal held that if a lease was terminated, the covenants contained therein came to an end, so that no claim could be made for prospective contractual damages.⁴⁹ The Supreme Court of Canada overturned this decision in 1971 in *Highway Properties Limited v. Kelly, Douglas & Company Limited*,⁵⁰ stating that, with respect to commercial leases, it was no longer sensible to pretend that it is simply a conveyance and not also a contract. The Supreme Court has since reiterated this view by

urban Canadians rely on rental premises for their housing needs can be seen from the percentages of occupied private dwellings which are rental units in a selection of cities: Halifax, 44.4%; Ottawa-Hull, 47.7%; Toronto, 43.5%; Regina, 35.7%; Vancouver, 41.5%. Statistics Canada, 1981 *Census of Canada: Census Tracts, Population, Occupied Private Dwellings, Private Households, Census Families in Private Households: Selected Characteristics*.

48. See Siegal, *Is a Modern Lease a Contract or a Conveyance — A Historical Inquiry* (1975), 52 J. Urb. L. 649 and Weinberg, *From Contract to Conveyance: The Law of Landlord and Tenant, 1800-1920 (Part I)*, [1980] So. 111. U.L.J. 29.

49. *Goldhar v. Universal Sections and Mouldings Ltd.* (1962), 36 D.L.R. (2d) 450.

50. (1971), 17 D.L.R. (3d) 710, 721.

stating that the doctrine of mitigation is applicable to the breach of a commercial lease.⁵¹

One long-standing rule which separated leases from other types of contracts was the refusal to apply, to leases, the doctrine of frustration. From the time when Prince Rupert expelled the tenant Jane from his lands until very recently, the courts refused to give relief to a tenant who was unable to use the rented premises because of what would normally be considered a frustrating event.⁵² The refusal was based on the property origins of the lease: since the lease created an estate in land, the lessee still had the benefit of the estate, if not the beneficial use of the land, despite the otherwise frustrating event.⁵³ Recently, the House of Lords has held that the doctrine of frustration was capable of applying to an executed lease of land if a frustrating event occurred during the currency of the term.⁵⁴ Emphasis was placed on the incongruity in distinguishing between personal property and real property. The length of the lease and the permanence of land are considerations to be accounted for in determining how the risk of frustrating events should be apportioned. It is not sensible to say that the tenant has the benefit of the leasehold estate when all the tenant really wants is the use of the premises for a particular purpose. The conferring of an estate is not an end in itself, but merely a subsidiary means of obtaining an object.

While the courts' recent emphasis on the lease as a contract may be a substantial improvement in the law for commercial arrangements where the parties are likely to be relatively equal in bargaining power, this does little to improve the position of residential tenants. In many situations, especially if there is a shortage of rental accommodations, the tenant will be at a relative

51. *Apeco of Canada Ltd. v. Windmill Place* (1978), 82 D.L.R. (3d) 1.

52. *Paradine v. Jane* (1647), Aley 26, 82 E.R. 897 (K.B.).

53. *Cricklewood Property and Trust Investment Ltd. v. Leightons Investment Trust Ltd.*, [1945] A.C. 221; [1945] 1 All E.R. 252 (H.L.). There were some suggestions that, given this rationale for refusing to apply the frustration doctrine, the doctrine could apply where rental premises above ground level in an apartment or office building were destroyed. See Rhodes, ed., *Williams' Canadian Law of Landlord and Tenant* 6 (4th ed., 1973).

54. *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] 1 All E.R. 161. The decision was presaged by the Ontario Court of Appeal in *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.* (1975), 90.R (2d) 617, 61 D.L.R. (3d) 385, which had observed that the doctrine should apply to leasehold interests. See also Robertson, *Frustrated leases: 'No to Never — But Rarely if Ever'* (1982), 60 Can. Bar Rev. 619.

disadvantage in attempting to strike a bargain. Furthermore, through the use of standard form leases, the landlord will be able to impose a "take-it-or-leave-it" package of rights and obligations. By narrowly defining his or her obligations and with the extensive use of exemption clauses, the landlord can insulate himself or herself from onerous burdens and effectively block the tenant's aspirations to be secure in the tenancy. It is doubtful whether the law of contract is sufficiently flexible to adequately regulate the landlord-tenant relationship, even with rules regarding unconscionability,⁵⁵ given an inequality of bargaining power and an increasing sophistication in dealing with standard form contracts. The parties have basic interests which must be protected, and legislatures increasingly recognize that there is wide scope for remedial legislation to protect the security of tenants.⁵⁶

All Canadian provinces have enacted specialized legislation governing residential tenancies⁵⁷ which extensively revises common law doctrine. For instance, it abolishes the landlord's right to avail himself or herself of the self-help remedy of distress for nonpayment of rent.⁵⁸ The doctrine of frustration now clearly applies in most jurisdictions to residential leases.⁵⁹ Nor will a tenant be required to continue paying rent or to perform other obligations under the lease, given the breach of a material covenant by the landlord.⁶⁰ Furthermore, the landlord may not unreasonably or

55. For instance, in the state of New York, tenants have been given the right to petition a court to declare that a lease or any of its clauses are unconscionable and, hence, unenforceable; see N.Y. Real Property Law 235-C (McKinney Supp. 1978). For a consideration of the applicability of the doctrine of unconscionability to leases, see Farrelly, *Leasehold Unconscionability: Caveat Lessor* (1978-79), 7 Ford. Urb. L. J. 337.

56. Even where a statute sets out the rights and obligations of the parties, the extent to which the parties may contract about additional terms has been subjected in one jurisdiction to tests of reasonableness. See Residential Tenancy Act, R.S.B.C. 1979, c. 365, s.10.

57. *Landlord and Tenant Act*, R.S.A. 1980, c. L-6; *Residential Tenancies Act*, R.S.B.C. 1979, c. 365; *Landlord and Tenant Act*, R.S.M. 1970, c. L70; *The Residential Tenancies Act*, R.S.N.B. 1973, c. R-10.2; *The Landlord and Tenant (Residential Tenancies) Act*, 1973, S.N. 1973, No. 54; *Residential Tenancies Act*, S.N.S. 1970, c. 13; *Landlord and Tenant Act*, R.S.O. 1980, c. 232, Part IV; *Landlord and Tenant Act*, R.S.P.E.I. 1974, c. L-7, Part V; Quebec Civil Code, Articles 1650-1665.6; *The Residential Tenancies Act*, R.S.S. 1978, c. R-22.

58. B.C., ss. 8(1); 8(1.1); Ont., s.86; N.S., ss.4, 4A.

59. B.C., s. 8(3); Ont., s. 88; N.S., no provision.

60. B.C., s. 9; Ont. s. 89; N.S., no provision.

arbitrarily withhold consent to the assignment or subletting by a tenant.⁶¹ Restrictions are placed on the landlord's rights to require security deposits⁶² and a positive duty is placed on the landlord to provide and maintain the premises in a good state of repair and a state fit for habitation during the tenancy.⁶³ Accompanying these significant changes are a variety of remedial procedures which make use of more expeditious and informal techniques to adjudicate disputes.⁶⁴ The attempt of provinces to completely remove from the courts jurisdiction over all aspects of residential tenancy matters by creating residential tenancy commissions which would be solely responsible for enforcing the statutory schemes has run afoul of section 96 of the Constitution Act, 1867.⁶⁵ Nevertheless, there is a clear trend towards using extensive government regulation, accompanied by administrative enforcement mechanisms, in an attempt to protect and balance the vital interests of both the landlord and the tenant.

