

Property Rights: The Key to Environmental Protection

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The importance of private property rights in a market economy is widely understood. Property rights play a critical role in motivating and organizing economic activity, and in adjudicating disputes. The free exchange of private property is credited with facilitating cooperation among individuals with widely varying interests, and encouraging adaptation to changing circumstances. Secure rights are also valuable because they increase confidence in returns and strengthen incentives to invest, fuelling economic growth. As summed up by one legal scholar, “It is generally agreed that a system of private property helps to bring about economic prosperity” (Sunstein, 1993: 911).

Less commonly appreciated is the role property rights play in protecting the environment. Secure property rights provide both powerful incentives for the preservation of natural resources and effective tools to resolve differences over resource use. Although the Canadian judiciary has traditionally been committed to protecting property rights, few governments (federal or provincial) have acknowledged the importance of such rights or have allowed them to thrive. Indeed, successive governments have systematically overridden property rights to the detriment of both the economy and the environment. Because of their economic and environmental

value, environmental policies that restore, protect, and strengthen property rights are likely to create considerable benefits.

Other chapters in this book address the merits of establishing property rights in natural resources. This chapter focuses on the need to restore the common-law property rights that have empowered people to protect the quality of their air, land, and water for centuries. Although it proposes a number of means to this end, it advocates one principal reform: the enshrining of property rights in the *Canadian Charter of Rights and Freedoms*.

> Defining property rights

William Blackstone, the famous eighteenth-century English jurist whose commentaries on the common law continue to influence legal thinking, defined the right of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe” (1765-9, Bk 2, Ch 2: 2). Although Blackstone called the right of property “absolute,” he understood both its multi-faceted nature and its subjection to the law. The right of property, he explained, “consists in the free use, enjoyment, and disposal of all [one’s] acquisitions, without any control or

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diminution, save only by the laws of the land” (1765-9, Bk 1, Ch 1: 134).

Today, property rights are often thought of as a “bundle” of rights that may include distinct rights to acquire something, to possess it, to control the way it is used, to enjoy the benefits of its use, to exclude others from it, and to transfer it to others. In the context of environmental protection, the most useful “stick” in this bundle is the right, long-protected by the common law, to use and enjoy one’s property and to be free of interferences with it.

The right to use and enjoy one’s property has a significant corollary: the obligation not to interfere with others’ rights to use and enjoy their property. This obligation has been a cornerstone of the common law since medieval times. Henry of Bratton, a thirteenth-century English judge, wrote of the prohibition against a man’s “doing on his own land what may damage a neighbour” (1230: 189–90). More than 500 years later, the maxim, “use your own property so as not to harm another’s,” which has been cited in numerous legal decisions, was described as “the rule” by Blackstone (1765-9, Bk 3, Ch 13: 217).

The rule retained its importance as common law evolved in Canada. Indeed, Canadian courts have been remarkably consistent in adhering to this central principle (Brubaker, 1995, 2007). Although different theories of property rights have come in and out of fashion over the years (Fox, 2006), Canada’s judiciary has rarely strayed from the rule that one must not harm another’s property or interfere with his enjoyment of it. Of particular interest to environmental policy makers is the courts’ consistent application of this rule when resolving disputes about pollution.

> Common-law property rights in an environmental context

Depending on the nature of the dispute, environmental conflicts have traditionally been addressed under one of three branches of the common law: trespass law, nuisance law, or the law of riparian rights. Trespass law has been used when pollutants have constituted direct, tangible invasions. A trespass has traditionally been understood to mean the placement of anything—even a small amount of a harmless substance—on someone else’s property. As an Alberta judge explained in 1976, citing a ruling made 200 years earlier, “Every invasion of private property, be it ever so minute, is a trespass” (*Kerr et al. v. Revelstoke Building Materials Ltd.*). Over the years, trespassing invasions have included straying animals, waste products, flood waters, sawdust, and pesticide sprays (Brubaker, 1995).

