University of Alberta

The State's Ownership Interest in Public Land

by

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A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of

Master of Laws

Faculty of Law

Edmonton, Alberta
Spring 2007

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Your file Votre référence
ISBN: 978-0-494-29867-1
Our file Notre référence
ISBN: 978-0-494-29867-1

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Abstract

A primary distinction between public and private ownership is the claim that private owners hold the right to act in a purely self-seeking fashion and that public owners, far from holding this right, are burdened by obligations to act for the public good. This thesis challenges the notion that this distinction can be uniformly applied to all types of public property through an analysis of the provincial and federal government's (the "State") ownership interest in public land. In this thesis, I argue that the State has—until very recently—owned property in precisely the same manner as a private owner. The critical element underlying State ownership, the public interest, is political and does not derogate from the State's ownership interest. However, judicial interpretation of the *Canadian Charter of Rights and Freedoms* altered the content of the State's ownership interest by placing justiciable limitations on the State's use of public land.

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Chapter One: Introduction

It is commonplace to differentiate between public and private property, and there are significant differences between systems of public and private property. Within a system of private property rights in relation to resources are allocated to individuals who determine how resources are to be used and for whose benefit.[1] One of the primary and central interests underlying and justifying private property is the interest individuals have "in exclusively determining the use of things,"[2] and private owners are specifically entitled to act in a self-seeking manner. I take that right to mean that an owner has the power to make a particular use of property *without justifying* that use. Ownership itself is authority for the decision.

In a system of public property, decisions respecting the use, control and disposition of resources are made by the state or some agency of the state and with reference to the public interest.[3] Prominent property theorists, such as J.W. Harris and Jeremy Waldron, consider public and private property to be fundamentally different from each other and view authorized self-seekingness as peculiar to private property. Harris, speaking of ownership by "groups or . . . agencies discharging public functions"[4], says the "precise" difference between ownership by private persons and ownership by such groups and agencies (which he terms quasi-ownership) is that in the latter case ownership does not authorize self-seekingness. The content of public ownership is derived from *and limited by* the social function of the owner:

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[1] J. Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 38.
[2] J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) at 49.
[3] Waldron, *supra* not 1 at 40-41.
[4] J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 100.

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> [T]he privileged domain . . . afforded to [these] officials falls nowhere along the ownership spectrum since it lacks the crucial feature of legitimate, self-seeking exploitation. Exploitation is governed by conceptions of social function which vary according to the public enterprise in question, but which uniformly do not include the idea that the officials, or any personified complex of them, may, *prima facie*, do what they like with 'their' assets.[5]

Waldron asserts that even if the "legal rules" for public and private property are the same, public ownership is still fundamentally different from private ownership because public ownership is supposed to serve the public interest, and decisions for the use of resources should be made by reference to the public interest:

> In a system of collective property . . . the use of material resources in particular cases is to be determined by reference to the collective interests of society as a whole.
>
> . . .
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> Collective property is sometimes presented as though it were a special case of private property, with the state as the equivalent of a private owner. This may be true at the level of the legal rules, particularly when we are talking about elements of collective property in, say, a predominately capitalist society: those few industries that are controlled by the state are controlled by it as nominal owner. But at a deeper level of theoretical analysis, it is clear that 'ownership' by the state or its agencies is in quite a different category from ownership by a private firm or individual. It is the effect of a decision by a sovereign authority, which determines the rules of property, to retain control of a resource itself, and not to allow a resource to be controlled exclusively by any private organization."[6]

Overall, public property is distinguished from private property on the basis of the owner's obligation to act in furtherance of some notion of the public benefit. At the heart of this distinction is a claim about the content of ownership: private owners hold, as an incident of ownership, the right to act in a purely self-seeking fashion, an attribute that has no counterpart in the public sphere. Public property, it is said, is burdened by obligations that require the owner to act for the public benefit. Thus the Crown is said to hold land in trust for the public[7], "who are the owners of the land in

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[5] *Ibid.* at 105.

