

## PRIVATE RIGHTS TO PUBLIC PROPERTY: THE EVOLUTION OF COMMON PROPERTY IN CANADA

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This article uses the recent Occupy litigation of *Batty v. City of Toronto* to argue that Canadian courts no longer have a robust understanding of common property and its attendant rights. The lack of judicial understanding of common property is hardly surprising given property theory's focus on private property, particularly individual private property. This article argues that rather than use the traditional analogy of governments holding common property in trust for the public, *Batty* relies on an analogy of common property which treats the government as an owner. The emergence of the latter understanding of common property can be traced to Supreme Court jurisprudence from the early 1990s. Although the government-as-owner analogy of common property was introduced in a concurring judgment, more recent Supreme Court decisions have since reiterated the analogy. Such an understanding of common property is a clear attempt to force all property into a private property model and emphasize the rights of owners above all other rights in property. This article argues that the government-as-owner analogy is problematic given its emphasis on the government's use of property rather than the public's benefit from common property and calls for a return to the trust analogy of common property.

En s'appuyant sur le récent litige « Occupy » dans l'affaire *Batty c City of Toronto* (*Batty*), cet article montre que le judiciaire canadien n'a plus de compréhension solide des biens communs, ni des droits qui y sont associés. Ce manque de compréhension judiciaire en matière de biens communs est à peine surprenant compte tenu la focalisation de la théorie sur la propriété privée, et particulièrement la propriété privée individuelle. Cet article soutient qu'au lieu d'utiliser l'analogie traditionnelle, selon laquelle le gouvernement détient les biens communs en fiducie pour le public, *Batty* se fonde sur une analogie qui considère le gouvernement comme propriétaire. L'émergence de cette dernière compréhension des biens communs peut être retracée à la jurisprudence de la Cour Suprême du début des années 1990. Bien que l'analogie gouvernement comme propriétaire ait été introduite par un jugement concurren- t, des décisions plus récentes de la Cour Suprême l'ont réitérée. Une telle compréhension de la propriété est une tentative évidente de forcer tout le droit des biens dans un modèle de propriété privée, et d'accentuer les droits des propriétaires par-dessus tous les autres droits reliés à la propriété. Cet article soutient que l'analogie gouvernement comme propriétaire est problématique puisqu'elle met l'accent sur l'usage que fait le gouvernement des biens communs, et non les bienfaits publics qui en ressortent. L'article appelle ainsi à un retour à l'analogie fiduciaire des biens communs.

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## Introduction

“How do we live together in a community? How do we share common space?” These questions opened Justice Brown’s judgment in *Batty v. City of Toronto* and were prompted by the Occupy movement’s “occupation” of a park in downtown Toronto.<sup>1</sup> Despite these opening lines, the decision in *Batty* does not deliver the promised discussion of common space. Instead, *Batty* repeatedly defers to private property rights or the rights of the city of Toronto in its role as manager of municipal parks. That is not to say that *Batty* reached the wrong decision but to say that *Batty* reached the right decision for the wrong reasons, and rather than taking common property rights seriously—particularly the public’s right not to be excluded from such property<sup>2</sup>—the case upholds individual private property as the only acceptable way to think about property.

It is the purpose of this article to explore the state of common property in Canada. I argue that in cases dealing with issues of what would traditionally be understood as common property, such as streets and parks, Canadian courts have shown themselves to have a weak understanding of such property. By weak understanding, I mean that the courts have preferred to force instances of common property into a private property model rather than delineating what rights exist for common property *qua* common property. The resulting picture of common property emphasizes the state’s role as regulator of such property or, less often, the impact of common property on private property rights. The unease that Canadian courts have with common property appears to stem from questions over ownership. I argue that this unease is hardly surprising due to two factors. First, the conventional categorization of property tacitly assumes that individually owned private property is the base-line model or original form of property.<sup>3</sup> Second, the conventional categorization’s tacit assumptions about private property are compounded by the dominant theory of property as taught in law schools and promoted by academics. This theory, generally known as the bundle of rights theory,<sup>4</sup> has in recent years

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<sup>1</sup> *Batty v Toronto (City of)*, 2011 ONSC 6862 at para 1, 108 OR (3d) 571, [*Batty*].

<sup>2</sup> I use the term common property to mean instances of public property which are open to the public. My definition of common property and choice of terminology are explained below (*infra* notes 20 to 50 and accompanying text).

<sup>3</sup> Elinor Ostrom & Charlotte Hess, “Private and Common Property Rights” in Boudewijn Bouckaert, ed, *Property Law and Economics, Encyclopedia of Law and Economics*, 2nd ed (Cheltenham: Edward Elgar, 2010) 53 at 53-54. This argument is further explored below.

<sup>4</sup> For academic discussions of this theory see Tony Honoré, “Ownership” in *Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987) 161; Thomas W Merrill & Henry E Smith, “What Happened to Property in Law and Economics” (2001) 111:2 Yale LJ 357; JE Penner, “The ‘Bundle of Rights’ Picture of Property” (1996) 43:3

come to concern itself with questions of how best to define and recognize ownership of private property.<sup>5</sup> Put simply the bundle of rights theory assumes that if a person holds all of the rights then she is the owner of the property.<sup>6</sup> The question of ownership of common property is much more complex than ownership of private property because whatever rights there are to common property, they are shared among the population and between the public and the government. Rather than struggle with the complexity of common property, Canadian courts have sought to simplify the issue and force all forms of property into a private property model.<sup>7</sup>

There are two paradigmatic ways to understand common property. The first is the trust analogy whereby the common property is described as being held in trust by the government for the benefit of the public. The trust analogy has the same roots as the American public trust doctrine, but in Canada, the idea of a public trust is much weaker and less developed than in the United States.<sup>8</sup> Hence, to avoid confusion with the more powerful American public trust doctrine, I call the Canadian version “the trust analogy”.<sup>9</sup> The trust analogy is one with a long history,<sup>10</sup> but this article argues that it has since been replaced with the government-as-owner

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UCLA L Rev 711. For a discussion of this theory in law textbooks see Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 2-3; Daniel H Cole & Peter Z Grossman, *Principles of Law and Economics* 2nd ed (New York: Wolters Kluwer, 2011) at 109-110. See also Michael A Heller, “The Dynamic Analytics of Property Law” (2001) 2:1 *Theor Inq L* 79 at 92, [Heller, “Dynamic Analytics”].

<sup>5</sup> Larissa Katz, “Exclusion and Exclusivity in Property Law” (2008) 58:3 *UTLJ* 275 [Katz, “Exclusion and Exclusivity”]; Thomas W Merrill, “Property and the Right to Exclude” (1998) 77:4 *Neb L Rev* 730; Merrill & Smith, *supra* note 5 at 385-387.

<sup>6</sup> This is further explored *infra* notes 54-75 and accompanying text.

<sup>7</sup> See Parts II and III.

<sup>8</sup> Constance D Hunt, “The Public Trust Doctrine in Canada” in John Swaigen, ed, *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 151 at 151-56, 166; Barbara von Tigerstrom, “The Public Trust Doctrine in Canada” (1997) 7:3 *J Envtl L & Prac* 379 at 380-81; John C Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized” (1997) 7:1 *J Envtl L & Prac* 1 at 2-7; Kate Penelope Smallwood, *Coming out of Hibernation: The Canadian Public Trust Doctrine* (LLM Thesis, University of British Columbia Faculty of Law, 1993) [unpublished] at 12-42, 78-93.

<sup>9</sup> This term also has the benefit of emphasising that an actual trust is not created and therefore the law that applies to private trusts does not apply to property held under the trust analogy. The question of whether or not private trust law applies to public trusts seems uncertain, though the consensus leans towards the claim that it does not, Hunt, *supra* note 9 at 175; von Tigerstrom, *supra* note 9 at 393; Smallwood, *supra* note 8 at 108.

<sup>10</sup> Hunt, *supra* note 8 at 151-56; Maguire, *supra* note 8 at 2-7; Smallwood, *supra* note 8 at 12-42, 78-93. See *Vancouver (City of) v Burchill*, [1932] SCR 620 at 625, [1932] 4 DLR 200, [Burchill].

analogy, where the *government's use* of the property is more important than the public benefit. The government-as-owner analogy first appeared in *The Committee for the Commonwealth of Canada v. Canada* and has since come to dominate discussions of common property.<sup>11</sup> These two paradigms often overlap but the key difference lies in the deference that the latter shows to the government “as owner” of the property.

Before I explore how *Batty* handled the issues of common property it is necessary to define common property and differentiate it from other kinds of property. In the first part of this article, I argue that the conventional “analytics” of property,<sup>12</sup> particularly the categorization of property, tacitly assumes that private property is the baseline model of property. In contrast to this, I argue that C.B. Macpherson’s categorization of property and definition of common property avoids the emphasis on private property seen in the conventional understanding, and for this reason, I use Macpherson’s definition of common property in this article.<sup>13</sup> The first section also argues that the dominant understanding of the bundle of rights theory is primarily concerned with the owner’s use and control of his property, which is a definition better suited to private property rather than to common property. Taken together, the conventional categorization and theory of property struggle to understand common property as anything other than a subcategory of private property,<sup>14</sup> yet Macpherson’s work shows that this does not have to be the case. The second part of the article examines the weakened understanding of common property in *Batty* and why, despite some initial reasons for optimism in the analysis of the property issues, the case ultimately defers to irrelevant private property concerns. Such an outcome is hardly surprising given recent Canadian jurisprudence on common property or potential common property issues. The third part examines this recent jurisprudence and argues that the courts have shown themselves as being unable to conceptualize the complexity of common property and have sought to reduce all forms of property to pri-

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<sup>11</sup> *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, 77 DLR (4th) 385, [*Commonwealth*]. I further explore the emergence of this *infra* notes 134-53 and accompanying text.

<sup>12</sup> The term “analytics” is borrowed from Heller, “Dynamic Analytics”, *supra* note 4.

<sup>13</sup> CB Macpherson, “The Meaning of Property” in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 1 at 4.

<sup>14</sup> Daniel Cole observes that theories of common property are underdeveloped in comparison to theories of individual private property or commonly held property, Daniel H Cole, “Property Creation by Regulation: Rights to Clean Air and Rights to Pollute” in Daniel H Cole & Elinor Ostrom, eds, *Property in Land and Other Resources* (Cambridge, MA: Lincoln Institute of Land Policy, 2012) 125 at 126 [Cole, “Property Creation”] [Cole & Ostrom, *Property*]. It should be noted that Cole uses slightly different terminology here than I do. For an explanation of the terms I use, see *infra* notes 16-44 and accompanying text.

vate property. The fourth section evaluates proposed solutions and argues for a greater emphasis of the public nature of common property.

## I. Kinds of Property and the Bundle of Rights

Property is a politically sensitive topic.<sup>15</sup> Thus, any discussion of property tends to be riddled with tacit ideological commitments rather than an examination of what actually happens.<sup>16</sup> Historically, the major point of contention in property was and remains the potential benefits and costs of private property. In the common law world, John Locke's belief that property emerged from individual action, served to justify the special role that the landed proprietor held in society, and thus, the benefits that accrued to those with private property.<sup>17</sup> Locke's theory also presents private property as something that predates government,<sup>18</sup> and fails acknowledge the role that others play in recognizing property rights and the fact that property can only exist in a system.<sup>19</sup> Clearly there is more to property than simply *private* property, but such is the power of private property that it dominates both the conventional categorization of property and the current understanding of the bundle-of-rights theory. That is to say, private property appears as the baseline or original model of property, while other forms of property appear as deviations.<sup>20</sup> Such a situation makes it difficult to take other forms of property seriously because they do not appear to conform to property theory. I begin this section with an examina-

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<sup>15</sup> Macpherson, *supra* note 13 at 4. For perhaps exaggerated claims about property's role in political and social battles see Richard Pipes, *Property and Freedom* (New York: Random House, 1999) at xi-xii; Roy Vogt, *Whose Property? The Deepening Conflict between Property and Democracy in Canada* (Toronto: University of Toronto Press, 1999) at 3.

