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# Common Law Property Theory and Jurisprudence in Canada

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*In recent years, property theorists have offered varying accounts as to what exactly ownership is, typically focusing on one or more key rights to the owned thing. However, most of these theories are articulated in the abstract and do not engage the jurisprudence. This article uses the jurisprudence concerning expropriation and adverse possession to show that Canadian courts have in fact developed their own definition of ownership—one that is not reflected in the property theory discourse. The author goes on to argue that this narrower definition of ownership—made up by the rights to exclude and to primary use—is preferable to those offered by the property theorists, as it better balances the competing interests of owners, non-owners and the state.*

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## Introduction

### I. Property in Theory: More than Exclusion

### II. Property in Court: The Importance of the Primary Use

### III. Property Lessons: From Jurisprudence to Theory

## Conclusion

# Introduction

Property theory has been booming for over two decades.<sup>1</sup> The key tenets of property theory have been debated, and multiple theories—each offering a different definition of property—have emerged. These attempts to define what is really at the core of property typically focus on one or more of the rights that theorists claim are essential to ownership.<sup>2</sup> These theories are relatively abstract, with little reference to actual case law, though some scholars insist that they are trying to develop a theory of property, or ownership, that fits the law, or that seeks to explain property as a legal practice.<sup>3</sup> Such claims appear to be the exception rather than the rule, and it is not clear that the turmoil in property theory has been reflected in the jurisprudence or, more importantly, what theory of property dominates the jurisprudence.

In this article, I examine recent developments in property theory and argue that Canadian jurisprudence offers a superior definition of what property is—the essence of which is the right to exclude others and the right to existing uses of the property. This alternative definition, I argue, allows the balancing of the rights of owners, non-owners and the state in better ways than those offered by mainstream property theory. Part I focuses on the changing shape of property theory. In particular, I focus on

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1. See Hanoch Dagan, *Property: Values and Institutions* (Oxford: Oxford University Press, 2011) at xi; Amnon Lehavi, *The Construction of Property: Norms, Institutions, Challenges* (Cambridge, UK: Cambridge University Press, 2013) at 2.

2. The question of how well property theory engages with non-ownership is beyond the scope of this article. With respect to how ownership is defined, Avihay Dorfman differs from the majority discussed in this article and focuses on the core *power* of owners, not rights. This is further examined below. See Avihay Dorfman, “Private Ownership” (2010) 16:1 *Leg Theory* 1 at 17.

3. See Christopher Essert, “The Office of Ownership” (2013) 63:3 *UTLJ* 418 at 450; Lisa M Austin, “Possession and the Distractions of Philosophy” in James Penner & Henry Smith, eds, *Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2013) 182 at 184.

theorists who are concerned with defining what property *is* rather than what it should *do*—those who are more interested in the how of property than its outcomes.<sup>4</sup> These theorists are generally known as essentialists, as they are attempting to determine what is essential to property. They are not concerned with justifying why we have property, rather they seek to explain what property *is*, and so they rarely engage with whether or not property interests are legitimate.<sup>5</sup>

In Part II, I discuss the definition of property offered by the Supreme Court of Canada in *Canadian Pacific Railway v Vancouver (City)* (*CPR*).<sup>6</sup> I argue that this definition echoes that seen in earlier cases, and that it offers an alternative definition to that of property theorists. In particular, I focus on two types of cases: those about regulatory takings—or de facto expropriation as it is called in Canada—and those about adverse possession. My reason for focusing on these types of cases is that both require the courts to comment on when a property right, particularly ownership, has been transferred from one person to another or to the state. As such, each type offers a window into how the courts understand and define property, particularly ownership of property. Part III examines how the theory and the jurisprudence fit together. Although there are similarities in how the courts and the theorists define ownership, the courts' definition is fairer and more predictable. Both theorists and courts recognize the importance of the right to exclude and the right to use, but the courts have only extended protection to existing uses, while mainstream property theorists believe owners should have wide discretion over how their property is used. I conclude by recognizing that although jurisprudence offers a narrower definition of property, it provides for a better balance between the competing interests of owners, non-owners and the state.

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4. See Jane B Baron, “Rescuing the Bundle of Rights Metaphor in Property Law” (2014) 82:1 U Cin L Rev 57.

5. That is not to say their work does not implicitly rely on certain kinds of political arrangements. See Joseph William Singer, “Property as the Law of Democracy” (2014) 63:6 Duke LJ 1287 at 1300.

6. 2006 SCC 5, [2006] 1 SCR 227 [*CPR*].

## I. Property in Theory: More than Exclusion

While there is significant disagreement over what exactly property is, it is generally accepted that property law is a way of managing resources.<sup>7</sup> As such, property law must contain rules about who can use what things for what purposes and for how long they may use those things. The observation that many different rights can exist in a single piece of property is trite but true; not all property rights will necessarily be united in the owner. The problem facing property theory is how to capture the various rights that can exist in property law. Traditionally, the multiple property rights have been illustrated via the “bundle of rights” theory. However, there has been increasing dissatisfaction with this theory.<sup>8</sup> My goal is not to offer a complete history of property theory, and so my discussion in this Part focuses on the essentialist property theorists who began to write in the 1990s. Some essentialist work occurred before then, but it was not until the 1990s that the modern backlash against the bundle of rights theory snowballed.<sup>9</sup> This Part begins with a brief overview of the bundle theory before examining critiques of, and proposed alternatives to, the theory.

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7. See e.g. Thomas W Merrill, “The Property Strategy” (2012) 160:7 U Pa L Rev 2061 at 2062 [Merrill, “Property Strategy”]; Henry E Smith, “On the Economy of Concepts in Property” (2012) 160:7 U Pa L Rev 2097 at 2104; David Lametti, “The Concept of Property: Relations *Through* Objects of Social Wealth” (2003) 53:4 UTLJ 325; Gregory S Alexander, *The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (Chicago: University of Chicago Press, 2006) at 5; Yonatan Even, “Appropriability and Property” (2009) 58:6 Am U L Rev 1417 at 1421.

8. See e.g. Kenneth J Vandevelde, “The New Property of the Nineteenth Century: The Development of the Modern Concept of Property” (1980) 29:2 Buff L Rev 325; Baron, *supra* note 4 at 58–67; Jeanne L Schroeder, “Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property” (1994) 93:2 Mich L Rev 239.