[6] Waldron, *supra* note 1 at 40-41.

[7] *Canada* v. *McFarlane* , (1882) 7 S.C.R. 216 at 234 and 236, 1882 CarswellNat 9, online: eCarswell <http://www.ecarswell.com> [hereinafter *McFarlane* cited to S.C.R.].

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reality."[8] "Property owned by the Crown is only to be administered by the Crown for the benefit of its citizens, and not for its own benefit."[9]

But do these assertions—found in case law of the highest authority—withstand close scrutiny? Christine Willmore, for example, notes that in the common law, conceptions of public property are dominated by "the private property paradigm"[10], something that marginalizes the "[s]tudy of the use of property as a *tool* of government" that may be used to achieve policy objectives.[11] Further, what is meant by the public interest? What does it mean to say that the state or other public bodies must use their property for the public benefit or with the public interest in mind? Clearly citizens have valid political expectations that the state and other public bodies will use their property for the public benefit. But do citizens have any justiciable rights in relation to this property? What obligates the state or other public bodies to use their property for the benefit of citizens? Do these obligations arise out of or affect the content of ownership? Or are they entirely external to ownership? And what is the remedy should public owners fail to adhere to their obligations?[12]

Not all of these questions will explored in depth in this thesis. My aim here is to examine the content of the federal and provincial governments' (the "State")

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[8] *Bernier* v. *Paradis* (1921), 62 S.C.R. 217, 1921 CarswellQue 75 at para. 25, online: eCarswell <http://www.ecarswell.com> [hereinafter *Bernier* cited to Carswell].
[9] *British Columbia* v. *Forrest*, (1994) 23 C.P.C. (3d) 92, [1994] B.C.J. No. 178 at para. 12 (S.C. Chamb), online: QL (BCJ) [hereinafter *Forrest* cited to QL].
[10] C. Willmore, "Constructing 'Public Land': The Role of 'Publicly' Owned Land in the Delivery of Public Policy Objectives" (2005)16: 3 Stellenbosch L. Rev. 378 at 381.
[11] *Ibid.* at 379.
[12] The attorney general is charged with the duty of protecting and enforcing public rights, and thus any action to protect the public's interest in public land, something that the Courts recognize may exist but which has not been defined yet, will likely have to be instigated by the Crown itself rather than by a private citizen: *British Columbia* v. *Canadian Forest Products Ltd.* 2004 SCC 38, 2 S.C.R. 74 at paras. 63 to 83. For an analysis of this case, see J.V. DeMarco, M. Valiante, and M. Bowden "Case Comment: Opening the Door for Common Law Environmental Protection in Canada: The Decision in *British Columbia* v. *Canadian Forest Products Ltd*" (2005) 15 J. Env. L. & Prac. 233.

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ownership interest in public land to assess whether the content of a public ownership interest is necessarily different from the content of a "full-blooded" [13] private ownership interest. It is my thesis that, but for limitations arising out of the *Charter*, the State's ownership interest is largely the same as a private ownership interest because until recent *Charter* jurisprudence, the State had the same powers and privileges arising out of ownership as did a private owner, including the right to act in a self-seeking manner.

The *Constitution Act, 1867*[14] is the foundation of State ownership in Canada, and it vests the Crown's entire beneficial interest in public land in the executive branch of the State. Under the *Constitution Act, 1867* the content of the State's ownership interest in public land has always been the same as a private ownership interest. The State has the same open-ended rights of use and control as does a private owner and is not restricted from acting in a self-seeking manner—that is, from justifying decisions for the use of public land *on the basis of ownership*. Significant changes to the content of the State's ownership interest arising out the *Charter* have failed to acknowledge the plenary nature of the State's ownership interest or consider the impact of a change in the content of ownership.