<sup>16</sup> See for example Elinor Ostrom and Charlotte Hess's discussion of Henry Sumner Maine's argument about the origins of property, Ostrom & Hess, *supra* note 4 at 53-54.

<sup>17</sup> *Ibid* at 54. See John Locke, *Second Treatise of Government*, ed by CB Macpherson (Indianapolis: Hackett, 1980) at 21-23. The continued importance of Locke's theory can be seen in the in-depth treatment that his discussion of property continues to receive: see for example Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 137-252 [Waldron, *Private Property*]; JE Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) at 187-201.

<sup>18</sup> Douglas Sturm, "Property: A Relational Perspective" (1986) 4:2 *JL & Religion* 353 at 380-87. Sturm does note that Locke's theory has been appropriated by both ends of the political spectrum and that there are competing readings of Locke's theory.

<sup>19</sup> Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder: Westview Press, 1994) at 37-38.

<sup>20</sup> Historically there was even some doubt over whether non-private property was property: Carol M Rose, "Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age" (2003) 66:1-2 *Law & Contemp Probs* 89 at 91 [Rose, "Romans"].

tion of how private property dominates the conventional categorization of property before moving on to explore how it dominates the bundle-of-rights theory.<sup>21</sup>

In addition to Locke's justificatory theory of private property's origins, common law lawyers have tended to believe that private property is somehow superior to other forms of property.<sup>22</sup> Although these claims of private property's origins, justification, and superiority have long since been proven false,<sup>23</sup> the conventional categorization of property tacitly continues the idea that individual private property is the baseline model of property. Even scholars like Elinor Ostrom and Daniel Cole, whose research focuses on the regulation of commonly held resources such as fishing rights or environmental goods,<sup>24</sup> inadvertently perpetuate the myth that individual private property is the baseline model of property. The continued dominance of individual private property becomes clear if we compare the "conventional" categorization of property used by Cole and Ostrom with C.B. Macpherson's categorization, and the original civilian categories from which both categorizations are drawn.<sup>25</sup>

Both Cole and Ostrom rely on four categories of property—private, common, public, and non-property (or open access)<sup>26</sup>—which Cole calls the "conventional typology".<sup>27</sup> Under this categorization, private property is the property owned by individuals, and in which individuals have the

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<sup>21</sup> As the literature on common property and property categories is voluminous, I focus on the conventional categorization, which is used by property textbooks and as the starting point for discussions of property categorization. See, Ziff, *supra* note 4 at, 2-3, 7-10; Cole & Grossman, *supra* note 4 at 109-10, 114-16.

<sup>22</sup> Ostrom & Hess, *supra* note 3 at 53; Daniel H Cole & Elinor Ostrom, "Introduction" in Cole & Ostrom, *Property*, *supra* note 14, 1 at 2-3.

<sup>23</sup> Ostrom & Hess, *supra* note 3 at 53-54; Carol M Rose, "Property as the Keystone Right?" (1995-1996) 71:3 Notre Dame L Rev 329 [Rose, "Keystone"].

<sup>24</sup> See Daniel H Cole, "New Forms of Private Property: Property Rights in Environmental Goods" in Bouckaert, *supra* note 4, 225 [Cole, "New Forms"]; Cole, "Property Creation", *supra* note 14; Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990).

<sup>25</sup> Rose, "Romans", *supra* note 20. The categories were imported into the common law via Henry de Bracton, *De Legibus et Consuetudinibus Angliae* [On the Laws and Customs of England], ed by Sir Travers Twiss (London: Longman, 1878) vol 1 at 39-41.

<sup>26</sup> Cole, "New Forms", *supra* note 24 at 229; Daniel H Cole & Elinor Ostrom, "The Variety of Property Systems and Rights in Natural Resources" in Cole & Ostrom, *Property*, *supra* note 15, 37 at 42-43 [Cole & Ostrom, "Property Systems"].

<sup>27</sup> Cole, "New Forms", *supra* note 24 at 229. On occasion, other scholars omit non-property and refer to the property "trilogy": see Hanoch Dagan & Michael A Heller, "The Liberal Commons" (2000-2001) 110:4 Yale LJ 549 at 555-58; Amnon Lehavi, "Mixing Property" (2008) 38:1 Seton Hall L Rev 137 at 139-41. These categories of property are also used in the leading Canadian property law textbook, Ziff, *supra* note 4 at 7-10.

right to exclude others from their property. Common property is property which is collectively owned and from which “outsiders” can be excluded, while public property is “a special form of common property supposedly owned by all the citizens, but typically controlled by elected officials or bureaucrats.”<sup>28</sup> The final category of property is property which has no owner and which anyone can freely use.<sup>29</sup> Cole is careful to note that these categories of property are ideal types and do not actually exist in their pure form.<sup>30</sup> In fact, many scholars, including Cole and Ostrom, argue that the conventional categories are hopelessly inadequate for the real world.<sup>31</sup> Nonetheless, both Cole and Ostrom continue to use these four kinds of property as the starting point for discussion without seriously examining the conventional categorization’s implicit biases.

The conventional categorization implies that the other forms of property are derivatives of *individual* private property; for example, it emphasizes the exclusionary nature of common property, and the fact that public property is really controlled by the state. Ostrom and Hess argue that the terms “government, private and common property ... better reflect the status and *organization* of the holder of a particular right.”<sup>32</sup> What they fail to note, however, is that the conventional typology’s emphasis on *organization* seeks to maintain the idea that somehow individual private property is better or at the very least so fundamentally different that it deserves a category of its own. In *Pollution and Property*, Cole points out that in “common parlance ‘private’ property is not counterpoised to ‘common’ property as it is in much of the academic literature,”<sup>33</sup> and that some academics conflate “common property” with other forms of property.<sup>34</sup> However, Cole blames the differences in terminology on “ideological issues more than real distinctions,” and argues that the more important issue is the oft neglected question of “just what specific rights and corresponding duties to the various property regimes entail.”<sup>35</sup> While I agree that more attention should be paid to the rights and duties that attach to various in-

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<sup>28</sup> Cole, “New Forms”, *supra* note 24 at 229.

<sup>29</sup> *Ibid.* See also Lehari, *supra* note 27 at 141.

<sup>30</sup> Daniel H Cole, *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* (Cambridge: Cambridge University Press, 2002) at 9-13 [Cole, *Pollution and Property*].

<sup>31</sup> *Ibid* at 13; Ostrom & Hess, *supra* note 3 at 62. See also Heller, “Dynamic Analytics”, *supra* note 4 at 79-89.

<sup>32</sup> Ostrom & Hess, *supra* note 3 at 62 [emphasis added]. See also Cole, “New Forms”, *supra* note 24 at 229-30.

<sup>33</sup> Cole, *Pollution and Property*, *supra* note 30 at 9.

<sup>34</sup> *Ibid* at 11-12.

<sup>35</sup> *Ibid* at 12-13.



stances of property, this is unlikely to happen if the conventional typology is used due to its tacit assumption that individual private property is the baseline model. The dominance of individual private property and its attendant myths makes it harder to examine common property *qua* common property, because common property appears as a corruption of private property rather than something inherently different.

In contrast to the conventional typology, Macpherson offers a tripartite categorization of property: common, private, and state.<sup>36</sup> For Macpherson common property includes things such as streets, parks, and highways which “society or the state [declares] ... are for common use.”<sup>37</sup> Each individual has the right not to be excluded from such common property subject only to the state’s regulation of their use. The right not to be excluded rests on the importance that common property has in the successful functioning of a society and of an individual in that society.<sup>38</sup> Private property is also the right of an individual but it is the right to exclude others from the “use and benefit” of the property in question.<sup>39</sup> State property is, according to Macpherson, “the assets held by the state acting as a corporation.”<sup>40</sup> Here Macpherson lists Air France as an example, and given that Air France has since been nationalized, his definition seems dated.<sup>41</sup> If, however, we understand state property as that property in which the state has an interest in excluding others, either for business purposes as in the Air France example, or for security purposes, then the category continues to make sense. Given this understanding of state property, it is likely that army bases and government office buildings, among others, will fall into the category of state property.

For Macpherson, other kinds of property are not simply derivatives of private property.<sup>42</sup> Although Macpherson stresses that property rights are the rights of individuals, he also emphasizes the role of the state in creating and enforcing property rights, and thus, tacitly challenges the idea that property arose out of individual action.<sup>43</sup> Macpherson’s concern is to

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<sup>36</sup> Macpherson, *supra* note 13 at 4-5.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* Such an understanding is also implied in the common law’s historical trust analogy which granted the public certain rights of access to tidal waters and highways for the purposes of fishing, navigation, and commerce, Smallwood, *supra* note 8 at 9-10, 42.

<sup>39</sup> Macpherson, *supra* note 13 at 5.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* at 5-6. Hanoch Dagan and Michael Heller argue that state property has become less important since the collapse of many socialist states, however, they use “state property” when Cole and others use “public”: Dagan & Heller, *supra* note 27 at 557-58.

<sup>42</sup> Macpherson, *supra* note 13 at 9-11.

<sup>43</sup> *Ibid.* at 4-5.

offer a categorization of property that recognizes the social aspect of property, rather than just the individual. Thus, when compared to the “conventional” typology, Macpherson’s categorization of property seems to better reflect the actual social practice of property, given its emphasis on the role of society and the state in property rights.<sup>44</sup> Conversely, the conventional categorization seems to treat other forms of property as a deviation from private property that ought to be made to conform to the private property model as far as possible.

Asides from their differences in emphasis, the two categorizations differ in their understanding of common property. For Macpherson common property could also be called public property (public-common), whereas the conventional typology views common property as a species of private property (private-common). In *Pollution and Property*, Cole recognized that common property was a subcategory of both public and private property, and though he opted to stick with the “conventional” categorization, he was careful to further qualify each type of property and how he used it.<sup>45</sup> The problem for Cole and Ostrom is that the existence of both private-common and public-common property conflicts with the conventional categorization’s attempt to make private-common property a separate category. As a result, Cole and Ostrom view legal scholars’ tendency to conflate common property with public property as a mistake.<sup>46</sup> Cole and Ostrom note that even Justinian’s lawyers would confuse the two categories,<sup>47</sup> but if we look at how these two types of property were defined by the civil law, we can see that the conventional typology actually has it wrong. According to Bracton, *res communes* were things such as running water and air, while *res publicae* were rivers and ports, though Bracton is quick to note that *res publicae* may also be called *res communes*.<sup>48</sup> Carol Rose added a further gloss to these categories by noting that the common law tends to vest items of common property such as oceans and air in the sovereign, thus they are more like *res publicae* than *res communes*.<sup>49</sup> The problem suffered by the “conventional” typology is its insistence that group property rights are so different from individual private property

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<sup>44</sup> This is arguably in keeping with the arguments advanced by Carol Rose and Joseph Singer; see Rose, “Keystone”, *supra* note 23; Joseph William Singer, “Democratic Estates: Property Law in a Free and Democratic Society” (2008-2009) 94:4 Cornell L Rev 1009 at 1010, 1027 [Singer, “Democratic Estates”].

<sup>45</sup> Cole, *Pollution and Property*, *supra* note 30 at 10, 13.

<sup>46</sup> Cole, “New Forms”, *supra* note 24 at 229-31; Ostrom & Hess, *supra* note 3 at 55-59; Cole & Ostrom, “Property Systems”, *supra* note 26 at 43-44.

<sup>47</sup> *Ibid* at 43.