By far the most significant modification to the subsisting distribution of property rights between the landlord and the tenant occurs through the implementation of rental controls and security of tenure schemes. The relationship between the two is of a symbiotic nature. The rental controls prevent the landlord from capturing all

61. Ont., s. 91; B.C., s. 29; N.S., s. 6(1).

62. Ont., s. 84; B.C., s. 31; N.S., s. 9.

63. Ont., s. 96; B.C., s. 25; N.S., s. 6(1).

64. For instance, the tenant may be entitled to withhold rent and obtain an order for abatement of rent when the landlord breaches covenants or statutory duties. Although the present Ontario Act still provides for enforcement primarily through the county court, in British Columbia wide powers are given to a rentalsman to make orders binding on the parties. In Nova Scotia, the Residential Tenancies Commission has powers to hold a hearing and make a report to the county court, which can then grant the order sought by the landlord or tenant.

65. Formerly the *British North America Act*, 1867, 30-31 Vict., c. 3 (U.K.). In enacting the *Residential Tenancies Act*, R.S.O. 1980, c. 452, only portions of which have yet been proclaimed, the Ontario legislature created a Residential Tenancies Commission which would be responsible for making orders for possession or orders to comply with obligations imposed by the act. While the Supreme Court of Canada felt that there may be a need for procedures which are not too cumbersome, formal, or expensive, the duties being farmed out to the commission were judicial powers within the purview of section 96; see *Reference Re Residential Tenancies Act* (1981), 123 D.L.R. (3d) 554. The Supreme Court refused to comment on the British Columbia legislation which had been held to be *intra vires* by the B.C. Court of Appeal in *Re Pepita and Doukas* (1980), 101 D.L.R. (3d) 577.

the windfall profits generated by the scarcity of housing resources, while at the same time preventing social and economic hardships, which would otherwise ensue, from befalling those seeking accommodations.⁶⁶ Security of tenure, on the other hand, is a means of ensuring that a tenant who has secured rental accommodation cannot be deprived thereof unless there is good cause for doing so. It is a natural concomitant of rental control, and prevents the landlord from using threats of eviction to coerce a tenant to agree to pay a rent that exceeds the statutory limit. Although the rental rate under a rent control scheme is normally tied to the premises and not to the individual lease, where the housing market is restricted, the landlord's bargaining power is such that he may be able to extract illegal rents unless the tenant is assured of security.

Just as security of tenure is a means of protecting the integrity of a rent control program, rent controls serve to ensure that there is security in the tenant's occupation of residential premises. If the primary objective is to protect the tenant's right to occupancy of the premises, there must be some means of ensuring that the landlord is unable to use threats of unjustified rental increases to force a tenant to forfeit possession. A general system of rent controls is one means of so doing.

In Ontario, rental controls and the scheme of security of tenure were introduced concurrently in 1975.⁶⁷ Before the introduction of a system of security of tenure, the landlord had the right to terminate a tenancy agreement at the end of its term, whether the tenancy agreement specified a fixed termination date or created a periodic tenancy. While there may have been requirements that sufficient notice be given to the tenant,⁶⁸ there was no restriction upon the reasons on which a landlord might base his decision to end the tenancy — in fact, there was no requirement that a landlord give any reasons at all for so doing. At present, however, a landlord in Ontario is only entitled to obtain possession, after giving the required notice, if the tenant voluntarily vacates the premises or if

66. *Rent Control in New York City* 1 (1967) quoted in *Interim Report on Landlord and Tenant Law*, *supra*, note 47.

67. An Act to Amend the Landlord and Tenant Act, S.O. 1975 (Second Sess.), c. 13; The Residential Premises Rent Review Act, 1975, S.O. 1975 (Second Sess.) c. 12.

68. In Ontario, notice requirements are set out in ss. 100-105 of the Landlord and Tenant Act, R.S.O. 1980, c. 232.

the landlord obtains an order from the county court for possession. The landlord has no right to any self-help remedy. To be entitled to obtain a court order, landlords must demonstrate that they have cause, and the reasons giving cause are limited to those set out in the statute. Such causes include nonpayment of rent by the tenant, misconduct by the tenant with respect to the use of the premises, or the landlord requiring the premises for other specified uses. If the landlords cannot demonstrate a reason why he or she should obtain possession and if no new tenancy agreement is entered into by the parties, the landlord and tenant are deemed to have renewed the tenancy as a monthly tenancy and upon the same terms and conditions as in the expired agreement. This is a statutory form of tenancy.

There has been a fundamental alteration in the extent to which the landlord can claim a reversionary interest in rental premises. According to one commentator, if the legislature successfully identifies the forms of obnoxious tenant conduct and the legitimate needs of the landlord for which the tenancy should be terminable, all the landlord will have lost is the right to be capricious or arbitrary in ending the tenancy.⁶⁹ However, this represents a change in emphasis on the contents of the property rights distributed between the landlord and the tenant. The public interest in ensuring the security of the individual with respect to the vital need of housing deprives landlords of a right they had previously enjoyed — the right to obtain possession of premises for any purpose, whether or not the purpose was considered by the legislature to be reasonable.

Under the Ontario scheme, when a landlord applies for a writ of possession, the judge is given the discretion to refuse to grant the writ unless he is satisfied that it would be unfair to do so, and he may, in any event, order the postponement of the enforcement of a writ of possession for up to one week.⁷⁰ If a tenant in economic straits is having difficulty paying rent, but the housing shortage is so severe that a writ of possession may literally leave him with no place to go, a judge will be sorely tempted to allow the tenant to remain for one week. This leaves the landlord with the expense of supporting the tenant, a most direct form of wealth redistribution. It raises troubling questions about techniques used by government to

69. Gorsky, *An Examination of Some of the Recent Amendments to the Ontario Landlord and Tenant Act* (1977), 3 Dal. L.J. 663, 669.

70. Landlord and Tenant Act, R.S.O. 1980, c. 261, s. 121.

protect vital interests. Although there may be a general need to distribute more wealth to tenants as a class, the danger lies in putting an unequal burden on certain landlords. A more comprehensive scheme of government-directed wealth distribution, exercised through a general welfare system or through public housing, would be preferable. In the absence of such a program, such discretionary powers may be justifiable as a short-term, second-best mechanism, on the basis of the weight of the vital interests of the tenant in comparison with those of the landlord.

It is not only the security of tenure provisions which raise questions about the changing nature of the tenancy relationship and the redistribution of wealth. Rent control is perhaps a more visible manifestation of these issues. Although rental controls were used in Canada during World War II, they did not continue to be in wide use. When the Anti-Inflation Program was introduced in 1975, most provinces enacted rent control schemes. In a number of provinces, these have outlasted, by far, most of the other elements of the program. Although rental controls are one means of providing greater effectiveness to a security of tenure regime, they are not a necessary element.⁷¹ So long as a mechanism is set up to ensure that a rent increase is not imposed for the purpose of forcing the tenant to vacate the premises, security of tenancy would be operable. In a number of states in the United States, prohibitions on retaliatory eviction have been the primary protection afforded to tenants, and only in a few states is there a wider form of security of tenure.⁷² Nevertheless, even a system which guarantees only freedom from retaliatory eviction can be very effective. If retaliatory eviction is easily assumed and if the assumption is difficult to rebut, the difference between retaliatory eviction and "good cause" eviction diminishes. Similarly, if rental control is eschewed as a means of making security of tenure more concrete, a presumption that rent increases are intended to be retaliatory will nevertheless provide extensive protection.