In general, nuisance law has been applied to indirect invasions and other less tangible interferences with the use or enjoyment of private property. In order for an activity to constitute a nuisance, it must create an unreasonable and substantial interference. Furthermore, unlike a trespass, it must cause harm, be it physical damage, financial harm, annoyance, discomfort, or inconvenience.¹ The character of the neighbourhood in which

¹ Courts have also determined that exposures to risks may constitute nuisances and have ordered *quia timet* (“because he fears”) injunctions to prevent such nuisances from continuing. Weighing both the probability and the consequences of apprehended harms, Canadian courts have tended to issue injunctions against proposed or ongoing activities if they have posed a real and substantial risk of harm, if the harm would have been irreparable, and if a mone-

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the interference occurs also plays a part in determining whether something is a nuisance. Despite these constraints, courts have found a variety of interferences, including smoke, fumes, foul smells, noises, vibrations, and a plethora of pollutants, to be nuisances (Brubaker, 1995). In 1928, Supreme Court Judge Thibaudeau Rinfret went so far as to say, “Pollution is always unlawful and, in itself, constitutes a nuisance” (*Malcolm Forbes Groat and Walter S. Groat v. The Mayor, Aldermen and Burgesses, being the Corporation of the City of Edmonton*).

A third branch of the common law, the law of riparian rights, has traditionally been used to protect surface water. Under the common law, the people who own or occupy land beside lakes and rivers have the right to the natural flow of the water. They have the right to receive the water, substantially unaltered in quantity or quality. The broad reach of these rights has made them powerful tools, enabling riparians to protect their lakes and rivers from sanitary sewage, storm-water runoff, mine discharges, mill wastes, industrial effluents, dams, water diversions, thermal pollution, the discolouration of water, and even the hardening of water (Brubaker, 1995).

Despite its broad applicability, the common law has not been used frivolously. Courts have refrained from ruling on trifling amounts of pollution, allowing the rule of “give and take, live and let live” to govern minor inconveniences or temporary irritants. Even in cases concerning more significant pollution, courts have not automatically sided with plaintiffs. They have considered the specific circumstances of each conflict, including

tary payment could not have adequately compensated for the harm (Sharpe, 1992: 1.27–1.32; Brubaker, 1996: 7–8).

the severity of the impacts cited in the complaint, the sensitivity of the plaintiffs, and the reasonableness of the disputed activities. Such an approach has deterred plaintiffs with unfounded claims from using the courts. Canada’s tradition of awarding costs against losing parties has further discouraged frivolous lawsuits.

Where it has been used, the common law has successfully balanced the conflicting interests of neighbours, allowing sustainable land uses and enjoining those that unreasonably harm others. The frequent use of the injunction (a court order prohibiting the continuation of an activity or compelling a particular action) has encouraged bargaining between parties and enabled them to work out efficient, mutually acceptable solutions (Yandle, 1997). Although guided by firm principles and precedents, the common law has adapted to an infinite variety of new circumstances, effectively controlling the adverse environmental impacts of countless activities (Brubaker, 1995).

> From common law to statute law

Sadly, the common law has proven *too* effective for many governments—especially provincial governments. Lawmakers have worried that the common law puts costly constraints on polluting industries and municipalities. As a result, in the last century, lawmakers have gradually legalized many nuisances, replacing the common law and its determined protection of property with more permissive government-made statutes and regulations.

The process of overriding the common law with statutory law is as old as the common law itself. Parliamentary

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supremacy has always given statutes precedence over the common law and has, for centuries, shielded parties from common-law liability for the inevitable consequences of statutorily authorized activities. Even the most rights-conscious judges have understood that “the legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong” (*Canadian Pacific Ry. Co. v. Roy*).

