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PRIVATE PROPERTY RIGHTS AND PUBLIC RESPONSIBILITY: LEAVING ROOM FOR THE HOMELESS.

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ABSTRACT

This paper uses the recent case of *Victoria (City) v Adams* to examine how Canadian law guarantees or restricts access to publicly accessible property. The paper argues that the understanding and view of property in *Adams* is in keeping with the Supreme Court of Canada's jurisprudence on publicly accessible property. By comparing public property with private property, the paper argues that in Canada all property is seen as private property and is protected as such. The paper argues that the current understanding of property is unacceptable because it leaves no room for those who have no private property rights. It looks at other models of property to see if they leave room for those with no property of their own. The paper then moves on to argue that the common law, despite understanding all property as private, leaves room for those who have no property of their own. This feature of the common law of property has often been overlooked, however, resulting in laws that are unworkable and unacceptable.

INTRODUCTION

The recent case of *Victoria (City) v Adams*¹ reveals some implicit ideas about property and property rights in Canada. The City of Victoria argued that the homeless people's claim was really about property rights because they were attempting to have public property allocated to their exclusive use. The British Columbia Supreme Court and the Court of Appeal rejected this claim.² However, a careful reading of the case and analysis of the way the Courts deal with the claims of the homeless reveal an understanding of what property is and what property owners can and cannot do,

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¹ 2009 BCCA 563, 313 DLR (4th) 29 [*Adams (BCCA)* cited to DLR].

² *Victoria (City) v Adams*, 2008 BCSC 1363, 299 DLR (4th) 193 at para 132 [*Adams (BCSC)* cited to DLR]; *Adams (BCCA)*, *ibid* at para 100.

especially when the property owner is a public body.³ When the Courts examine whether or not the homeless of Victoria are claiming a property right, they reveal an assumption that private property is the dominant, if not the only, model. *Adams* also sheds light on a more troubling issue surrounding the way that property controls where a person can be at any given time and what they can do while there.⁴

At first glance however, the case does not seem to be about property at all. The case centred on the City of Victoria's by-laws which prohibited homeless people from erecting overhead protection while they slept in public parks. The by-laws did not prohibit sleeping in the parks but forbade any structures "although a simple, individual, non-structural, weather repellent cover...that is removed once a person is awake is allowed."⁵ Both the BC Supreme Court and the Court of Appeal found that the by-laws violated section 7 of the *Charter of Rights and Freedoms*.⁶ Section 7 of the *Charter* deals with the right to life, liberty and security of the person, and makes no mention of property.

This paper begins with an examination of what the decisions of the courts in *Adams* reveal about judicial understanding of property. It will then explore how the Supreme Court of Canada understands publicly accessible property through an examination of some key decisions about access to property and property rights. Having briefly outlined how the Supreme Court of Canada understands property, and who is entitled to access what property, the paper will move on to examine other models of property. The paper will argue that these different models are by themselves no more likely to grant room for the homeless than the model that exists in Canada. However, a combination of models or concepts of property can provide room for the homeless within the private property model. The paper will conclude by arguing that even though the common law understands all property as private, it does leave room for those who have no property although this has often been overlooked.

The predicament of the homeless, namely that they have no private property rights of their own, forces them to live entirely on publicly accessible property, or on those private properties, such as shelters, which are open to them. The term publicly accessible property is used here because it is not clear if public property exists as a separate legal category in Canada.⁷

³ Unless otherwise stated, throughout this essay I will use property to refer to property in land.

⁴ Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991-1992) 39 *UCLA L Rev* 295 at 296 [Waldron, "Homelessness"].

⁵ *Adams (BCSC)*, *supra* note 2 at para 26.

⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (UK), 1982, c11 [Charter]*; *Adams (BCCA)*, *supra* note 1 at para 195; *Adams (BCSC)*, *ibid* at para 239.

⁷ In fact, it is not clear that public property exists as a separate category in any common law country. As early as the 1920s, Morris Cohen pointed out those who make the decisions about property law in common law countries tend to have trained more in private law than public law which has not helped theorize the public or social aspects of property, see

The existing theories of property often overlook the predicament of the homeless. Jane B. Baron called for ‘no property’ to become a recognised legal category but while she introduced this idea, she has yet to develop it further to explain how it might fit into the current legal understanding of property.⁸ C.B. Macpherson proposed the concept of the “right... not to be excluded” from certain kinds of property.⁹ This paper will use his ideas to further develop Baron’s ‘no property’ category, evaluate the existing model of property in Canada, and demonstrate that the common law of property does have room for the property-less. It will be argued that the current understanding of property in Canada does not recognize those with no private property and will suggest a way this could be changed.

The understanding of property found in *Adams* is in keeping with the jurisprudence of the Supreme Court. However, most of the Supreme Court jurisprudence centres on the right to freedom of expression on publicly accessible property (i.e. *Harrison v Carswell*¹⁰ and *Committee for the Commonwealth of Canada v Canada*¹¹). The jurisprudence does not deal with the issue of those who lack any private property rights of their own.¹² It was this lack of private property that made the homeless population’s claim in *Adams* about the right to exist rather than the right to property.¹³ The homeless in *Adams* did not claim that they had a private property right in the park where they slept, but that they had a right to construct adequate shelter so that they could keep themselves alive.

“Property and Sovereignty,” in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 155 at 168.

⁸ Jane B Baron, “Homelessness as a Property Problem” (2004) 36 *Urban Lawyer* 273 [Baron, “Homelessness”]; Jane B Baron, “The “No Property” Problem: Understanding Poverty by Understanding Wealth” (2004) 102 *Mich L Rev* 1000 [Baron, “No Property”]; Jane B. Baron, “Property and “No Property” (2006) 42 *Houston L Rev* 1425 [Baron, “Property”].

⁹ CB Macpherson, “The Meaning of Property,” in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 1 at 4 [Macpherson, “Meaning of Property”].

¹⁰ [1976] 2 SCR 200, 62 DLR (3d) 68 [*Harrison* cited to SCR].

¹¹ [1991] 1 SCR 139, 77 DLR (4th) 385 [*Commonwealth of Canada* cited to SCR].

¹² Jeremy Waldron, “Community and Property – For Those Who Have Neither” (2009) 10 *Theoretical Inquiries in Law* 161 at 171 [Waldron, “Community and Property”]; Nicholas Blomley, “Homelessness, Rights, and the Delusions of Property” (2009) 30:6 *Urban Geography* 577 at 581 [Blomley, “Homelessness”]; Baron, “Homelessness”, *supra* note 8 at 273, 288.

¹³ In the case of *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429, 221 DLR (4th) 257 [*Gosselin* cited to SCR]. Gosselin argued that the Government of Quebec had deprived her of social assistance in such a way that infringed her section 7 rights. As the *Charter* does not provide explicit protection to property rights, Gosselin could not claim that she had a property right in social assistance, which, as with *Adams*, meant she resorted to a section 7 claim. It is outside the scope of this paper, however, to examine whether or not property rights exist in social welfare programs.

VICTORIA (CITY) V ADAMS: WHERE AND WHEN YOU CAN AND CANNOT BE

In the judgments of the trial and appellate courts in *Adams*, it was suggested that had certain facts in the case been different, it would likely have significantly altered the decisions.¹⁴ To understand such comments, it is necessary to provide some background to the *Adams* litigation.