A system of rental controls will prevent the unwarranted distribution of income from tenants to landlords. However, the

71. See, for example, British Columbia Law Reform Commission, *Landlord and Tenant Relationships: Residential Tenancies* (1973) and Institute of Law Research and Reform, *Report No. 22: Residential Tenancies* 135 (1975, Allurta), both of which recommend that if security of tenure provisions are to be introduced, this should be done without rent controls.

72. Glendon. *supra*, note 1 at p. 523.

strictures placed on landlords may lead to a number of almost inevitable consequences. First, there is a major disincentive to the construction of new rental accommodations. This, in turn, leads to the growing intervention of government in supplying rental accommodation.⁷³ In addition, the need to maintain existing rental stock may make it necessary to restrict the landlord's right to convert premises to other uses, in particular, condominiums. In Ontario, such restrictions have been effectively imposed by indirect means. A conversion of rental premises to condominiums requires a subdivision of the site,⁷⁴ for which the approval of the Minister of Housing is needed. In accordance with the Planning Act,⁷⁵ the minister may confer with officials of municipalities to ensure that the subdivision meets all requirements or the authority to approve the application may be delegated to a municipal council. A number of municipal councils have promulgated policy statements specifying that permission to convert rental accommodations into condominiums will not be granted unless the vacancy rate exceeds a specified percentage.⁷⁶ The Ontario Municipal Board has approved the practice, stating that the municipality is justified in attempting to ensure that rent control is not circumvented by such conversions.⁷⁷

These instances of government intervention seriously undermine traditional concepts of private ownership of property. The landlord is forced to accept a fixed rate of return on his or her investment because of rental control. Once some persons have been accepted as tenants, regulation of the relationship and its termination is beyond the control of the landlord, except for a few enumerated exceptions. And finally, with the restrictions on conversion to condominiums, the landlord is forced to maintain the property as rental accommodation. As one commentator has put it, the landlord merely exercises administrative and managerial responsibility,

73. For example, the Canada Rental Supply Program, administered by the Canada Mortgage and Housing Corporation, provides incentives for the construction of rental accommodation. In 1982-83, funds have been budgeted for the construction of 30,000 rental units. Interest-free loans for fifteen years of \$7,500 per unit are available. Calls are made for proposals in cities that have low vacancy rates, with that being the primary criterion for allocating funds across the country.

74. Condominium Act, R.S.O. 1980, c. 84, ss. 2, 4, 50.

75. R.S.O. 1980, c. 379, ss. 36(3), 53(2).

76. For example, the stipulated percentage for the City of Ottawa is 3%.

77. See *Abraham Saslove Ltd. v. City of Ottawa* (1980), 11 O.M.B.R. 86; *Quantock Investments Ltd. v. City of Toronto* (1980), 11 O.M.B.R. 234; *Re Borough of Etobicoke Official Plan Amendment No. 5-7* (1980), 11 O.M.B.R. 311.

while ownership has, in effect, been transferred to the public sector.⁷⁸ Another characterization of the landlord-tenant relationship is that it has become dominated by status. Although the parties are free to enter the relationship, once it is created its incidents are fixed by law. The basis of the typical statutory arrangement is no longer contractual, and the law of landlord and tenant relationships has shifted from the domain of private law to that of public law, with the goal of protecting the vital interests of the parties and the public under modern urban conditions which require the proper operation and maintenance of housing.⁷⁹ In fact, the landlord-tenant relationship has become subject to much the same style of regulation as public utilities. The rates set by public utilities are usually subject to review by an administrative board, created by statute.⁸⁰ For reasons of efficiency, the public utility is likely to have a monopoly in the supply of services, and the rates it may charge are, therefore, regulated to protect the consumer while allowing the utility a reasonable return on investment. Here the analogy to the landlord-tenant relationship breaks down, in that the supply of rental housing is not likely to be monopolistic.⁸¹ Nevertheless, a similarity remains in that there is still the danger of the landlord being able to extort exorbitant rents because of fluctuating demand in the housing market.

Further comparisons between the landlord and the public utility are worth considering. One duty that is placed on the public utility is the obligation to provide services. For those public utilities regulated by the Ontario Public Utilities Act,⁸² a corporation is required to supply services, upon request, to all buildings along the line of any supply pipe, wire, or rod, provided that there is a sufficient supply of the utility. It is probable that a similar duty

78. G. Klippert, *Residential Tenancies in British Columbia* 158 (1976).

79. Glendon, *supra*, note 46 at p. 553.

80. The following provisions regulate the rates charged for public utilities in Ontario: Ontario Energy Board Act, R.S.O. 1980, c. 382, s. 19 (gas); s. 37 (electricity); Power Corporation Act, R.S.O. 1980, c. 384, ss. 90, 92, 95 (electricity); Railway Act, R.S.C. 1970, c. R-2, s. 320 (telephones and telegraphs).

81. Berger, *The New Residential Tenancy Law — Are Landlords Public Utilities?* (1981), 60 Neb. L. Rev. 707.

82. R.S.O. 1980, c. 423. Utilities covered include water, artificial or natural gas, electrical power or energy, and steam or hot water. A similar provision exists for telephone services provided by Bell Canada: An Act Respecting the Bell Telephone Company of Canada, S.C. 1902, c. 41, s. 2.

existed at common law.⁸³ Thus, the utility has no discretion in deciding whether to grant the service. The only parallel restriction placed on landlords in making their decisions to rent premises to particular individuals are the provisions of the Human Rights Code which prohibit the landlord from discriminating on the grounds specified.⁸⁴

Another aspect worth comparing is the right to ask for security deposits. The landlord is normally restricted in the amount of the deposit which can be requested of a residential tenant.⁸⁵ Similarly, it has been held that a public utility may not require a consumer to pay a deposit before connecting services unless there is express power given to the utility company to do so.⁸⁶ The particular danger is that there may be discrimination against those who have not yet established a credit rating. Generally, the power to ask for security deposits is granted to the utility,⁸⁷ although there may be strict scrutiny of the system used.⁸⁸

A more interesting analogy arises between the termination of a tenancy and the termination of utility services. For those services regulated by the Ontario Public Utilities Act, it seems that once supply of a utility has commenced, it can be terminated without the consumer's consent only if the consumer has failed to continue paying the rate.⁸⁹ Thus, the utility company, so long as it continues to supply services in the area, cannot refuse to continue supplying a particular customer unless there is cause — and the only permitted cause, nonpayment of rates, is analogous to the nonpayment of rent by a tenant.⁹⁰ Nevertheless, the process by which a utility company

83. *St. Lawrence Rendering Company Ltd. v. The City of Cornwall*, [1951] O.R. 669; *Chastain v. B.C. Hydro & Power Authority* (1972), 32 D.L.R. (3d) 443 (B.C.S.C.); *A.G. Canada v. The City of Toronto* (1893), 23 S.C.R. 514; *Scottish Ontario and Manitoba Land Co. v. City of Toronto* (1899), 26 O.A.R. 345; *The City of Hamilton v. The Hamilton Distillery Co.* (1907), 38 S.C.R. 239; *c.f. Holmberg et al v. Public Utilities Commission of Sault Ste. Marie*, [1966] 2 O.R. 675 (C.A.).

84. S.O. 1981, c. 53, s. 2.

85. Landlord and Tenant Act, R.S.O. 1980, c. 232, ss. 84, 85.

86. *Chastain v. B.C. Hydro*, *supra*, note 83.