This thesis is divided into eight chapters. Chapters two to five deal with issues preliminary to the central question in this thesis. In chapter two, I define public land as land that is beneficially owned by the State as opposed to land held by other public bodies or land over which public rights of use subsist in order to

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[13] The term "full-blooded" is taken from Harris' work, *supra* note 4, and refers to the fullest ownership interest. For clarification, references to full-blooded ownership, full beneficial ownership and other similar expressions refer to a full-blooded ownership interest.

[14] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].

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demarcate a category of property through which the powers and privileges arising out of State ownership may be scrutinized. In chapter three, I distinguish the powers and privileges arising out of ownership from the powers and privileges arising out of the State's legislative jurisdiction. In chapter four, I assess the purposes for State ownership of land and argue that public land is best understood as a category of public property that is explained by the political—not legal—duties of its owner. It is the State's political duties and goals of the Canadian electorate that define the purposes for—but not the content of—State ownership. In chapter five, I explore the nature of private ownership and provide an overview of how it is usually distinguished from public ownership. For the purpose of comparing State ownership to private ownership, I define private ownership is an *in rem* right that vests in an owner the right to exclude, an open-ended right of use, and the right to exercise any and all incidents of ownership in a self-seeking manner.

Chapters six and seven address the central question of this thesis: the content of the State's ownership interest. In chapter six, I assess the content of the State's ownership interest in public land and come to the conclusion that the State's ownership interest in land is, *prima facie*, the same as a private ownership interest. In chapter seven, I assess limitations on the State's use of public land arising out of the State's duty to act in the public interest and the *Canadian Charter of Rights and Freedoms*.[15] As will be seen the State's obligation to exercise its ownership powers in the public interest is a political obligation, one that does not derogate from the content of State ownership. This does not mean that the public interest should be ignored. It

[15] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

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is one of the critical interests underlying and justifying current State ownership and is fundamental to understanding how the State ought to exercise its ownership powers and to assessing whether the State's decisions for the use of public land are consistent with its duty to the public.

The *Charter*, however, entrenches constitutional limitations on the State's ownership interest by restricting the State's right to use its land as it sees fit and abolishing its right to use ownership as a justification for particular uses of public land where the use in question limits a right or freedom guaranteed by the *Charter*. However, the *Charter* does not provide a normative basis for the use of public land because restrictions on the State's use of public land are specific to the rights and freedoms guaranteed by the *Charter*.

In chapter eight, I conclude that the State's ownership interest in public land blunts the claim that public and private ownership interests are necessarily different from each other. While State ownership is premised on ownership for some notion of the "public benefit", and while decisions respecting the use and disposition of public land are to be made in the public interest, this interest, which is fundamental to understanding public land, does not require the content of ownership to be modified. Property is a legal and a social institution that is fundamentally concerned with the problem of organizing individual entitlement to the use and benefit of scarce resources.[16] Systems of private property respond to this problem by allocating decision-making power over resources directly to individuals, generally to use as they please, and generally transmissible at the owner's will through contract and gift. Systems of public property respond to this problem by allocating decision-making

[16] Harris, *supra* note 4 at 4 and 141-2; Waldron, *supra* note 1 at 32.

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power over resources to the various types of public bodies. The content of ownership may, but need not, be qualified or modified by reference to the interest being served, and, in the case of State ownership, it is not.

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Chapter Two: Defining Public Land

A. Introduction

The term public land is used to describe four broad, and often overlapping categories of land: (i) land owned beneficially by the State; (ii) "land owned by emanations of the state—public bodies—in all their variety;"[17] (iii) land subject to the Crown's radical title[18]; and (iv) land subject to public rights, such as public rivers and parks. For the purpose of this thesis the term public land will be used to refer to land in the first category because it is the content of the State's ownership that is subject to analysis. Thus in this part, I will define public land as land that is beneficially owned by the State and distinguish it from other types of public property.