At the time of the litigation, the City of Victoria had a significant homeless population but it did not have enough shelter beds for all the homeless to have somewhere to sleep at night.¹⁵ Consequently a number of homeless people slept in public parks, which the City tolerated so long as those sleeping in parks did not erect any structures to shelter themselves.¹⁶ However, in 2005 some homeless people established a tent city in Victoria's Cridge Park. The City sought to have the tent city removed on the grounds that it violated municipal by-laws.¹⁷ By the time the issue came to trial, those who had been living in the tent city had vacated Cridge Park, and had filed a counter-claim arguing that the by-laws violated the *Charter*.¹⁸ Thus, the issue at the BC Supreme Court was the constitutionality of the by-laws as a whole, and not the correctness of the by-laws' application to the tent city.

Arguably, had the tent city still been in existence, the outcome of the trial would have been very different. The Attorney General of British Columbia argued that the tent city went beyond the 'mere "shelter"' that the homeless were claiming a right to; however, Ross J pointed out that the issue was not the tent city but the constitutionality of the by-laws.¹⁹ She also stated that the homeless were not "seeking...the right to establish permanent tent cities in the public parks."²⁰ Had they been seeking this right, they would have lost because a permanent tent city would have been "an appropriation of public property for private use."²¹

This provides an insight into what the BC Supreme Court understood the rights of access and use of public property to mean. Ross J emphasized the *temporary* nature of the shelter that people who sleep in public parks would be likely to erect and further declared the by-laws of no force and effect only insofar as they applied to

¹⁴ *Adams (BCSC)*, *supra* note 2 at paras 127-128 and 191; *Adams (BCCA)*, *supra* note 1 para 74.

¹⁵ *Adams (BCSC)*, *ibid* at paras 38-58.

¹⁶ *Ibid* at para 26; City of Victoria, by-law No 07-057, *Parks Regulation Bylaw*, ss13(1)(a), 14(1)(d).

¹⁷ *Adams (BCSC)*, *ibid* at paras 7-11.

¹⁸ *Ibid* at paras 12, 28.

¹⁹ *Ibid* at paras 70-73, 127.

²⁰ *Ibid.* at para 213.

²¹ *Ibid* at para 126.

temporary structures.²² The frequent reference to the non-permanent nature of the shelter is important, because it makes the claim of the homeless equivalent to that of other citizens who also use the park. For example, a family having a picnic in a public park might spread a blanket on the ground. Such an action creates a temporary interest in public property, and one that is likely to be respected by other patrons of the park.²³

While reference to the temporary nature of the sleeping shelters is essential to the success of the homeless people's claim, it does ignore the fact that the homeless differ from other citizens in one key way: they have no private property of their own. The understanding that citizens only want temporary access to public property assumes that they have private property of their own to retreat to. For the vast majority of people, this assumption of a private property interest is correct.²⁴ The homeless are, by contrast, excluded from all private property unless they secure the owner's permission to be there.²⁵ Thus, they must spend their lives on publicly accessible property, but it is assumed that a person only wants or needs temporary access to such property. The homeless, therefore, are permanently on property to which they only have a temporary right to access and use.²⁶ The City of Victoria even stated that its by-laws aimed at avoiding permanence in an individual's use of the park.²⁷ If the regulations which spell out the temporary nature of the right to access and use public places are strictly enforced, the homeless must constantly move to avoid running afoul of them.²⁸

The Courts also viewed sleeping in public parks to be temporary in another way. Property law governs where a person has a right to be at any given time and what they can do there.²⁹ The BC Supreme Court and the Court of Appeal thought that shelters were the proper place for homeless people to be at night. Ross J points out that if there were enough shelter spaces "the case would be different and more

²² *Ibid* at para 237.

²³ Robert C Ellickson, "Property in Land" (1992-1993) 102 Yale LJ 1315 at 1364; Ellickson's argument has some echoes with the informal rules which surfers use to informally govern access to the "surfing commons"; Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004) at 18 [*Blomley, Unsettling the City*].

²⁴ I say interest because citizens might rent rather than own.

²⁵ Waldron, "Homelessness", *supra* note 4 at 299.

²⁶ Due to the temporary nature of this right the homeless struggle to meet their most basic needs, see *ibid* at 311-312, 323.

²⁷ *Adams (BCSC)*, *supra* note 2 at paras 206-207.

²⁸ Such regulations have been frequently been the subject of litigation in the United States of America. By way of example, see *Jones v City of Los Angeles*, 444 F3d 1118, (2006); *Lehr v City of Sacramento* 624 FSupp 2d 1218, ED Cal2009; *Pottinger v City of Miami* 810 F Supp1551, SD Fla, 1992. For another Canadian example, see *R v Banks*, 2007 ONCA 19, 84 OR (3d)1, 275 DLR (4th) 640 [*Banks* cited to OR]. This case does not deal with homelessness *per se* but it does deal with legislation regulating begging.

²⁹ Waldron, "Homelessness", *supra* note 4 at 302.

difficult.”³⁰ The Court of Appeal goes further and says that “[i]f there were sufficient shelter spaces to accommodate the homeless population in Victoria, a blanket prohibition on the erection of overhead protection in public parks might be constitutional.”³¹

The remedy that the Court of Appeal granted reflects the view that the proper place for the homeless is in shelters. The Court of Appeal found that the by-laws “are inoperative insofar and only insofar as they apply to prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds...”³² The remedy that the BC Supreme Court granted made no mention of the time period when the invalidity would operate, nor did Ross J limit the suspension until such a time when there might be enough shelter beds.³³ Thus the Court of Appeal reveals an implicit understanding that the proper place for the homeless at night is in shelters and denies the homeless the right to provide their own shelter.

The reason why the right of access to and use of publicly accessible property is only temporary is because a permanent right would be exclusionary, and thus it would turn public property into private. If you can exclude someone from property under your control and the true owner of the property does not interrupt your occupation, then under the doctrine of adverse possession you can become the legal owner of the property.³⁴ Alberta is the only province in Canada to exclude Crown land from being subject to adverse possession.³⁵ However, British Columbia has introduced some limits to adverse possession and has abolished the acquisition of property rights through prescription.³⁶ Thus the homeless could claim no adverse possession rights over public parks.

³⁰ *Adams (BCSC)*, *supra* note 2 at para 191.

³¹ *Adams (BCCA)*, *supra* note 1 at para 74.

³² *Ibid* at para 166.

³³ *Adams (BCSC)*, *supra* note 2 at para 239.

³⁴ See e.g. *Teis v Ancaster (Town)*, [1997] 35 OR (3d) 216, 152 DLR (4th) 304 (Ont CA) [*Teis* cited to OR].

³⁵ For Alberta, see *Public Lands Act*, RSA 2000, c P-40, s 4; *Limitations Act*, RSA 2000 c L-12, s 2(4)(a). In Ontario, the time period for adverse possession on Crown land is sixty years instead of ten years for privately owned land, see *Real Property Limitations Act*, RSO 1990 c L-15, s 3.

³⁶ *Land Title Act*, RSBC 1996, c C-250, ss 23-24. Even if prescription still existed in British Columbia, it is unlikely that the homeless could have claimed they had a prescriptive easement over public parks, as prescription requires years of use. In addition, an easement typically relates to two parcels of land: one being the dominant tenement and the other as servient tenement. The homeless have no land and they could not claim an easement over public property. An easement would only give the homeless a right to use property for a specific purpose. For a further discussion on prescriptive easements, see *Report on the Basic Principles of Land Law* (Toronto: Ontario Law Reform Commission, 1997) at 133-138. Likewise, any claim of adverse possession would have failed due to the short length of time that the tent city had existed.

In their examination of whether or not the homeless of Victoria were claiming a property right, the Courts reveal an understanding of property which assumes private property to be the dominant model. Neither Court differentiates explicitly between ‘public’ and ‘private’ property in the context of the allegation that the homeless were claiming a property right. Admittedly, property rights are not protected under the *Charter* and this would presumably apply to public property rights, if there are such things in Canada. Nevertheless, the Courts implicitly assume that any property right would be one that would fit into the private property model. In understanding property rights this way, the judgments highlight that the essence of the private property model is the inter-related rights of exclusion and control.