87. Public Utilities Act, R.S.O. 1980, c.423, s. 49(4).

88. The CRTC, for instance, closely regulates the policies of Bell Canada; see CRTC Telecom Public Notice 1982-83: *Bell Canada — Trial of New Credit Screening Process*.

89. R.S.O. 1980, c. 423, s. 58; *St. Lawrence Rendering Co.*, *supra*, note 83.

90. One particular problem may arise for a tenant where the landlord has assumed the duty of paying for utilities. If the landlord is in arrears, can the utility company

may terminate a service when payment has not been forthcoming illustrates gaps in the protection of vital interests. The continuation of the service is of great concern to the consumer. To be suddenly denied the service with no advance warning and no opportunity to make one's case that the service should not be disconnected may create a serious hardship and, if the company acted wrongfully, should arguably be cause for redress.

This point is becoming well-developed in the constitutional jurisprudence of the United States. To the extent that a public utility can be said to be acting as an organ of the state,⁹¹ it may be required by the due process provision of the Fourteenth Amendment to provide a hearing before disconnecting services.⁹² The right to a service is a property right. This is so because it is possible to characterize the interest in continued supply of utility services as an entitlement created by state law through the recognition that a consumer has a right to damages if utility services are disconnected without cause. No person may then be denied enjoyment of the property right, except when certain procedural devices are followed.⁹³

In Canada, there seems to have been little thought given to the matter. Public utilities which are expressly mandated by statute to

require the tenant to pay the arrears as a condition of continuing the supply? It has been held that where a mortgagor is in arrears on rates and a mortgagee takes possession, the mortgagee is entitled to an injunction to prevent disconnection of services, and there is no duty on the mortgagee to pay the debts of the mortgagor; *Syncap Credit Corp. v. Consumers' Gas Co. and Scarborough Public Utilities Commission* (1978), 18 O.R. (2d) 633. The wording of section 54 of the Public Utilities Act suggests that the *occupant*, as well as the owner, has a right to demand supply of the services. Several recent cases holding a receiver liable to pay debts of the debtor as a condition of continued service have clearly rested on the ground that the receiver is occupying the premises as an agent of the debtor; *Pete Marwick Ltd. v. Consumers' Gas Co.* (1977), 18 O.R. (2d) 631 aff'd (1980), 29 O.R. (2d) 336 (C.A.); *Roy Nat Ltd. v. Consumers' Gas Co.* (1980), 28 O.R. (2d) 97; c.f. *Canada Trust et al v. Consumers' Gas Co.* (1977), 18 O.R. (2d) 629; *Re Les Plastiques Valsen Inc.: Gaz Metropolitan Ltd. v. St. Georges* (1981), 41 C.B.R. (N.S.) 7 (C.S. Qué.).

91. *Jackson v. Metropolitan Edison Co.* (1974), 419 U.S. 345.

92. *Memphis Light, Gas & Water Division v. Craft* (1978), 436 U.S. 1.

93. See *Case Comment*, (1979), 12 Creighton L. Rev. 1243; *Case Comment* (1976), 14 Duquesne L. Rev. 761; *Comment, Fourteenth Amendment Due Process in Termination of Utility Services for Nonpayment* (1973), 86 Harv. L. Rev. 1477; *Note, Constitutional Protection of Summary Telephone Disconnections for Illegal Use* (1982), 82 Colum. L.R. 98.

disconnect services of a person who has not paid the rates may be required to act fairly by informing the consumer of the reasons for disconnection and by giving him or her an opportunity to be heard. The Canadian Radio and Television Commission has recently suggested that there may be a need to review the policies of the telephone companies under its jurisdiction in order to ensure that a pre-termination hearing of some kind is held.⁹⁴ The limited recognition given to the vital interest of the consumer in continuing the supply of essential services is in contrast to the more extensive protection given a tenant. The mechanism used in Ontario for the review of a tenant's claim to continue in the premises is to require the landlord to obtain a court order before evicting. Thus, the tenant is given an opportunity to a court hearing, a much more formal procedure than might be required of a public utility if there was merely a duty to act fairly before terminating services.

The similarities in the regulation of the residential tenancy and the public utility should not be overstated. Nevertheless, it makes sense to prevent arbitrary conduct of both the landlord and the public utility by specifying the causes for which the tenancy or supply of services should end and to provide procedural protection to ensure that the rights of the tenant or consumer are not trampled.

The implementation of such rights modifies the extent to which the landlord or utility company can exercise its power over its own property. Stating that the tenant or consumer has acquired a new form of property obfuscates a more crucial issue: how does one guarantee security in housing and the essential services connected therewith for those who are unable to pay? An intermittent duty on the landlord and public utility company to continue supplying the essential needs of the indigent is not a proper solution. The underlying structure of the welfare state will still have to redistribute wealth to those who cannot provide for their own needs. The need for the protection of those who have not acquired the "new property" or cannot afford to pay for it is as great as it is for those who can pay their way.

94. Telecom Decision CRTC 77-14. At present, the *Bell Canada General Tariff*, Rule 35, specifies the grounds on which the company can terminate services. There is no requirement that notice be given, but this generally is done and the customer would normally have a chance to state his or her position. There is also an avenue of complaint through the CRTC, which may intervene and ask Bell Canada not to terminate services until it investigates. There appears to be no legal duty on Bell Canada to comply, but principles of comity may induce such compliance.

The developments which have taken place with respect to landlord-tenant law are matched by the substantial changes taking place in the extent to which persons have legally recognized rights associated with jobs. The next section will consider some of these changes in light of the foregoing discussion.

IV. *The Employment Relationship*

A working person is seldom his or her own master. The vast majority of individuals are unable to rely on their own work and resources to provide a livelihood, and sources of production and the control of jobs are concentrated in a small segment of the population. We have, thus, become a society of wage earners, with the result that the employment relationship is one of the most important institutional mechanisms in society. The manner in which the relationship is legally regulated has broad ramifications for the protection of, and concern and respect for, the worker as an individual.⁹⁵ The worker, through employment, contributes by his or her productive labour to the welfare of society and, at the same time, promotes the economic, social, and psychological well-being of the individual. An increasing number of commentators are calling for recognition of the "universal and equal property right in employment."⁹⁶ Because employment not only provides the basis for individual subsistence, but also fulfills deep psychological needs, the demands to construct legal guarantees of security will undoubtedly have profound implications on one's assessment of fundamental values. What will be attempted here is a survey of some of the developments which are responding to these claims for greater security.⁹⁷

95. Langille, *Labour Law is a Subset of Employment Law* (1981), 31 U.T.L.J. 200, 202.

96. Beatty, "Labour is Not a Commodity", in B. Reiter, J. Swan, eds., *Studies in Contract Law* 313, 317. See also Meyers, *Ownership of Jobs: A Comparative Study* 16 (1964); P. Selznick, *Law, Society and Industrial Justice* 203 (1969); McLintock, *Enterprise Labour and the Developing Law of Employee Job Rights — Part One* (1972), 8 Gonz. L. Rev. 40; Looney, *Expected Continued Employment as a Protected Property Right* (1976), 22 Loy. L. Rev. 884; Levine, *Towards a Property Right in Employment* (1973), 22 Buffalo L. Rev. 1081.

97. It is possible to characterize a wide range of worker-initiated protests as part of a great centuries-long movement in defence of rights to subsistence — upheavals by the workers as industrial change was introduced as a protest against the usurpation of rights to resources, land, forests, etc., on which subsistence depended. See F. Piven and R. Cloward, *The New Class War* 53 (1982).