B. Beneficial Ownership

The State has beneficial ownership of vast tracts of land. At Confederation, the *Constitution Act, 1867* divided public property between Canada and the provinces. Section 109[19] vests ownership of lands, mines, minerals and royalties in a province in that province. The *Constitution Act, 1867* originally applied only to the provinces specifically mentioned in section 109, namely Ontario, Quebec, Nova Scotia and New Brunswick, but this general division of property now applies to all of

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[17] Willmore, *supra* note 10 at 378.

[18] See P. Babie, *Crown Land in Australia* (Doctor of Philosophy, Oxford 2001) at 136 [unpublished]. Babie argues that radical title establishes a proprietary relationship between the Crown and all land, including land held in fee simple by private persons, and that, therefore, all land is in some sense public land. Drawing on J.W.Harris' ownership spectrum, he plots land along a continuum, from fee simple lands, where the Crown has the fewest rights, to land owned beneficially by the Crown, where the Crown has the greatest rights, on what he calls the public land continuum: 117-144.

[19] *Constitution Act, 1867*, *supra* note 14, s. 109: "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

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the provinces by virtue of legislation admitting the other provinces to Canada[20] and the natural resource transfer agreements effected under the *Constitution Act, 1930*.[21] Section 117[22] provides that the provinces own all of their public property not

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[20] Section 10 of the *British Columbia Terms of Union* (May 16, 1871) provides that "The provisions of the "British North America Act, 1867," shall . . . be applicable to British Columbia . . . as if the colony of British Columbia had been one of the Provinces originally united by the said Act. The *Prince Edward Island Terms of Union* (June 26, 1873) also provides that "the Provisions in the "British North America Act, 1867," shall . . . be applicable to Prince Edward Island, in the same way and to the same extent as they apply to the other Provinces of the Dominion, and as if the Colony of Prince Edward Island had been one of the Provinces originally united by the said Act." However, Prince Edward Island did not have any Crown land at the time of union, so the *Prince Edward Island Terms of Union* provided for a yearly payment from Canada to Prince Edward Island for "for the purchase of lands now held by large proprietors." Section 37 of the *Newfoundland Act* 12-13 George VI, c. 22 (U.K.) [23rd March 1949] provides "All lands, mines, minerals, and royalties belonging to Newfoundland at the date of Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the Province of Newfoundland, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

[21] 20-21 George V, c. 26 (U.K.) (Imp.) [hereinafter the *Constitution Act, 1930*]. The *Constitution Act, 1930* placed Alberta, Saskatchewan and Manitoba in the same position: Section 1 of Schedule 1 (Manitoba), section 1 of Schedule 2 (Alberta), and section 1 of Schedule 3 (Saskatchewan) all provide that "In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this agreement . . . belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same".
See chapter 3 of G. V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Canada: University of Toronto Press, 1969) for a history of the proprietary rights of the provinces on joining Canada and for a discussion of the natural resource transfer agreements. See also *Reference re: Proposed Federal Tax on Exported Natural Gas* (1981), 28 A.R. 11, [1981] A.J. No. 9 at para. 44, online: QL (AJ), aff'd, [1982] 1 S.C.R. 1004, (1982) 37 A.R. 541 [hereinafter *Alberta Federal Tax on Natural Gas* cited to QL] where it was argued that Alberta and Saskatchewan have superior rights in relation to their land and natural resources because s. 1 of the *Constitution Act, 1930* provides that "[t]he agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the *British North America Act 1867*, or any Act amending the same, or any Act of the Parliament of Canada or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid." On the basis of this provision it was argued that Alberta's rights to its natural resources override "anything contained in The BNA Act 1867" including "the powers given to Canada under Section 91 thus excluding the doctrine of paramountcy from applying to the natural resources of the Western Provinces." The Court of Appeal declined to express an opinion on the validity of the argument but stated that such an argument would likely be a "shock to the draughtsman of the document."

[22] *Constitution Act 1867, supra* note 14, s. 117: "The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country."