As early as the eighteenth century, British courts determined that the public interest warranted indemnifying public works authorized by Parliament. In the nineteenth century, government-authorized railway companies frequently benefited from protections from common-law liability. It wasn’t until the mid-twentieth century that government-sanctioned property rights violations became commonplace. Modern governments, driven by interest group politics, have conferred liability limitations with abandon,² sometimes on one particular polluter—such as a pulp mill whose pollution had been enjoined by the Supreme Court of Canada (*K.V.P. Co. Ltd. v. Earl McKie et al.*)—and sometimes on entire classes of polluters, such as nickel and copper smelters, the operators of sewage works, or the nuclear industry (Brubaker, 1995). Some of the most recent beneficiaries of such laws have been farmers. Between 1976 and 2003, every province adopted “right-to-farm” legislation, which shields

farmers from common-law liability for the nuisances they create (Brubaker, 2007).

By substituting statute law for the common law, governments have transformed not only the manner in which environmental conflicts are resolved, but also the incentives driving the processes and the results themselves. Statutes have shifted decision making from courts, which hear the cases of individuals who are directly affected by pollution, to governments that are far removed from the disputes. Unlike the neutral judges who traditionally “discovered” rather than “made” the law, politicians and bureaucrats, driven by political ends, choose sides, creating winners and losers. Furthermore, unlike traditional common-law principles, which were simple, long-standing, and knowable in advance, political rules are often subjective and unpredictable.³ As one political theorist explains, “‘law,’ a body of stable, predictable rules, is being replaced by legislation, directives geared towards public ends” (Barry, 2004). In addition to creating tremendous uncertainty, such changes encourage polluters to invest in lobbying politicians, rather than in curbing their pollution, acquiring insurance, or working with those they harm to find mutually agreeable solutions.

³ Traditional common-law courts, adhering to published precedents, may be thought of as putting new facts into a black box containing all prior law, and almost mindlessly withdrawing from that box the proper answer to a dispute. In this way, at least ideally, disinterested judges worked within an objective and predictable law (Manne, 1997: 20–21). Perhaps somewhat paradoxically, however, the common law is also known for its flexibility and adaptability. Its timeless principles have continually had to respond and adjust to new circumstances (Pejovich, 2006).

² Nobel Prize-winning economist Ronald Coase has pointed out the extent to which the nuisances we commonly confront have been legalized by governments that are intent on protecting businesses from the claims of those they have harmed. He notes that economists widely—and wrongly—assume that immunity from liability for damage is the fault of too little government regulation rather than too much intervention (Coase, 1960: 23–28).

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Laws overriding property rights have had a number of other adverse consequences, as well. All have reallocated valuable rights from one set of citizens to another. While those living downwind or downstream from polluters have lost their age-old right to enjoy their property, polluters have gained a new right: the right to harm others. This new right subsidizes polluters by enabling them to externalize some environmental costs. In violation of the principle of polluter pay—a principle at the heart of environmental sustainability—it shifts costs to the polluters’ victims. In so doing, it removes polluters’ incentives to minimize adverse effects. Furthermore, it favours polluting practices over other uses of land and resources that may be more valuable and more benign.

Constitutional protection for private property

Despite the many advantages of robust private property rights, almost nothing protects them against unreasonable legislative override. Conversely, despite the damaging effects of the many statutes overriding property rights, almost nothing restrains federal or provincial governments from enacting such statutes. Property rights exist at the whim of governments. Most developed countries have constitutions that limit government expropriation of private property. Under the Fifth Amendment to the US Constitution, “No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The First Protocol of the European Convention on Human Rights, although weaker, nonetheless specifies, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

interest and subject to the conditions provided for by law and by the general principles of international law.” No such protections exist in Canada.

Property rights have been protected under federal statute since 1960, when the government of John Diefenbaker enacted the *Canadian Bill of Rights*. The Bill of Rights includes the individual’s right to enjoyment of property as one of the human rights and fundamental freedoms that “have existed and shall continue to exist” in Canada. An individual may not be deprived of this right except by due process of law. Regrettably, the Bill of Rights has been of limited practical value for environmental protection. It is widely seen as ineffective (Magnet, 2001). It restricts only federal laws, and even they may find relief in the bill’s notwithstanding clause.

