MCH91-113-3-1

Memo To: Aninka Claassens ANC LCC working group.
From: Ronalda Murphy
Date: July 19, 1993
Re: Constitutional Issues Regarding the Proposed Provisions Affecting Land

DRAFT ONLY

This memo explains why a differential treatment of the "right to property"[1] and a claim to restoration based on deprivation of land because of apartheid policies has problematic legal ramifications as well as obvious moral and political ones. In Part elaborate the theoretical framework in which this issue must be understood and hc current proposals for interim/future protection of property would function. jurisprudence under the Canadian Charter of Rights and Freedoms to illustrate the chal that an unequal status of claims necessarily leads to. In Part Two (forthcoming tc propose responses for you to consider and indicate their relative advantages in legal Attached is a memo from Jonathan Klaaren detailing the issues which arise reg administrative law. I also attach a recent article from a Canadian law professor that e the extent to which courts have or have not been deferential to the decisions of the Ca Human Rights Commision and Tribunal. If a land resoration agency is establishe statute (as opposed to the constitution), it would likely be in an analogous legal posi relation to the courts.

PART ONE: THE CONSTITUTIONAL FRAMEWORK

A. THEORETICAL

The term "rights" must be understood as encompassing a variety of claims, not all of which are equal to one another. Whether a particular right is effective as against another claim is determined in the first instance by the source of the right itself. The key concept to hold in place in this discussion is the doctrine of constitutional supremacy. Essentially, any right that is derived from the constitution has primacy over any other claim that is derived from any other source. The rights and freedoms contained in the Constitution trump all other rights of freedoms, wherever derived, as long as the provisions of the constitution are applicable.[2] This means at a minimum that no act or practice of the state can be inconsistent with the constitution. If a right granted in a statute is contrary to, or insufficiently protective of, a right contained in the constitution, then the person or group holding the constitutional right is entitled to have the statutory provision that impairs the constitutional right either

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[1]By "property" in this part I refer to land owners. The situation becomes even more complicated if a wider definition of property is employed because more constitutional rights are involved.

[2]The application section in all the drafts that I have read is very wide, including application to non-state action where "appropriate".

declared invalid or interpreted in a way that is adequately respectful of the constitutional right. All claims are thus subservient to constitutional claims. This is true even for rights that are granted in a statute protecting human rights.[3] Another key point to keep in mind is that none of the constitutional provisions can be read in isolation. This will be important in considering alternative proposals to deal with the concerns of the Land Claims Court Working Group. Generally, any clauses regarding land and property and the procedures for determining allocation, restoration and compensation must be consistent with other, and usually more general, clauses in the constitution. Thus if there is a clause granting judicial review in the constitution, a particular statute cannot oust the courts from interfering with administrative agency proceedings. As well, other rights can come into play in a particular context. An example would be the vulnerability of a statutory exclusion of the press from an administrative agency proceeding to a challenge based on a violation of freedom of the press.

The second principle is that where an administrative agency is interpreting constitutional rights (assuming that the agency is determined to be allowed to interpret constitutional claims, a complex question itself)[4], there is less basis for the courts to be deferential. Interpreting constitutional rights is the essence of the judicial function; administrative agencies do not necessarily have expertise in constitutional analysis that courts will recognize. In any event, because of the principle of constitutional supremacy discussed above, any administrative agency decisions that interpret constitutional as opposed to merely statutory provisions must necessarily be reviewable by the highest court in charge of ensuring the constitution has been adhered to. The difficulty here is in determining the standard under which courts will review administrative decisions for compliance with the constitution as opposed to compliance with the agency's governing (jurisdiction-granting) statute. This is a novel and confusing point that has not given rise to much case law until very recently.[5]

Cases illustrating the principle of constitutional supremacy and the primacy of constitutional provisions over any others:

a. Conflict between constitution based and statute based substantive rights:

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[3]see the cases discussed under Part One, a, Blainey and Manitoba Council of Health Care Unions, infra.