The devices available to promote the protection of vital interests in employment are multi-layered. First, the individual relationship of employment is regarded as being primarily contractual. In the law of wrongful dismissal, one sees the development of contractual principles in such a way as to recognize some of the legitimate claims of individuals to greater security in employment. Second, the process of collective bargaining has forced management to concede some of its unilateral prerogative to effectively decide the fate of an employee with respect to his or her continuation of employment. Third, the development of legislative standards seeks not merely to create a floor of rights, but, in some circumstances, to define the circumstances under which employment can be terminated. Finally, developing procedural standards of natural justice and fairness which emphasize the manner in which employment can be terminated creates a new avenue of protection, especially for the large numbers who are employees of government.

The contract of employment has come under fierce attack as a regulating instrument. The tendency of contract law to presentiate and make as discrete as possible every exchange with which it deals strips the exchange of its relational characteristics.⁹⁸ Leaving the employer with the unfettered right to end the transaction and the relationship demonstrates the past failures of contract law to accord to workers the legitimacy of their claim to identification with the job, as well as that of their claims to respect and security. Over time, however, the courts have come to recognize, through the fictional device of an implied term in the contract of employment, that workers are often entitled to reasonable notice if their employment is to be terminated other than for cause.⁹⁹ While this in no way acts as an absolute fetter on the management's right to discharge, it does force management to at least weigh the costs of immediate termination¹⁰⁰ against the interest of the employee in

98. Beatty, *supra*, note 96 at p. 329; MacNeil, *The Many Futures of Contracts* (1974), So. Cal. L. Rev. 691.

99. For some of the recent analysis of the developments, see Harrison, *Termination of Employment* (1972), 10 *Alta L. Rev.* 250; D. Harris, *Wrongful Dismissal* (2nd ed., 1980); England, *Recent Developments in Wrongful Dismissal Laws and some Pointers for Reform* (1978), 16 *Alta. L. Rev.* 470; Swinton, "Contract Law and The Employment Relationship: The Proper Forum for Reform", in B. Reiter, J. Swan, eds., *Studies in Contract Law* 357; B. Grossman, *The Executive Firing Line* (1982); Grossman, Marcus, *New Developments in Wrongful Dismissal Litigation* (1982), 60 *Can. Bar Rev.* 656.

100. Damages for failure to give reasonable notice can be very substantial for

continuing to work, even if it does so only throughout the period of reasonable notice. Through the use of the “reasonableness” doctrine, courts are increasingly emphasizing the difficulty of finding alternative employment as one of the factors which entitles the worker to a longer period of notice. This focus is an advance for employees’ interests in job security, providing as it does more realistic protection on discharge than do inflexible periods linked to job status.¹⁰¹ Nevertheless, there is the continuing assumption that the employee has no right to continue in the job. If the proper notice is given, the employee cannot complain of a breach of contract, and even if there has been a breach, reinstatement is not normally an available remedy.¹⁰²

Several other facets of the contractual doctrine in employment are worth mentioning. First, because of the problems of the inequality of bargaining power, it is always open to the employer, at the time the relationship commences, to specify the length of notice to which an employee is entitled. The courts have proved flexible in evading such clauses,¹⁰³ recognizing that, with the passage of time and the continuation of the relationship, the employees’ legitimate expectations and identification with respect to the job demand a longer notice period than may have been set out at the time the contract was made. Furthermore, the statutory notice periods in the various employment standards statutes are a minimum only and do not preclude the court from determining that the employees are entitled to much longer periods of notice.¹⁰⁴

Another contractual development emphasizing the special attachment which an employee develops for a job is the awarding of damages for mental distress when an employee is dismissed without receiving reasonable notice.¹⁰⁵ Such damages are awarded where it

highly paid executives who are entitled to long periods of notice.

101. Swinton, *supra*, note 99 at p. 367.

102. *McWhirter v. University of Alberta* (1977), 80 D.L.R. (3d) 609, rev’d on other grounds (1979), 18 A.R. 145.

103. *Chadburn v. Sinclair Canada Oil Co.* (1966), 57 W.W.R. 477; *Allison v. Amoco Production Co.*, [1975] 5 W.W.R. 501; *Wallace v. Toronto Dominion Bank* (1981), 39 O.R. (2d) 350.

104. *O’Donovan v. Burns Foods Ltd.* (1976), 61 D.L.R. (3d) 766 aff’d (1977), 73 D.L.R. (3d) 321 (Sask C.A.).

105. *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711, 114 D.L.R. (3d) 378; *Brown v. Waterloo Regional Board of Commissioners of Police* (1982), 37 O.R. (2d) 277 (H.C.); *Grant v. MacMillan Bloedel Industries Ltd.* (1982), 83 C.L.L.C. 14,002.

can be reasonably foreseeable that they will be caused by the dismissal of an employee who has been led to believe that he or she is secure in his or her job. The limitation on the development of the doctrine is that such damages must be said to be foreseeable at the time at which the contract is made. With the great mobility of workers and the rapid change in industry, it might be arguable that it is unlikely an employee will ever develop expectations of security. Yet, it becomes clear that if an employee actually has developed, through the passage of time, an attachment to the job, there will indeed be great distress if the relationship is abruptly terminated. From that perspective, such damages are foreseeable at the time the contract is made. The employer should know that the longer the relationship is permitted to continue, the greater the severity of the economic and psychic consequence for the employee who is wrongfully dismissed. While the courts are unable to fashion, through contractual principles, a comprehensive scheme for protecting job security, there is a growing jurisprudence which is attempting to define situations where employees should be compensated for the abrupt termination of an employment relationship.

A much more direct attack on management's unilateral powers of discharge has been mounted through the collective bargaining process. By including "just cause" provisions in the collective agreement, management has effectively conceded that it has no right to terminate employment in an arbitrary or capricious fashion. In addition to the substantive protection given to employees, the power of deciding whether there was in fact just cause for the employer's actions is transferred to the arbitrator. The grievance procedure as the chosen method of resolving disputes leads to changes in the form of personnel management. For example, disciplinary procedures are created to comply with standards developed by the arbitrators, who tend to insist on equal punishment for the same offence, advance notice of company rules, and an opportunity for employees to explain their conduct before being disciplined. The rule of the employer gives way to the rule of law within the workplace,¹⁰⁶ and the employee's sense of security is heightened to the extent that arbitrary action can be counteracted.

The extent of the protection is evident from a study of discharge

106. Getman, *Labour Arbitration and Dispute Resolution* (1978-79), 88 Yale L. Rev. 916, 921.

cases undertaken by Adams.¹⁰⁷ Of 645 disciplinary discharges which were considered by arbitrators in Ontario between 1970 and 1974, the arbitrators found that in 53.5 percent of the cases, there was not sufficient cause for discharge. In 17.8 percent of the cases heard, no discipline at all was justified, and in 35.7 percent of the cases, the arbitrator substituted a lesser penalty than the discharge chosen by the employer. In many of these cases, the employees were reinstated. The right to reinstatement is a much more effective form of redress for the employee, recognizing as it does that damages cannot adequately compensate for the capricious, arbitrary, or unjustified sundering of the attachment to the job which one has developed. Furthermore, when arbitrators reinstated employees to their positions, the employee was, in the vast majority of situations, able to reintegrate into the workforce and continue in employment to the satisfaction of the employer.