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otherwise disposed of by the *Constitution Act, 1867.* Section 108[23] vests specified public works and properties in Canada.

Shortly after Confederation, by Order in Council dated June 23, 1870, and effective July 15, 1870, Rupert's Land and the North-western Territory, out of which Alberta, Saskatchewan, Manitoba, the Northwest Territories, the Yukon and Nunavut were created, were admitted to Canada and Crown land vested in Canada.[24] While Alberta, Saskatchewan and Manitoba have been given ownership of public lands within their boundaries, Canada retains ownership of public lands in the Northwest Territories and the Yukon but has transferred the power "use, sell or otherwise dispose" of public lands and the right to retain proceeds from the use or disposition of public lands to the Commissioner of the Northwest Territories or the Yukon, as the case may be, who is the federally appointed head of the executive council.[25] Canada has also retained ownership of public lands in Nunavut but has transferred

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[23] *Ibid.*, s. 108: "The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada." Schedule 3 lists the following property: canals, public harbours, lighthouses and piers, steamboats, dredges and public vessels, rivers and lake improvements, railways, military roads, custom houses, post offices and other public buildings, ordinance and military property and land set aside for general public purposes.

[24] The first territories added to the Union were Rupert's Land and the North-Western Territory, (subsequently designated the Northwest Territories), which were admitted pursuant to section 146 of the *Constitution Act, 1867* and the *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.), by the *Rupert's Land and North-Western Territory Order* of June 23, 1870, effective July 15, 1870. And see *Re Saskatchewan Natural Resources*, [1931] S.C.R. 263, 1 D.L.R. 865, aff'd [1931] 4 D.L.R. 712 , A.C. 28 (P.C.) confirming that public land in Rupert's Land and the Northwest Territory was vested in Canada until such time as the land was transferred to the provinces. See also the *Manitoba Act, 1870,* S.C. 1870, c. 3, reprinted R.S.C. 1985, App. II, No. 8; the *Alberta Act*, 4-5 Edward VII, c. 3 (Canada), reprinted in R.S.C. 1985, App. II, No. 20; and the *Saskatchewan Act*, 4-5 Edward VII, c. 42 (Canada), reprinted in R.S.C. 1985, App. II, No. 21, which reserved public land within these provinces in Canada.

[25] *Northwest Territories Act*, R.S.C. 1985, c. N-27, ss. 2 and 44. *Yukon Act*, S.C. 2002, c. 7, ss. 2, 4, and 48. There are minor differences between these Acts with respect to public property. For example, the *Northwest Territories Act* speaks of public land and the *Yukon Act* of public real property, which includes public land. But the provisions with respect to public lands have the same purpose and effect of transferring the administration and control of public lands to the Commissioner of the territory.

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administration and control as well as the right to the beneficial use of those lands to the Commissioner of Nunavut,[26] who is also a federally appointed official.[27]

The intent of the *Northwest Territories Act*, the *Yukon Act* and the *Nunavut Act* appears to be to give the territorial governments most of the usual powers of ownership, and put them in a position that is somewhat analogous to the provinces with respect to public land, without fully transferring ownership to them. The territorial governments have the same general ownership powers as provincial governments, but these ownership powers are conferred by ordinary federal legislation and do not arise out of ownership *per se*. This means that the territorial governments' power over land—both legislative and executive—may be changed by amendments to the federal legislation conferring the power in the first place.[28] One reason for continued federal ownership may be that it does not make sense for Canada to transfer ownership to the territorial governments as long as these governments are delegates of Canada, especially considering that beneficial ownership and legislative

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[26] *Nunavut Act*, S.C. 1993, c. 28, ss. 2 and 49.

[27] *Ibid.*, s. 5.