<sup>48</sup> Bracton, *supra* note 25 at 39-41.

<sup>49</sup> Rose, “Romans”, *supra* note 20 at 93.

that they require a separate category.<sup>50</sup> Macpherson's definition of common property leaves room for group property rights under private property while emphasizing that common property is that property which is held for the benefit of the public. I use Macpherson's definition of common property in this article, though I recognize that common property in the sense meant by Macpherson is a subcategory of public property.

Despite the differences in emphasis between Macpherson's categories and the so-called conventional categories there is some overlap between the two. Both agree, for example, that there is a division between public and private property, although they differ as to where they draw the line. Macpherson's care to separate "state property" from both private and common property leaves more room to limit the extent of the rights that the government has to such property. That is, Macpherson is keen to emphasize the public obligations inherent in both common and state property as well as the state's role in creating and enforcing property rights.<sup>51</sup> In this way, Macpherson's categories more accurately capture how property actually operates. Ultimately, his categorization is to be preferred given that he strikes a more realistic balance between individual rights and the role of society in upholding these rights. That is to say that his understanding of property is compatible with what Jennifer Nedelsky has called "relational autonomy" and is arguably compatible with recent calls for a more "progressive" understanding of property.<sup>52</sup>

However, regardless of which typology is used, the categories of property are overly simplistic and cannot account for instances of overlap.<sup>53</sup> Even the public-private divide is not as clear-cut as it might first appear. None of the categorizations of property leave room for privately-owned properties like inns and taverns which, under the common law, had a longstanding obligation to offer food and shelter to any and all travellers.<sup>54</sup> The various categorizations of property also leave no room for the

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<sup>50</sup> Corporate property would fall under individual private property due to corporate personhood, a point which Macpherson explicitly recognized, Macpherson, *supra* note 13 at 5.

<sup>51</sup> It should go without saying that public property has public obligations: see Waldron, *Private Property*, *supra* note 17 at 40-41.

<sup>52</sup> Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) at 3, 9-11, 38-65, 163; Gregory S Alexander et al, "A Statement of Progressive Property" (2009) 94:4 Cornell L Rev 743.

<sup>53</sup> Cole, "New Forms", *supra* note 24 at 229-31; Cole & Ostrom, "Property Systems" *supra* note 26 at 37; Lehavi, *supra* note 27 at 211; Heller, "Dynamic Analytics", *supra* note 4 at 82-89.

<sup>54</sup> Joseph William Singer, "No Right to Exclude: Public Accommodations and Private Property" (1996) 90:4 Nw UL Rev 1283 at 1291-93 [Singer, "No Right to Exclude"]; AK

more recent innovation of shopping centres and malls which, while privately owned, are open to the public. Such forms of property might be more appropriately referred to as publicly accessible private property, rather than just “private property.” Similarly, Macpherson’s categories do not shed any light on apparent privatizations of common property represented by entities such as business improvement districts (BIDs) which lobby governments for improvements of the common property adjacent to their business interests.<sup>55</sup> BIDs seem to imply that some individuals, due to the location of their private property rights, have additional rights to comment on and influence the use of common property.

The issues raised by BIDs also point to a further problem with attempts to categorize property: how do the categories relate to one another? Is it the case that private property will have more of a say in how adjacent common property is used? In order to properly understand the complexity of property, we need to know more than just the kinds of property that exist; we need to know how property operates. Property is, after all, a system of governance because it controls how and who can access what resources, and for how long.<sup>56</sup> The bundle of rights theory of property provides answers to these questions of access and use, but as we shall see, its current understanding relies on a bounded vision of property that isolates each piece of property from all others as far as possible, and that also overemphasizes the role of individual action in creating and maintaining property.

The rights typically included in the bundle-of-rights theory are the right to exclude, the right to use, the right to possession and so on, but not all of these rights are considered equally important.<sup>57</sup> If an individual owns a piece of property, it is likely that that individual will have all, or most of the rights listed in the bundle; but if an individual only has a right to use a piece of property, that individual will not have access to all of the bundled rights in relation to that property.<sup>58</sup> Of all the rights in the

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Sandoval-Strausz, “Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America” (2005) 23:1 LHR 53.

<sup>55</sup> Susanna Schaller & Gabriella Modan, “Contesting Public Space and Citizenship: Implications for Neighborhood Business Improvement Districts” (2005) 24:4 *Journal of Planning Education & Research* 394 at 394-96; see also Lehavi, *supra* note 27 at 188-89.

<sup>56</sup> Jeremy Waldron, “Homelessness and the Issue of Freedom” (1991) 39:1 *UCLA L Rev* 295 at 296 [Waldron, “Homelessness”].

<sup>57</sup> Tony Honoré calls these rights the “standard incidents of ownership” and lists “eleven leading incidents”, Honoré, *supra* note 4 at 165. Michael Heller notes that Honoré does not include the right to exclude in his discussion of ownership (Michael A Heller, “The Boundaries of Private Property” (1998-1999) 108:6 *Yale LJ* 1163 at 1213).

<sup>58</sup> See e.g. Ostrom and Hess’s discussion of which property rights adhere to various property interests (*supra* note 3 at 59-63).

bundle, the right to exclude is generally considered to be the most important right and represents the core of ownership.<sup>59</sup>

Recent scholarship has started to inch away from the idea that the right to exclude is the *sine qua non* of property rights<sup>60</sup> but, as yet, no one has seriously critiqued the emphasis placed on some form of exclusion or exclusivity. Shyamkrishna Balganesch has argued that the right to exclude is best understood as a duty that non-owners impose on themselves,<sup>61</sup> which places less emphasis on the individual's ability to effectively exclude others,<sup>62</sup> though he continues to argue that exclusion is central to property. While Larissa Katz has maintained that property ownership is exclusive, she argues that what is exclusive about ownership is the special position of owners to set the agenda for the resource, rather than the physical exclusion implied by the right to exclude.<sup>63</sup> Katz's focus on defining ownership also obscures how property rights can attach to non-owners. If applied to common property, Katz's definition would result in ownership vesting in the government because it "sets the agenda" for how such property is used.<sup>64</sup>

As J.E. Penner pointed out in his critique of the bundle of rights theory, Tony Honoré's essay on ownership was the first to provide substance to the bundle of rights theory.<sup>65</sup> Honoré's discussion of ownership unified the bundle of rights in the owner but he recognized the possibility of division and that non-owners can and do have property rights.<sup>66</sup> Honoré's focus on ownership did, however, ignore the possibility that, under the bundle of rights theory, an item could be considered property and give rise to property rights without there being an identifiable owner other than that of the state. As such, the bundle of rights theory has, in some discussions of it, collapsed into a description of ownership, and thus property rights

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<sup>59</sup> Merrill, *supra* note 5 at 730, 745-52.

<sup>60</sup> The language of *sine qua non* was used in Merrill, (*ibid* at 730); see also Jane B Baron, "The Contested Commitments of Property" (2010) 61:4 *Hastings LJ* 917 at 919.

<sup>61</sup> Shyamkrishna Balganesch, "Demystifying the *Right* to Exclude: Of Property, Inviolability, and Automatic Injunctions" (2008) 31:2 *Harv JL & Pub Pol'y* 593 at 612, 619.

<sup>62</sup> For a discussion of self-help and property see Henry E Smith, "Self-Help and the Nature of Property" (2005) 1:1 *Journal of Law, Economics & Policy* 69.

<sup>63</sup> Katz, "Exclusion and Exclusivity", *supra* note 5 at 276-78. Similar ideas are seen in Eric Claeys' work (see Eric R Claeys, "Property 101: Is Property a Thing or a Bundle?", Book Review of *Property: Principles and Policies* by Thomas W Merrill & Henry E Smith (2009) 32:3 *Seattle UL Rev* 617 at 631-34).

<sup>64</sup> AWB Simpson argues that the idea of government "ownership" is actually quite modern (*A History of the Land Law*, 2nd ed (Oxford: Clarendon Press, 1986) at 47).

<sup>65</sup> Penner, *supra* note 4 at 731.

<sup>66</sup> Honoré, *supra* note 4 at 176.

appear individualistic instead of relational<sup>67</sup> and emphasize the rights of owners above all else. Although Ostrom and Hess apply the bundle of rights theory to instances of commonly owned resources,<sup>68</sup> legal academics have tended to limit the application of the theory to private property ownership.

Penner criticized the bundle of rights theory because of its inability to do more than elaborate on “the scope of action that ownership provides,”<sup>69</sup> or as Eric Claeys put it, “a right to exclude from the thing merely states a particular outcome.”<sup>70</sup> That is, of course, precisely the point. Henry Smith and Thomas Merrill praise the bundle of rights theory, in particular the right to exclude, because it efficiently identifies the owner and gives him control over his property at little cost to others.<sup>71</sup> The current understanding of the bundle of rights theory thus envisages property as something that is capable of being bounded as far as possible. The right to exclude, for example, implies that a person has a bounded thing over which he or she is entirely sovereign.<sup>72</sup> The exclusive and exclusionary rights that a person has over this bounded thing, which is theoretically separate from all other things, is supposed to protect and promote certain other rights of citizens and act as a bulwark against government interference.<sup>73</sup> The idea of individual power, free from all other constraints over a bounded thing,

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<sup>67</sup> For more on the idea that legal entitlements are relational see generally, Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning and Other Legal Essays* (New Haven: Yale University Press, 1923).

<sup>68</sup> Ostrom & Hess, *supra* note 3 at 59-63.

<sup>69</sup> Penner, *supra* note 4 at 741.

<sup>70</sup> Claeys, *supra* note 63 at 633-34. Compare with Mossoff's critique of both the bundle of rights theory and the right to exclude because both fail to produce “a concept of property that can serve as a viable, substantive foundation for our property doctrines” (Adam Mossoff, “What is Property? Putting the Pieces Back Together” (2003) 45:2 *Ariz L Rev* 371 at 376).

<sup>71</sup> Merrill & Smith, *supra* note 4 at 387-89.

<sup>72</sup> This idea of the exclusionary right as being like sovereignty can be seen in Katz's formulation of ownership as agenda-setting: “[j]ust as a sovereign governs a territory without making all decisions that concern it, so the fate of a thing is not solely a function of an owner's decisions” (Katz, “Exclusion and Exclusivity”, *supra* note 5 at 294; see also *ibid* at 277-78, 293-95). See also Morris Cohen, “Property and Sovereignty” in Macpherson, *supra* note 13 at 155.

<sup>73</sup> For a critique of this, see Rose, “Keystone”, *supra* note 23. Larissa Katz has recently argued that formal private property rights are not always the best way to defend against government intrusion because they can breed dependence. Katz, however, goes on to argue that “informal” private property rights, such as neighbours settling disputes amongst themselves without recourse to the state, can actually do a better job of protecting the individual against the state, (Larissa Katz, “Governing through Owners: How and Why Formal Private Property Rights Enhance State Power” (2012) 160:7 *U Pa L Rev* 2029).

is much easier to understand than the reality of exceptions, limits, and burdens inherent in property rights.<sup>74</sup> In this way, the current understanding of the bundle of rights theory overemphasizes the role of the individual in creating and enforcing property rights at the expense of recognizing their inherently relational nature.

