

Property Rights, the *Magna Carta*, and Canada: The Last Frontier for Civil Rights?

From its origins as a failed peace treaty between the Crown and its disputatious subjects, the *Magna Carta* has come to represent the embodiment of freedom and of the rule of law in English-speaking countries. Lord Coke invoked its provisions and spirit against the Stuarts, the American colonists against the Hanoverians, and civil libertarians everywhere against illiberal Leviathan. However, as its 800th anniversary is being celebrated this year – not only in Canada but across many continents – many of the principles which the Great Charter have come to embody are coming under threat in Canada or, worse yet, have already disappeared from the Canadian landscape. Of these, the most important is the right to property. At the core of the *Magna Carta* and the demands of the barons against the Crown are property rights. However, they are not afforded any constitutional protection in Canada. They exist, for the most part, at the pleasure of the provincial governments, which can deprive their citizens from their goods and chattels with little or no due process. After exposing the historical roots of property rights in the *Magna Carta* and their current situation in Canada, I will propose some ways in which property rights can be restored within the Canadian legal framework and preserved for future generations.

I. The *Magna Carta* and Property Rights

First-time readers of the *Magna Carta* will often gloss over the document's first nine or so clauses, for their language is even more archaic than the rest of the Charter and their relevance to modern societies seem to be nil. For who except the student of Medieval history can decipher the meaning behind clauses such as "If any of our earls or barons, or others holding of us in chief by military service shall have died, and at the time of his death his heir shall be of full age and owe relief he shall have his inheritance on payment of

the ancient relief”?¹ These clauses cover a wide range of seemingly disparate topics, from the guardianship of minors to the marital rights of widows, almost none of which seem to have any modern applicability.

Yet these provisions are among the *Magna Carta*’s most important clauses, and their placement at the very beginning of the documents indicates their outstanding importance. For they are all concerned with property rights, one of the central issues which led to the First Barons’ War and to the *Magna Carta*. In King John’s day, the ultimate title to all the land in England – the allodial title – belonged to the King, who granted usage rights to some of his subjects, called tenants.² That is, in a nutshell, feudalism. As feudal overlord, the King possessed extensive rights over his tenants, on the theory that that as the ultimate owner of the lands in the custody of his tenants, he had a right of ensuring that they were in good hands.

However, King John, like many of his predecessors, was in the habit of abusing his feudal rights over his tenants in order to extract additional revenues for the Crown. When one of his tenants died while his heir was a minor, the King had the right to appoint his guardian. Often, the latter would take this opportunity to enrich himself and the King by mismanaging the estates under his guardianship, so that by the time the heir reached his majority there remained little to his inheritance.³ In the case of widows, not infrequently the King would pressure a wealthy widow to marry one of his favourites; if she refused, he would sequester or ‘distrain’ her lands until she agreed to marry the man he had chosen.⁴ The barons were acutely aware that as long as the King was allowed to perpetrate these outrages, they would not be safe in the ownership of their property. Hence, guarantees against this type of abuse formed a substantial portion of the *Magna Carta*.

II. Property Rights in Canada Today: Constitutional *Terra Nullius*?

¹ *Magna Carta*, 25 Edw. I, c.9, s. 2.

² A comprehensive description of the English feudal system can be found in S.F.C. Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 1969), 88-100.

³ Scott L. Waugh, *The Lordship of England: Royal Wardships and Marriages in English Society and Politics, 1217-1327* (Princeton: Princeton University Press, 2014), 83-5.

⁴ Waugh, 85-7.

So much for the history, but what of the current situation in Canada? Uniquely among the main rights protected by the *Magna Carta*, property rights are wholly absent from the Canadian constitution. Equality before the law is protected by s. 15 of the *Charter*, jury trials by s. 11 (although in a circumscribed form), but nowhere are property rights mentioned. The omission was intentional: in the *Charter*'s first draft, there was indeed a provision protecting "the right of the individual to the use and enjoyment of property." However, the provinces, fearful that the clause would curb their eminent domain and taxation powers, managed to exclude it from the final version of the *Charter*.⁵ Later efforts to add property rights into the *Charter*, notably in 1991, failed as well, and property rights remain absent from the Constitution.