9. See e.g. JE Penner, “The ‘Bundle of Rights’ Picture of Property” (1996) 43:3 UCLA L Rev 711 [Penner, “Bundle of Rights”]; JE Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) at 1 [Penner, *Idea of Property*]; Thomas W Merrill, “Property and the Right to Exclude” (1998) 77:4 Neb L Rev 730 [Merrill, “Right to Exclude”]. This list is not exhaustive.

Although there is some disagreement surrounding the origins of the bundle theory,<sup>10</sup> Tony Honoré has offered perhaps the clearest discussion of it in his essay on ownership.<sup>11</sup> Put simply, the bundle theory posits that there are several rights a person can have in relation to a piece of property, and that multiple people can have rights—though not necessarily identical rights—to the same piece of property. The bundle theory implies that these rights are severable and does not explain how or if these rights relate to one another. As such, it is relatively skeletal and has been described as nothing more than “an elaboration of the scope of action that ownership provides”.<sup>12</sup> This description is slightly unfair. The bundle theory was never meant to be just a discussion on the rights of owners. It was meant to delineate the various rights that can exist in a single thing—not all of which may be united in a single rights holder.

The potential for multiple rights holders allowed the bundle theory to become linked with the idea that property was really about individuals’ relationships with each other rather than being about the right to a thing. This “dephysicalization” of property is usually attributed to the work of Hohfeld and the legal realist movement.<sup>13</sup> Hohfeld understood property as a set of legal relations rather than being about things, and this idea was built upon by subsequent scholars so that any entitlement could, at least in theory, be considered property.<sup>14</sup> The idea that property is really a relationship has come under sustained attack along with the bundle theory for failing to grasp the thingness of property,<sup>15</sup>

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10. See Richard A Epstein, “Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property” (2011) 8:3 *Econ J Watch* 223 at 225; Baron, *supra* note 4 at 60.

11. Tony Honoré, “Ownership” in Tony Honoré, ed, *Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987) 161 at 161–68.

12. Penner, “Bundle of Rights”, *supra* note 9 at 741.

13. See e.g. Vandeveld, *supra* note 8 at 329–30, 359–61, referring to Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23:1 *Yale LJ* 16; Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26:8 *Yale LJ* 710.

14. See e.g. CB Macpherson, “Liberal-Democracy and Property” in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 199.

15. See Vandeveld, *supra* note 8 at 329; Craig Anthony Arnold, “The Reconstitution of Property: Property as a Web of Interests” (2006) 26:2 *Harv Envtl L Rev* 281 at 292; Even, *supra* note 7 at 1419.

threatening to reduce property to mere nominalism<sup>16</sup> and its disaggregation of property.<sup>17</sup>

James Penner squarely linked the dephysicalization of property with the bundle of rights theory<sup>18</sup> and argued that the bundle theory was not a theory at all.<sup>19</sup> He said that the bundle theory “multiplies elements of property to produce an explanation which is actually inferior to one which regards it as a unified legal relation”.<sup>20</sup> In other words, it seems to make every valuable entitlement into property, a tendency that Penner blamed on economists.<sup>21</sup> Other property theorists have also echoed these arguments—that the bundle theory “is more of a description than a theory”<sup>22</sup> and that economic scholarship has failed to “take property more seriously”<sup>23</sup>—as they too seek to offer a better understanding of property.

In response to the failures of the bundle of rights theory, alternative theories typically look to one core right or try to lump several rights together. Of all the rights in the bundle, the right to exclude is the one most often relied upon as being the core, defining right of property—with property typically meaning ownership.<sup>24</sup> Thomas Merrill’s argument that the right to exclude is the *sine qua non* of property is perhaps the most famous articulation of the centrality of this right to property.<sup>25</sup> Certainly it is the most straightforward, with other theorists offering variations on

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16. See Adam Mossoff, “What is Property: Putting the Pieces Back Together” (2003) 45:2 *Ariz L Rev* 371 at 372; Henry E Smith, “Property as the Law of Things” (2012) 125:7 *Harv L Rev* 1691 at 1697 [Smith, “Law of Things”]; Thomas W Merrill & Henry E Smith, “What Happened to Property in Law and Economics?” (2001) 111:2 *Yale LJ* 357 at 358; Henry E Smith, “Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law” (2008) 94:4 *Cornell L Rev* 959 at 963 [Smith, “Mind the Gap”].

17. See Schroeder, *supra* note 8; Mossoff, *supra* note 16 at 375; Dagan, *supra* note 1 at 38 (noting the disaggregation critique).

18. Penner, “Bundle of Rights”, *supra* note 9 at 732–33; Penner, *Idea of Property*, *supra* note 9 at 1–5; Stephen R Munzer, “A Bundle Theorist Holds on to His Collection of Sticks” (2011) 8:3 *Econ J Watch* 265 at 266.

19. Penner, “Bundle of Rights”, *supra* note 9 at 741.

20. *Ibid* at 739.

21. Penner, *Idea of Property*, *supra* note 9 at 64.

22. Smith, “Law of Things”, *supra* note 16 at 1694.

23. Merrill & Smith, *supra* note 16 at 358.

24. See e.g. Lehari, *supra* note 1 at 2–4. The collapse of property theory into ownership theory is well known but is beyond the scope of this article to engage with fully.

25. Merrill, “Right to Exclude”, *supra* note 9 at 730. Penner’s version of right to exclude predated Merrill. See the text accompanying notes 27–29.

the right to exclude rather than Merrill's right to exclude simpliciter. Yet perhaps because of its simplicity, Merrill's formulation of the right to exclude has several weaknesses. It does not, for example, guarantee any right of entry into the property, nor does it speak to what the right holder can do with her property.<sup>26</sup>

The variations on the right to exclude, including one later offered by Merrill himself,<sup>27</sup> offer ways around the weaknesses of relying simply on the right to exclude. Penner sought to ground his version of the right to exclude in the "interest we have in the use of things"—an interest that he noted was social.<sup>28</sup> He argued that:

The right to property is the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it, and includes the right to abandon it, to share it, to license it to others (either exclusively or not) and to give it to others in its entirety.<sup>29</sup>

This unitary, though multi-pronged, right lumps several rights from the bundle together and emphasizes that dictating use is an important property right. In fact, there are those who claim that "the law designates an owner who has a presumptive right to exclude others from determin[ing] the use of a defined thing"<sup>30</sup> and that the right to exclude from the physical thing flows from this designation.<sup>31</sup>

The idea that the power to decide is an important property right is also seen in Larissa Katz's argument that the right to set the agenda is the core ownership right.<sup>32</sup> The agenda-setting right functions as a variation of the right to exclude in that the right to set the agenda is exclusive to the owner. In other words, the owner has the right to exclude others from making decisions about how the property is used. Katz notes that while the

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26. See Richard Epstein, *Design for Liberty: Private Property, Public Administration and the Rule of Law* (Cambridge, Mass: Harvard University Press, 2011) at 77 [Epstein, *Design for Liberty*].