Thus, the current dominant theory of property is more a definition of ownership than an explanation of property. The focus on ownership means that any analysis of property must begin with the owner and his or her use of the property. This focus poses particular problems for common property as ownership is either shared equally among the population—which would make it next to impossible to deduce the owners' agenda—or vested in the government. The latter understanding of the ownership of common property would still cause problems under the bundle of rights theory because the theory does not recognize the potential for outside influences on the owner or the property. Consequently, under the bundle of rights theory, property often appears divorced from its social context because the theory defers to the owner's control of his property and only reluctantly examines any other relationships.<sup>75</sup> A more nuanced understanding of common property is further hindered by legal academics' reliance on the conventional categories of property, which views individual private property as the base-line model from which all other forms of property emerge. As a result property's inherently social nature appears as an aberration that must be qualified and limited. It does not have to be this way, however, because Macpherson relies on the bundle of rights theory without collapsing it into a description of ownership.<sup>76</sup> In addition to this Ostrom and Hess use the bundle of rights theory to describe how rights are shared in commonly held resources and are able to differentiate between rights of ownership and rights of access to such resources.<sup>77</sup>

Despite the alternate visions of property offered by Macpherson, and Ostrom and Hess, the academic focus on how to explain ownership of private property has left Canadian courts without the tools needed to understand common property on its own terms. As I now move on to show, the

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<sup>74</sup> Bruce A Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977) at 97-100; Jonathan Remy Nash, "Packaging Property: The Effect of Paradigmatic Framing of Property Rights" (2009) 83:3 Tul L Rev 691 at 692. Law and economics theory also claims that a bounded thing has fewer information costs, Merrill & Smith, *supra* note 4 at 383-89.

<sup>75</sup> See for example Smith's distinction between trespass and nuisance, Henry E Smith, "Exclusion versus Governance: Two Strategies for Delineating Property Rights" (2002) 31:2 J Legal Stud S453 at S455.

<sup>76</sup> Macpherson, *supra* note 13 at 3.

<sup>77</sup> Ostrom & Hess, *supra* note 3 at 59-63.

recent case of *Batty* provides an excellent example of just how much Canadian courts struggle with the idea of common property.

## II. *Batty*: Parks, Protesters, and Private Property

*Batty* ought to have been a simple case. The case arose out of a Trespass Notice issued by the City of Toronto under the *Trespass to Property Act*<sup>78</sup> to Occupy Toronto, which had been protesting in St. James Park continuously for several weeks.<sup>79</sup> Occupy Toronto challenged the Trespass Notice on the grounds that it violated the protesters' sections 2(a) to (d) *Charter* rights.<sup>80</sup> While their challenge ultimately failed, the court engaged in an unnecessarily lengthy and meandering decision that failed to deliver its promised discussion of "How do we share common space?"<sup>81</sup>

Although certain aspects of *Batty* were novel, neither tent cities, nor quasi-permanent structures erected as part of a protest were unknown to Canadian jurisprudence.<sup>82</sup> In fact, two British Columbian cases, one dealing with a tent city and the other dealing with the right of protesters to erect a structure, were decided in 2009 and 2010 respectively.<sup>83</sup> Before I compare *Batty* with the existing jurisprudence, it is necessary to examine what the court had to say about Occupy Toronto and its right to use St. James Park.

The park at issue in *Batty* is located in downtown Toronto, within walking distance of Bay Street, Canada's financial centre. The park is mostly grass and pathways, although it also contains a smaller ornamental garden, a large gazebo, a handful of benches, and numerous "mature trees". According to Richard Ubbens, Toronto's Director of Parks, St. James Park is a "lovely urban oasis" and a restful place in an otherwise densely built-up area.<sup>84</sup> Due to the park's proximity to Bay Street, Occupy Toronto chose it as the site for their protest, echoing Occupy Wall Street's

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<sup>78</sup> RSO 1990, c T21.

<sup>79</sup> *Batty*, *supra* note 1 at paras 3-4.

<sup>80</sup> *Ibid* at para 6.

<sup>81</sup> *Ibid* at para 1.

<sup>82</sup> *Victoria (City of) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29, [Adams]; *Weisfeld v Canada*, [1995] 1 FCR 68 (available on QL); *Vancouver (City of) v Zhang*, 2010 BCCA 450, 325 DLR (4th) 313, [Zhang].

<sup>83</sup> *Adams*, *supra* note 82; *Zhang*, *supra* note 82.

<sup>84</sup> *Ibid* at paras 24-26



occupation of Zuccotti Park in New York City.<sup>85</sup> Occupy Toronto erected numerous tents and other structures in St James Park and proceeded to live in, or “occupy”, the park for four weeks until the City of Toronto began the process of eviction. According to Ubbens’ affidavit, there were almost two hundred structures in St. James Park, the majority of which were tents, though there were also two yurts, a tree house, and several port-o-lets.<sup>86</sup> The nature of Occupy Toronto’s use of St. James Park was such that other Torontonians could not freely access the park as they once had.

While *Batty* did offer some discussion of how Toronto and Torontonians used St. James Park, the court also examined the impact of Occupy Toronto on surrounding and adjacent properties. At first, this seems like a bold move for property law, given its resistance to explicit recognition of property’s inherently overlapping and interconnected nature.<sup>87</sup> Based, however, on Occupy Toronto’s clear and legally unjustified de facto appropriation of common property, there was no need to refer to the protest’s impact on adjacent properties. That the court should do so is indicative of the weakness of common property and the dominance of private property in Canadian jurisprudence.

The local residents’ affidavits depicted Occupy Toronto as a nuisance, though that term was not explicitly mentioned. The residents complained that the protestors’ encampment was noisy and smelly. Excessive noise and unpleasant smells are two classic examples of nuisance due to the difficulty of containing them to the area where they originate.<sup>88</sup> In *Batty*, the residents also described Occupy Toronto as being threatening, and mention how they were avoiding the areas closest to the park. Thus, the disruption caused by Occupy Toronto was not limited to the park, as the protesters claimed it was.

The appearance of the local residents in the decision adds another element of balancing into the case, which echoes Joseph Singer’s proposed social relations model of property. Singer’s social relations model centred on nuisance with the hope that this would force courts to balance private property rights with the effects of these rights’ exercise “on other property

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<sup>85</sup> *Ibid* at para 27; see Mattahias Schwartz, “Map: How Occupy Wall Street Chose Zuccotti Park” *The New Yorker* (21 November 2011), online: The New Yorker <<http://www.newyorker.com/online/blogs/newsdesk/2011/11/occupy-wall-street-map.html>>.

<sup>86</sup> *Batty*, *supra* note 1 at para 29.

<sup>87</sup> See Craig Anthony Arnold, “The Reconstitution of Property: Property as a Web of Interests” (2002) 26:2 *Harv Envtl L Rev* 281 at 282, 332-33; see also Nestor M Davidson & Rashmi Dyal-Chand, “Property in Crisis” (2010) 78:4 *Fordham L Rev* 1607 at 1638.

<sup>88</sup> *Batty*, *supra* note 1 at para 42. For a definition and discussion of nuisance see, Henry E Smith, “Exclusion and Property Rules in the Law of Nuisance” (2004) 90:4 *Va L Rev* 965 at 996-1004 [Smith, “Exclusion”].

owners and on the public at large.”<sup>89</sup> In *Batty*, Occupy Toronto’s use of St. James Park was balanced in exactly this way. The judgment in *Batty* opens with the recognition that all rights have to be balanced with each other and that no rights are absolute because they are limited both by others’ rights and the law.<sup>90</sup> This statement alone would have been enough to justify the court’s decision to uphold Toronto’s order to remove the Occupy encampment for, as already mentioned, the movement failed to respect others’ common property rights. The appearance of local residents in the judgment, however, results in the court balancing the impact of Occupy Toronto on adjacent properties as well.

Yet, Singer’s social relations model was suggested solely in the context of private property rights, not common property rights. In the article where he first discussed the social relations model, Singer was concerned with how to ensure public accommodation to private properties like shops or hotels.<sup>91</sup> While it is true that common property such as parks necessarily overlaps with and is interdependent on the property that surrounds it, there was no explicit nuisance complaint in *Batty*. Therefore, the park ought to have been examined in isolation. The effect of importing a social relations model of property into *Batty* is that those people with private property rights adjacent to the park are considered twice: first, as members of the public excluded from the park by Occupy Toronto, and second, because of their proximity to the park. The views and rights of private property owners were, consequently, amplified. As desirable as it might be for courts to perform a relational analysis of property, in the context of common property such an analysis can overemphasize the rights of adjacent private property owners at the expense of common property rights. Everyone has an equal right not to be excluded from common property; yet, *Batty*’s focus on adjacent property rights gave those with adjacent property rights extra rights in the park and thus added an element of inequality to the analysis.

The legal issue in *Batty*, however, was the application of trespass legislation rather than an allegation of nuisance. Had it been the latter, the court would have been entitled to examine the impact of Occupy Toronto on surrounding properties. The question over the constitutionality of Toronto’s Trespass Notice ought to have kept the court focused on the issue of how Occupy Toronto used the park, whether this was in keeping with Toronto’s by-laws governing the use of municipal parks, and whether these by-laws infringed the *Charter*. As Occupy Toronto protesters effec-

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<sup>89</sup> Singer, “No Right to Exclude”, *supra* note 54 at 1464.

<sup>90</sup> *Batty*, *supra* note 1 at paras 1-2, 13-15.

<sup>91</sup> *Ibid* at 1286-302.

tively appropriated the park and prevented others from using it, they violated the common property rights of others. Consequently, the Trespass Notice formed a reasonable attempt by the city to regulate its property according to the limits imposed by the *Charter* and by the need to keep parks available for all.<sup>92</sup> At no point did Toronto attempt to ban Occupy Toronto from St. James Park. The city did, however, attempt to persuade the protesters to only use the park during the appointed hours.<sup>93</sup> As Toronto did not seek to impose an “absolute ban” on Occupy Toronto’s expression, the Trespass Notice was constitutional.<sup>94</sup>

The court’s discussion of what were ultimately irrelevant private property interests suggests that the court did not feel that Occupy Toronto’s violation of the public’s common property rights was enough of a justification for the city’s action. The appearance of these irrelevant private property rights is even more jarring given that the court eventually concluded that Occupy Toronto would be entitled to protest in the park from 5:30 a.m. to 12:00 a.m.<sup>95</sup> These hours of protest would arguably be just as much of a nuisance to local residents and businesses as the twenty-four-hour protest.<sup>96</sup> It is not entirely clear that limiting Occupy Toronto to these hours would have changed much for the protesters as, according to the decision in *Batty*, the protest was not particularly active at night and many of the protesters did not camp in the park overnight.<sup>97</sup> The real problem then, despite Justice Brown’s attempt to portray Occupy Toronto as a nuisance, was the de facto appropriation of the park and the exclusion of other members of the public from using the park.

There are a number of reasons why *Batty* may have mentioned the affidavits of local residents, but the prevailing reason appears to have been the court’s reluctance to rely solely on common property rights. The court adopted a three-pronged critique of Occupy Toronto. First, it appropriated common property for its own use; second, it failed to comply with Toronto’s attempts to regulate its parks; and third, it inconvenienced those with adjacent private property rights.<sup>98</sup> Of the three main criticisms of Occupy Toronto, the second one proved to be the most fully developed. In its role of regulator of common property, Toronto appears more like an owner, be-

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<sup>92</sup> *Batty*, *supra* note 1 at para 111.

<sup>93</sup> *Ibid* at para 104.

<sup>94</sup> *Ibid* at paras 104, 124, 128.

<sup>95</sup> *Ibid* at paras 5, 75, 123.

<sup>96</sup> *Ibid* at para 104.

<sup>97</sup> *Ibid* at paras 30-31.

<sup>98</sup> *Ibid* at paras 42, 45-48, 108.

cause it makes the decisions and sets the agenda for such property.<sup>99</sup> Even though Toronto only holds such property for the benefit of the public, it has a large degree of discretion over the appropriate use of this property.<sup>100</sup> Traditionally, the analogy of common property has been that of the trust, but *Batty* seems to adopt the analogy of government as owner. The differences between the two analogies are subtle, but the trust analogy of common property emphasizes that such property is held for the *benefit of the public*, while the ownership analogy emphasizes how the *government uses the property*.<sup>101</sup> Although the public appeared in *Batty*, the court paid much more attention to the appropriateness of Toronto's regulation and failed to discuss what rights exist in common property and how they operate.