The City of Victoria claimed that the homeless were asserting a right to camp on public property and thus they were claiming a property right.³⁷ The City’s argument did not convince Ross J, who pointed out that because there are not enough shelter spaces “[t]he use of some public property by the homeless is unavoidable.”³⁸ Ross J did not think that the homeless were appropriating public property, because the homeless were not trying to *exclude* anyone else from using the parks.³⁹ In fact in Ross J’s view, a homeless person sleeping in the park at night would not prevent other members of the public from using the park during the day.⁴⁰ The regulation of public spaces requires a careful balancing act, because public spaces are for everyone – no person’s use should preclude another from enjoying them.⁴¹ The BC Supreme Court seems to differentiate between the rights of access to and use of public and private property based on the permanence and exclusivity of the rights to private property. By pointing out that the homeless people’s presence on public property is only temporary, Ross J shows how their demands are not for a private property right, but for a more appropriate balancing in the regulation of public space.

The BC Court of Appeal agreed with the trial judge’s finding that the homeless were not claiming a property right:

The right asserted by the respondents and recognized by the trial judge is the right to provide oneself with rudimentary shelter on a *temporary* basis in areas where the City acknowledges that people can, and must, sleep. This is not a property right, but a right to be free of a state-imposed prohibition on the activity of creating or utilizing shelter, a prohibition which was found to impose significant and potentially severe health risks on one of the City’s most vulnerable and marginalized populations.⁴²

³⁷ *Adams (BCSC)*, *supra* note 2 at para 126.

³⁸ *Ibid* at para 129.

³⁹ *Ibid* at para 132.

⁴⁰ *Ibid* at paras 130, 181.

⁴¹ Waldron, “Homelessness”, *supra* note 4 at 312.

⁴² *Adams (BCCA)*, *supra* note 1 at para 100 [emphasis added].

Similar to the trial Court, the Court of Appeal differentiates a property right from the private property model. The Court of Appeal seems to think that any property right to the park would be permanent in nature, and because of this it would exclude others from the park. Thus, a property right can change the nature of the land from public to private.

Through an examination of what the Courts say about property rights, we can see that they understand that private property centres on the right to exclude. The right to exclude is related to the right to control who can access your property and what they can do while there. In the context of the right to control property, both Courts focus on the actions of the City of Victoria. It is here that a potentially different model of property comes to light. The BC Supreme Court refers to an earlier Supreme Court of Canada case, *Commonwealth of Canada*,⁴³ to reject the idea that “the government can determine the use of its property in the same manner as a private owner.”⁴⁴ However, Ross J does not argue that public property is an entirely different category from private property.

The government may not be the same as a private owner but it is an owner nonetheless. According to Ross J, “[p]ublic properties are held for the benefit of the public, which includes the homeless.”⁴⁵ The question is whether the kind of ownership a government has is so different from a private citizen that government owned property becomes another class of property altogether. Judging by the evidence presented in *Adams*, government ownership does not drastically alter the nature and rights of property ownership, and therefore public property is not a separate class of private property.

In the decision of the BC Supreme Court, Ross J was convinced that the homeless were not demanding a property right, because all they were asking was that the City not manage its property in a way that “interferes with their ability to keep themselves safe and warm.”⁴⁶ As a public body, the City of Victoria must respect the *Charter*, and this is arguably the main difference between government owned and privately owned property. A private individual could manage his or her property in a way that would prohibit the homeless from entering, whereas the City of Victoria must manage its property in compliance with the *Charter*. So if Victoria wishes to ban the homeless from its property, it must show that any infringement of the *Charter* flowing from the prohibition is allowed under section 1.

⁴³ *Supra* note 11. This case was about the freedom of expression. It arose when members of an interest group attempted to distribute leaflets at Montreal’s Dorval airport. The airport managers and security personnel told the group that they could not distribute leaflets at the airport, and the group claimed that this restriction breached their freedom of expression guaranteed by the *Charter*.

⁴⁴ *Adams (BCSC)*, *supra* note 2 at para 131.

⁴⁵ *Ibid.*

⁴⁶ See *ibid* at paras 132, 188.

Both the BC Supreme Court and the Court of Appeal found that while the by-laws were aimed at achieving an important objective, they did not comply with the *Charter*.⁴⁷ If the requirement that government property is managed in compliance with the *Charter* is the only way it is differentiated from a private citizen's property, it does not seem as though publicly owned property is inherently different from private property. In the case of government owned and publicly accessible property⁴⁸ the *Charter* acts as a limitation on how the owner can manage its property. The property of private citizens is also subject to limitations, for example the law of nuisance restricts what a private owner can do on his or her property.⁴⁹ At best, the *Charter* limitations on government property create a type of property which could be described as 'private property minus' rather than a category of public property which is different *ab initio*.

The following section will now look at some Canadian Supreme Court jurisprudence to show that the property law aspects of *Adams* are in keeping with how public property is understood by Canada's highest court.

PUBLIC PROPERTY AND THE SUPREME COURT OF CANADA

The Supreme Court of Canada has long recognised that government owned property is not the same as property owned by private citizens. For example in the 1932 case of *Vancouver (City) v Burchill*,⁵⁰ Rinfret J said "municipalities are in a sense owners of the streets. They are not, however, owners in the full sense of the word, and certainly not to the extent that a proprietor owns his land."⁵¹ Much like Ross J, Rinfret J argued that municipalities hold their land as "trustee for the public."⁵²

In *Burchill*, the City of Vancouver argued that an unlicensed driver was a trespasser and, as such, the City owed Burchill "no other duty other than not to do or to cause him malicious or wilful injury."⁵³ *Burchill* was a pre-*Charter* case but it shows that the common law has long recognised that members of the public have the right to "pass and repass" on a municipality's streets.⁵⁴ The Court accepted that Vancouver could regulate how their highways were used and punish those who failed

⁴⁷ *Ibid* at paras 200, 216; *Adams (BCCA)*, *supra* note 1 at para 129.

⁴⁸ The Supreme Court of Canada has stated that the traditional use of government property will affect how it can be managed, see *Commonwealth of Canada*, *supra* note 11 at paras 10, 12, 208. See also Richard Moon, "Out of Place: Comment on *Committee for the Commonwealth of Canada v Canada*" (1992-1993) 38 McGill LJ 204 at 208.

⁴⁹ Joseph William Singer, "Sovereignty and Property" (1991-1992) 86 Nw UL Rev 1 at 47 [*Singer*, "Sovereignty"].

⁵⁰ [1932] SCR 620, [1932] 4 DLR 200 [*Burchill* cited to SCR].

⁵¹ *Ibid* at para 22.

⁵² *Ibid*; *Adams (BCSC)*, *supra* note 2 at para 131.

⁵³ *Burchill*, *supra* note 50 at para 21.

⁵⁴ *Ibid* at paras 17, 22.

to observe these rules, with the caveat that such laws could not criminalize accessing the property itself.⁵⁵ Such a conclusion echoes the City of Victoria's claim in *Adams* that they were not preventing the homeless from accessing and using public parks, they were merely regulating how the parks were used. In both cases, the Cities claimed to restrict the use of their property with the aim of protecting the public.⁵⁶

Arguably when Ross J spoke of public property being held for public benefit, she had in mind something similar to a trust; although, unlike Rinfret J, she does not state this explicitly.⁵⁷ Understanding government owned property as being held in a trust for the public does not change the nature of the property being held. Trust property remains private property, the difference that a trust makes is that the trustees hold the property for the benefit of others.⁵⁸ As such in Canada, government owned property and privately owned property are not inherently different. It should also be noted that the alleged trust under which government property is held does not actually exist; the trust concept is used as an analogy to limit what the government can do with its property.