[4]I believe that the National Labour Relations Board in the United States does not have the power. The situation is Canada is different. This is an enormously complicated legal point that requires further analysis. I think it is safe to assume that administrative agencies are required to apply the rights contained in the constitution but they may not be considered competent to award remedies for breach. That turns in part on how the remedial clause in the constitution or interim bill of rights is drafted.

[5] See the text of footnote 11. There are compelling arguments on both sides of this issue. See the discussion in J.M. Evans, "The Principles of Fundamental Justice: The Constitution and the common Law" (1991) 29 Osgoode Hall Law Journal 51. This article preceded the decision in Chuddy Chicks, infra.

In Re Blainey and Ontario Hockey Association[6] Justine Blainey was prevented from playing on a boy's hockey team. Her mom went to the Human Rights Commission of Ontario to file a complaint. The Commission was established under the Ontario Human Rights Code and is charged with the mandate of investigating complaints and enforcing the rights contained in the Code. Human Rights Codes in Canada apply to "private", or non-state actors who discriminate in the provision of accommodation, services or facilities. The Ontario Code at issue specifically prohibits sex discrimination with respect to services and facilities. However, the Commission said that it had no jurisdiction over the complaint because the another provision Code allowed for an exemption from the right to sexual equality "where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex[7] The Charter has a right to gender equality that does not contain a similar exemption.[8] Justice relied on the Charter as a superior constitutional right and the Court ruled that the section in the Code containing the exemption was in violation of the Charter and it was declared to be of no force or effect.

The principle is also illustrated in Manitoba Council of Health Care Unions v. Bethesda Hospital.[9] A province passed a statute to establish pay equity[10] in education and health care facilities. However, a clause restricted the ability of the affected parties to implement pay equity by banning a reduction in wages to any group that were being advantaged by non-pay equity practices (i.e. male dominated jobs) and by restricting the amount of adjustment that employers could made to achieve pay equity. This statute was enacted with clause that gave the Act primacy over any other statutes (i.e. over that province's Human Rights Code). Under the Pay Equity Act parties that were unable to agree on implementation were required to refer the matter to the Manitoba Labour Board, an administrative agency. The Board ordered that the scheme be implemented in accordance with the restrictions in the Pay Equity Act. The groups representing the affected employees brought an application for judicial review an argued that the Pay Equity Act's restrictions were inconsistent with the provisions of the Charter. The court held that one of the Pay

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[6]26 D.L.R. (4th) 728 (Ontario Court of Appeal) leave to appeal to Supreme Court of Canada refused, [1986] S.C.R. xii.

[7]Ibid, at 735, s. 19(2) of the Code.

[8]s. 15. The only possible limit is through application of the general savings clause in s. 1 which allows for limitations that are demonstrably justified in a free and democratic society.

[9]88 D.L.R. (4th) 60 (Manitoba Queen's Bench). It is likely that an appeal was launched but I am unable to check that in this library.

[10]This was defined in the Act as "...a compensation practice which is based primarily on the relative value of work performed, irrespective of the gender of employees, and includes the requirement that no employer shall establish or maintain a difference between the wages paid to make and female employees, employed by that employer, who are performing work of equal or comparable value."

Equity Act's restrictive clause violated the superior right to gender equality in the Charter.[11]

b. Conflict between constitutional procedural rights and statute based procedural rights:

Section 7 of the Charter grants a right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Individuals seeking refugee status under the Immigration Act challenged the procedures under which their claims were adjudicated as being in violation of their s.7 rights. The Supreme Court of Canada held that given the nature of the claimant's interest, fundamental justice required that in tribunal proceedings where credibility was at issue, and where it was important for the claimant to know the case she has to meet, a oral hearing is required.[12] This decision has an enormous effect on the immigration process by greatly increasing the amount of state resources that have to be directed to the refugee determination process.[13]

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[11]The Court was very uncertain about how to deal with the judicial review of the board's decision. The general principle is that a court will interfere with the decision of an administrative agency on the ground that the agency exceeded its jurisdiction if it errs in a "patently unreasonable manner". The dilemma is that this standard of review was pre-Charter and if the Charter is really supreme, then agencies have no scope for anything other than a correct interpretation of the Charter. Noting that there was no case law (obviously Chuddy, see infra, had not been cited), the judge stated that he didn't need to deal with the issue since he was declaring the obnoxious statutory provisions invalid, but he made the following point which is useful to bear in mind (at 71): "In the final analysis, however, the provisions of [the right to equality] are so important, that where a statute admits of two possible interpretations, it would be patently unreasonable for an administrative tribunal to interpret the statute in a manner that creates or perpetuates discrimination."