27. Merrill, "Property Strategy", *supra* note 7 at 2065.

28. Penner, "Bundle of Rights", *supra* note 9 at 743.

29. *Ibid* at 742. But see Epstein, *Design for Liberty*, *supra* note 26 at 78.

30. Yun-Chien Chang & Henry E Smith, "An Economic Analysis of Civil Versus Common Law Property" (2012) 88:1 Notre Dame L Rev 1 at 23.

31. *Ibid* at 24.

32. Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275 at 289-90 [Katz, "Exclusion and Exclusivity"].



owner's right to set the agenda will not trump the state's power to make decisions, it is superior to the rights of other private individuals.<sup>33</sup> Katz has since further developed her theory of ownership with the argument that the agenda-setting right only allows the owner to use her property in a way that she feels is worthwhile.<sup>34</sup> This limitation is designed to prevent owners from using their position as a way to dominate others.<sup>35</sup> It will only apply in an "abuse of right" situation, where "[a]n owner exceeds her jurisdiction" and "her real purpose is . . . to cause harm—not only as an end in itself but also as a means to gain leverage".<sup>36</sup> This restriction of the right to use is relatively narrow, and for the most part the right to use or set the agenda remains broad.<sup>37</sup> Katz's "principle of abuse of right" attempts to explain when it is legitimate to restrict owners' power to dictate uses.

Katz is far from the only theorist to recognize that owners' powers are, or should be, constrained. In more recent work, Merrill emphasizes the restrictions on owners while arguing that property is about deciding how to use resources.<sup>38</sup> The "concept of ownership" continues to be important in Merrill's discussion of property, and he argues that ownership is characterized by two prerogatives: "residual managerial authority" and "residual accessionary rights".<sup>39</sup> For the former prerogative he uses "residual" to highlight that the owner's control will always be constrained. By the latter he means that the owner will have the right to changes in value.<sup>40</sup> Ownership thus remains powerful, but it exists in a world of laws that can—and do—limit the owner's right to set the agenda for his property.

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33. *Ibid* at 295.

34. Larissa Katz, "Spite and Extortion: A Jurisdictional Principle of Abuse of (Property) Right" (2013) 122:6 Yale LJ 1444 at 1448–49 [Katz, "Spite and Extortion"].

35. *Ibid* at 1451.

36. *Ibid* at 1455. But see *Bradford Corporation v Pickles*, [1895] AC 587 (HL).

37. See e.g. Henry E Smith, "Exclusion and Property Rules in the Law of Nuisance" (2004) 90:4 Va L Rev 965 at 971; Robert C Ellickson & Charles Dia Thorland, "Ancient Land Law: Mesopotamia, Egypt, Israel" (1995) 71:1 Chicago-Kent L Rev 321 at 346; Chang & Smith, *supra* note 30 at 33.

38. Merrill, "Property Strategy", *supra* note 7 at 2062.

39. *Ibid* at 2066–67.

40. *Ibid* at 2068–70.

The idea that exclusion carries with it more than simply the right to exclude others is tacit in these glosses on the right to exclude. On occasion, property theorists have offered a group of core rights. Richard Epstein, for example, has argued that the rights to exclude, use and dispose of the property should be considered equal, and should never be separated from one another.<sup>41</sup> The argument thus becomes that property is lumpy. It is not endlessly scalable or malleable, and the law will only recognize particular lumps of rights as property.<sup>42</sup> This lumpy—or modular—approach to property allows certain rights to clump together, while seeking to explain how some of the rights in the bundle theory interact with each other.<sup>43</sup> For Henry Smith, what is important about this modular approach is that it allows property law to efficiently manage the complexity of interactions between private parties.<sup>44</sup>

There is something intuitively correct about Smith's concept of modularity in property. In practice, property rights are not as neatly severable as the bundle theory seems to suggest, and tinkering with one right will necessarily impact other rights.<sup>45</sup> Smith is unwilling to argue that any particular feature of property is absolute, but he notes that three basic features ought to be considered central: "the in rem aspect of property, the right to exclude, and the residual claim".<sup>46</sup> Though these features do not have to be present in every instance of property, and can be removed or added to as needed, they are the default package—property at its most basic.<sup>47</sup>

Rather than seeking to define property, Simon Douglas and Ben McFarlane have sought to explain what is distinctive about property rights. However, in so doing they offer an interesting gloss on the idea of property as lumpy.<sup>48</sup> Douglas and McFarlane have argued that property

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41. Epstein, *Design for Liberty*, *supra* note 26 at 78.

42. See Lee Anne Fennell, "Lumpy Property" (2012) 160:7 U Pa L Rev 1955 at 1963; Chang & Smith, *supra* note 30 at 33; Smith, "Law of Things", *supra* note 16 at 1700–02.

43. Smith, "Law of Things", *supra* note 16 at 1692, 1699–703, 1709, 1725–26.

44. *Ibid* at 1699.

45. *Ibid* at 1716–17.

46. *Ibid* at 1709.

47. *Ibid*.

48. Simon Douglas & Ben McFarlane, "Defining Property Rights" in James Penner & Henry Smith, eds, *Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2014) 219.

rights are distinguished by the duty of the rest of the world not to interfere with the owned thing.<sup>49</sup> For Douglas and McFarlane, the duty of the rest of the world not to interfere with owned things makes up the owner's right to exclude,<sup>50</sup> and as such, the right to exclude is a "claim-right" in the Hohfeldian sense.<sup>51</sup> This understanding still leaves room for open-ended uses of the property, but crucially, the right to use is not a claim-right, but a liberty or privilege; the right to use gives the owner freedom to use his property but does not impose duties on anyone else.<sup>52</sup> Use rights will be indirectly protected by the general duty of non-interference, but they will not impose duties on others in and of themselves.<sup>53</sup> Douglas and McFarlane have argued that their conception is lumpy insofar as it organizes a property right around the general duty "not to physically interfere with a physical thing".<sup>54</sup> Yet their definition seems to undermine the idea of lumpiness because in arguing that use rights are a different class of right than the right to exclude, they allow for use rights to be severed, and as a result, do not guarantee that the owner will be able to access her property.