The protection of the working person is greatly advanced from the common law position. But what of the workers who have just commenced working and who have not yet developed an expectation to continue employment? Arbitrators and courts have been struggling to define the rights of probationary employees. The extent to which the treatment of this class of employee differs from that of the permanent employee emphasizes the development of devices to protect more firmly rooted expectations of security.

The concept of the probationary employee has developed primarily in the context of dismissal for just cause. If the employer could terminate any employee merely by giving notice,¹⁰⁸ then the employer could hire any person on a trial basis, without explicitly stating such, and there would be no great bar to letting the person go. But where there are just cause provisions, the employer may push for creating the special category of probationary employee. Unions have been willing to agree that the employer should exercise discretion in hiring and should have an opportunity to evaluate an employee before making a long-term commitment. However, the issue is whether the fate of probationary employees is to be left entirely to the discretion of the employer or if there is a limit to be

107. Adams, G., *Grievance Arbitration of Discharge Cases: A Study of the Concepts of Industrial Disciplines and their Results* (1978).

108. For a short-term employee, the notice period would be relatively short, since one of the factors considered in determining reasonable notice is the length of employment; *Bardal v. Globe & Mail Ltd.*, [1960] O.W.N. 253, 24 D.L.R. (2d) 140 (H.C.).

placed on the employer's unilateral right to terminate. The answer turns both on statutory provisions which provide for the final determination of disputes arising under a collective agreement to be settled by arbitration¹⁰⁹ and on the particular wording of the collective agreement. A number of recent decisions have held that the legislation prohibits a probationary employee from being denied access to arbitration in order to dispute a dismissal.¹¹⁰ The basic approach in these cases seems to be that if the collective agreement guarantees a right, then the parties to the agreement are constrained, by the legislation, from denying any class of employees access to adjudication if the right is allegedly violated. Another approach suggests that one must look to the intention of the parties, and if the working of the collective agreement clearly demonstrates an intention to deny the access of a probationary employee to arbitration, then effect must be given to such intention.¹¹¹ However, even if the collective agreement specifies that the dismissal of probationary employees is within the discretion of the employer, some arbitrators have held that there is an implied promise that the employer will not exercise such discretion in bad faith¹¹² or in a discriminatory manner.

While probationary employees cannot be prevented from having their disputes arbitrated, the extent of their rights may be less than that of permanent employees. In particular, the just cause standard may be considerably relaxed, so that the termination of a probationary employee will not be set aside unless the decision is arbitrary, discriminatory, or made in bad faith.¹¹³ The emphasis is on the bona fide expectation of an employee to be treated at least fairly. The courts appear, at present, to be moving towards a policy that employees should be entitled to procedural protection.¹¹⁴

109. For example, Labour Relations Act, R.S.O. 1980, c. 228, s. 44(1).

110. *Re Toronto Hydro-Electric Systems and CUPE, Local 1* (1980), 29 O.R. (2d) 18 (Div. Ct.) aff'd 30 O.R. (2d) 64 (C.A.); *International Association of Firefighters, Local 268 v. City of Halifax* (1982), 82 C.L.L.C. 14, 167 (N.S.S.C. A.D.).

111. *Re Dominion Stores Ltd. and Retail, Wholesale & Department Store Union Local 414 et al.* (1981), 128 D.L.R. (3d) 262 (Ont. Div. Ct.); *Peel Board of Education* (1982), 4 L.A.C. (3d) 409 (Beck); *Gulf Canada Limited* (1981), 28 L.A.C. (2d) 340 (Palmer).

112. *Consolidated-Bathurst Packaging Ltd. (St. Thomas Division)* (1981), 1 L.A.C. (3d) 10 (Adams).

113. *Pacific Western Airlines Ltd.* (1981), 30 L.A.C. (2d) 68.

114. The courts frequently conclude that a person is not a probationary employee

Underlying this move is the attitude that the employment relationship is of such a nature that the employer should no longer fully control its termination. This policy is still only in its formative stages. Many steps will be taken in a backwards direction, but even more will be taken forward as a coherent theory of the protection of vital interests emerges.

Even for unorganized workers, a number of jurisdictions have greatly expanded the protection and remedies available to employees. Nova Scotia was the first province to grant statutory protection against unreasonable discharge.¹¹⁵ The usefulness of the provision was limited by the fact that it was available only to employees with ten or more years of seniority. Subsequently, the Canada Labour Code¹¹⁶ and the Quebec Labour Standards Act¹¹⁷ have been amended to include similar provisions, with federal statutory protection available to employees with one year's employment, while the Quebec provision applies only after five. There has already been extensive experience under the federal legislation which indicates that it is, for the most part, successful.¹¹⁸ The statutes recognize the inadequacy of present common law developments with respect to wrongful dismissal and establish a substantive right similar to that achieved through collective bargaining, as well as a procedural mechanism for adjudication claimed violations.

Other forms of protection have also been created by statute. Labour relations legislation prevents an employer from terminating or otherwise discriminating against an employee because of legitimate union activities.¹¹⁹ Human rights legislation prohibits discriminatory actions on a number of grounds, the specifics of which vary somewhat from province to province.¹²⁰ Employees making claims under workers' compensation statutes are also

and is, thus, entitled to just cause protection; *Town of Kentville v. Kentville Police Association* (1981), 47 N.S.R. (2d) 374 (S.C.A.D.); *Emms v. The Queen* (1979), 102 D.L.R. (3d) 193 (S.C.C.); *Martin v. Wright* (1981), 33 A.R. 354 (Q.B.).

115. Labour Standards Code, S.N.S. 1972, c. 10, s. 67A as am. S.N.S. 1975, c. 50, s. 4.

116. R.S.C. 1970, c. L-1, s. 61.5 as am.

117. S.Q. 1979, c. 45, s. 124, as am.

118. England, *Unjust Dismissal in the Federal Jurisdiction: The First Three Years* (1982), 12 Man. L.J. 9; Langille, *supra*, note 95.

119. For example, Labour Relations Act, R.S.O. 1980, c. 228, s. 66.

120. For example, Human Rights Code, S.O. 1981, c. 53, s. 4.

protected,¹²¹ and employment standards legislation¹²² prohibits retaliatory action by an employer when a person files a claim pursuant to the statute. In most of these situations, reinstatement is a possible remedy and the statutory framework may act as a catalyst for the development of such a remedy at common law.¹²³

It is not only through prohibitions of dismissal that statutes explicitly recognize the security interests of a worker in employment. Provisions for periods of notice and, particularly, for severance pay recognize the need to aid employees in adjusting to the loss of jobs. Thus, severance pay can be viewed as compensation for the expropriation of the rights which the employee had acquired in the course of the job.¹²⁴ Underlying the job protection approach is a scheme of social security which provides unemployment insurance benefits, job creation and retraining schemes, pension benefits, and, in the last resort, welfare. It is beyond doubt that, in times of rapid change, neither the government nor the economy will succeed in providing continuous employment for all. Guaranteeing security in the job itself is an unrealistic goal. It also raises fundamental questions as to why the interests of those who have been fortunate enough to acquire jobs should be deemed to be more deserving of protection than the interests of those who want to work, but cannot find jobs. To characterize jobs as property drives one back to the question of why one person is justified in claiming power over a scarce resource which others would also like to share.

For those employees who are employed by the state, there are a number of special factors worth considering. One problem lies in distinguishing between two roles of the state: it acts as the employer of vast numbers of persons, but is also the most basic institution of

121. See P. Weiler, *Reshaping Workers' Compensation for Ontario* 64 (1980) and Government of Ontario, *White Paper on the Workers Compensation Act* 58 (1981). No explicit provision is contained in the Ontario statute, but it is probable that such discrimination is covered by the Human Rights Code, S.O. 1981, c. 53, s.4.