[12]Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 655, per Wilson J..

[13]It is noted in one article:

> This decision has had the unintended consequences of creating a backlog of 124,000 refugee claimants, an amnesty for 15,000 claimants already in Canada, $179 million in additional costs, and a new refugee law that some critics say is more unfair than the original one. The new refugee law took effect 1 January 1989. Eighteen months later, the government announced that the new Immigration and Refugee Board would quadruple its capacity to keep up with applicants. This would allow the Board to hire an additional 280 public servants (to add to the present 496) at an additional cost of $20 million. This increase brings the annual budget of the new Board to $80 million.

See F.L. Morton et al, "The Supreme Court of Canada's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall Law Journal 1.

c. Conflict between constitutionally derived substantive rights and statute based procedural rights:

Legislation provided for the Director of Investigation and Research of the Restrictive Trade Practices Commission to apply for orders compelling corporations and individuals to give oral testimony and produce business documents in relation to an inquiry being conducted for violations of the Combines Investigation Act. The individuals and corporations against whom these orders were issued challenged the law on the ground that it violated the right to be free from a deprivation of liberty (i.e. compulsion to testify) except in accordance with the principles of fundamental justice (s. 7 of the Charter) and the right to be free from unreasonable search and seizure (s. 8 of the Charter). The Supreme Court of Canada ultimately upheld the law, but different judges found different violations of the rights at issue. Some of the violations were found to be permissible because of the savings clause in s.1 of the Charter,[14] while others were held to not be reviewable because of a defect in the appeal process by the claimants. One judge would have struck down the law.

d. Conflict between constitutionally derived procedural rights and statute derived substantive rights:

An illustration of this is afforded by the well known decision of the United States Supreme Court in Goldberg v. Kelly.[15] At issue was the constitutionality under the due process clause of the suspension of welfare benefits pending an oral hearing to made a determination as to whether benefits would be terminated. Welfare benefits are based on a statute and not the constitution. The due process is a constitutionally based right to fair procedures (i.e. no person may be deprived of life, liberty, or property without due process of law). The Court held that the privilege of welfare benefits triggered the due process clause and that suspension was a form of deprivation of such magnitude that recepients were entitled to "a hearing before an impartial judicial officer, the right to an attorney's help, the right to present evidence and argument orally, the chance to examine all materials that would be relied on or to confront and cross-examine adverse witnesses, a decision limited to the record thus made and explained in an opinion."[16]

e. Standard of court review of administrative agency decisions concerning the constitution.

In Chuddy Chicks Ltd. v. Ontario (Labour Relations Board),[17] a unanimous Supreme

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[14]This clause allows for limits on rights as long as they are demonstrably justified in a free and democratic society.

[15]397 U.S. 254 (1970), as discussed in Peter Strauss, An Introduction to Administrative Justice in the United States (1989) at 38-43.

[16]Ibid at 39.

[17](1991) 50 Administrative L. R. 44 (S.C.C.) as cited by Alison Harvison Young, "Keeping the Courts at Bay: The Canadian Human Rights Commission and its Counterparts

Court of Canada stated that in the context of judicial review of the decision of a labour tribunal, the board "could expect no curial deference with respect to constitutional decisions."[18]