Avihay Dorfman has criticized property theorists' recent emphasis on the right to exclude and the right to use as the key features of property because this definition does not differentiate ownership from possession.<sup>55</sup> Like Katz, Dorfman's definition of private ownership focuses on the "special authority" of owners. Unlike Katz, however, he has argued that the defining feature of an owner is his power to "change (in some non-trivial measure) the rights and duties that nonowners have toward the owner with respect to an object", rather than the right to set the agenda for an object.<sup>56</sup> As such, Dorfman's theory does not "predetermine the breadth and scope of ownership" in the way that many essentialist theories do.<sup>57</sup> He seeks to leave room for argument about what the rights of ownership might be, but he also seeks to capture the relational aspects

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49. *Ibid* at 240.

50. *Ibid* at 222.

51. *Ibid* at 221.

52. *Ibid* at 223, 226–27.

53. *Ibid* at 227–33.

54. *Ibid* at 243.

55. Dorfman, *supra* note 2 at 2–3.

56. *Ibid* at 17, 20–23 (criticizing Katz's agenda setting theory).

57. *Ibid* at 28–31.

of property.<sup>58</sup> That said, Dorfman claims that the power of alienation is the “manifestation” of an owner’s power because it demonstrates how an owner can alter the normative standing of others with respect to an object.<sup>59</sup> Here there is an echo of the idea that the right to dispose of one’s property is a key feature of property.<sup>60</sup> Dorfman’s thesis links the loss of the right to dispose with the loss of an owner’s authority, and thus the loss of ownership altogether.<sup>61</sup> Although there are some clear differences between the essentialist theories of property outlined in this Part, there are also many similarities.

Most essentialist theorists would agree that exclusion remains central to property, but that the right to exclude others does not do enough by itself. As such, there has been a shift to either a more expansive exclusionary right—one which carries with it rights of use and so on—or to the idea that property is lumpy or modular, and certain rights come as a package. Such claims are a clear response to the belief that the bundle theory made property endlessly malleable. Crucially, some of these theories are also beginning to hint at the ways in which one person’s property rights interact with another’s. Smith argues that adjacent property rights “mesh” with each other and ultimately form something of a network,<sup>62</sup> while Katz argues that a person can only use their property in worthwhile ways and not in ways designed to gain leverage over others.<sup>63</sup> Dorfman’s argument about the special authority of owners is the most explicitly relational account of ownership, though he does not fully flesh out the questions of legitimacy that surround an owner’s authority.<sup>64</sup> Consequently, the focus of these essentialist theorists remains very much on the *what* of property, and particularly on the rights or powers that define ownership. For the most part, these theories fail to seriously engage with actual jurisprudence on property, and when they do the evidence is somewhat limited. This is because these theories tend to be formed with reference

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58. *Ibid* at 32–34.

59. *Ibid* at 34.

60. Penner, “Bundle of Rights”, *supra* note 9 at 742; Epstein, *Design for Liberty*, *supra* note 26 at 78.

61. Dorfman, *supra* note 2 at 34.

62. Smith, “Law of Things”, *supra* note 16 at 1707.

63. Katz, “Spite and Extortion”, *supra* note 34 at 1451.

64. Dorfman, *supra* note 2 at 35.

to the United States rather than other common law jurisdictions.<sup>65</sup> Yet discussions of property in other jurisdictions—Canada in this instance—can shed light on the theoretical debates surrounding property, and can even offer an alternative definition.

## II. Property in Court: The Importance of the Primary Use

The term “Canadian property jurisprudence” is something of a misnomer. Under the *Constitution Act, 1867*,<sup>66</sup> property is a subject assigned to the provinces, so there is not necessarily uniformity across the country.<sup>67</sup> This lack of uniformity is obvious in the case of Quebec, where a civil law system of property is used instead of the common law system employed in the other provinces.<sup>68</sup> As my title suggests, the focus in this article is on the common law provinces, but even among these provinces uniformity is often lacking. Alberta, for example, continues to allow adverse possession under a Torrens system of land titles while the other common law provinces do not.<sup>69</sup> That being said, my goal is not so much to argue that there is uniformity between the provinces, but to argue that the jurisprudence offers an alternative definition of property—the essence of which is the right to exclude others and the right to existing uses of the property.

I begin with a discussion of the jurisprudence on de facto expropriation; in particular, I examine the most recent restatement of this doctrine by the Supreme Court of Canada. Then I move on to show how the understanding of property contained within *Canadian Pacific Railway v*

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65. For some exceptions, see e.g. Larissa Katz, “A Traditionalist’s Property Jurisprudence” in Kim Brooks, ed, *Justice Bertha Wilson: One Woman’s Difference* (Vancouver: UBC Press, 2009) 39 [Katz, “A Traditionalist’s Property Jurisprudence”]; Mary Jane Mossman, “Toward ‘New Property’ and ‘New Scholarship’: An Assessment of Canadian Property Scholarship” (1985) 23:4 Osgoode Hall LJ 633 at 634; Douglas & McFarlane, *supra* note 48.

66. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

67. See Mossman, *supra* note 65 at 634.

68. There are of course some attempts to read the civil law and common law jurisprudence together. See e.g. Michael H Lubetsky, “Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law” (2009) 47:3 Osgoode Hall LJ 497.

69. See Sandra Petersson, “Something for Nothing: The Law of Adverse Possession in Alberta” (1992) 30:4 Alta L Rev 1291 at 1296.

*Vancouver (City)* is compatible with the existing jurisprudence on this topic, as well as with the jurisprudence on adverse possession. Central to Canadian courts' understanding of property is how that property is primarily or historically used. The courts do not protect speculative future uses, suggesting that in Canada the right to use is much narrower than allowed for by property theorists.