[28] The federal government has exclusive legislative jurisdiction over the territories but has delegated various legislative powers to the territories through ordinary legislation: See *Nunavut Act*, *ibid.*, s. 23; *Northwest Territories Act*, *supra* note 25, s. 16; *Yukon Act*, *supra* note 25, s. 17(1). See also *Yellowknife (City) v. Canada (Labour Relations Board)*, [1977] 2 S.C.R. 729 at para. 8, 14 N.R. 72 and *Shewan v. Canada (Attorney General)* (1994), 27 C.P.C. (3d) 244, 1994 CarswellOnt 527 at para. 15, online: Carswell, <http://www.ecarswell.com> (Ont. Master) where it is emphasized that while Parliament has delegated many province-like powers to the territories, they are fundamentally different from the provinces: "the Parliament of Canada has within it the power to change the political structure of the Yukon Territory and indeed has the legislative power even to end the very existence of the Yukon. The Parliament of Canada has no such power with regard to the provinces." Canada retains much control over territorial land. See for example, *Canada Petroleum Resources Act* R.S.C, 1985, c. 36, s. 2, which defines "frontier lands" as "lands that belong to Her Majesty in right of Canada, or in respect of which Her Majesty in right of Canada has the right to dispose of or exploit the natural resources, and that are situated in (*a*) the Northwest Territories, Nunavut or Sable Island, or (*b*) submarine areas, not within a province, in the internal waters of Canada, the territorial sea of Canada or the continental shelf of Canada, but does not include the adjoining area, as defined in section 2 of the *Yukon Act*." Interests in frontier lands are issued by the federal minister of Natural Resources or the federal minister of Indian Affairs and Northern Development, depending on which department has administration and control of particular lands: s. 13.

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jurisdiction are generally co-extensive.[29] Further, by retaining ownership, Canada retains substantial power over the use and disposition of public lands and the revenues generated from these lands, including revenues arising out of natural resources. In any event, the territorial governments do not have the same type of ownership interest in public lands as Canada or the provinces, and their ownership interest will not be considered here.

Land vested in the State refers to land as it is ordinarily defined in the private law context[30] with one stipulation. Whereas private owners hold precious metals in land by proprietary title, the State holds precious metals in land by prerogative right. Thus land, whether public or private, is a three dimensional space consisting of the soil, the subsurface below the soil, and it carries with it the right to use a reasonable amount of airspace above the soil.[31] Land includes the ordinary incidents attached to land, such as mines and minerals but not prerogative rights connected to land, such as escheats[32] and, and in the case of the State precious metals,[33] which are held by prerogative right. Escheats, by definition, can only be held by the Crown. Because precious metals are held by the Crown by prerogative right, a transfer of land by the

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[29] A transfer of public land from Canada to a province or vice versa "effects a change not only in beneficial interest but also in legislative jurisdiction": *Canada (Attorney General)* v. *Higbie*, [1945] S.C.R. 385 at 432, 1945 CarswellBC 89 at para. 161, per Rand J., online: eCarswell <http://www.ecarswell.com> [hereinafter *Higbie* cited to Carswell].

[30] *Burrard Power Co.* v. *R.* (1910), 43 S.C.R. 27 at 40, 1910 CarswellNat 25 at paras. 6 and 40, online: eCarswell <http://www.ecarswell.com>, aff'd [1911] A.C. 87 , C.R. [1911] 1 A.C. 195 (PC) [hereinafter *Burrard* cited to Carswell].

[31] See, for example, *Manitoba* v. *Air Canada* (1978), 86 D.L.R. (3d) 631, [1978] M.J. No. 15 at paras. 14-16, online: QL (MJ), aff'd on other grounds by (1980), 111 D.L.R. (3d) 513, [1980] 2 S.C.R. 303.

[32] For a discussion of escheats, see chapter two, part D, below.