Other countries do, however, explicitly distinguish between privately owned property and government owned property.⁵⁹ Christine Willmore identifies two other models of government ownership, in addition to the private property model. She calls these models the public obligation model and the dualist model.⁶⁰ Under the former, *all* property must serve the public interest thus "public obligations are an inherent part of the definition of property rather than a subsequently imposed limitation."⁶¹ The dualist model sees property as being either public or private with the two categories being subject to different law.⁶² In France, property classed as *domain public* is seen as the property of all citizens.⁶³

⁵⁵ *Ibid* at para 22.

⁵⁶ *Ibid*; *Adams (BCSC)*, *supra* note 2 at para 31; In *Adams*, the City argued that its by-laws were intended to protect public health.

⁵⁷ *Adams (BCSC)*, *supra* note 2 at para 131.

⁵⁸ Samantha J Hepburn, *Principles of Equity and Trusts* 4th ed (Sydney: The Federation Press, 2009) at 358-360.

⁵⁹ Christine Willmore, "Constructing "Public Land": The Role of "Publicly" Owned Land in the Delivery of Public Policy Objectives" (2005) 16:3 Stellenbosch L Rev 378 at 384-386.

⁶⁰ *Ibid* at 384.

⁶¹ *Ibid* at 385. See e.g. *Grundrechtskatalog* 1949, art 14.2, *Basic Law for the Federal Republic of Germany (Grundrechtskatalog)*, online: < <https://www.btg-bestellservice.de/pdf/80201000.pdf> > [as cited in *ibid* at 385].

⁶² Willmore, *supra* note 59 at 385-386. Willmore uses the French and Italian systems as examples.

⁶³ *Ibid*. See also Cons Constitutionnel, 25 June 1986, *Privatisations*, Rec 1986 61, 86-207 DC, online: < <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1986/86-207-dc/decision-n-86-207-dc-du-26-juin-1986.8271.html> > [as cited in *ibid* at 386].

The trust analogy of government owned property did not disappear with the advent of the *Charter*. In the *Commonwealth of Canada* case, Lamer CJC suggested that the government has a “quasi fiduciary duty” to the public with regard to its property when he said that the government owns property “for the citizens’ benefit and use.”⁶⁴

By the time the Supreme Court decided *Commonwealth of Canada*, it had the benefit of significant American jurisprudence dealing with the freedom of expression on government property and its solution of the ‘public forum’ doctrine.⁶⁵ The Supreme Court decided against adopting the American ‘public forum’ doctrine. Instead the Court opted to defer to the government and its use of the property, over and above the *Charter* rights of citizens.⁶⁶

The judgments in *Commonwealth of Canada* focus mainly on the issue of the freedom of expression; however, as the issue was accessing government property to communicate, the case does contain a commentary on public property relevant to *Adams*. The government claimed in *Commonwealth of Canada* that it had the same property rights as any other owner, but Lamer CJC, Sopinka, L’Heureux-Dube, Gonthier, and Cory JJ rejected this claim.⁶⁷ Interestingly, McLachlin and LaForest JJ argued that the government could exclude people from its property subject only to the *Charter*. La Forest J went so far as to say “[a]s a general proposition, the Crown’s proprietary rights are the same as those of a private owner, but in exercising them the Crown is subject to the overriding requirements of the Canadian Charter of Rights and Freedoms.”⁶⁸ McLachlin and La Forest JJ’s opinion on government owned property seems to be markedly different from *Burchill*. McLachlin and La Forest JJ’s view that government property only differs from private property due to the extra requirements that the *Charter* imposes seems to be an even stronger statement of the private property model than had previously existed.

The Supreme Court may have rejected the American ‘public forum’ doctrine, but it did provide its own balancing act for government owned property in Canada. Richard Moon has described the balancing act as the Court attempting to differentiate between ‘private’ government property and ‘public’ government property.⁶⁹ The Court had particular difficulties with its attempt to differentiate between these categories of government property.

McLachlin J effectively introduces the idea of completely ‘private’ government owned property.⁷⁰ In the context of *Commonwealth of Canada*, McLachlin J found that the right to free expression on government owned property was restricted to

⁶⁴ *Commonwealth of Canada*, *supra* note 11 at para 14; Moon, *supra* note 48 at 212.

⁶⁵ *Commonwealth of Canada*, *supra* note 11 at paras 3-6, 9, 202, 226.

⁶⁶ Moon, *supra* note 48 at 208.

⁶⁷ *Commonwealth of Canada*, *supra* note 11 at paras 13, 107, 120.

⁶⁸ *Ibid* at paras 45.

⁶⁹ Moon, *supra* note 48 at 204.

⁷⁰ *Commonwealth of Canada*, *supra* note 11 at para 215; Moon, *supra* note 48 at 207, 221.

government properties that were traditionally publicly accessible.⁷¹ However, she bases her test for the right of access on the *state's* use of its property,⁷² which results in ignoring the availability of other forums for expression.⁷³ The effect of McLachlin J's balancing act in *Commonwealth of Canada* is to ultimately defer to the government as a property owner to decide on how to control its property.⁷⁴ However, McLachlin J's attempt to introduce a public/private divide into government owned property points to an understanding that the categorization of property is complex.

In her judgment, L'Heureux-Dube J shares the view that not all government property was available to the public under freedom of expression, and she too attempted a public/private division.⁷⁵ Unlike McLachlin J, L'Heureux-Dube J's differentiation between public and private government owned property results in different standards of review rather than the automatic failure of free expression on 'private' government owned property.⁷⁶

Reading the judgments of the Supreme Court of Canada together, it is clear that the Court was attempting to defer to the state's use of its property rather than the nature of the right infringed.⁷⁷ The Court declared that the government had the same rights as a private owner except for the *Charter*. Yet in their attempt to explain how the *Charter* limitation might operate, the Court revealed that it was the use, and not the owner of the property, that made government property either public or private.

The use distinction has echoes of the French model of state property, which is divided into *domain public* or *domain privé*. The former type of ownership is only open to public bodies and has certain restrictions; for example, it must be declassified by the *Conseil d'Etat* before the state disposes of it. The latter type of ownership, however, gives the state all the same rights as a private owner.⁷⁸

In addition, it is possible that the use distinction could be extended to property that is owned by private individuals. L'Heureux-Dube J, in her judgment in *Commonwealth of Canada*, referred to American jurisprudence which subjects some publicly accessible private property to constitutional rights such as freedom of expression.⁷⁹ L'Heureux-Dube J is quick to note that current Canadian jurisprudence has not yet adopted the American position, and the position in Canada remains that of *Harrison*, which allows a private owner to exclude anyone from their property.

⁷¹ *Commonwealth of Canada*, *ibid* at para 225.

⁷² *Ibid* at para 240.

⁷³ Moon, *supra* note 48 at 223-224.

⁷⁴ *Ibid* at 225.

⁷⁵ *Ibid* at 228-229; *Commonwealth of Canada*, *supra* note 11 at paras 134-136.

⁷⁶ *Commonwealth of Canada*, *supra* note 11 (“[r]estrictions on expression in particular places will be harder to defend than in others. In some places the justifiability of the restrictions is immediately apparent” at para 135).

⁷⁷ Moon, *supra* note 48 at 232.

⁷⁸ Willmore, *supra* note 59 at 386.

⁷⁹ *Commonwealth of Canada*, *supra* note 11 at para 128; L'Heureux-Dube J quotes from the American case, *Marsh v Alabama*, 326 US 501 (1946) at 506.