As a result, both the provinces and the Federal government have the power of depriving anyone of his property, with or without compensation, for virtually any reason. As the Supreme Court ruled in *Authorson v Canada* (2003), "Parliament has the right to expropriate property, even without compensation, if it has made its intention clear".⁶ In that appalling case, the Federal government had failed to invest properly the pensions 30,000 mentally-disabled veterans, violating its fiduciary duties to the latter. Whereas an ordinary trustee would have been liable to pay the lost income in its entirety, Parliament simply passed a law rendering itself immune from veterans' lawsuits to recover these sums, in effect expropriating hundreds of millions of dollars from veterans to whom the money was owed but never paid. It is difficult to imagine a more egregious instance of abuse of power than the government depriving disabled veterans from the money that was due to them; but as property rights are not protected by the Constitution, it was perfectly legal for the Federal government to do so.

The lack of protection for property rights also threatens other rights cherished by Canadians. For instance, it is a truism to say that Anglo-Saxon criminal law is based around the presumption of innocence

⁵ See Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms", *Canadian Journal of Political Science*, vol. 24, no. 2 (June 1991), 309-329.

⁶ *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 SCR 40

and that guilt must be proven beyond reasonable doubt. Such a right is implicitly guaranteed by section 39 of the *Magna Carta* and explicitly protected in the Canadian *Charter*. Yet, almost every Canadian province has passed civil forfeiture statutes, which allow for the government to seize private property allegedly used in unlawful activity, even when no conviction has been secured in a court of law.

In civil forfeiture proceedings, the standard of proof used is that of preponderance of the evidence. This means that private assets can be seized if there is a 51% probability that they were somehow connected to a crime, even if no criminal prosecution is ever undertaken. As an example, British Columbia's Ministry of Justice notes that "[civil forfeiture] proceedings are not commenced in court, they are an administrative process."⁷ In other words, procedural protections afforded to criminal defendants are all but absent in civil forfeiture cases. Add that to the B.C. Court of Appeal's ruling that under the provincial civil forfeiture law, "there is no requirement that [the] primary use [of what is forfeited] has been unlawful, or, is likely to be in future"⁸ and the fact that the Civil Forfeiture Office is funded through proceeds arising from civil forfeitures, the scope for governmental abuse under the *Civil Forfeiture Act* is virtually unlimited. Most provinces have similar statutes. Since property rights are not protected in the Constitution, the Supreme Court has found provincial civil forfeiture laws to be constitutional,⁹ so that the government retains the ability to destroy someone's life by seizing his assets on the flimsiest of evidence. Canadians, of whatever political stripe, should deplore such arbitrary exercises of governmental power.

III. What is to be Done? A Realistic Way Forward

At this stage, it would normally be the writer's duty to propose a solution to the evils which he has described in the paragraphs above. Obviously, the most logical solution to the lack of constitutional protection for property rights would be to amend the Constitution to add a provision to that effect.

⁷ British Columbia Ministry of Justice, "Civil Forfeiture in British Columbia", www.pssg.gov.bc.ca/civilforfeiture/ (accessed October 1st 2015)

⁸ *British Columbia (Director of Civil Forfeiture) v. Wolff*, 2012 BCCA 473

⁹ *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 SCR 624

However, to say so would be pointless, for it should be obvious that such an attempt must be condemned to failure, like all previous attempts at amendment. Under the Constitution's general amending formula, an amendment to the Constitution requires the agreement of the legislature of at least six provinces whose total population is at least half of Canada's population.¹⁰ The provinces were the forces which managed to exclude property rights from the *Charter* in 1982, and there is nothing to suggest that provincial governments have changed their minds since then about the topic. Indeed, as the flurry of new civil forfeiture laws would suggest, they are now even less inclined to support a proposal to protect property rights than before. For all practical purposes, amending the Constitution is a dead end.