B. APPLICATION TO THE CURRENT PROPOSALS

1. In the Technical Working Group Proposal, there is a general right to property that attaches to everyone, and there is a right in the state to expropriate in the public interest and on certain terms of compensation.[19] There is no countervailing constitutionally based right to restoration; nor is there provision for a statutorily based claim to restoration. As a result, any attempt by the state to recognize restoration claims will be unconstitutional unless that attempt is sufficiently respectful of the right to own property and of the limit on the state's ability to expropriate except in accordance with the terms set out in the constitution. The only exception will be cases where the court determined that the violation is justified under the general "savings clause", i.e. the clause that states limitations that are "necessary and reasonable, and justifiable in a free, open and democratic society" and which do not "negate the essential content of the right or freedom in question."[20] To appreciate the type of constitutional challenges that this provision may generate, we can consider the following scenarios. Note that challenges to statues appear to be immunized during the interim period in the sense only that the Draft seems to preclude declarations of invalidity except in a special court set up for that purpose.

Assumption: the interim or next elected government does not enact a statute providing for claims to restoration, but enacts an expropraition statute.

Analysis: Thus there is only one right (the property owner's) and it can only be limited as provided for in the constitution itself. If the state makes no such provision, there is no claim at all in current law and thus no basis in law for people to come forward to the courts or to

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in Britain and Northern Ireland: Some Comparative Lessons" (1993) 43 University of Toronto Law Journal 65, attached. I do not have a copy of this case but will ask the library to order it as soon as possible.

[18]Ibid., at 28, per La Forest J. at 56

[19]These terms are contested, but regardless of how they are defined, the constitutional problems I refer to remain the same as long as there is a constitutionally derived right to property set up against an inferior right to restoration.

[20]This is the wording in the Technical Working Group's proposal, see clause 30. It is also in the ANC's draft Bill of Rights (it has slightly different wording, see Article 15 (2)) and thus would likely be in any interim and later created Bill of Rights.

the political process and demand recognition.[21] In any event, there is no place or institution for them to make their claim to. Any state-initiated effort (whether legislative or administrative, referred to here as "state action") concerning land (excluding a right to restoration statute that I deal with later) will be met by constitutional challenges on the following grounds:

(i)the state action violates the right to own property.

The only state action that would survive this challenge is state expropriation as defined in the constitution. Any other action will be inconsistent with the right to own property. Since we envisage expropriation as the main social context, we need not worry too much about this challenge.

(ii)the state action violates the right to be free from expropriation except as set out in the constitution.

A statutory scheme that creates a mechanism through which the state determines that certain land will be expropriated on terms other than that provided in the constitution it will be violative of the constitution. First, if the state is only allowed to expropriate on terms such as "the public interest" then a court (meaning any court competent to hear constitutional challenges to laws) may well interpret that term in a manner than restricts what land the state may seek to expropriate. On the other hand, it may defer to the state as to what constitutes the public interest. At a minimum, the state will be required to substantiate its assertion of public interest.[22] It is possible that every single expropriation could be challenged in court for compliance with this criteria. Second, if the constitution uses "just and equitable," for example, then that is the only measure for compensation available and anything less than that will generate a constitutional violation. If the constitution provides for factors to be considered in determining "just and equitable," there is less room for challenge as long as the statute provides for the same factors and those factors are in practice adhered to. Any disparity between the constitutional factors and the statutory factors will result in the latter being read so as to be consistent with the former, and if there is incompatability, then the law could be struck down. Finally, if the state establishes a mechanism for the determination of land expropriation and excludes existing property owners from that process of decision making, it is <u>arguable</u>[23] that

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[21]Obviously there is a morally-driven claim but that is of limited value in any arena.

[22]Add cite to the Canadian case where for s.1 you need state evidence though needn't be terribly much. Post-Oakes decision.

[23]"Arguable" because it could be said that as long as the constitution provides for compensation, <u>determined by a court of law</u>, (which I note even the ANC has in its response document) the property owner is protected at the end of the road. In other words, there is

that mechanism is insufficiently protective of the constitutional right to own property and thus the property owner might have a right to be heard at all stages of determination.

(iii)the state action violates other rights in the constitution.