Although the *Canadian Charter of Rights and Freedoms*, incorporated into the *Constitution Act of 1982* by the government of Pierre Trudeau, replicated and enshrined many of the provisions of the Bill of Rights, it did not enshrine property rights. This was a grave omission, and one that should be remedied as soon as possible. Enshrining property rights in the Charter would help safeguard individuals from inappropriate government interference in environmental disputes. It would limit politicians’ ability to protect favoured industries or to arbitrarily transfer the costs of industrial activities to those living downstream and downwind. It would confirm the government’s duty to protect citizens from harm by others, and to compensate them for harms that are permitted.⁴ It would help restore the “government

⁴ There is a common-law presumption in favour of compensation where land has been taken. However, governments may enact

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of laws and not of men” that was the norm before the regulatory state exploded (Massachusetts, 1780: Article XXX). It would, in short, regulate the regulators, both federal and provincial.

Of course, there is no guarantee that entrenching property rights in the Charter would provide the desired protections. The Charter can offer only what James Madison described as a “parchment barrier” against encroachment. The protection of Charter rights depends on their interpretation by judges.⁵ Section One of the Charter gives judges leeway to override rights if they determine that doing so is “reasonably necessary in a free and democratic society.” Despite such limitations, Canada’s legal history provides reasons for optimism. For centuries, judges have shown themselves to be fierce protectors of individual rights. They have been far less susceptible than governments to political pressures and

statutes denying compensation. Protecting property rights in the Constitution would limit Parliament’s ability to take away owners’ rights to compensation.

⁵ The notorious decision in *Kelo v. City of New London*, issued by the US Supreme Court in June 2005, highlighted how unfavourable judicial interpretation can be. The Court ruled that New London, Connecticut, could take private land to facilitate private economic development. It reasoned that since the creation of office space, parking, and retail services was expected to create jobs, increase tax revenues, and revitalize the city, this action would serve a public purpose. Sandra Day O’Connor, one of the four dissenting justices, lamented that with this decision the court abandoned a long-held, basic limitation on government power. She warned, “All property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded in the process ... Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory” (*Kelo v. City of New London*).

have consistently rejected overriding individual rights to benefit particular industries or the public at large. In the words of Supreme Court Justice John Sopinka, “The courts strain against a conclusion that private rights are intended to be sacrificed for the common good” (*Tock et al. v. St. John’s Metropolitan Area Board*). Enshrining property rights in the Charter would further enhance their status, making it even less likely that courts would override them.

The federal government has acknowledged the value of enshrining property rights in the Charter. The Prime Minister has advocated such a change. In 2005, Stephen Harper stated, “We believe in property rights ... and we believe they should be protected in our Constitution ... As a government, we will seek the agreement of the provinces to amend the Constitution to include this right, as well as guarantee that no person shall be deprived of their just right without the due process of law and full and just and timely compensation” (Harper, 2005). In its platform for the 2006 federal election, the Conservative Party went further, pledging not only to propose a constitutional amendment, but also to “enact legislation to ensure that full, just, and timely compensation will be paid to all persons who are deprived of personal or private property as a result of any federal government initiative, policy, process, regulation, or legislation” (Conservative Party of Canada, 2006: 43).

Many environmentalists oppose enshrining property rights in the Charter. Their concerns largely stem from a fear that stronger property rights could weaken environmental legislation. They point to the United States, where property rights protections have been used to overturn environmental laws (Sierra Club, 2006). Such fears are overblown. In most states, only in extreme

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cases have laws or regulations been found to violate the Constitution's prohibition against taking private property without compensation. Prohibitions against activities that threaten public health or safety or create nuisances have not been deemed regulatory takings. Such harmful activities were not previously permitted, and thus their prohibition by regulation requires no compensation. Nor has the American Constitution's respect for property rights prevented the United States from adopting stronger and more effective environmental regulations than those found in Canada.