However, L'Heureux-Dube J quotes from the majority decision and Laskin CJC's dissent noting that *Harrison* was decided pre-*Charter*.⁸⁰ This suggests that *Harrison* may now be out of date.⁸¹

In *Harrison*, Dickson J stated that the law in Canada "has traditionally recognized...the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law."⁸² Dickson J pointed out that the shopping centre owner in *Harrison* "had never permitted the distribution of pamphlets or leaflets, or the carrying of placards, within the mall."⁸³ In other words, Dickson J found that the shopping centre's exclusion of striking workers was a part of a longer standing regime of property control.

Should a case with similar facts come before the Supreme Court again, L'Heureux-Dube J's discussion of *Harrison* in *Commonwealth of Canada* suggests that the outcome might be different.⁸⁴ She quotes from the portion of Laskin CJC's dissent which argued that the majority's finding in *Harrison* did not accurately reflect "economic or social fact."⁸⁵ Laskin CJC argued that where private property, such as a shopping centre, was open to the public, the property's owner has invested the public with a right of access, subject to each individual's lawful behaviour.⁸⁶ Laskin CJC did not, however, make the right of access to such private property absolute but limited it to the hours of business only.⁸⁷

In his dissent, Laskin CJC referred to American jurisprudence and its granting of an unrestricted right of access to shopping centres because of their similarity to the public markets of old.⁸⁸ Despite Laskin CJC's reference to the American solution, no American court "acknowledged a general right of access to property open to the public" until the New Jersey Supreme Court did in 1982.⁸⁹

Laskin CJC did not adopt the same solution as the American courts. Despite disagreeing with the majority's remedy, Laskin CJC also rooted his solution in the private property model and its right to exclude. He proposed that the correct approach was to recognize a "continuing privilege" to use the publicly accessible areas of private property so long as the public behaved lawfully.⁹⁰ Laskin CJC's solution is

⁸⁰ *Commonwealth of Canada*, *supra* note 11 at paras 130-131.

⁸¹ MM Litman is optimistic that *Harrison* would no longer be followed, see "Freedom of Speech and Private Property: The Case of the Mall Owner," in David Scheidemann, ed, *Freedom of Expression and the Charter* (Calgary: Thomson Publishing, 1991) 361.

⁸² *Commonwealth of Canada*, *supra* note 11 at para 129.

⁸³ *Ibid* at para 129.

⁸⁴ See *Commonwealth of Canada*, *supra* note 11 at paras 130-131.

⁸⁵ *Ibid* at para 130. L'Heureux-Dube J quotes from *Harrison*, *supra* note 10 at para 32.

⁸⁶ *Harrison*, *supra* note 10 at para 19.

⁸⁷ *Ibid* at para 41.

⁸⁸ *Ibid* at para 38.

⁸⁹ Joseph William Singer, "No Right to Exclude: Public Accommodations to Private Property" (1995-1996) 90 *Nw UL Rev* 1283 at 1412 [Singer, "Public Accommodations"].

⁹⁰ *Harrison*, *supra* note 10 at paras 39-41.

that when private properties, such as shopping centres, are open to the public the owner cannot exclude members of the public arbitrarily, but the private property owners can regulate when their properties are open to the public. Thus the private, publicly accessible properties in question would only become subject to the rights of access that exist on government owned publicly accessible properties. These private property owners retain ultimate control of access to their property, in keeping with the private property model.

Two lower court decisions, *Cadillac Fairview Corporation Limited v Retail, Wholesale and Department Store Union*⁹¹ and *Queen's University at Kingston v C.U.P.E., Local 229*⁹² distinguished *Harrison*, but did not explicitly say that *Harrison* was out of date. In *Cadillac Fairview*, the Court said that *Harrison* “cannot be read so as to give shopping centre owners the unfettered right to control the use of their premises without regard to the provisions of the *Labour Relations Act*.”⁹³ Whereas in *Queen's University*, the Ontario Court of Appeal found that there “was no unrestricted invitation to the public to enter”, and thus the University was not publicly accessible.⁹⁴

Litman concluded that *Harrison* was wrongly decided and that it will eventually be reconsidered and reversed⁹⁵; but as yet, no lower court has explicitly refused to follow it, though it has been repeatedly distinguished. It is not certain that the Supreme Court would grant access to the property of a private owner for the purposes of free speech. In *Commonwealth of Canada*, McLachlin J commented that the *Charter* does not “extend to private actions...therefore...confers no right to use private property as a forum for expression.”⁹⁶ However, it is not always clear where to draw the public/private line when it comes to the applicability of the *Charter*.⁹⁷

While the *Charter* has changed how the Supreme Court treats property, it has not made government owned property into a separate category. The assumption remains that all property is essentially private; and consequently only property owners, regardless of who they are, have property rights. Despite the dominance of the private property model, Canadian courts have previously diluted private property rights on the grounds of public policy.⁹⁸

⁹¹ 1985 CanLII 1116 (ON LRB), 1989 CarswellOnt 936, [1989] OLRB REP 1292 [*Cadillac Fairview* cited to CanLii].

⁹² [1994] 120 DLR (4th) 717, 76 OAC 356 [*Queen's University* cited to DLR].

⁹³ *Cadillac Fairview*, *supra* note 91 at para 35. The Act referred to is RSO 1980, c 228.

⁹⁴ *Queen's University*, *supra* note 92 at para 25.

⁹⁵ Litman, *supra* note 81 at 407.

⁹⁶ *Commonwealth of Canada*, *supra* note 11 at para 218.

⁹⁷ For a discussion of the public/private divide, see Allan C Hutchinson & Andrew Petter, “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988) 38 UTLJ 278; Peter W. Hogg, “The Dolphin Delivery Case: The Application of the Charter to Private Action” (1986-1987) 51 Sask L Review 273.

⁹⁸ Litman, *supra* note 81 at 371.

The Supreme Court's reliance on the private property model implies that there are no other ways of thinking about property. Such an implication is untrue. European countries have a long history of recognizing public property as a separate category *ab initio*.⁹⁹ Regardless, the existence of public property as a separate category may not leave room for the homeless any more than the private property model does. However desirable separate categories of public and private property may be, the distinction between the two is not always clear cut and may not accurately reflect the modern complexity of property. I will argue that the private property model in the common law has been too narrowly interpreted and perhaps there is room for the homeless after all.

FINDING ROOM FOR THE HOMELESS

Joseph Singer has pointed out that the common law has long recognised that certain types of private property could not arbitrarily exclude people. In particular, privately owned properties, such as inns, that held themselves out as being open to the public had a duty to serve the public under the law of public accommodation.¹⁰⁰ Singer has pointed out the assumption that property, like shops and shopping centres, cannot exclude individuals arbitrarily, giving these private property owners certain obligations usually held exclusively by governments.¹⁰¹ Singer has suggested an alternative model of property, called the social relations model, which seems to better reflect how property operates. The social relations model calls for a broader understanding of the private property model and emphasizes that the common law can recognise ideas such as common ownership and individuals' property interests extending beyond the boundaries of their own property, overlapping with that of their neighbours and community. On its own, the social relations model may not go far enough. Moreover, the model does not explicitly comment on the effect it would have on government owned public property. This section will first explore the social relations model before moving on to explore the trust analogy of government owned property, and will then combine ideas from the two models to show how the private property model has room for the homeless.

THE SOCIAL RELATIONS MODEL OF PROPERTY

Nicholas Blomley's work on Vancouver points to the idea that even private homes might have certain public aspects. Blomley surveyed the inhabitants of a neighbourhood in Vancouver to see if they thought there was a difference between

⁹⁹ See Willmore, *supra* note 59; see also, Richard Perruso, "The Development of the Doctrine of *Res Communes* in Medieval and Early Modern Europe," (2002) 70 *Tijdschrift voor Rechtsgeschiedenis* 69.