The impossibility of enacting a constitutional amendment protecting property rights does not mean that nothing can be done. Indeed, a fixation on enacting a comprehensive solution to the problem at hand risks obscuring the many concrete and achievable steps that can be taken to improve the current situation regarding property rights. For instance, a concerted effort to repeal provincial civil forfeiture laws, or at least to introduce due process into the forfeiture proceedings, should be made. The *Criminal Code of Canada* already contains extensive provisions for the forfeiture of property connected to criminal activities, so that the repeal of provincial forfeiture legislation will not, as some will inevitably claim, protect criminals' ill-gotten gains.¹¹ In the United States, efforts by various campaigners have already led to substantial reforms of the Federal civil forfeiture programs,¹² and there is no reason to think that the same cannot happen in Canada if a well-run campaign against civil forfeiture legislation is mounted by civil rights organizations.

There is also an urgent need to build up cross-party consensus on the subject of property rights. In the 1980s, the Federal NDP's opposition to entrenching property rights in the Constitution helped to keep

¹⁰ *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 38.

¹¹ *Criminal Code*, R.S.C., 1985, c. C-46, s. 83.13 and s. 487.

¹² Robert O'Harrow Jr., "Holder announces new limits on civil asset forfeitures", *The Washington Post*, March 31st 2015.

them out of the *Charter*.¹³ Now that the NDP has officially renounced socialism by amending it out of its constitution, there exists an opportunity of building up cross-party support for property rights. Protection for property rights is far from being a uniquely right-wing idea. Indeed, the Universal Declaration of Human Rights, a document lionized by both Left and Right, states that “Everyone has the right to own property” and that “No one shall be arbitrarily deprived of his property.”¹⁴ Many Canadian Progressives, habitually eager to denounce any deviation by Canada from international norms, have not yet felt the need to attack confiscatory legislation in this country which contravene the UDHR, and they should be called out on their intellectual inconsistency in that regard. In sum, property rights are not an ideological creature of the Right, but are universal values which are core human rights. A movement that seeks to protect them has to reach out to, and rally, Canadians of all political persuasion in order to succeed.

Finally, none of the above can take place unless there is an organized movement dedicated to advance the cause of property rights in Canada. Currently, there are a few scattered groups fighting for better protection for property rights, ranging from realtors concerned about endangered species legislation to bicycle gangs protesting the seizure of their clubhouses.¹⁵ They are all fundamentally motivated by immediate self-interest, which means their efforts are not likely to gain traction with the bulk of the Canadian population, much less with governments. Only an organization which seeks to represent all Canadians on the issue can constitute an effective lobbying force for the cause, achieve real change, and overcome the collective action problem which afflicts most social movements. Such a body could model itself after the many civil liberty advocacy organizations which currently exist in Canada, which seek to preserve rights such as freedom of speech and of religion through litigation and awareness campaigns. Their

¹³ David Johansen, “Property Rights and the Constitution”, Library of Parliament Research Paper BP-268E, October 1991.

¹⁴ *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 17.

¹⁵ See for instance Sunny Dhillon, “Hells Angels challenge Civil Forfeiture Office in court”, *The Globe and Mail*, May 14th 2015.

efforts have proven to be successful, and they should serve as a template for an embryonic Canadian property rights' movement.

Postscript

The *Magna Carta* did not prove to be a durable settlement: the Pope annulled it by papal bull and both King John and the barons went to war again. Property rights continued to be abused by the Crown, notwithstanding the *Magna Carta*'s property rights provisions, which lay forgotten on the statute books. Four centuries later, Charles I's abuse use of wardship and levying of excessive feudal dues – practices which the *Magna Carta* explicitly attempted to eradicate – were among the most important proximate causes of the English Civil War. In fact, it was not until the *Tenures Abolition Act* of 1660 that these threats to private property were finally consigned to the dust-heap of history.

The fate of the *Magna Carta*'s property rights provisions tells us something important. There is no easy way to achieve victory in the struggle for rights, for there will always be powerful vested interests determined to protect their own interests and the *status quo*. In the *Magna Carta*'s case, it was the mighty English Crown, seeking to raise revenues with which it could wage foreign wars. Today in Canada, it is still the Crown, or rather the eleven Federal and provincial governments which only bear a nominal connection with Her Majesty, which seek to extract as much as possible from their subjects. Winning the fight for property rights will require determination, unity of purpose, and patience. But it is a battle well worth fighting.