The facts of *CPR* are relatively simple and are centred on whether or not the City of Vancouver had expropriated a section of disused railway track known as the Arbutus Corridor. The Corridor "winds ten kilometres north-south through the west side of the City of Vancouver. Owned in fee simple by the CPR, this fifty to sixty-six foot-wide strip of land is, depending on one's perspective, forty-five acres of enormously valuable real estate, or a precious ribbon of automobile-free urban land."<sup>70</sup> In light of the unprofitability of continuing to use the Corridor for train service, the Canadian Pacific Railway (CP Rail) proposed to develop it "for residential and commercial purposes"<sup>71</sup> and invited Vancouver to expropriate the Corridor.<sup>72</sup> Vancouver declined to do so; instead, the city adopted the *Arbutus Corridor Official Development Plan By-law*,<sup>73</sup> which "designated the corridor as a public thoroughfare for transportation and 'greenways', like heritage walks, nature trails and cyclist paths".<sup>74</sup> The bylaw also explicitly protected the Corridor's prior use as a railway by listing rail as an approved use.<sup>75</sup> Understandably, CP Rail objected to this plan and alleged that it was "a *de facto* taking of its land, requiring compensation".<sup>76</sup>

In deciding whether or not CP Rail had suffered a *de facto* taking, the Supreme Court necessarily offered insight into how it understands

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70. Douglas C Harris, "A Railway, a City, and the Public Regulation of Private Property: *CPR v City of Vancouver*" in Eric Tucker, James Muir & Bruce Ziff, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law for the Osgoode Society for Canadian Legal History, 2012) 455 at 455.

71. *Ibid*; *CPR*, *supra* note 6 at paras 2–3.

72. *CPR*, *supra* note 6 at paras 3–4.

73. City of Vancouver, by-law No 8249, *A By-law to Adopt the Arbutus Corridor Development Plan as an Official Development Plan* (25 July 2000); *CPR*, *supra* note 6 at paras 5–8.

74. *CPR*, *supra* note 6 at para 4.

75. *Ibid* at para 7.

76. *Ibid* at para 28.

property. The Canadian test for de facto takings is strict and requires that there is “(1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property”.<sup>77</sup> The Court found that the bylaw did not meet the first part of the test because all Vancouver got from the bylaw was “some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land”.<sup>78</sup> This reasoning also points to why the Court thought that CP Rail had not lost “all reasonable uses” of the Corridor. In fact, the Court went on to state that CP Rail could still exclude people from the Arbutus Corridor, and that those Vancouverites currently biking or walking along the Corridor were committing trespass.<sup>79</sup> As the Court put it, “the by-law does not remove all reasonable uses of the property . . . [it] does not prevent CPR from using its land to operate a railway, the only use to which the land has ever been put during the history of the City”.<sup>80</sup> Thus the important property rights—according to the Court—are the right to exclude and the right to the primary or historical use of the property.

Notably, the Court seems to discount the idea that the right to set the agenda is essential to ownership, or even a property right at all.<sup>81</sup> Many property theorists believe that the right to set the agenda is a key right—if not *the* key right—of ownership.<sup>82</sup> Granted, Katz argues that the owner is only “supreme vis-a-vis other private individuals” and not in regards to

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77. *Ibid* at para 30. Indeed, there are those who criticize this test for being more appropriate for de jure expropriation. See e.g. Russell Brown, “Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience” (2009) 1:3 *Int JL in Built Environment* 179 at 188–89 [Brown, “Legal Incoherence”].

78. *CPR*, *supra* note 6 at para 33. For a critique of this decision, see Russell Brown, “The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling” (2007) 40:1 *UBC L Rev* 315 [Brown, “Once More”]; Brown, “Legal Incoherence”, *supra* note 77.

79. *CPR*, *supra* note 6 at para 33.

80. *Ibid* at paras 33–34.

81. *Ibid* (“[t]he City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a ‘tak[ing]’”).

82. See Katz, “Exclusion and Exclusivity”, *supra* note 32 at 284; Jeremy Waldron, “What is Private Property?” (1985) 5:3 *Oxford J Leg Stud* 313 at 333; Merrill, “Property Strategy”, *supra* note 7 at 2067–70. See also Penner, “Bundle of Rights”, *supra* note 9; Penner, *Idea of Property*, *supra* note 9.

the state.<sup>83</sup> As such, her formulation leaves room for the state to dictate uses of property, but *CPR*'s limitation is much stricter than that typically envisaged by property theory. The Court even noted that the *Vancouver Charter* precluded the possibility of describing "property affected by a by-law" as having been taken,<sup>84</sup> which leaves owners without a remedy. Such emphasis on existing or historical uses implies that owners have a relatively constrained right to decide how their property is used. It is not clear whether *CPR* would have been decided differently had the bylaw prohibited the historical uses of the Corridor, but *CPR* is not the only case where the Court has deferred to existing uses. In fact, such deference is common among other cases involving de facto expropriation, or regulatory takings.

The Canadian doctrine of regulatory takings is not only much younger than that seen in the United States, but it is also much smaller and stricter.<sup>85</sup> The Canadian doctrine of de facto takings requires both a loss by the property owner *and* a gain by the government. As a result, there are only a handful of cases where the courts have actually found that there was a de facto expropriation of property.<sup>86</sup> Importantly, these cases did not involve fee simple ownership in land as *CPR* did, but involved rights such as goodwill<sup>87</sup> or the ownership of mineral claims.<sup>88</sup> These rights are all better described as use rights, which are more vulnerable to being rendered useless by government regulation than fee simple ownership. Using the mineral claims cases as an example, if government regulation prohibits the removal of minerals, there is no other use that the ownership of such claims can be put to.<sup>89</sup> Consequently, any prohibition on removal amounts to a total loss of the right, which requires compensation.

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83. Katz, "Exclusion and Exclusivity", *supra* note 32 at 295.

84. *CPR*, *supra* note 6 at para 36, discussing *Vancouver Charter*, SBC 1953, c 55, s 569.

85. See Stephen R Munzer, *A Theory of Property* (Cambridge, UK: Cambridge University Press, 1990) at 447 (the American takings case law is often unpredictable).

86. See *Manitoba Fisheries Ltd v R* (1978), [1979] 1 SCR 101, [1978] 6 WWR 496 [*Manitoba Fisheries* cited to SCR]; *British Columbia v Tener*, [1985] 1 SCR 533, 17 DLR (4th) 1 [*Tener* cited to SCR]; *Casamiro Resource Corp v British Columbia* (1991), 55 BCLR (2d) 346, 80 DLR (4th) 1 (CA) [*Casamiro* cited to BCLR].

87. See *Manitoba Fisheries*, *supra* note 86. For an in-depth discussion of this case, see Jim Phillips & Jeremy Martin, "Manitoba Fisheries v the Queen: The Origins of Canada's De Facto Expropriation Doctrine" in Tucker, Muir & Ziff, *supra* note 70, 259.