Since 1922, when the US Supreme Court ruled that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," courts have struggled to define "too far" (*Pennsylvania Coal Co. v. Mahon*). In 1992, the Supreme Court issued one of its most important decisions on this matter, concluding that if legislation deprives an owner of all economically viable use of his land, then compensation is required, unless the planned development would have violated state property laws or nuisance laws (*Lucas v. South Carolina Coastal Council*). A decade later, the court noted that regulations that permanently deprive property of all value are the "extraordinary case." It refused to treat all land-use regulations or all moratoria on development as compensable takings, or to propose a precise formula for determining when a regulation goes too far. Instead, it advocated an ad hoc approach that weighs all relevant circumstances (*Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*).

Individual states continue to grapple with the issue of when regulation requires compensation. Some of the most restrictive requirements are now found in Oregon,

where a successful ballot initiative, upheld by the state's highest court in February 2006, requires state and local governments to compensate landowners if land-use regulations imposed after they acquire their properties reduce their property values (*Hector Macpherson et al. v. Department of Administrative Services et al.*). Alternatively, under the new law, governments may modify the regulations or refrain from applying them. The law does not apply to regulations that prevent public nuisances, protect health and safety, or are required to comply with federal law.

Successful challenges to laws that amount to regulatory takings do not override the laws. They simply require that affected property owners be compensated for their losses. In this way, these challenges shift costs from individual property owners to taxpayers. Such a shift is appropriate. If individuals must forgo their property rights in order to produce social benefits, it is only fair that the public at large bear the costs. Enshrining property rights in the Charter could move Canada closer to this more equitable distribution of costs and benefits.⁶

⁶ The prospect of enshrining property rights in the Charter raises questions about what forms of property would be protected. Some have raised the possibility that the easements obtained by polluters who have been given statutory permission to violate their neighbours' property rights would themselves be defined as property rights meriting protection. Others have noted that welfare benefits, jobs, or agricultural production quotas could be defined as a new kind of property, also meriting protection. Inevitably, courts would have to separate genuine rights from privileges masquerading as rights. They would have to distinguish between "what really is property deserving of protection and what is merely an illegitimate creation of the state implemented by the use or

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Statutory protection for private property

Constitutional reform has been a difficult process in Canada. A commitment to stronger property rights could take other forms, should amending the Charter prove beyond the reach of the current government. The federal government should adopt a policy not to enact any legislation or regulation that allows federal bodies to override private property rights without (1) a demonstration that doing so is unavoidably necessary for an essential public use;⁷ (2) due process of law; and (3) full and fair compensation. Although such a policy would not bind provincial governments, the federal government should refuse to fund provincial schemes that violate any of these three requirements.

The federal government should also incorporate principles from the common law into its regulatory regimes (Yandle, 1997). Such principles include the right to be free of harm from one's neighbours, the responsibility to use one's own property so as not to harm another's, the importance of internalizing the costs of pollution, and the value of decentralized decision making. Exemplary

threat of brute force—in effect, stolen property” (Selick, 2001). Should courts seriously err in defining property, governments would have the authority to override their decisions by evoking the “notwithstanding” clause found in Section 33 of the Charter. A discussion of the merits and drawbacks of doing so is beyond the scope of this chapter.

7 The concept of public use is admittedly problematic. Too often, governments and courts have failed to distinguish private from public uses. In response to the Kelo decision, many American states have limited the definition of public use (see notes 5 and 9). The coming years will provide invaluable information on how effective different definitions may be in preventing the concept from being abused.

common-law practices also include stopping polluting activities through injunctions (rather than merely fining polluters) and, when fines are levied, directing them to polluters' victims rather than to governments. Incorporating such principles and practices into environmental statutes and regulations would make them far more sustainable.