If the state action establishes a mechanism for determining what land is to be expropriated that mechanism must conform to any other rights in the constitution that provide, for example, a right to fair process or natural/fundamental justice. As a general rule, a constitutionally protected right is entitled to fair process protection such as a right to present a position, to be free from a biased decision-maker etc. (see Jonathan's memo). A free-standing right to property, as opposed to a right to compensation for expropriation would definitely generate protection. If there is merely a right to compensation for expropriation, then it is less likely that fair process rights in the constitution could be triggered.[24] To illustrate, in the Technical Working Group Proposal, two clauses might be relevant in addition to the property rights clause. Clause 18 states that "Every person shall have the right to have disputes settled by a court of law". If this were enacted, then it would be impossible to exclude the courts from expropriation disputes, whether on compensation or other issues. In addition, clause 20(1) states: "Every person shall have the right to lawful and procedurally fair decisions." This means that at a minimum, if any administrative agency is set up, judicial review for the administrative agency's compliance with the law and with the principles of fair process is mandated. It does not, however, mean that a certain right need only have this type of protection; as noted, the right to property generates substantive review and not merely procedural safeguards.

Conclusion: this type of scenario opens up the entire process regarding land allocation and holding to massive legal challenge and uncertainty. It would result in a number of difficult constitutional challenges. It significantly hampers the ability of the state to undertake significant reform.

2. The ANC draft property clause (in the fax sheet) drops the free standing right to property and converts it to a right to be free from compulsory expropriation by the state. The clause also states that the terms of expropriation must be prescribed by a law which must provide

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no right to be free of expropriation (thus loss of ownership), merely a right to certain compensation.

[24]Note that fair process rights can be triggered outside the constitution. If the expropriation mechanism is at all like an administrative agency, natural justice/duty of fairness standards would likely attach.

for "appropriate compensation which shall take into account the public interest, available public resources, the circumstances of the prior acquisition and the use of the property as well as the interests of the party or parties affected by the acquisition." It also mandates that a tribunal, with explicit constitutional recognition, be established to determine compensation but not exclude the right of the courts to hear an appeal from any amount awarded.

Assumption: the interim or future government again makes no provision for a right of restoration but does enact an expropriation statute.

Analysis: The state is not required to act only in the public interest. There is only one right, and it is the right of a property owner, but it is a much more limited right. However, it is a right which can be claimed at two locations: the tribunal and the courts (any courts deemed competent to hear constitutional matters). There is no basis for a claim on behalf of those seeking restoration. Only pressure on the political process can cause the government to seek to expropriate certain land. The following challenges could be generated by property owners:

(i)the enacted statute does not comply with the terms of the constitution (a claim made by owners before any court competent to hear constitutional matters).

This is not a viable appeal provided that the statute follows the text of the constitution exactly.

(ii)the tribunal's application of the factors does not result in "appropriate" compensation.

This claim can be made at all levels. Because of the nature of the interest at stake, it is likely on administrative law principles that the tribunal cannot exclude the property owners from their deliberations. In addition, the constitution itself ensures appeals from the tribunal determinations. However, it seems that only a hostile constitutional court would make a ruling that interpreted "appropriate" to mean market value, especially since it is not even a factor that is mandated. Nonetheless, this could result in a case-by-case tribunal and court procedure that would delay the land restoration process significantly. Indeed, it makes little sense to have the tribunal at all as it is more than inevitable that all orders will be appealed.

Conclusion: this situation has the advantage of a restricted right to property that amounts to a right to appropriate compensation. Given the redistributive potential of such a narrow right, the disadvantages may not seem significant. It frees the state as well from a public interest precondition. The main problem is that the tribunal is ineffective, there is no basis for deference to it by the courts, its decisions are fully appealable by any competent court on the merits of the award, and moreover the tribunal does not act as an institution that claims for restoration can be made to. If there was a countervailing right of restoration, the tribunal might have some benefit, but the availability of full appeal remains a handicap in the process.

3. The Land Claims Court Working Group Proposal envisages that a statute provides for land restoration by creating an entitlement such as "people who lost land or rights to land as a result of apartheid policies, practices or laws, and who were not adequately or effectively compensated, are entitled to the restoration of their land." This entitlement is administered through a tribunal/commission or a court.