88. See *Tener*, *supra* note 86 at 536–38; *Casamiro*, *supra* note 86 at 347.

89. For the legislation, see *Tener*, *supra* note 86 at 538; *Casamiro*, *supra* note 86 at 350.



The courts' reasoning is less convincing in these cases when they explain what exactly the government has gained. In *Manitoba Fisheries Ltd v R*, the Court found that the government had acquired the company's goodwill based on the fact that "the appellant's suppliers and customers who it had acquired and cultivated over the years [and who] constituted one of its most valuable assets . . . were left with no choice but to do business with the Freshwater Fish Marketing Corporation".<sup>90</sup> However, in the two cases dealing with the loss of mineral claims, the government's gain was less clear. In *British Columbia v Tener*, the majority observed that the British Columbia government had "at minimum acquired a negative right not to compensate the respondents for future mineral development by forestalling any such development".<sup>91</sup> The concurring judgment of Dickson CJC and Wilson J simply referred to the earlier decision of *Manitoba Fisheries* to refute the government's assertion that it had not acquired the mineral claims.<sup>92</sup>

In the cases dealing with the loss of goodwill or mineral claims, the government's gain is arguably proven by the loss of the property right. Although both goodwill and mineral claims are apparently severable from the items to which they are attached—either the physical assets of a business or the land over which the mineral claims lie—in a factual sense, the property rights remain dependent on the assets. If the land or the physical assets to which the severed property right is attached were to be destroyed or rendered unusable, so too would the goodwill and mineral claims be destroyed. Consequently, if an owner loses his goodwill or mineral claim, it must then be considered to have returned to the owner of the physical asset or the land.

The pre-*CPR* jurisprudence on regulatory takings makes it clear that if the owner can continue to use her property as she always has, there is no loss and consequently no gain. In fact, in *Mariner Real Estate v Nova Scotia (AG)*, a case which is similar to *CPR* in that it dealt with use restrictions on property owned in fee simple, the Nova Scotia Court of Appeal found that because the owners could continue to use their property as they always had, they had suffered no loss.<sup>93</sup> The Court even

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90. *Manitoba Fisheries*, *supra* note 86 at 107.

91. *Supra* note 86 at 556.

92. *Ibid* at 551.

93. (1999), 178 NSR (2d) 294 at 301, 318, 177 DLR (4th) 696 [*Mariner Real Estate*].

noted that “ownership carries with it the possibility of stringent land use regulation”.<sup>94</sup> The owners in question were not completely precluded from building on their land; they could still build subject to securing the necessary permits and showing that their plans respected the fact that their land was on an environmentally protected beachfront.<sup>95</sup> In other words, it was not clear that the owners had actually lost this potential future use; the legislation added additional conditions, but did not amount to an outright ban on building. Nonetheless, the Court focused its analysis on actual uses, rather than speculative future uses.<sup>96</sup> As the loss of a future interest did not represent the loss of a property right, there was no corresponding gain by the government, and so no *de facto* expropriation.

Canadian courts’ focus on current or historical uses of property as a way of assessing the loss or gain of property is also seen in the jurisprudence on adverse possession. Adverse possession might pose something of a moral paradox<sup>97</sup> in that it allows a non-owner to usurp the true owner, but its underlying goal is to promote “the stability and certainty of landholdings”.<sup>98</sup> In theory, the doctrine also seeks to encourage owners to actually use their property and make it known that they are owners.<sup>99</sup>

Of all the provinces that still allow for adverse possession, Ontario’s jurisprudence has attracted the most academic attention as a result of its “inconsistent use test”.<sup>100</sup> This test appeared in the late 1970s and modified the old common law requirements of actual possession and an *animus possidendi*—an intent to possess and exclude all others<sup>101</sup>—by adding the requirement that the adverse possessor’s use be inconsistent with the owners’ use of the land.<sup>102</sup> Katz argues that the appearance of the

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94. *Ibid* at 306, 309.

95. *Ibid* at 319.

96. *Ibid* at 301–03.

97. See Larissa Katz, “The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law” (2010) 55:1 McGill LJ 47 at 49.

98. Lubetsky, *supra* note 68 at 500.

99. *Ibid*.

100. See Lubetsky, *supra* note 68; Katz, “A Traditionalist’s Property Jurisprudence”, *supra* note 65; Brian Bucknall, “Two Roads Diverged: Recent Decisions on Possessory Title” (1984) 22:2 Osgoode Hall LJ 375.

101. See Lubetsky, *supra* note 68 at 507.

102. *Keefe v Arillotta* (1976), 13 OR (2d) 680 at 691, 72 DLR (3d) 182 (CA).

inconsistent use test supports her claim that the agenda-setting right is the key right of ownership.<sup>103</sup> However, given the Supreme Court's refusal to recognize this right in *CPR*, the inconsistent use test could be read as further evidence of the courts seeking to protect and uphold the current or historical uses of the property. The Ontario Court of Appeal has explicitly stated that the inconsistent use test cannot be used to protect future uses planned by the owner,<sup>104</sup> suggesting that only current uses are relevant. Somewhat paradoxically, however, the Court of Appeal has also found that holding land for future development can be counted as a current use.<sup>105</sup> Such statements may be evidence of the perceived difficulty that Ontario courts have with the inconsistent use test,<sup>106</sup> but they also make it significantly harder for adverse possession claims to succeed.

In addition to protecting current uses of the property, the inconsistent use test also tacitly protects the owner's right to exclude. It was this idea of exclusion which animated Katz's argument about the agenda-setting right's relationship with the inconsistent use test because inconsistent uses necessarily usurp the owner's position as sole agenda setter for the property.<sup>107</sup> There is a kernel of truth in this argument, but inconsistent uses also imply that the owner has been excluded from the property in a simpler sense—namely that the owner has failed to be physically present or to take any actions to make his presence felt. So long as the disputed property is being used as the actual owner used it, there is no evidence that the owner has abandoned his property. As such, the right to exclude and the right to the historical or current use of the property seem to reinforce each other in Ontario's adverse possession jurisprudence.

To succeed in an adverse possession claim in Alberta, a person must prove exclusive possession of the disputed land.<sup>108</sup> Alberta has not yet adopted the inconsistent use test, but does require that the adverse possessor possess the land in a way that is "outwardly *inconsistent* with

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103. Katz, "A Traditionalist's Property Jurisprudence", *supra* note 65 at 44–50.

104. *Elliott v Woodstock Agricultural Society*, 2008 ONCA 648 at para 16, 298 DLR (4th) 577.