The reason Toronto's regulation of its parks appears more like the action of a private property owner than that of a public body is due to how *Batty* understands Toronto's regulation. Justice Brown argued that, without the city's careful balancing act, "chaos would reign; parks would become battlegrounds of competing uses," or that "parks would become places where the stronger, by use of occupation and intimidation, could exclude the weaker."<sup>102</sup> In short, Justice Brown adopted the Hobbesian understanding of the state of nature and combined it with the tragedy of the commons to describe Toronto's regulation as a civilizing force and one which ensures efficient use.<sup>103</sup> Justice Brown's understanding has clear echoes with the traditional common law ideas about private property's ability to civilize and to ensure efficient use.<sup>104</sup> While it is true that many municipal parks emerged out of a late-nineteenth-century attempt to shape the population towards a desired ideal,<sup>105</sup> it is also clear that Justice Brown confuses common property with non-property or open access prop-

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<sup>99</sup> Larissa Katz argues that the agenda-setting right is the key ownership right ("Exclusion and Exclusivity", *supra* note 5).

<sup>100</sup> For a discussion of how St. James Park was used, see *Batty*, *supra* note 1 at para 25.

<sup>101</sup> See *infra* notes 115-24 and accompanying text.

<sup>102</sup> *Batty*, *supra* note 1 at para 91.

<sup>103</sup> For Hobbes' understanding of the state of nature see Sturm, *supra* note 17 at 370-71. For the tragedy of the commons, see Garrett Hardin, "The Tragedy of the Commons" (1968) 162 *Science* 1243. Brown J explicitly references the "tragedy of the commons" in *Batty*, *supra* note 1 at para 113.

<sup>104</sup> For more on the belief in the civilising potential of individual private property see Sturm, *supra* note 18 at 355-60; Gregory S Alexander, "Time and Property in the American Republican Legal Culture" (1991) 66:2 *NYUL Rev* 273 at 286-87, 332; John Brewer & Susan Staves, "Introduction" in John Brewer & Susan Staves, eds, *Early Modern Conceptions of Property* (New York: Routledge, 1995) 1 at 1.

<sup>105</sup> Lehari, *supra* note 27 at 177.

erty.<sup>106</sup> Common property, like all forms of property, only exists because of state recognition and regulation. If *Batty* had taken common property seriously, the emphasis would have been on the benefit that the public actually receives from common property such as parks, rather than the alleged harm that Toronto's regulation prevented.<sup>107</sup>

Had *Batty* relied on the trust analogy, the court's analysis would have emphasized the public's right not to be excluded above all else. While it is true that the government as owner analogy still leaves room for that property to be held in the public interest, the public interest appears as a burden on the property rather than a defining feature of the property as it is under the trust analogy of common property. Thus the government-as-owner analogy assumes that private property is the baseline model of property, and attempts to force it into a private property model as far as possible. In *Batty*, the court's reliance on the government-as-owner analogy, which understands common property as a variant of private property, forced the court to paint the Occupy movement as a nuisance rather than just relying on the public's right not to be excluded. Had the court used the trust analogy, there would have been no need to refer to the impact of Occupy Toronto on surrounding properties because the court would have focused on Toronto's need to make and keep its parks open to all. Under the trust analogy, the court would have emphasized the benefit the public receives from parks like St. James Park.<sup>108</sup> The trust analogy would not have given any member of the public standing to challenge how Toronto managed its property,<sup>109</sup> but it would have focused the court's attention on the public's right to access and use the park.<sup>110</sup> The court would have emphasized that Toronto's attempt to regulate public parks aimed to ensure

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<sup>106</sup> See *supra* notes 16-44 for definitions of these kinds of property.

<sup>107</sup> On several occasions the decision in *Batty* references anarchy, chaos, and the need to obey the law; such comments appear as an implicit critique of Occupy Toronto and its methods, see e.g. *Batty*, *supra* note 1 at para 91. A full examination of this aspect of *Batty* is beyond the scope of this article.

<sup>108</sup> It should be noted that the trust analogy does not actually create a trust, and much like the public trust doctrine in the US, traditional trust law does not apply. There is, thus, no need to discuss the identity of the settler, trustee, and beneficiary in cases of public trusts.

<sup>109</sup> Unless, of course, any individual could show that she "suffered damages of a special character" as a result of the government's regulation of public-common property (see Hunt, *supra* note 8 at 166).

<sup>110</sup> Although some academics have called for Canada to adopt the American public trust doctrine, two recent court cases suggest that the Canadian judiciary would be deeply reluctant to do so without express legislative provisions: *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at paras 80-83, [2004] 2 SCR 74, [*Canadian Forest*]; *Burns Bog Conservation Society v Canada (AG)*, 2012 FC 1024 at paras 39, 107 (available on CanLII) [*Burns Bog*].

that the public would not be excluded from these parks, rather than focusing on the impact that the use of common property has on adjacent private property. As Occupy Toronto quite clearly appropriated an entire city park, and thus, excluded the public, there was no need to paint the protest as a nuisance as well.

Although *Batty* does reference the fact that Occupy Toronto effectively appropriated the entire park, Justice Brown also repeatedly refers to Toronto's need to respect the private property rights of those adjacent to the park.<sup>111</sup> Therefore, not only must Toronto take into account the public's right not to be excluded from municipal parks, it must also be respectful of the private property rights of those adjacent to public parks. Such a stance would make little sense under the trust analogy of common property, because under that analogy such property is held for the benefit of the public not the benefit of adjacent private property rights holders. As desirable as it might be to recognize the relational aspects of property, they should not be recognized at the expense of everyone's right to use instances of common property, or more importantly, at the expense of fundamental human rights such as free expression. Nor should the relational aspects of property only apply to common property. Justice Brown's reference to Toronto's need to respect adjacent private property rights appears to echo the maxim *sic utere tuo ut alienum non laedas* (use your property in such a way that you do not damage others' property), though Justice Brown fails to mention that this maxim applies to *all* forms of property, not just common. Ironically, *Batty's* deference to the private property rights of those adjacent to St. James Park does the very thing that Occupy Toronto was accused of doing: it seems to create private rights to public property.<sup>112</sup>

The appearance of private property owners in *Batty* is in contrast to two recent cases dealing with similar situations. Just two years before the decision in *Batty*, the Court of Appeal for British Columbia delivered its judgment in *Victoria (City) v. Adams*, a case which arose out of a tent city in one of Victoria's parks. *Adams* differed from *Batty* in that the court focused on whether or not Victoria's by-law prohibiting overhead shelter during the night in public parks violated section 7 of the *Charter*. At both

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<sup>111</sup> For references to Occupy Toronto's appropriation see *Batty*, *supra* note 1 at paras 12, 15, 42-49, 70, 91, 97, 108-09. For references to adjacent properties, see *ibid* at paras 42, 44, 92, 97, 112.

<sup>112</sup> Mariana Valverde argues that certain features of urban governance such as noise codes and zoning laws grant more protections to certain socio-economic groups than to others ("Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance" (2011) 45:2 *Law & Soc'y Rev* 277 at 286, 295). Arguably this could also lead to a similar private appropriation of public property.

trial and appeal, the by-law was found to violate the right to life because Victoria lacked enough overnight shelters for its homeless population.<sup>113</sup> *Adams*, however, also dealt with the same common property issues that arose in *Batty*, namely that such overhead shelter acted as an appropriation of common property for private use. At no stage in *Adams* did the court refer to the impact that any such shelter would have on adjacent private property. A year after *Adams*, the Court of Appeal for British Columbia issued its judgment in *Zhang*, which dealt with a semi-permanent shelter erected by the Falun Gong outside Vancouver's Chinese Consulate.<sup>114</sup> The court found Vancouver's by-law prohibiting the erection of structures on public streets to violate the *Charter* because it lacked an explicit political exception. As in *Adams*, the court made reference to the need to balance the competing rights and usage of property such as streets and parks. The impact of Falun Gong's shelter on adjacent properties was ignored, even though the Chinese Consulate had complained about it.<sup>115</sup>

Both *Zhang* and *Adams* challenged municipal by-laws while *Batty* sought to challenge the Trespass Notice issued by Toronto under the *Trespass to Property Act*. The difference might appear subtle, but it results in *Batty*'s property issues taking on greater importance. In most common law provinces, trespass legislation codifies and enhances the common law protections against trespass to property. As noted by the courts, such legislation increases the power of private property owners.<sup>116</sup> In particular, it grants private property owners the power to declare a behaviour trespass. In short, the trespass legislation grants property owners the right to control who can access their property and *what* they can do there.<sup>117</sup> The result is that not only does *Batty* defer to adjacent private property rights, it also defers to the city's use of the park over and above the public's use of the park.

The deference to the city as regulator was also seen in the judgement of the Court of Appeal in *Adams*. Unlike the trial court, the Court of Ap-

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<sup>113</sup> *Adams*, *supra* note 82 at paras 1, 166. Overhead shelters during the day remain prohibited, see *Johnston v Victoria (City of)*, 2011 BCCA 400 at paras 6, 7, 16, 22 BCLR (5th) 269.

<sup>114</sup> *Zhang*, *supra* note 82 at para 1.

<sup>115</sup> *Ibid* at paras 26-27.

<sup>116</sup> *R v Asante-Mensah*, 2003 SCC 38 at para 25, [2003] 2 SCR 3, [*Asante-Mensah*]; *R v SA*, 2011 ABPC 269 at paras 65-66, 242 CRR (2d) 26, rev'd 2012 ABQB 311, 97 MPLR (4th) 217 [SA (ABPC)] [SA (ABQB)], leave of appeal granted 2012 ABCA 323 (available on CanLII).

<sup>117</sup> *Trespass Act*, RSBC 1996, c 462, s 4(1)(c); *Trespass to Property Act*, *supra* note 100 at ss (2)(a)(ii), 4(1).

peal did not offer any serious analysis of common property rights and appeared to assume that the only limitation on how Victoria regulated its property was the *Charter*.<sup>118</sup> In fact, the Court of Appeal refused to consider a *temporary* right to use the park as any kind of property right.<sup>119</sup> *Zhang* saw the same court reiterate the need to regulate city streets;<sup>120</sup> however, in its discussion of city streets, the court emphasized their role in both circulation and free expression, rather than the public's right not to be excluded from them. Such failures to properly engage with common property rights are hardly surprising given the existing jurisprudence from the Supreme Court of Canada, which strongly suggests a shift from the trust analogy of common property to the government as owner analogy.

### III. The Rise of the Government-as-Owner

The emergence of the government-as-owner analogy of common property echoes developments in the jurisprudence on private property. The latter jurisprudence also defers to the owner of the property rather than attempting to situate the property in the context of how others see it and use it. Canadian courts, for example, still do not recognize the possibility of public forums existing on private property. This is in contrast to some American jurisprudence which holds that, because malls and shopping centres fulfill the function of public markets, they are considered public forums and thus owners cannot prohibit some forms of free expression.<sup>121</sup> Similar jurisprudence from Canada defers to the owner's use and control of the shopping centre in question, which necessarily simplifies how such property is understood, and grants a significant amount of power to the owners of private property. In this section I explore how Canadian courts treat common property and, where relevant, I compare it with how the courts treat publicly accessible, yet privately owned property.

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<sup>118</sup> *Adams*, *supra* note 82 at paras 98-101.

<sup>119</sup> *Ibid* at para 100.

<sup>120</sup> *Zhang*, *supra* note 82 at para 50.