Assumption A: this is matched by a constitutional right to property, similar to the one proposed in the Technical Working group, thus a right to property and a right in the state to public interest expropriation as long as there is just and equitable compensation.

Analysis: here one right is a constitutional one (the property owner's) and the other is based on statute (those who meet the entitlement criteria). Thus the property owner's rights will trump in situations of conflict. The following challenges are available to the property owner:

(i)the land restoration act violates the right to property and the limits imposed on the state regarding expropriation.

> This challenge is tenable against any agency and any determination of the matter is appealable whether the Act provides for it or not. At one level, the right to restoration is in direct conflict with the right to property. The challenge would argue that such an Act violates the public interest by gutting the right to property to any meaningful protection. It would come immediately and could result in the entire statute being struck down. The failure to elevate the claims to restoration to equal status with the right to property makes this attack inevitable. However, the constitution does provide for state expropriation and a statute allowing for expropriation is thus permissible. To succeed on a full frontal challenge to the scheme as a whole a court would have to be willing to say that the right to property precludes state creation of new property rights which is a bit far fetched. The real conflict is with respect to compensation. Only if the the measure of compensation is the exact same in both the constitution and in the Land Restoration Act, i.e. just and equitable, would the challenge fail. Of course, there is not much point in having a Land Restoration Act if the compensation has to be just and equitable in any event.

(ii)the Land restoration Act fails to provide sufficient procedural safeguards to ensure that the right to property is adequately protected.

> There is no way that the property right holders, who have a constitutional claim, could ever be excluded from meaningful participation in any administrative process. While oral evidence is not necessarily required in tribunal proceedings, where one of the affected parties has a constitutional right at stake, it may well be that an oral hearing would be necessary to

ensure adequate protection of that superior right. The right to property trumps any statute, and a court might well find that an agency set up under a statute that has the purpose and effect of affecting property rights to the extent of expropriation could not conceivably limit judicial review to excess of jurisdiction or unfair procedures. In any event, under the technical Working Group's proposal, (and under the ANC response) the property owners have a constitutional right to an appeal on the measure of compensation.

Assumption B: the land restoration act is matched by a constitutional right to appropriate compensation as per statute (the ANC draft proposal)

Analysis: This has the advantage of weakening the nature of the property right significantly. The disadvantage is in the inability to immunize the tribunal process by regular appeal to a court of law, thus making speedy resolution of land claims impossible. There is really only one constitutional argument available:

(i)the statute is inconsistent with the terms of compensation established in the constitution

This is an argument that a property owner can make and it is directed at the wording of the statute and not its application to a specific set of facts. This is a simple factual case: if it is inconsistent, the law is unconstitutional; if the terms are the same, the statute will be safe. The ANC draft and the Land Restoration clauses regarding restoration are sufficiently similar except on the issue of appellate control on the award of compensation. Again, the terms in the Constitution would prevail and appellate control (as opposed to mere review for process and jurisdiction) would have to be included. This has the practical effect of having the issue of compensation tied up in the courts on a case-by-case basis.

Assumption C: the land restoration act is matched by a statutorily derived right to compensation for expropriation as determined by either the courts or a tribunal (ie nothing is in the constitution regarding property, land restoration, or expropriation).[25]

Analysis: This creates two rights, each derived from statute. No constitutional claims can be made except for claims to fair process before administrative tribunals, if there is a provision to that effect in the constitution. Any legislative determination as to the measure of compensation is free from appeal in the courts as to the criteria. Obviously the two statutes would have to be consistent with one another or else a court will find a way to read them together. Because of the high regard for property at common law, inconsistencies would be

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[25]Note that I return to this scenario as a possible resolution in Part Two.

treated in the manner most favourable to the existing property rights holder. Courts may of course ensure that in a particular case the law was applied but they could not change or strike down any such law. In the absence of a constitutional provision allowing for judicial review on jurisdiction and fairness, only general administrative law rules apply.