105. *Ibid* at para 25.

106. See Lubetsky, *supra* note 68 at 498.

107. Katz, "A Traditionalist's Property Jurisprudence", *supra* note 65 at 44

108. See *Andriet v Strathcona No 20 (County of)*, 2008 ABCA 27 at para 72, [2008] 5 WWR 590.

the notion of another holding title”.<sup>109</sup> Such claims are in keeping with the historical requirements that adverse possession be open and notorious.<sup>110</sup> While Ontario’s inconsistent use test allows the courts to examine the state of mind of the titleholder,<sup>111</sup> Alberta’s jurisprudence on adverse possession examines the state of mind of the adverse possessor. If the adverse possessor thinks that he has a right to use the land in question but does not think he owns the land, any claims for adverse possession will fail.<sup>112</sup>

When read with the jurisprudence on regulatory takings, the jurisprudence on adverse possession suggests many of the same ideas about property. In both, there is attention given to the right to exclude and whether or not the primary use of the property has been altered. It is clear that Canadian courts are not willing to protect broad, undefined use rights, and based on the expropriation jurisprudence, the use rights they are willing to protect are quite narrow. The law surrounding adverse possession varies from province to province, and seems to offer more protection to use rights. Yet there is the potential for the courts to only look to the owner’s current use, and not to any future uses. The idea of exclusion is often tacit in discussions of regulatory takings, and the court has not yet fleshed it out. In *CPR*, the fact that the railway could still exclude others from the Corridor was proof that the City had not removed CP Rail’s right to use the Arbutus Corridor as a railway;<sup>113</sup> Vancouver had not yet turned the Corridor into a legal park. Exclusion arguably plays a much greater role in adverse possession than regulatory takings, but that is likely due to the historical requirements that a person be in possession of the property in order to prove such a claim. The jurisprudence’s emphasis on the rights to exclude and the primary use has remained relatively stable for several decades and contains lessons for property theory.

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109. Petersson, *supra* note 69 at 1307 [emphasis in original].

110. See Lubetsky, *supra* note 68 at 505–06.

111. This test will not apply in the case of mutual mistake. See *Teis v Ancaster (Town)* (1997), 35 OR (3d) 216 at 218, 152 DLR (4th) 304 (CA). See also *Lubetsky*, *supra* note 68 at 515–25.

112. See *Medicine Hat (City) v Mund*, 86 AR 392 at para 14, 10 ACWS (3d) 47.

113. *Supra* note 6 at para 33.

### III. Property Lessons: From Jurisprudence to Theory

Though the case law discussed in Part II is not a full assessment of property law, it does focus on when property—particularly ownership—is lost and/or transferred against the owner’s wishes. The case law therefore offers insight into how the courts understand ownership. It is clear that Canadian property jurisprudence does not necessarily protect ownership to the same extent as envisaged by the theorists. Not surprisingly, the relatively narrow protection afforded by Canadian *de facto* takings law has come under some criticism for failing to adequately protect property.<sup>114</sup> Yet both the courts and the theorists agree that property can, and perhaps should, be heavily regulated.<sup>115</sup> In this Part I compare the definition of ownership offered by Canadian courts with that offered by the essentialist theorists. I do this by analyzing the two key rights that Canadian courts rely upon in their discussion of ownership. I argue that these rights complicate the theoretical picture presented by the essentialist theorists. Put simply, the Canadian jurisprudence allows for predictability and stability in ownership but also offers ways to protect the interests of non-owners as well.

Where the essentialist theorists and Canadian jurisprudence overlap the most is in the recognition of the centrality of the right to exclude and the right to use. These two rights are typically included, either explicitly or implicitly, in the core “lump” or “module” of property that many essentialist theorists endorse.<sup>116</sup> However, any discussion of the right to transfer or dispose of property—which is usually the third key right in the new core understanding of ownership<sup>117</sup>—is notably absent from the Canadian property jurisprudence. This is likely due to the fact that none of the cases have directly touched on the loss of the right to dispose, but arguably the right to dispose is lost along with the right to use. You cannot transfer your property if all reasonable uses have been removed

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114. See e.g. Brown, “Legal Incoherence”, *supra* note 77; Brown, “Once More”, *supra* note 78.

115. See *Mariner Real Estate*, *supra* note 93 at 306; Merrill, “Property Strategy”, *supra* note 7 at 2068–69.

116. See *supra* notes 44–51 and accompanying text.

117. *Ibid.* See also Dorfman, *supra* note 2 at 33–34.

from it. As such, this complicates Dorfman's argument that the loss of the right to transfer represents the loss of ownership.<sup>118</sup> His argument rests on the idea that ownership is authority exercised over others, but does not explain how the law can identify *when* that authority is lost. Canadian property jurisprudence suggests that an owner's authority is lost with the loss of the right to use and the right to exclude.

Most mainstream property theory tacitly assumes that owners should get a wide degree of discretion over how their property is used. Where the Canadian jurisprudence diverges sharply from theory is its tendency to only protect existing uses of property. Although the United States' takings doctrine extends some protection to potential future uses, existing uses are subject to a higher level of protection,<sup>119</sup> which suggests that there is something fundamental about them. The protection of current uses seems to fit well with Douglas and McFarlane's argument that use rights are liberties rather than "claim-rights" and are thus less protected.<sup>120</sup> However, Douglas and McFarlane's thesis does not explain why courts protect existing uses more than future uses. Deference to existing uses may be no more than judicial deference to the status quo, or it may be a reflection of the courts' preference to focus on the provable facts of a case rather than on some speculative future. Arguably, courts do not have the insight to intervene in decisions about *how* property should be used; such future-oriented decisions are best left to legislatures. Where the courts will intervene, however, is when the primary use of the property is removed or rendered impossible.<sup>121</sup> In so doing, the courts are protecting the settled expectations of parties. The judicial protection of current uses, then, offers ownership a degree of stability and suggests that such uses are a baseline of property which cannot be lost without losing the property right.

Furthermore, Canadian courts' reluctance or refusal to protect potential future uses says something about ownership. In *CPR*, the Court thought that setting the agenda for the future uses of the Arbutus

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118. Dorfman, *supra* note 2 at 34.

119. See Christopher Serkin, "Existing Uses and the Limits of Land Use Regulations" (2009) 84:5 NYUL Rev 1222 at 1291.

120. Douglas & McFarlane, *supra* note 48 at 232–40.

121. This is also seen in the jurisprudence on nuisance, though a full examination of how it plays out in nuisance cases is beyond the scope of this article.