¹⁰⁰ Singer, "Public Accommodations", *supra* note 89 at 1308.

¹⁰¹ *Ibid* at 1286.

their front and rear gardens, the point being that the front gardens were more publicly visible.¹⁰² Vancouver and other cities have by-laws which require owners to maintain their property in ways that suggest an underlying public interest.¹⁰³ Such by-laws directly infringe on the private property model's idea of the owner having the right to control his or her property however they see fit. The public interest in these by-laws is frequently framed as economic. For example, the value of your property might be adversely impacted if your neighbour has an unkept garden.

An argument in defence of the rights that the private property model provides is that property serves a significant economic function. For example, private property is thought to encourage people to develop their property and make it fruitful.¹⁰⁴ Thus, the by-laws which force people to maintain their property are actually in keeping with the dominant private property model, because they protect the economic investment of private property. While such by-laws support the idea that property has significant economic functions, the by-laws also reveal that private property is dependent on others and is inherently relational and social. Even the private property model functions as a social system¹⁰⁵ and is not just a way to protect individual's rights.

Singer's proposed social relations model of property actually allows for several models of property to exist in the various spheres of social life.¹⁰⁶ The social relations model is rooted in the common law understanding of property but rather than emphasizing the private aspects of property and the right to exclude,¹⁰⁷ it focuses on the balancing of rights and interests to property. Singer goes on to list several models of property and ownership that already exist or are recognised under the common law to illustrate that the private property model is a gross oversimplification that may not be helpful in understanding property.¹⁰⁸

The social relations model is particularly convincing in two places: first is when Singer uses the existing doctrine of nuisance to argue that property rights are all about balancing the owner's right to his or her property with the effect this will have on other people.¹⁰⁹ Singer proposes that nuisance should be the basis of a new model

¹⁰² Nicholas Blomley, "The Borrowed View: Privacy, Propriety, and the Entanglements of Property," (2005) 30 *Law & Soc Inquiry* 617 at 639-640 [Blomley, "Borrowed View"].

¹⁰³ *Ibid* at 629-630.

¹⁰⁴ Carol Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property" (1986) 53:3 *University of Chicago Law Review* 711 at 711 [Rose, "Comedy of the Commons"]; Carol M Rose, "Canons of Property Talk, or Blackstone's Anxiety" (1998-1999) 108 *Yale LJ* 601 at 619 [Rose, "Blackstone Anxiety"]; Ellickson, *supra* note 23 at 1317.

¹⁰⁵ Singer, "Public Accommodations," *supra* note 89 at 1461.

¹⁰⁶ *Ibid* at 1462.

¹⁰⁷ The right to exclude has been called the "central question for property law and theory", see Jane B Baron, "The Contested Commitments of Property" (2010) 61 *Hastings Law Journal* 917.

¹⁰⁸ Singer, "Public Accommodations," *supra* note 89 at 1462-1463.

¹⁰⁹ *Ibid* at 1465-1466.

of property rights. However, this also results in a property model that requires judicial balancing in order to allow homeless people to use public property in a way that affords them life, liberty and security of the person. More importantly, there is no guarantee that a property model based on nuisance would include the homeless as members of the community whose interests were being balanced. Thus, the nuisance model may also exclude the homeless.

The second aspect of the social relations model which is most convincing is the recognition of multiple owners and overlapping interests in property. The examples that Singer gives are marital property, joint ownership, tenancy, business partnerships, and corporations to name but a few.¹¹⁰ Arguably, a community interest would be classed as an acceptable property interest under the social relations model, but it could also be available under the common law.

Recognising that communities have an interest in the property within their area is a broader understanding of the doctrine of nuisance. An example of how a community interest in property might work is provided by Vancouver's Downtown Eastside ("DTES"). When a developer acquired permission to turn a derelict building in the DTES into condos, the residents of the area objected, and claimed the building as community property.¹¹¹ The DTES residents feared that if the Woodward's building was transformed into condos, it would be the first step in removing the poor from the area. The residents of the area squatted in and around the building, and eventually the developers and Vancouver agreed to develop Woodward's in consultation with the DTES residents.¹¹²

Blomley argues that the Woodward's example challenges the traditional understandings of property. He points out that tenants in the single room occupancy ("SRO") hotels which surround Woodward's, are in a precarious position in that their property rights are sub-ordinate, in the eyes of the law, to the property rights of their landlords.¹¹³ It is hard to see how the private property rights that tenants have can be "a bulwark of individual liberty and autonomy" as they are wholly contingent on their landlords continuing to run the hotels as hotels.¹¹⁴ The hotel landlords' property rights are currently granted more legal protection, but this protection can be used to expropriate the property of others.¹¹⁵ Unless we recognise that the tenants' and the landlords' property rights ought to be protected, the protection of private property rights will continue to operate to harm more vulnerable parties.

If the protection of private property rights can actually make some property rights more vulnerable (i.e. tenants' rights are more precarious than landlords' rights),

¹¹⁰ *Ibid* at 1462-1463.

¹¹¹ Nicholas Blomley, "Enclosure, Common Right, and the Property of the Poor," (2008) 17 *Social and Legal Studies* 311 at 312 [Blomley, "Enclosure"].

¹¹² *Ibid* at 311-315.

¹¹³ *Ibid* at 325.

¹¹⁴ *Ibid* at 326.

¹¹⁵ *Ibid*.

it is clear that those who lack any private property rights or interests are even more vulnerable. The tenants of the hotels in Vancouver's DTES currently have no legal redress should their landlord opt to convert the hotel into condos or alter the terms of the tenancy which make it impossible for long-term residents to stay.¹¹⁶ By valuing the landlord's right to use and dispose of his property as he sees fit over and above the rights of his tenants, the current understanding of property law leaves the economically disadvantaged subject to the constant risk of displacement.¹¹⁷

The homeless who were 'camping' in Victoria's public parks are perhaps even more vulnerable than the tenants of SRO hotels. Blomley and Singer have both argued that non-owners have an interest in property which is worthy of legal protection,¹¹⁸ but a homeless person has no right of their own because their status of 'no property' is not recognised by law. While the residents of the DTES could make claims about community property, their underlying fear was that the development of Woodward's would threaten their own precarious property rights.¹¹⁹ As a consequence, the homeless were arguably left out of this idea of community. The homeless who live in the DTES only have a community interest in the area because they have no private property. However, the assertion of Woodward's as community property was motivated by a desire to protect the private property interests of the residents of the DTES which meant that without a private property interest, the homeless were also excluded from the community property.

Jeremy Waldron has pointed out that community and property are intertwined and, as such, community can be just as exclusionary as property.¹²⁰ There is a way, however, to think about property so as to leave room for the homeless. Singer and other commentators have pointed out that property acts as a social system.¹²¹ Currently, property operates in Canada to deny those without private property a right to exist. Translated into a social system, the current Canadian understanding of property renders the homeless visible only by their invisibility. Homeless people's invisibility results from the laws and by-laws that impose obligations impossible for those without private property to uphold.¹²² Laws which impose impossible

¹¹⁶ *Ibid* at 312; Marg Green, *The Downtown Eastside: A Time for Mediation or a Time to Take a Stand* (unpublished, undated) quoted in Blomley, "Unsettling the City", *supra* note 23 at 92; For example, a hotel landlord could significantly raise the rent or limit the number of consecutive nights a person can stay at the hotel. Such measures are not always successful, see Blomley, *Unsettling the City*, *supra* note 23 at 176 n 81.