122. Employment Standards Act, R.S.O. 1980, c. 137, s.57.

123. See, *supra*, note 102.

124. Mac Neil, *Plant Closings and Workers' Rights* (1982), 14 Ott. L. Rev. 1, 27-37. In *Ballard et al v. The Canadian Fishing Co. Ltd.* (1982), 83 C.L.L.C. 14,008 (B.C.S.C.), an employer who had contractually bound itself to make severance payments was required to do so, although employees were taken on by a successor employer. The only loss suffered by the employees was loss of seniority, but that is sufficient to justify the severance payment. See also *Sloan v. Union Oil Co. of Canada Ltd.* (1955), 16 W.W.R. 225.

developed society for accomplishing the task of governing. To the extent that a worker has claims against, and duties toward, the state, both as an employee and as a citizen, his or her position may differ significantly from that of an employee who works for a private employer. The term "government employee" is vague and could characterize holders of office at pleasure, holders of office who can only be dismissed for certain definable reasons,¹²⁵ or persons who serve pursuant to contracts of employment. The term is made even more vague by the fact that such persons might be employed by government departments, semi-autonomous government agencies, administrative boards created by statute, crown corporations, etc.

Until recently, the dichotomy between the legal protection and the actual security enjoyed by public service employees was astonishing.¹²⁶ At common law, crown servants were subject to dismissal at the pleasure of the Crown;¹²⁷ no advance notice or reasons for termination were required. Apparently, this rule originally developed with respect to military personnel, but was later extended to include the general civil service as well. Its legal basis may have been an extension of the Crown's prerogative powers over military service, the ground that there was no contract between the Crown and the servant,¹²⁸ or an implied term in the contract of employment that the relationship could be terminated at will.¹²⁹ Even if the relationship could have been characterized as contractual, the Crown may not have been able to contract, without statutory authorization,¹³⁰ on any basis other than at pleasure. In the

125. These classifications were adopted by Lord Reid in *Ridge v. Baldwin*, [1964] A.C. 60, 65 (H.L.), to consider what rights a person might have to the exercise of natural justice before dismissal. According to Lord Reid, if it was a pure case of master and servant or where an office is simply held at pleasure, there is no duty on the person having the power to dismiss to disclose reasons or give an opportunity to be heard.

126. H. Wade, *Administrative Law* 62 (4th ed., 1977).

127. P. Hogg, *Liability of the Crown* 150 (1971). See, for example, *Dunn v. The Queen*, [1896] 1 Q.B. 116, where a civil servant who had been hired for a three-year term brought an action after being dismissed before the end of the term. It was held that there must be imported into the contract of employment a term that the Crown may put an end to the employment at its pleasure, in order to protect the public interest. Thus, unless a statute otherwise provided, the Crown was incapable of contracting on terms other than at pleasure.

128. Blair, *The Civil Servant — A Status Relationship* (1958), 21 Mod. L. R. 265.

129. Richardson, *Incidents of the Crown-Servant Relationship* (1955), 33 Can. Bar Rev. 424.

130. *Supra*, note 125.

absence of explicit statutory provisions which limit the power of the state to terminate its employees in its own unfettered discretion, the courts continue to apply the concept of service at pleasure.¹³¹ Statutes which regulate employment in the public service tend to reinforce the underlying common law approach by providing that service is at pleasure,¹³² subject, of course, to explicit statutory provisions to the contrary.

The common law position of civil service employees has been redefined to an enormous extent. In the Canadian federal jurisdiction, the primary sources of the redefinition are the Public Service Employment Act¹³³ and the Public Service Staff Relations Act.¹³⁴ The former primarily regulates appointments, promotions, and transfers in the public service, with merit as the primary selection criterion. These tasks are performed under the auspices of the Public Service Commission. The focus of the latter statute is the system of collective bargaining in the public sector. The Public Service Employment Act states that the tenure of civil service employees is at the pleasure of Her Majesty, is subject to the act or to other acts or regulations, and, unless some other period of employment is specified, tenure is for an indeterminate period.¹³⁵ The act specifies a number of ways in which employment may be terminated, including resignation, abandonment (unexcused absence for a period of one week),¹³⁶ rejection for cause of a probationary employee, layoff for lack of work, or discontinuance of a function, expiration of a term contract,¹³⁷ and release for incompetence.¹³⁸ Where termination occurs for the latter reason, an

131. See, for example, *McKnight v. The Province of New Brunswick* (1978), 21 N.B.R. (2d) 297; *Re Bondarchuk and Administrator of Yukon* (1981), 127 D.L.R. (3d) 467 (Y.T.C.A.); *Kedward v. The Queen*, [1973] F.C. 1142.

132. Public Service Employment Act, R.S.C. 1970, c. P-32, s. 24; Interpretation Act, R.S.O. 1980, c. 219, s. 21.

133. R.S.C. 1970, c. P-32 as am.

134. R.S.C. 1970, c. P-35 as am.

135. R.S.C. 1970, c. P-32, s. 24.

136. See *Perry v. Public Service Commission Appeal Board*, [1980] 1 F.C. 57 (C.A.).

137. See *Morin v. The Queen*, [1981] F.C. 3 (C.A.), where a successful action brought before the Trial Division of the Federal Court challenging the Deputy Minister's declaration of abandonment was overturned by the Court of Appeal.

138. See *Snaauw v. Public Service Commission Appeal Board*, [1980] 1 F.C. 78, where the dismissal of an employee for incompetence was upheld, although evidence of the incompetence was gathered during the employee's probationary period.

employee has the right to appeal to a board established by the Public Service Commission. This guarantees the procedural protection of a hearing in order to ensure that the reason for release is actually incompetence or incapacity. When termination occurs for some other reason, an employee may be entitled to a hearing under the following circumstances. In the federal sector, most employees are governed by collective agreements and can use the grievance arbitration procedure to have decisions on termination reviewed, although collective bargaining is effectively precluded from dealing with matters that come within the statutory mandate of the Public Service Commission.¹³⁹ However, if discipline is given as the primary basis for the employer's action against an employee, then that would fall within the scope of the collective agreement. Furthermore, individual employees have a right, under the Public Service Staff Relations Act, to grieve the interpretation, or application to them, of any provision of any statute or regulation concerning terms and conditions of employment. If the dispute is over a disciplinary action resulting in discharge, suspension, or financial penalty, the employee can refer the grievance to adjudication. The right of employees to have their termination of employment reviewed turns on whether the dismissal is for a disciplinary purpose.¹⁴⁰ These procedures can provide some protection even for the probationary employee, in that he or she may attempt to establish that the true cause for rejection was the discipline of the employee, rather than an assessment of the employee's unsuitability for the position.¹⁴¹

The highest courts have had to interpret the scope of the legislative provisions, weighing the rights of employees to have employment against the need of the government employer to enjoy flexible exercise of the merit principle. For example, in *Emms v. The Queen*,¹⁴² it was held that the probationary period could not be extended and that regulations so authorizing were ultra vires the

139. Public Service Staff Relations Act, R.S.C. 1970, c. P-34, s. 56(2).

140. Joliffe, *Adjudication in the Canadian Public Service* (1974), 20 McGill L.J. 351, 360.

141. *Jacmain v. Attorney General of Canada* (1977), 81 D.L.R. (3d) 1 (S.C.C.). The same result may not apply where a collective agreement expressly excludes the probationary employee from the protection of the dismissal for cause provisions of the collective agreement; *The Queen in Right of New Brunswick v. Leeming*, [1981] 1 S.C.R. 129.