<sup>121</sup> *Harrison v Carswell*, [1976] 2 SCR 200 at 210-12, 62 DLR (3d) 68, Laskin CJC [*Harrison*] citing to *Schwartz-Torrance Investment Corp v Bakery & Confectionery Workers Union Local 31* 61 Cal 2d 766, 394 P 2d 921 (Cal S Ct 1964); *Food Employees v Logan Valley Plaza* 391 US 308 at 319-25 (US S Ct 1968); *Amalgamated Clothing Workers of America v Wonderland Shopping Center* 370 Mich 547, 122 NW 2d 783 (Mich S Ct 1963); *Lloyd Corp Ltd v Tanner* 407 US 551 (US S Ct 1972) (holding that because the hand billing at issue had no connection to activity within the mall it was not protected under the First Amendment). Subsequent to Laskin CJC's reference to similar American jurisprudence in *Harrison*, American courts restricted access to malls. For a discussion of this development see, Timothy Zick, "Property, Place, and Public Discourse" (2006) 21 Wash UJL & Pol'y 173 at 181-82. See also Singer, "No Right to Exclude", *supra* note 54 at 1412, n 42-43 and accompanying text.



The leading case on the issue of public access to private property remains the pre-*Charter* decision of *Harrison v. Carswell*.<sup>122</sup> This case dealt with whether or not employees engaged in a lawful strike could picket on the private sidewalk of a privately owned shopping centre. Despite the fact that the owner of the shopping centre openly invited members of the public onto his property, the Supreme Court of Canada found that the owner could prohibit picketing on his property and that the striking employees' convictions for trespass were valid.<sup>123</sup>

Moe Litman argues that *Harrison* would no longer be considered good law, but recent comments from the Supreme Court of Canada suggest otherwise.<sup>124</sup> Litman's argument that *Harrison* is out of date rests on the decision in *Cadillac Fairview Corporation Limited v. Retail, Wholesale and Department Store Union*, which centred on labour law rather than property law.<sup>125</sup> In this case, Ontario's labour legislation created a specific exemption from the effects of *Harrison*, which suggests that *Harrison* would have otherwise been followed. In contrast to Litman's claim, Jim Phillips and Phil Girard argue that *Cadillac Fairview* took place in such a different context that it does not act as a limit to the decision in *Harrison*.<sup>126</sup> Litman, however, also claimed that invoking a Trespass Notice under trespass legislation would be enough to meet the demands of state action required by the *Charter*.<sup>127</sup> Litman's argument was made almost two decades ago and, since then, comments from the Supreme Court, particularly the McLachlin Court, suggest that *Harrison* is still good law.<sup>128</sup> In *Québec Inc*, for example, the Court commented that "[p]rivate property ... will fall outside the protected sphere of s. 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the *Canadian*

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<sup>122</sup> For an in-depth history of this case see Philip Girard & Jim Phillips, "A Certain 'Mal-laise': *Harrison v. Carswell*, Shopping Centre Picketing, and the Limits of the Post-war Settlement" in Judy Fudge & Eric Tucker, eds, *Work on Trial: Canadian Labour Law Struggles* (Toronto: Osgoode Society for Canadian Legal History by Irwin Law, 2010) 249.

<sup>123</sup> *Harrison*, *supra* note 121 at 219.

<sup>124</sup> MM Litman, "Freedom of Speech and Private Property: The Case of the Mall Owner" in David Schneiderman, ed, *Freedom of Expression and the Charter* (Calgary: Thomson, 1991) 361 at 399.

<sup>125</sup> *Cadillac Fairview Corp Ltd v Retail, Wholesale and Department Store Union*, 71 OR (2d) 206 (available on CanLII).

<sup>126</sup> Girard & Phillips, *supra* note 122 at 271.

<sup>127</sup> Litman, *supra* note 124 at 401-02.

<sup>128</sup> This was the case before Litman wrote his article, see *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at para 33, 33 DLR (4th) 174. See also Girard & Phillips, *supra* note 122 at 272 ("*Harrison* remains a potent precedent"). For pre-*Charter* decisions, see *infra* notes 152-58 and accompanying text.

*Charter*.”<sup>129</sup> This comment seems to suggest that the Supreme Court would be unwilling to adopt Litman’s argument that a Trespass Notice constitutes state action unless the notice is issued in respect of government property. In addition, *R. v. Asante-Mensah* saw the Supreme Court comment that Trespass Notices could be applied in the context of protesters on private property. While the Court noted that this was a powerful weapon, it was one granted by the legislature, which suggests a reluctance to interfere with it without further legislative direction.<sup>130</sup>

The starting point for a post-*Charter* analysis of common property is *Commonwealth of Canada*. Although this case focused on the issue of free expression, the location of the contested expression—the public hall of Montreal’s Dorval airport—resulted in the Supreme Court providing a revealing commentary on property. In this case, the government attempted to argue that it had all the same rights as a private property owner and could, thus, prohibit expressive activity from the airport, but the Supreme Court disagreed. In doing so, the Court necessarily discussed the nature of government-owned property; in particular, it focused on what rights as owner, if any, the government had in respect of instances of common property.

Prior to *Commonwealth of Canada*, the trust analogy of common property appeared to be the dominant paradigm of common property in Canada, as in other common law countries.<sup>131</sup> The trust analogy is generally considered to have its origins in ancient Roman law and was later adopted into the early English common law. Traditionally, the trust analogy granted the public the rights of navigation, commerce, and fishing in tidal waters. The trust analogy also granted access to highways and certain parts of the coast. Under the English common law, these rights remained relatively narrow and the English courts never explicitly described the public’s rights to such property as being a “public trust”.<sup>132</sup> Canada copied the narrow and limited nature of the trust analogy, though as Smallwood notes, Canadian recognition of the public’s rights of navigation and fishing was “fairly short-lived” and underdeveloped.<sup>133</sup> Smallwood argues that

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<sup>129</sup> *Montreal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 62, [2005] 3 SCR 141 [*Québec Inc*].

<sup>130</sup> *Asante-Mensah*, *supra* note 116 at paras 26-28.

<sup>131</sup> Smallwood, *supra* note 8 at 10, 12-61; Hunt, *supra* note 8 at 152-56.

<sup>132</sup> von Tigerstrom, *supra* note 8 at 381; Smallwood, *supra* note 8 at 10.

<sup>133</sup> Smallwood, *supra* note 8 at 77-103. Three years after Smallwood wrote her thesis, however, the Supreme Court issued a number of decisions about aboriginal fishing rights that also referred to the public’s common law right to fish (see e.g. *R v Gladstone*, [1996] 2 SCR 723 at 770-71, 137 DLR (4th) 648 [*Gladstone*]). For an in-depth critique of *Gladstone* and the other fishing rights cases, see Mark D Walters, “Aboriginal Rights,

Canadian recognition of the public's right to highways was stronger, but remained limited in scope.<sup>134</sup> In the United States, however, the trust analogy developed into the public trust doctrine and has proven to be a powerful tool for protecting the environment.<sup>135</sup>

Though the trust analogy never became as powerful in Canada as it is in the United States, in *Commonwealth of Canada*, Chief Justice Lamer quoted from an American case, *Hague v. Committee for Industrial Organization*, in order to describe common property:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. Th[is] privilege ... may be regulated in the interest of all; it is not absolute, but relative, ... but it must not, in the guise of regulation, be abridged or denied.<sup>136</sup>

This definition echoes the Supreme Court of Canada's decision in the 1932 case of *Burchill*. In *Burchill*, Justice Rinfret may have said that "municipalities are in a sense owners of the streets," but he was quick to qualify this by noting that municipal property was nothing like private property and that municipalities "[hold] [their streets] as trustee for the public."<sup>137</sup> Thus under the trust analogy, governments are only "owners" of property in the sense that trustees are owners of trust property. To put it another way, the trust analogy understands the government as holding property for the benefit of the public and does not grant the government the same extensive ownership rights as found under private property.

In *Commonwealth of Canada*, the appearance of the trust analogy is particularly notable given the exact nature of the common property at issue. Traditionally the trust analogy only applied to assets such as highways, tidal waters, and certain fishing grounds. Yet in *Commonwealth of Canada*, Chief Justice Lamer used section 2(b) of the *Charter* to extend

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*Magna Carta*, and Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998) 23:2 Queen's LJ 301.

<sup>134</sup> Smallwood, *supra* note 8 at 93-100.

<sup>135</sup> Hunt, *supra* note 8 at 156-61. See also Ziff, *supra* note 4 at 228.

<sup>136</sup> 307 US 496 (1939) at 515-16, 59 S Ct 954 cited by Lamer CJ in *Commonwealth*, *supra* note 11 at para 14. Compare with Simpson, *supra* note 64 at 47 ("[t]he lawyers never adopted the premise that the King owned all the land; such a dogma is of very modern appearance"). See also the history of this idea in the English common law in Smallwood, *supra* note 8 at 19-42.

<sup>137</sup> *Burchill*, *supra* note 10 at 625.

the trust analogy to the public area of an airport terminal and extended the public's right of access so that it includes communicative purposes.<sup>138</sup> According to Chief Justice Lamer, then, the *Charter* enhances the public's right of access to include buildings provided such buildings are analogous to parks or other public meeting places, and provided such buildings are "owned" by the government. Though the Chief Justice's discussion of the trust analogy seemed largely ignorant of the earlier Canadian jurisprudence on the issue,<sup>139</sup> he accepted that the analogy applied in Canada and that it had a long history.

Despite the long history of the trust analogy of common property, *Commonwealth of Canada* introduced another way to understand such property. While Chief Justice Lamer and Justice Sopinka rejected the government's claim to have the same rights as a private property owner and adhered to the trust analogy of common property,<sup>140</sup> the judgements of Justices McLachlin and La Forest effectively introduced the government-as-owner analogy.<sup>141</sup> Justice McLachlin (as she then was) attempted to differentiate between private government property and public government property.<sup>142</sup> While this attempt appears to recognize the complexity of property, its application results in an oversimplification. Rather than examine whether or not there are other forums available for free expression, Justice McLachlin only paid attention to the government's use of its property and effectively deferred to the government as owner.<sup>143</sup> The idea that the government only holds property for the benefit of the public vanished in Justice McLachlin's categories of government property and, even in the case of public government-owned property, the only real limitation on the government's use is the *Charter*. As Chief Justice of Canada, McLachlin has since reiterated her distinction between the forms of gov-

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<sup>138</sup> *Criminal Lawyers' Assn v Ontario (Ministry of Public Safety and Security)*, 2007 ONCA 392 at para 39, 280 DLR (4th) 193 ("[in *Commonwealth*] the issue was whether the public had a right to access an airport for the purposes of expressing itself. In that case, there was no underlying statutory or common law right to access the location in question... [T]he court had to determine whether s. 2(b) ought to warrant a right of access.") [CLA].

<sup>139</sup> This jurisprudence is discussed in detail in Smallwood, *supra* note 8 at 77-103. Somewhat surprisingly Smallwood failed to discuss the decision in *Commonwealth* even though it came out before she wrote her thesis.

<sup>140</sup> *Commonwealth*, *supra* note 11 at paras 13-14.

<sup>141</sup> *Ibid* at paras 45, 215.

<sup>142</sup> *Ibid* at para 215. LaForme JA's comments in *CLA* (*supra* note 138 at para 39) might explain McLachlin J's novel "government as owner" analogy, but they do not explain Lamer CJC and Sopinka J's continued reliance on the trust analogy.