¹¹⁷ Nicholas Blomley, "Landscapes of Property" (1998) 32 *Law & Soc Review* 567 at 588.

¹¹⁸ Blomley, "Unsettling the City", *supra* note 23 at 57; Joseph William Singer, "The Reliance Interest in Property" (1987-1988) 40 *Stan L Rev* 611 at 622, 641, 657.

¹¹⁹ Blomley, "Enclosure", *supra* note 111 at 312.

¹²⁰ Waldron, "Community and Property", *supra* note 12.

¹²¹ Singer, "Public Accommodations", *supra* note 89 at 1303, 1461, 1477; Blomley, "Borrowed View", *supra* note 102 at 649; Baron, "Property", *supra* note 8 at 1443.

¹²² As examples, Edmonton has a by-law against camping on parkland, City of Edmonton, By-Law No 12308, *Unauthorized Use of Parkland* (1 April 2001). Calgary has a by-law

obligations are considered null and void;¹²³ thus in order for these public behaviour laws and by-laws to be valid, the homeless must not exist.

Homeless people, however, do exist in spite of the laws that try to make their public life difficult, if not impossible.¹²⁴ Attempts to regulate public property, especially government owned publicly accessible property, in a way that denies the existence of people who need to live entirely in public will fail. The by-laws at issue in *Adams* did not prohibit sleeping in parks, but they did regulate the way that people could sleep in parks so as to make it impossible for a person to sleep in a park and stay healthy.¹²⁵ While the BC Supreme Court recognised that “[t]he use of some public property by the homeless is unavoidable”¹²⁶, the Court still seems to think that the homeless will only need temporary access to the parks. Presumably they will have to move somewhere else during the day if they are not to run afoul of the by-laws.

It may not always be possible for the homeless to move somewhere else during the day, or move quickly enough to comply with the “temporary overnight shelter” limit that the Court of Appeal introduced into Victoria’s by-laws.¹²⁷ For example, a homeless person may not be well and need to rest during the day, yet Victoria’s by-laws only allow the homeless to shelter themselves at night.

The homeless cannot fulfil the temporary aspect which is implicit in the rights of access to publicly accessible property. Currently the legal protections that the homeless have seem to stem from an inadequate understanding of their plight. The homeless are forced to fight for the right to live, as participation in society remains beyond them. Perhaps if, as Baron suggests, ‘no property’ was a recognised legal category, the regulation of the homeless could be made less problematic.¹²⁸

Baron has only hinted at what a developed concept of ‘no property’ might look like. She has suggested that it is the “photographic negative” of the wealth and rights

which prohibits urinating, spitting, and loitering in public among other things, see City of Calgary, By-law No 54M2006 *Public Behaviour Bylaw* (20 November 2006). Don Mitchell has argued that the anti-homeless laws in the United States work to make the homeless disappear, see “The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States,” (1997) 29:3 *Antipode* 303 at 307.

¹²³ At least the laws would be considered null by some legal theorists, see Lon Fuller, *Morality of Law* (New Haven: Yale University Press, 1964) at 70-79. Arguably the laws could also be void, because they discriminate against a class of people. A complete exploration of the validity of these laws on grounds of discrimination or impossibility is beyond the scope of this essay.

¹²⁴ Mitchell, *supra* note 122 at 305; Waldron, “Community and Property”, *supra* note 12 at 181.

¹²⁵ *Adams* (BCSC), *supra* note 2 at para 68.

¹²⁶ *Ibid* at para 129.

¹²⁷ *Adams* (BCCA), *supra* note 1 at para 166.

¹²⁸ Baron, “Homelessness”, *supra* note 8 at 288.

that private property provides,¹²⁹ and that it is a position of “social and legal vulnerability”¹³⁰, but she has not discussed how it might operate or even if the common law has room for it. Perhaps if Baron’s ideas are combined with Macpherson’s concept of the “right not to be excluded” and the trust analogy of public property, we can find room for the homeless in the common law.

THE TRUST ANALOGY

As shown above, the problem with the social relations model proposed by Singer is that it may not allow any more room for the homeless than the current model of property. Singer’s model does not currently articulate how those who have no private property rights would be able to survive. However, Singer reminds us that private property rights are elastic enough to conceive of multiple persons with interests in and rights to one piece of property. The understanding of property rights in Canada is elastic enough to recognise categories of property that are not strictly private property.

The decision in *Commonwealth of Canada* hints that government owned property might be different from privately owned property, but the Supreme Court seemed unable to break completely from the private property model. Macpherson argued that the concept of property could not logically be restricted to private property and that the understanding of property as being only private property was the result of certain historical circumstances.¹³¹ He argued that there were three categories of property: private property, common property, and state property. According to Macpherson, what distinguishes common property is that individuals have a right not to be excluded from it, whereas private property gives individuals the right to exclude others.¹³²

It seems that when Baron talks about ‘no property’ she really means ‘no private property.’ Her failure to distinguish ‘property’ from ‘private property’ is symbolic of just how dominant the private property model has become. Therefore, if we are to reclaim Macpherson’s concept of common property and the rights that individuals have in such property, it is necessary to find a private property analogy to common property: this analogy is the implied trust. The trust analogy would appear to be the common law’s way around the lack of a distinctive concept of public property. Thus, the trust analogy could also be used to implement Macpherson’s category of common property.

¹²⁹ *Ibid* at 285.

¹³⁰ Baron, “Property”, *supra* note 8 at 1427.

¹³¹ Macpherson, “Meaning of Property”, *supra* note 9 at 2.

¹³² *Ibid* at 4-6.

The trust analogy, that Rinfret J described in *Burchill* and that Ross J hinted at in *Adams*, was invoked to limit what governments can do with their property.¹³³ Ross J stated that publicly owned property was held for public benefit¹³⁴, but she did not elaborate on the rights of the public as beneficiaries of this implied trust. The rights that an individual citizen has to publicly owned (and publicly accessible) property does not include the right to exclude others as that would defeat the purpose of such public property. Therefore the right that an individual citizen has to public property must be the right not to be excluded. Macpherson's concept of common property is in many ways similar to the trust analogy used by Rinfret and Ross JJ, for Macpherson argues that, "[t]he "state *creates* the rights, the individuals *have* the rights. Common property is created by the guarantee to each individual that he will not be excluded from the use or benefit of something."¹³⁵

Macpherson argues that common property is "the most unadulterated kind of property [because it]...is always the right of the natural individual person."¹³⁶ It must also be the property right that an individual is left with when he is reduced to Baron's 'no (private) property' classification. There is some irony then, that when an individual has no private property rights and thus is most in need of his share of the public benefit of public property, he is most likely to find public property closed to him through regulations which criminalize his lack of private property. Under Macpherson's understanding of the rights that individuals have to common property, homeless individuals are left open to the accusation that their use of common property is excluding others from using it. Macpherson recognised that the government could regulate common property in a way that would limit the rights of individuals to it,¹³⁷ but pointed out that all forms of property and rights in and to property were ultimately justified through reference to "the individual right to life"¹³⁸ This justification is a clear echo of the homeless people's arguments that the City of Victoria's by-laws infringed their right to life. It does not necessarily solve the problem that upholding homeless people's right not to be excluded from common property results in the infringement of other citizens' rights not to be excluded.

SOCIAL RELATIONS AND COMMON PROPERTY

This paper critiqued Singer's social relations model, because Singer's model does not allow for any property rights other than private property rights and thus it leaves no room for the homeless. The trust analogy that Canadian courts use to describe and

¹³³ Any public service that it imposes is subsequent to the definition of the property thus the private property model remains in place, see Willmore, *supra* note 59 at 385.