142. (1979), 102 D.L.R. (3d) 193 (S.C.C.).

statute. And in *Kelso v. The Queen*,¹⁴³ it was declared that a regulation prevented the government from transferring an employee out of his position because it had been declared bilingual and he was only unilingual. In *Nova Scotia Government Employees Association et al v. Civil Service Commission of Nova Scotia*,¹⁴⁴ the court found that the Crown, faced with the provincial statute permitting collective bargaining, no longer retained unimpaired power to dismiss, at pleasure, employees who are covered by a collective agreement. As Laskin stated:¹⁴⁵

The law in Canada, in Canadian provinces as well as in other common law jurisdictions has gone far down the road to establishing a relative equality of legal position as between the Crown and those with whom it deals, too far in my opinion to warrant reversion to an anachronism At best, in my view, the power to dismiss at pleasure could be regarded as an implied term of an engagement which contained no contrary provision.

In addition to the collective bargaining and statutory protection given to employees in government service, the courts are developing another remedial device: the duty imposed upon administrative decision-makers to exercise their functions fairly. Thus, in *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police*,¹⁴⁶ a probationary police constable, who was dismissed from employment and who was not informed of the reasons or given an opportunity to be heard, was held to be improperly dismissed. In *Re Proctor and Board of Commissioners of Police of City of Sarnia*,¹⁴⁷ the dismissal of a constable by a chief of police was nullified because, it was held, only the Board of Police Commissioners can exercise the power to dismiss — a subsequent ratification was insufficient. In *McCarthy v. Attorney-General of Canada*,¹⁴⁸ the removal of the appellant from a qualification list for a position was held invalid because the appellant had not received notice of the reason for so doing, nor was she given a chance to be heard. However, the courts are much more

143. [1981] 1 S.C.R. 199.

144. (1981), 119 D.L.R. (3d) 1 (S.C.C.).

145. *Ibid*, at 2.

146. (1978), 88 D.L.R. (3d) 671 (S.C.C.). See also *Re Brown & Waterloo Police Commissioners* (1979), 26 O.R. (2d) 746 (Div. Ct.); *Re Gillingham and Metro Toronto Police Commission Board* (1979), 26 O.R. (2d) 77; *Kentville v. Kentville Police Association* (1981), 47 N.S.R. (2d) 374 (S.C.A.D.).

147. (1980), 116 D.L.R. (3d) 577 (S.C.C.).

148. [1981] F.C. 309 (C.A.).

reluctant to guarantee fair procedures where the alleged basis for decision is the security risk of the individual.¹⁴⁹

While the protection to be obtained through the development of a duty to proceed fairly may not alter the substantive rights of the employee,¹⁵⁰ the extensive legislative and contractual provisions, combined with a right to receive reasons and be heard before termination of employment, does provide substantial protection. The purpose of requiring a decision-maker to abide by certain procedural standards is to ensure that the person affected has at least an opportunity to explain and justify his or her conduct and to correct any mistaken information on which action would otherwise be taken. It is no longer only the judicial or quasi-judicial decision which requires procedural fairness, but also administrative decisions which are made by government bodies and which affect, in the employment context, the security interests of the worker.

It is worth noting that this development has taken place without characterizing the employees' interest in retaining their jobs as being proprietary in nature. The heralding of "new property" developments in the United States has been attributable, in part, to a series of Supreme Court decisions concerning due process requirements before the termination of public employees.¹⁵¹ Of the four principle cases, two involved the termination of professors at state-funded universities, one involved a federal government employee, and one involved an officer of a municipal police force. In these cases, the court stated that the constitutional right to due process is available only if one of the protected interests of life, liberty, or property, as set out in the Fifth or Fourteenth Amendments, is endangered. The court had originally interpreted the "life, liberty, or property" phrase as a unit and had given an open-ended functional interpretation, which meant that the government could not seriously hurt you without due process of law.¹⁵² The extent of the procedural protection available would, of course, vary with the seriousness of the harm and the usefulness or

149. *Lee v. Attorney General of Canada* (1981), 38 N.R. 347 (S.C.C.).

150. See Mullan, *Natural Justice and Fairness — Substantive as Well as Procedural Standards for the Review of Administrative Decision-Making?* (1982), 27 McGill L.J. 250.

151. *Board of Regents v. Roth* (1972), 408 U.S. 564; *Perry v. Sindermann* (1972), 408 U.S. 593; *Arnett v. Kennedy* (1974), 416 U.S. 134; *Bishop v. Wood* (1976), 426 U.S. 341.

152. J.H. Ely, *Democracy and Distrust* 19 (1980).

feasibility of particular procedures. At present, however, it is necessary to show that some particular interest is being affected. In characterizing expectations of continued employment as a property right, the court has so narrowly defined the term that, unless underlying state or federal law clearly establishes an entitlement, there is no guarantee of due process. The outcome is that the employee is left without protection in a vast range of cases, due to the difficulty in establishing the property interest.¹⁵³ The better approach would be to use the seriousness of the harm inflicted to decide whether fair procedures should be used.

Application of the duty to act fairly may have ramifications for nongovernment employers as well. There is scope for arbitrators to require that an employer act fairly in exercising its managerial prerogative.¹⁵⁴ Another possibility is that an employer will be required to give an employee a fair hearing before a discharge decision is made. The extent to which arbitrators continue their novel application of principles to limit arbitrary conduct by an employer and to protect security interests of employees remains to be seen.

V. Conclusion

These reviews of the residential landlord-tenant relationship and the employment relationship demonstrate the changing focus of the law. The law does not deny the property rights of the landlord or the employer, but, rather, it balances those rights against the rights of the individual to security in housing and employment. To characterize the greater attention given to the rights of these groups as creating "new property" is not necessarily helpful.¹⁵⁵ The rights

153. Van Alstyne, *Cracks in "the New Property": Adjudicative Due Process in the Welfare State* (1977), 62 Cornell L. Rev. 445.

154. *Re Municipality of Metropolitan Toronto and Toronto Civic Employees' Union Local No. 43* (1978), 79 D.L.R. (3d) 249 (Ont. Div. Ct.); *Re Falconbridge Nickel Mines Ltd. and Brunner et al (No. 2)* (1980), 111 D.L.R. (3d) 386 (Ont. Div. Ct.) aff'd (1981), 129 D.L.R. (3d) 561 (C.A.); but cf *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1981), 124 D.L.R. (3d) 684 (Ont. C.A.).

155. See, however, Michelman, *Process and Property in Constitutional Theory* (1981), 30 Cleve. St. L. Rev. 577, where an argument is made for considering property rights as being procedural, rather than substantive. In this context, "procedural" means that property is "an ingredient in the constitution of the individual as a participant in the life of the society, including not least the society's

which are being protected transcend the boundaries of property talk and go to the core of the fundamental essence of a right to life and full participation in a democratic society. The shortcoming of such protection is that the law is merely guaranteeing some form of security for those who have already acquired a share of the basic resources of society. There is a need to recognize that, if fundamental rights are to have any meaning, they must, above all, protect the claims of the poor to share in those resources, so that they can sustain a meaningful existence.¹⁵⁶

processes for regulating the conditions of an ineluctably social existence'' (p. 588). This accords with MacPherson, *supra*, note 40.

156. Samek, *Untrenching Fundamental Rights* (1982), 27 McGill L. J. 733, 755.