

Constitution Act, 1982

given a substantive as well as a procedural connotation. Due process has involved the American courts in assessing the substance of legislation. In the early years of this century, the American courts frequently challenged legislation on due process grounds.

Members may recall the case of *Lochner versus New York*, an early leading case in which the United States Supreme Court struck down a statute prescribing maximum weekly and daily hours of work for bakers on the grounds that it affected the deprivation of property rights without due process of law.

The American courts also applied a substantive due process of law doctrine to invalidate statutes relating to minimum wages and child labour.

Women's groups have expressed the fear that Canadian courts might adopt a substantive due process approach to property and other rights and they worry that on such an approach important reforms in the interest of women will be put at risk. Most Canadian courts have so far taken the view that fundamental justice refers to procedural due process only. That accords with the views expressed during Parliament's consideration of Section 7 of the Charter. Women's groups have taken the position that a substantive due process interpretation cannot be ruled out and, indeed, in two recent Superior Court decisions, the courts have suggested that the protections afforded by Section 7 of the Canadian Charter of Rights and Freedoms and fundamental justice specifically, may be more than procedural.

That question is now pending before the Supreme Court of Canada, and I shall therefore not go into further detail on that legal issue. However, if the courts were to adopt a substantive due process approach to property rights protections, women's groups are afraid that socially progressive legislation such as matrimonial property laws might be struck down by the courts on policy grounds as restrictions on the property rights of spouses. The provinces are similarly concerned, we have heard, that a substantive due process approach might endanger these and other important pieces of provincial legislation.

Women's groups are also concerned about the hardship and the cost of judicial review of family laws under property rights guarantees. Their view is that the cost and the burden of judicial review would fall on individual women. They point out the so-called "persons" case, a case that we all know and admire so much. In 1928, the "Famous Five" had to fight hard and finally appealed to the Privy Council to determine that women were indeed persons for the purpose of being appointed to the Senate.

The point that is made on behalf of women is that there is a financially limited capacity to individual women to take on these cases. Their concern is that important test cases would have to be mounted to determine the scope of entrenched property rights and their application to newer controls on individual property rights. The argument is that the cost and hardship of constitutional litigation would fall on those who are least able to bear it.

I would note that women's groups have acknowledged the positive aspects of the entrenchment of property rights. They have suggested that if property rights were entrenched, procedural property rights guarantees could be beneficial to women under a broad interpretation of property. They have taken the position that a broad interpretation of property might include interests in such things as social benefits. The property in such benefits would be premised on the expectations that arise from social assistance legislation. Under this interpretation, recipients could not be deprived of such benefits except by procedural due process.

Again, in the United States, the Supreme Court has on a number of occasions applied the due process clause of the U.S. Constitution to protect that so-called new property. The Supreme Court has held that an expectation of academic tenure, a driver's licence and disability benefits are property interests deserving of protection under the due process clause. It seems that women's groups might be more favourable to the entrenchment of property rights if "property" were given a broad interpretation along the lines of the American example, an interpretation which would provide protections in respect of social benefits received by women.

Women's groups as well as other groups and provinces have sincere concerns about the effects of entrenching property rights. We have an obligation to take their views into account and to seek, if possible, a consensus on this matter. Even if it is not possible to achieve unanimity, in the spirit of consultation and conciliation, we should make an effort to reconcile those with different views.

My Party is committed in principle to the entrenchment of property rights, but we cannot do so hastily and without reflection on the possible impact of such constitutional amendments on the interests of over half of the population. There are important and legitimate concerns that the Government needs to address over the first portion of its mandate. I look forward to the opportunity of discussing this matter not only in Private Members' Hour but on future occasions when it comes forward.

Mr. Deputy Speaker: The hour provided for the consideration of Private Members' Business is now expired.

● (1800)

PROCEEDINGS ON ADJOURNMENT DEBATE

[English]

A motion to adjourn the House under Standing Order 45 deemed to have been moved.