Many environmental statutes and regulations will be required, even if property rights are more fully protected. Stronger property rights alone cannot fully protect the environment. Traditional common-law property rights work best when a polluter can be identified, when its victims can be identified, and when the harm is substantial. The joining together of victims in associations that file lawsuits—or, in appropriate cases where many people are involved, class action suits—can address the challenges of pollution that affects many people. However, when many people suffer minor, cumulative damages from many small polluters (for example, those driving smog-producing automobiles), no one has an incentive to sue because each suit would be costly and ineffective. Likewise, common-law property rights will not effectively protect people from pollutants of foreign origin, those that are difficult to track,⁸ or those whose adverse effects do not appear for many years. Such cases call for statutes, regulations, and, in some cases, international cooperation. Ensuring that such regulations are based on sound science and economic analysis will doubtless remain difficult in the inevitably politicized realm.

8 The field of environmental forensics is improving, making pollutants easier to track. Stronger property rights would create stronger incentives to trace pollutants, spawning further advances in the field.

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Reviving and nurturing a culture of property rights

As important as they are, constitutional and legislative measures are no panacea. Ultimately, the protection of property rights, be it by courts or by legislatures, depends on a culture of respect for rights in the public at large. As a US court recently noted, “Although the judiciary and the legislature define the limits of state powers, such as eminent domain, the ultimate guardians of the people’s rights ... are the people themselves” (*Norwood v. Horney*). Americans are well known for their attachment to individual rights.⁹

Although Canadians’ attitudes towards property rights may be more nuanced, and while their understanding of them may have weakened from disuse, Canada’s common-law tradition of deep respect for property rights is, if anything, stronger than that of

its southern neighbour.¹⁰ All of the reforms proposed above, constitutional and statutory alike, would be in keeping with that strong legal tradition. Perhaps more importantly, they would help revive and nurture a culture of property rights in Canada. They would help restore not only the legal principles and practices, but also the cultural milieu that, for centuries, empowered Canadians to protect their air, land, and water. Strong property rights would once again provide individuals with the tools to protect the resources on which their health and well-being depend. Finally, they would create powerful incentives for industries to reduce pollution. No other single right, law, or regulation could preserve the environment more effectively.

9 The public reaction to the Kelo decision (see note 5), illustrates the importance of property rights in American culture and the passion with which citizens will defend those rights. The decision ignited a firestorm of opposition to expropriation. When the Court stated that “nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power,” citizens lobbied state legislatures with a vengeance. In the 17 months following the decision, 34 state legislatures moved to limit takings (Institute for Justice, 2006). Some states prohibited or limited the use of expropriation for private projects, urban renewal, economic development, or the enhancement of tax revenue; others changed expropriation procedures to make the process fairer and more transparent. Some of the changes were the subject of extraordinarily successful citizen ballot initiatives. When initiatives were voted on in November 2006, 83 percent of Georgia voters approved a state constitutional amendment to limit eminent domain to public use; in South Carolina, 86 percent supported such an amendment (Christie, 2006).

10 Canadian courts have been less willing than American courts to compromise individual rights to promote industrial development. They have less readily considered the economic importance of polluting industries, they have less often substituted damages for injunctions, and they have rejected the coming-to-a-nuisance defence—a defence that, in the United States, strengthens established polluters’ rights over new neighbours.

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Elizabeth Brubaker is the executive director of Environment Probe, a division of the Energy Probe Research Foundation. She is the author of three books, including *Property Rights in the Defence of Nature*, published in 1995 by Earthscan. She has contributed chapters to 13 other books, including a chapter on the environmental implications of establishing property rights in fish for the Fraser Institute's *Taking Ownership: Property Rights and Fisheries Management on the Atlantic Coast*.

Ms. Brubaker has written on a broad range of environmental issues including water quality, water pricing, agricultural pollution, and the siting of controversial facilities.

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