¹³⁴ *Adams (BCSC)*, *supra* note 2 at para 131.

¹³⁵ Macpherson, "Meaning of Property", *supra* note 9 at 5 [emphasis in original].

¹³⁶ *Ibid* at 6.

¹³⁷ *Ibid* at 4.

¹³⁸ *Ibid* at 12.

limit government-owned public property is similar, if not identical, to Macpherson's concept of common property. However, Macpherson's concept of "the right not to be excluded" would still leave the homeless vulnerable to the accusation that through their permanent existence on public property, they infringe other citizens' right not to be excluded.

Singer's social relations model calls for the balancing of rights and interests to property rather than focusing on the exclusionary aspects of the right to property. If we understand Singer's model as emphasising, or at least recognising, the social obligations of property rights and combine it with the trust analogy or Macpherson's concept of common property then the right not to be excluded emerges as a right which grants substantive equality, not formal equality. As Cohen put it, "property...cannot be pursued absolutely without detriment to human life."¹³⁹ Canadian courts have limited government regulation of public property when it infringes on a person's right to life; the right not to be excluded must also be limited by the right to life. The balancing described by the 'social trust' model of property should take place at the policy level as well as at the judicial level. It is vital that policy makers undertake such balancing, as homeless individuals frequently lack the resources to challenge laws and policies that restrict their ability to keep themselves alive.

Property theorists have long grappled with how to justify private property when such a system has the potential to leave no room for those without any rights to private property. John Locke and William Blackstone grudgingly allowed room in their theories of property for those with no private property. Locke qualified his right to private property by saying it was acceptable "at least where there is enough, and as good, left in common for others."¹⁴⁰ Blackstone granted the poor the right to collect the crop remnants left in the fields after a harvest and thought that the destitute had some right to assistance from those who were more prosperous.¹⁴¹

Locke and Blackstone tried to construct an understanding of property that would leave room, however small, for those with no private property of their own. Carol Rose has argued that the uneven distribution of property made Blackstone uncomfortable because property claims are interdependent on other people accepting such claims. Rose's argument contradicts the idea that private property protects an individual's independence.¹⁴² The homeless are in many ways deeply threatening to

¹³⁹ Cohen, *supra* note 7 at 167.

¹⁴⁰ John Locke, *The Second Treatise of Government*, ed by CB Macpherson (Indianapolis: Hackett, 1980) at 19.

¹⁴¹ Ellickson, *supra* note 23 at 1383; Rose, "Blackstone's Anxiety", *supra* note 104 at 603-604.

¹⁴² Rose, "Blackstone's Anxiety", *supra* note 104 at 609, 621, 632; Carol M Rose, "Property as the Keystone Right?" (1996) 71 *Notre Dame L Rev* 329 at 345, 363 [Rose, "Keystone Right"].

the justifications offered for private property and the way it regulates space and society.¹⁴³

The City of Victoria's by-laws attempted to make the homeless less visible, for a person sleeping uncovered in a park is not always immediately noticeable. People are much more visible when they have built a temporary shelter to sleep under. The Court of Appeal's amendments to the by-laws, which make "temporary *overnight* shelter" acceptable,¹⁴⁴ do not make the homeless any more visible, as public parks are not typically used by the public at night. The Court's decision was in keeping with the idea that everyone only needs temporary access to publicly accessible property.

However, if we understand such publicly accessible property as common property, as conceived of by Macpherson, then we can see that the Court's decision in *Adams* still reflects a private property only model. The decision in *Adams* does not properly balance the rights and interests of the public in the property which the government hold in trust for them. The Court attempts to keep the right of access to common property as formally equal as possible. A proper balancing of the rights and interests of the public in such property would have recognised that the homeless had nowhere else, where they could legally be on a permanent basis. Under a 'social trust' model of property, the Court would have had to recognise that the homeless have no private property rights and thus their need for the "public benefit" of public property is greater than those who have private property rights.

The decision also implicitly assumes that there is a clear division between public and private property, when there is not. Given that the Supreme Court of Canada has not yet recognised that owners, who grant the public access to their property, may have limited some of their rights to exclude arbitrarily, and may have acquired some of the obligations imposed on the government, the homeless are effectively restricted to publicly accessible government owned property. The City of Victoria argued, and the Court of Appeal agreed, that it had a duty to regulate its parks so that they were protected and maintained for everyone to use. Nevertheless, the homeless were not included in that category, because their use was and is necessarily different from that of everyone else. Recognising that different people use parks in different ways does not grant anyone a private property right to such public property, it merely ensures that their right not to be excluded from the benefit of the 'social trust' of government property is taken seriously and protected.

The homeless are often described as having only duties and obligations when it comes to public property, with no rights of their own. While the description of the homeless lacking rights to privately owned property is correct, it ignores the duties and obligations of those who have private property rights, and that the homeless may have rights in other forms of property, such as government owned property. Although property owners' rights and obligations are usually framed in relation to other property owners, the common law does have room to allow for obligations

¹⁴³ Mitchell, *supra* note 122 at 321.

¹⁴⁴ *Adams* (BCSC), *supra* note 2 at para 166 [emphasis added].

towards the community as a whole, including those who are homeless. Given the strength of the private property model in Canadian jurisprudence, it is unlikely that the obligations owed to the community would be imposed in their entirety on private owners, thus they must be imposed on government owned property, at least insofar as it is in accordance with the government's use of its property.¹⁴⁵

The homeless have to use publicly accessible government owned property for so long as they are without private property of their own. Thus, regulations which make publicly accessible property more attractive to other citizens by denying the existence of the homeless are unacceptable and unworkable. Such regulations effectively deny that the homeless are members of the public entitled to the benefit of government owned property.

CONCLUSION

Regulating public property, such as parks, to take account of the different uses people will make of the property is complex. However, the homeless are part of the community too,¹⁴⁶ even if this fact is often overlooked. As the homeless are part of the community and members of the public, they have the right to access and use parks and similar property, but such rights are not and never have been construed as private property rights because they cannot exclude others from such property.

Currently the homeless exist in a precarious state, that of 'no property.' They have nowhere else that they can legally be, aside from publicly accessible government owned property. If the property that the homeless can legally access is regulated in a way that effectively bars them from that property, it merely removes the problem of homelessness to another area, or forces the homeless to constantly break the law.

The common law understanding of private property has long placed obligations on owners to take account of others in the uses that they make of their property. These obligations also include duties towards the less fortunate. Today, property owners are typically concerned with protecting and increasing the value of their property. The presence of homeless people in a neighbourhood can decrease the value of the property in the area; therefore, cities and towns regulate their property in ways which make it impossible for the homeless to live legally.

These anti-homeless regulations have the effect of excluding homeless people from both property and community. The Court of Appeal in *Adams* held that the City could not regulate its parks in such a way that would violate section 7 of the *Charter*. Yet apart from the limitations placed on the City of Victoria by the *Charter*, the City was entitled to regulate its property in the same way as a private citizen. The Court of Appeal seems to overlook the trust analogy that Ross J hinted at, which would have placed a further restriction on how Victoria could regulate its parks. The trust analogy

¹⁴⁵ The government use test comes from *Commonwealth of Canada*, *supra* note 11.

¹⁴⁶ Waldron, "Community and Property", *supra* note 12 at 185-186.

implicitly echoes Macpherson's concept of common property, and if we combine these ideas with the balancing that Singer's social relations model requires, the public benefit of the parks is not limited to those who only need temporary access to them. Therefore, while cities and towns can and must regulate their publicly accessible property in such a way that it is preserved for everyone, they cannot ignore their obligations towards the homeless. Cities and towns must not regulate their property in such a way that it makes it impossible for the homeless to live within their borders.