<sup>143</sup> Richard Moon, "Out of Place: Comment on *Committee for the Commonwealth of Canada v. Canada*" (1993) 38:1 McGill LJ 204 at 224.

ernment-owned property and thus this distinction would appear to be good law in Canada.<sup>144</sup> McLachlin CJC's distinction has also been echoed by lower courts, which further suggests that the government as owner analogy of common property has taken over from the trust analogy.<sup>145</sup>

The term "government-owned property" is problematic for a further reason because it suggests that the public's right of access to "public government property" is a burden rather than a defining feature of such property. If we return to Macpherson's categories of state and common property we can see that the term "government-owned property" collapses common property into state property. Admittedly, the line between state and common property is a thin one given the state's role in creating and enforcing common property rights: it often acts like an owner. The real difference between the two forms of property lies not in how the state or government dictates their use but in the role that each form of property has to play. The role of common property is essential to the successful functioning of society because it facilitates transport, communication, connectivity, and other similar activities. By comparison, state property's role is more crucial to the activities of government, such as national security or taxation. McLachlin CJC's repeated emphasis on the government's use of property ignores the role that it has to play and, like the dominant understanding of the bundle of rights theory of property,<sup>146</sup> focuses on the owner rather than on the complex web of interests that surround most pieces of property. The term "government-owned property", thus, implies the state's private property rights rather than the public's rights to common property.

A recent case from Alberta highlights how the government-as-owner analogy complicates the application of trespass legislation to government-owned property. In *SA*, a teenager challenged her ban under the *Trespass to Premises Act* from all property owned by the Edmonton Transit Service (ETS) as a violation of her section 7 right to liberty<sup>147</sup> The court noted that the legislation did not differentiate between different types of property. At trial, the court clearly felt that there was a difference between public and private property and though the court was willing to concede that the government's right to "manage public property for the benefit of citizens ... may, on occasion, require that specific persons be banned from particular public premises," but repeatedly noted that "an absolute right to exclude persons from public property is inimical to the very notion of public prop-

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<sup>144</sup> *Québec Inc*, *supra* note 129 at para 64.

<sup>145</sup> *SA (ABPC)*, *supra* note 116 at para 82.

<sup>146</sup> See, *supra* notes 54-75 and accompanying text.

<sup>147</sup> *SA (ABPC)*, *supra* note 116 at para 114.

erty.”<sup>148</sup> Though the Provincial Court of Alberta also noted that the government might have a “fiduciary responsibility to manage public property for common good,”<sup>149</sup> it mistakenly thought that this concept was a relatively new one and failed to recognize that the trust analogy of common property is much older than the government-as-owner analogy. Ultimately, the court concluded that the *Trespass to Premises Act* was unconstitutional “to the extent that it purports to apply to public property to which the public have a general invitation and right to attend.”<sup>150</sup> The Court of Queen’s Bench of Alberta disagreed and held that, as a general rule, “the Crown has the same rights as individuals ... to hold property and to assert rights with respect to it, subject to its obligations under the *Charter*.”<sup>151</sup> Consequently, the Court of Queen’s Bench found the *Trespass to Premises Act* to be constitutional and that it was the government’s use of the Act which had the potential to be unconstitutional.<sup>152</sup> This suggests that the issue of whether and when trespass legislation will apply to government-owned property remains uncertain.”

*Commonwealth of Canada* was not the last time that the Supreme Court commented on common property: in 2005, the issue appeared again in *Québec Inc.* This case arose when a club in downtown Montreal installed a loudspeaker in its entrance which broadcast “the music and commentary accompanying the show under way inside so that passers-by would hear” in violation of the city’s bylaw against such noise.<sup>153</sup> The club was charged with “producing noise that could be heard outside using sound equipment” but contested this charge on the grounds of freedom of expression and argued that Montreal exceeded its power by defining an activity as a nuisance when it was not.<sup>154</sup> The Supreme Court disagreed and found Montreal’s bylaw to be constitutional. Despite the expression’s origin in private property, the Supreme Court focused its analysis on common property. The appearance of common property in *Québec Inc.* resulted from the fact that the case dealt with nuisance rather than a recognition that property is inherently interdependent.

In *Québec Inc.*, the Court seemed particularly concerned by noise pollution in Canadian urban centres and the need to protect the “peaceful en-

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<sup>148</sup> *Ibid* at paras 180, 91.

<sup>149</sup> *Ibid* at para 90.

<sup>150</sup> *Ibid* at para 190.

<sup>151</sup> *SA (ABQB)*, *supra* note 116 at para 80.

<sup>152</sup> *Ibid* at paras 82-85.

<sup>153</sup> *Québec Inc.*, *supra* note 129 at para 3.

<sup>154</sup> *Ibid* at para 4. For an analysis of the operation of nuisance in this case see, Valverde, *supra* note 112 at 304-305.

joyment” of streets and other public places.<sup>155</sup> While concerned that public streets be quiet, the Court also noted that the reduction of noise pollution was important for “residents” of the City, a term which implicitly suggests individuals with private property rights.<sup>156</sup> Had the Court used “citizens of the City” or “Montrealers”, for example, the association with private property rights would have been avoided. That being said, the Court still felt that public streets were appropriate venues for freedom of expression and that “[a]mplified emissions of noise from buildings onto a public street *could* further democratic discourse, truth finding and self-fulfillment.”<sup>157</sup> The Court held that street noise did not interfere with the primary function of streets and, thus, continued to examine the use of government-owned property rather than the rights at stake.<sup>158</sup>

What these cases show is that Canadian courts have long struggled with how to conceptualize common property. The distinction that arose in *Commonwealth of Canada* may have been in response to the fact that the expressive activity at issue took place *inside* a building rather than out on the streets, but the Supreme Court has since reiterated the private/public government-owned property distinction which suggests it holds for all government owned property. Prior to *Commonwealth of Canada*, Canadian courts appeared to prefer the trust analogy of common property as it allowed courts to both identify a body responsible for maintaining the property and recognize that such property was held for the benefit of others.<sup>159</sup> Despite Lamer CJC’s apparent reliance on the trust analogy in his judgment in *Commonwealth of Canada*, the other judgments, particularly those of McLachlin and La Forest JJ, preferred the government-as-owner analogy.<sup>160</sup>

The government-as-owner analogy has the effect of putting the government in the same position as the shopping centre owner in *Harrison* with one major difference. In cases about the public’s access to or use of government-owned property, the government’s action is obviously limited by the *Charter*.<sup>161</sup> The *Charter*, however, only applies if the use of the

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<sup>155</sup> *Québec Inc*, *supra* note 129 at paras 20, 26, 89.

<sup>156</sup> *Ibid* at para 99.

<sup>157</sup> *Ibid* at para 68 [emphasis added].

<sup>158</sup> *Ibid* at para 67.

<sup>159</sup> See *supra* notes 152-58 and accompanying text.

<sup>160</sup> *Commonwealth*, *supra* note 11 at paras 47 (LaForest J) and 227-41, 264 (McLachlin J).

<sup>161</sup> Even LaForest J, who argued that the government had private property rights was willing to concede this point (*Ibid* at para 47 (“[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 *Charter*”); *SA (ABQB)*, *supra* note 116 at paras 82-85 (referring to the government’s use of trespass legislation).

property is consistent with public access. For example, it is unlikely that the *Adams* case would have succeeded had the homeless tried to claim the right to sleep in City Hall overnight rather than in a municipal park. Like the decision in *Harrison*, the Canadian jurisprudence on common property examines the owner's use and control rather than the values which would be upheld by continuing the contested activity.

The government-as-owner analogy, much like the powers granted to private property in Canadian law, seeks to isolate property. The focus on the owner tends to ignore surrounding property, but more importantly, also disregards how others use the property. This isolation is less of a problem in cases dealing with private homes, but in cases dealing with shopping centres it overlooks the fact that the public may consider such property to be akin to a public park or a similar meeting place. In *Asante-Mensah*, the Supreme Court noted that trespass notices could be issued against teenagers in malls, and hence, the Court's decision over what powers of enforcement trespass legislation granted would have ramifications beyond the case at bar.<sup>162</sup> What the Court failed to discuss is whether or not the issuance of such trespass notices would be appropriate if the teenagers behaved lawfully, and if they had no other suitable meeting place. In the case of common property, the isolation inherent in the government-as-owner analogy fails to recognize that common property has an important social aspect. The refusal to recognize interests other than that of owners isolates property from its social aspects as well as from surrounding properties. It is this former isolation that is arguably the most serious because it emphasizes individuals but provides no guidance on how individuals are to live together.

#### IV. Bringing Back the Public

Several property scholars have recognized that the bundle of rights theory often ignores the social aspects of property and have proposed solutions.<sup>163</sup> These solutions fall short, however, when they are applied to common property because their primary aim is to make private property fairer. As noble a goal as this might be, it will not do much good if in making private property fairer the situation of common property deteriorates or fails to improve, particularly when the proposed new models of private

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<sup>162</sup> *Asante-Mensah*, *supra* note 116 at para 24.

<sup>163</sup> Singer, "No Right to Exclude", *supra* note 54; Singer, "Democratic Estates", *supra* note 44; Gregory S Alexander, "The Social-Obligation Norm in American Property Law" (2009) 94:4 Cornell L Rev 745 at 748 [Alexander, "Social-Obligation Norm"].



property still leave little room for those with no private property rights.<sup>164</sup> This section begins by examining some proposed new models of property and how they would impact common property and argues that they do not provide much of a solution to problems caused by the government-as-owner analogy. The only way to fix the problems caused by the government-as-owner analogy is to find a way to return common property's emphasis to the public and their interest in such property.

Singer's proposed social relations model of property, for example, is only effective in instances of private property.<sup>165</sup> Arguably, *Batty* implied a reliance on this social relations model of property when it referred to the impact that Occupy Toronto had on surrounding properties.<sup>166</sup> As discussed above, when applied to common property, the social relations model gives private property owners more rights because they get an extra say in how such common property is used. While the de facto appearance of the social relations model in *Batty* did bring a section of the public back into common property, it was only those members of the public who had private property rights adjacent to the park.<sup>167</sup> This cannot be seen as anything other than a continued deference to private property rights over and above common property rights. Such deference was also implied in *Québec Inc.* with its veiled references to "street noise" and "residents."<sup>168</sup>

Singer appeared to offer a further solution to property's problems in a more recent article when he called for a more democratic approach to property.<sup>169</sup> This approach "understands property not merely as an individual right but a social system."<sup>170</sup> Thus, the democratic approach to property would make the "shape and equality of human relationships" crucial to "determining whether a set of property rights can be accepted as legitimate in a free and equal society." While a more democratic approach would make the government's role in property rights more explicit, it is doubtful that such an approach could overcome commonly held beliefs

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<sup>164</sup> For a discussion of how a lack of private property rights affects individuals see e.g. Jane B Baron, "Homelessness as a Property Problem" (2004) 36 *Urban Lawyer* 273 at 278; see also Waldron, "Homelessness", *supra* note 56 at 296-301.

<sup>165</sup> See *supra* notes 90-92 and accompanying text.

<sup>166</sup> *Batty*, *supra* note 1 at para 42.

<sup>167</sup> *Ibid*; see also *supra* notes 87-92 and accompanying text.

<sup>168</sup> See *supra* notes 128-33 and accompanying text.

<sup>169</sup> Singer, "Democratic Estates", *supra* note 44.

<sup>170</sup> *Ibid* at 1049.

about private property which continue to see it as a bulwark against government power.<sup>171</sup>

Once again Singer's proposed solution focuses on private property rather than on common property. Presumably, common property would still be essential in the forms of streets and parks, but the more democratic approach would not necessarily make common property fundamentally different from private property. This approach would, for example, still allow Canadian courts to use the government-as-owner analogy. As like all owners, their rights would have to be judged based on how they promoted freedom and democracy.<sup>172</sup> Such a balancing is arguably already done in some cases involving common property in Canada, particularly in those cases where freedom of expression or the right to life is at stake.<sup>173</sup> It is, therefore, unclear whether a more democratic approach to property would coincide with a robust understanding of common property.