Corridor was not a property right.<sup>122</sup> This hints at a more democratic vision of property than previously recognized. By upholding the bylaw, the Court respected the legitimate decision-making power of Vancouver. Property theorists have long tied themselves in knots in their attempts to explain how private property is compatible with democracy: How is it that one person can legitimately control a resource that other people might need?<sup>123</sup> The answer offered by Canadian property jurisprudence is that owners do not have the only say in how property is used. Private property necessarily affects other people, including those with adjacent property rights and those without property rights, and owner's rights can be, should be, and are limited by these rights. These limits are to some extent reciprocal in that every owner's rights are limited by the rights of adjacent owners and non-owners. In short, property rights overlap and interconnect in ways that require the kind of oversight of uses that is impossible for each owner to manage by himself. Ownership thus exists in a network consisting of other owners and society more broadly.

In his discussion of an architectural or modular theory of property, Smith noted that "property rights 'mesh' with neighboring property rights and show network effects with more far-flung property rights".<sup>124</sup> His point is that standardizing property rights make them more valuable to everyone who has them. Yet he does not explicitly discuss the ways in which uses affect each other, and how a sort of reliance interest can develop on certain uses being precluded. To go back to the facts of *CPR*, the existence of a de facto park likely increased the value of the properties in the adjacent residential areas. Had the Corridor been developed in the way that CP Rail wished, the value of adjacent properties may have decreased. Property values would likely also decrease if CP Rail returned to using the Corridor as a railway, but the City seemed to gamble on the belief that the line was economically unviable.<sup>125</sup> The Court's reliance on

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122. *Supra* note 6 at para 33.

123. See e.g. Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 5, 105, 284, 424; Jeremy Waldron, "To Bestow Stability upon Possession": Hume's Alternative to Locke" in Penner & Smith, *supra* note 48, 1 at 5; CB Macpherson, "The Meaning of Property" in Macpherson, *supra* note 14, 1 at 11–13.

124. Smith, "Law of Things", *supra* note 16 at 1707.

125. In 2014, CP Rail suggested that it might start using the Corridor as a railway again in part because of its ongoing dispute with Vancouver. See "Will CP Trains Return to Vancouver's Arbutus Corridor?", *CBC News* (9 May 2014), online: <www.cbc.ca>.

CP Rail's historical use of the property offered a way to protect the status quo in Vancouver—one that had received democratic approval via the bylaw. The standardizing of property rights cannot just be about value or making property more efficient, as these are ideals of economics and not the law.<sup>126</sup> In a legal context, such standardization promotes stability and predictability, and thus allows individuals to plan their lives around this knowledge; it creates space for individuals to act as autonomous agents.

The social impact of property is often implicit in both the jurisprudence and the theory. In fact, the essentialist theorists have come under some criticism for their failure to fully engage with questions of democratic or social value, and for their failure to highlight the duties as well as the rights of property.<sup>127</sup> In response, Smith argues that such values are emergent from property and we should not expect all aspects of property law to promote them equally.<sup>128</sup> The question is, then, whether or not these values are actually emergent in the jurisprudence.

Jim Phillips and Phil Girard have argued that, at least in the courts, protection of private property continues to trump other values, such as labour rights.<sup>129</sup> While that claim may have some truth to it, the case that prompted that statement suggests that the Court would have upheld labour rights had they been protected by statute.<sup>130</sup> There is no doubt that private property rights remain important in Canada, even if they are not constitutionally protected. Nonetheless, the jurisprudence makes it clear that property rights can only trump legislation in rare circumstances, such as when legislation renders property unusable without explicitly

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126. See Jeremy Waldron, "Property Law" in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory* (West Sussex, UK: Blackwell, 2010) 9 at 21.

127. See Joseph William Singer, "Property as the Law of Democracy" (2014) 63:6 Duke LJ 1287 at 1291.

128. Smith, "Law of Things", *supra* note 16 at 1719.

129. Jim Phillips & Phil Girard, "A Certain 'Mallaise': *Harrison v Carswell*, Shopping Centre Picketing, and the Limits of the Postwar Settlement" in Judy Fudge & Eric Tucker, eds, *Work on Trial: Canadian Labour Law Struggles* (Toronto: Irwin Law for the Osgoode Society for Canadian Legal History, 2010) 249 at 272–73. On this point, see also Phillips & Martin, *supra* note 87 (the background to *Manitoba Fisheries* makes it clear that the fish processors were expropriated to protect Aboriginal fishers, yet the Supreme Court of Canada found a way to protect the processors' property rights).

130. *Harrison v Carswell* (1975), [1976] 2 SCR 200 at 219, 62 DLR (3d) 68.



precluding compensation. In this way, the jurisprudence defers to democratic processes while also upholding the settled expectations of property rights.

A close reading of the jurisprudence suggests that Canadian courts have certain tacit ideas about property. For one, the deference to primary uses suggests that property rights overlap with each other and form an interlocking network, or at least suggests that how property is used is of interest to more than the owner. As such, there is reciprocity between owners and non-owners in that the law recognizes that non-owners can limit, but must respect, the rights of owners. Similarly, although the idea of the physical exclusion of others remains important to Canadian courts' understanding of ownership, such exclusion does not readily translate into an exclusive right to decide the appropriate uses of the property. In these ways, Canadian property jurisprudence seems to respect democratic values by limiting the ability of owners to impose their will on others while limiting the ability of non-owners, including the state, to interfere with the settled uses of others' property.

## Conclusion

The idea of property in the cases discussed in this article offers an alternative definition of ownership to those offered by property theorists. Canadian courts define ownership as the right to the primary use of the property and the right to exclude others from the property. The courts' description of ownership differs from that seen throughout essentialist property theory; the jurisprudence offers a narrower definition of property, though it is one capable of tacitly recognizing the interests of non-owners in owned things.

I have argued that the courts' reluctance to uphold speculative future uses as property rights and their refusal to recognize agenda setting as a property right suggests deference to democratic processes. In leaving room for the opinion of non-owners in how items of property, particularly property in land, are to be used in the future, the Canadian jurisprudence points to one answer to the age-old question of how to justify one person's control over resources. The answer is to limit the extent of the owner's control, and to limit an owner's right to use to the historical or

primary use of the property. So long as the owner can continue to use their property as they always have, they cannot be considered to have suffered a legally recognizable loss.