Gregory Alexander proposed that private property should include a social obligation norm but he too fails to engage with how this would affect common property.<sup>174</sup> Alexander's proposed solution aims at making private property fairer through recognition that property rights, like all social structures and practices, should encourage human flourishing and should focus on the social obligations of property rather than on the rights of owners.<sup>175</sup> As Alexander recognizes, the major problem with this suggestion is that there is no one conception of what "human flourishing" might look like.<sup>176</sup> However, it is unclear whether this social obligation norm would actually change anything: Alexander claims that the social obligation norm is already supported by nuisance jurisprudence and that this norm can explain "[v]irtually every environmental regulation, federal, state, and local."<sup>177</sup> Such results could also be explained by the isolationist maxim that a person should not use her property in a way that harms others, which is the most reluctant recognition that property cannot be

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<sup>171</sup> See e.g. David Fagundes, "Explaining the Persistent Myth of Property Absolutism" in Robin Paul Malloy & Michael Diamond, eds, *The Public Nature of Private Property* (Farnham: Ashgate, 2011) 13 at 15.

<sup>172</sup> Singer, "Democratic Estates", *supra* note 45 at 1057.

<sup>173</sup> *Adams*, *supra* note 84 at para 75; *Batty*, *supra* note 1; *Québec Inc*, *supra* note 133.

<sup>174</sup> Alexander makes no mention of common property and limits his discussion to private property opening with the observation that "[p]rivate property ordinarily triggers notions of individual rights, not social obligations" (Alexander, "Social Obligation Norm", *supra* note 163 at 746).

<sup>175</sup> *Ibid* at 748.

<sup>176</sup> *Ibid* at 757.

<sup>177</sup> *Ibid* at 780-82, 796.

completely bounded and generally only defers to other private property rights holders.<sup>178</sup>

Alexander's main focus may have been to show that private property rights are inherently social but he fell short and conceded as much:

[t]he social-obligation theorist would remain constantly mindful of the risk that the state may demand more of private owners than it legitimately can and that we must limit the sacrifices that society asks owners to make in the interest of maintaining a society and a polity that nurture human good essential to a well-lived life.<sup>179</sup>

Alexander is understandably reluctant to suggest any serious changes to private property for fear of being seen as advocating redistribution. Thus, Alexander cannot escape the deference to private property rights that he envisaged with his social obligation norm.

In addition, it is not clear that imposing a social obligation norm on government-owned property would change the existing Canadian jurisprudence. Any imposition of a social obligation norm on government-owned property would, of course, escape the accusations of government interference that would happen if the norm was imposed on private property. In the case of government owned property, the social obligation norm might offer better protection of common property rights but this would depend on the social obligation norm being interpreted as an obligation to encourage equality and democracy. If the social obligation norm was instead interpreted as a variant of the nuisance doctrine, then it would have little impact on the current jurisprudence concerning government-owned property. In fact, it could be argued that Canadian courts already impose a social obligation norm in cases of government-owned property. Alexander's solution, therefore, would not offer a stronger understanding of common property.

Both Singer and Alexander were attempting to conceptualize ways to fix private property, and as a result, they both suggest limits on owners which already exist for common property, at least in Canada. In Canada, the *Charter* acts as a limit to what the government can do with the property that it is considered to own. The jurisprudence makes it clear that *Charter* limitations do not automatically apply to all forms of government-owned property. What the jurisprudence and its government-as-owner analogy overlooks is that it is not the owner of the property that is the key differentiation of property, but the public's relationship with that property. Arguably, the use test attempts to capture the public's relationship

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<sup>178</sup> See e.g. Henry Smith's discussion of nuisance ("Exclusion", *supra* note 88 at 970, 998, 1049).

<sup>179</sup> Alexander, "Social-Obligation Norm" *supra* note 163 at 782.

with government-owned property, but the use test should be the first step, not the second in any analysis of publicly-accessible government-owned property.

In addition to the *Charter* limitations on government-owned property, Canadian environmental lawyers have recently looked to the American public trust doctrine as a way of further limiting the government's ability to regulate its property freely.<sup>180</sup> I am sceptical of such attempts given the weakness of the doctrine in Canada and the Canadian courts' refusal to recognize such a doctrine.<sup>181</sup> Furthermore, the primary concern of environmental lawyers is to find a way to grant environmental groups standing to challenge government failures to protect the environment.<sup>182</sup> As laudable as such attempts might be, Canadian courts are unlikely to recognize such a doctrine without its express incorporation in legislation.<sup>183</sup> In addition, it is not clear how the public trust doctrine would operate in the context of streets and parks.<sup>184</sup> Nevertheless, increased Canadian interest in the American public trust doctrine does suggest frustration with the current understanding of the government's rights to its property.

In order to recapture a stronger understanding of common property, it is helpful to remind ourselves of the public's rights to such property. As Macpherson noted, common property rights attach to individuals in the form of a right not to be excluded. The state or the government creates and enforces these rights but as the exclusionary right—often called the core of ownership—attaches to individuals and not the government, the government cannot be considered the owner of such property.<sup>185</sup> In fact,

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<sup>180</sup> *Burns Bog*, *supra* note 110 at paras 39, 106.

<sup>181</sup> *Ibid*; see also *Canadian Forest*, *supra* note 110 at paras 77-83 (discussing the American public trust doctrine but refusing to discuss whether it existed in Canada or applied to the case at bar). Canadian courts remain willing to recognize the founding features of what would become the public trust doctrine, such as the public's right to fish, but this is hardly surprising given the shared legal heritage of Canada and the United States. See Smallwood, *supra* note 8 at 9-42.

<sup>182</sup> See Hunt, *supra* note 8; von Tigerstrom, *supra* note 8 at 391-92.

<sup>183</sup> Hunt, *supra* note 8 at 188. Some current Canadian environmental legislation does explicitly incorporate the public trust doctrine: see e.g. *Environment Act*, RSY 2002, c 76, preamble, s 38; see also *Environmental Rights Act*, RSNWT 1988, c 83, s 1.

<sup>184</sup> Proponents of the Canadian adoption of the public trust doctrine also often fail to discuss how this would impact Aboriginal fishing rights. A full exploration of this issue is beyond the scope of this article, but for a discussion of whether or not Aboriginal fishing rights can be considered exclusive see Walters, *supra* note 133; see also Douglas Harris, "Indian Reserves, Aboriginal Fisheries, and the Public Right to Fish in British Columbia, 1876-82" in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: University of British Columbia Press, 2005) 266.

<sup>185</sup> Macpherson, *supra* note 13 at 4-5.

the government only manages such property or holds it in trust for the public benefit. Yet the government-as-owner analogy suggests that it is not the government's use of the property.

The bundle of rights theory of property suggests how the government as owner analogy appeared. As already noted, the dominant understanding of this theory has collapsed into a description of private property ownership and when courts apply it to common property, the government appears to act like an owner. The exclusionary stick in the bundle of rights theory is generally understood as the right to exclude others. In the case of common property, as was observed in *SA*, there may be situations where an individual has to be excluded from such property by the government. It appears as though common property's exclusionary right vests in the government, not the public, and therefore the government appears to be the owner of the property. In addition, the government appears to set the agenda for common property and such an action is, according to Katz, the key definition of ownership.<sup>186</sup> Thus, not only does the government appear to exclude others, it also appears to have the final say over how such property is used. In this way the bundle of rights theory obscures the fact that common property is held for the benefit of the public and is not owned by the government.

As common property is under-theorized, it is easy to forget that an individual has different rights to common property than to private property. Common property's exclusionary right is the right *not to be excluded* rather than the right to *exclude others*. A close examination of common property's exclusionary right reveals that the government does not actually have the right to exclude others but a duty to uphold the right not to be excluded. An individual's exclusion from common property is potentially only temporary and it is only done to prevent others from being excluded. In *SA*, for example, a teenager was prohibited from ETS property because she committed assault in one of Edmonton's light rail stations.<sup>187</sup> Although the Alberta Court of the Queen's Bench in *SA*, upheld the ban on the grounds that it did not infringe the teenager's *Charter* rights,<sup>188</sup> the need to prohibit violent offenders from certain pieces of common property would protect the enjoyment of such property for others. In such cases, the government performs a balancing action, which is more like a managerial action than the action of an owner. The government does not have the right to exclude anyone from common property but it has a duty to uphold the right not to be excluded which, paradoxically, may have the ef-

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<sup>186</sup> Katz, "Exclusion and Exclusivity", *supra* note 5 at 315.

<sup>187</sup> *SA* (ABPC), *supra* note 116 at paras 1-2.

<sup>188</sup> *SA* (ABQB), *supra* note 116 at para 92.

fect of requiring certain individuals to be excluded. Like all rights, the right not to be excluded is not absolute and must be balanced with the rights of others.

In the case of public parks, for example, municipalities typically exclude all citizens from the park at night or regulate parks in such a way so that it is impractical to use them at night. Such regulation of municipal parks better protects the park for all citizens as it prevents the park from being “worn out”. Overnight exclusion from the park actually better protects the right not to be excluded during the day. This argument, though it contains several flaws which are beyond the scope of this article to engage with, was put forward by the City of Victoria in *Adams*.<sup>189</sup> The underpinning idea is that exclusion at certain times, or of certain people (or of certain behaviours which have the effect of excluding, such as prohibitions on camping), work to ensure that the vast majority of the public will be able to continue to access such common property. While it is true that the government appears to set the agenda for common property, it only does so as a representative of the people.

What the government-as-owner analogy obscures is the role of the government as the representative of the citizenry. The use of representatives or agents is an accepted legal practice but, crucially, representatives or agents act on behalf of others and not in their own interest. The trust analogy of common property recognized that the government held common property for the benefit of the public. In contrast, the government-as-owner analogy grants the government the same rights as private property owners but for the limitations of the *Charter*. Thus, it fails to recognize that when it comes to common property, the government acts on behalf of the public and not for its own ends.

In order to reclaim a stronger understanding of common property the government-as-owner analogy needs to be either abandoned or modified. A complete abandonment of the analogy seems unlikely as it is applicable for items of state property or “private government property”. In the case of common property, the government ought to be considered the owner only insofar as it is the public’s representative, and certainly should not be considered to have the same property rights as any private property owner. Ideally, the government-as-owner analogy would be replaced with the trust analogy in cases dealing with common property which would allow the *Charter* to continue to apply to how governments regulate common

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<sup>189</sup> *Adams*, *supra* note 82 at para 48. I have critiqued this argument elsewhere: see Sarah E Hamill, “Private Property Rights and Public Responsibility: Leaving Room for the Homeless” (2011) 30 Windsor Rev Legal Soc Issues 91 at 95-99, 112-13.

property but would also recognize that common property has always existed and continues to exist for the benefit of the public.

## Conclusion

Despite the absence of a robust understanding of common property in recent Canadian property jurisprudence, common property clearly still exists. It is important that such property is recognized as a distinct form of property because it provides a contrast to private property's vision of property. Common property necessarily requires us to pay attention to how others might need to use such property and it forces us to pay attention to others in ways that private property does not. Some have even argued that common property acts as a form of justification for private property.<sup>190</sup> However, the communicative and linking functions of common property mean that it does more than justify private property: these functions mean that common property is essential to the proper functioning of a democratic society.

The trust analogy of common property recognizes that the government is not the owner but is responsible for ensuring an individual's right not to be excluded from such property. Admittedly it is a moderately more complex analogy than the government-as-owner but it highlights the public nature of common property. The trust analogy also presents a more equitable vision of common property which recognizes that it is for the benefit of all, not just those with private property rights.

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<sup>190</sup> See e.g. Locke, *supra* note 17 at 19; Carol M Rose, "Canons of Property Talk, or, Blackstone's Anxiety" (1998) 108:3 Yale LJ 601 at 603-04.