[33] La Forest, *supra* note 21 at 76; *British Columbia (Attorney General)* v. *Canada (Attorney General)* 1889 CarswellNat 13 at para. 7, online: eCarswell <http://www.ecarswell.com> (sub nom. *Precious Metals Case*) (1889), 14 A.C 295 at 302 (P.C.); *Attorney General of Ontario* v. *Mercer* (1883), 3 Cart. B.N.A. 1 (P.C. Canada), (1882-83), 8 A.C. 767 at 779. Note, prerogative rights connected to land, such as the right to precious metals (gold and silver) and escheats were transferred to the provinces by the term royalties in s. 109 of the *Constitution Act, 1867.*

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Crown does not transfer precious metals unless express words are used, but a transfer of land by a private landowner will transfer precious metals where such rights are held unless express words of limitation are used.[34]

Land ceases to be public land, within the definition used here, when the fee simple is transferred from the State. Thus, public land includes land that is directly owned and used by the State as well as land that is owned by the State but leased or licensed to other governmental bodies or private individuals even though there is authority for the proposition that land ceases to be public land only when the fee simple is transferred to a party that is independent of government.[35] In *Canadian Occidental*, for example, the Attorney General for British Columbia argued that Parliament's exclusive legislative jurisdiction over "The Public Debt and Property" extended only to property used for a public purpose and not to land leased by a private corporation from a federal crown corporation. This argument was rejected because there was no constitutional support for such a restrictive interpretation of the term property, and thus the lands, though not directly owned by the State, were federal public lands and subject to federal jurisdiction.[36]

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[34] *Reference re Precious Metals in Certain Lands of Hudson's Bay Co.*, [1927] S.C.R. 458, 2 D.L.R. 897 at paras. 3 and 15, aff'd [1929] 1 D.L.R. 625, 1 W.W.R. 287 (P.C.)

[35] *Burrardview Neighborhood Assn.* v. *Vancouver (City)* (2004), 26 B.C.L.R. (4th) 263, [2004] B.C.J. No. 355 at para. 75, online: QL (BCJ), leave to appeal to S.C.C. granted [2004] S.C.C.A. No. 185 [hereinafter *Burrardview Neighborhood* cited to QL]; *Mississauga (City)* v. *Greater Toronto Airports Authority* (2000), 50 O.R. (3d) 641, [2000] O.J. No. 4086 at para. 66, online: QL (OJ), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 83; *Mercury Oils Ltd.* v. *Vulcan-Brown Petroleums Ltd.*, [1943] 1 D.L.R. 369, S.C.R. 37 at 42; *Canadian Occidental Petroleum Ltd.* v. *North Vancouver (District)* (1986), 13 B.C.L.R. (2d) 34, [1986] B.C.J. No. 588 at paras. 11 and 64, online: QL (BCJ) (C.A.) [hereinafter *Canadian Occidental*].

[36] *Ibid.* at para. 53.

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C. Other "Public" Owners

Lands held by public bodies, municipalities, agents of the State, and lands held by crown corporations that are agents of the State or over which the State exercises a significant degree of control are generally considered to be public for certain purposes even though not directly owned by the State.[37] Municipal property, for example, is public property because it is owned by a public body and may be used for public purposes, such as roads or parks. Lands held by agents of the State and crown corporations are also generally considered to be public if the State exercises a sufficient degree of control over them for the purpose of determining legislative jurisdiction or taxation regardless of whether the lands are put to a public use. In *Burrardview Neighbourhood*, for example, a fee simple estate held by the Vancouver Port Authority, which is a federal crown corporation, was held to be public land for the purposes of section 91(1A) of the *Constitution Act, 1867* and hence exempt from municipal land use bylaws.[38]

The manner in which these bodies may exercise their powers of ownership is usually restricted by the legislation that creates or controls them. Thus, in *Burrardview Neighbourhood* the Vancouver Port Authority, despite holding a fee simple estate in land, could not dispose of or lease that land without the approval of the federal Minister of Transport.[39] Municipal ownership is subject to similar limitations because it is "subject to the duties imposed by statute".[40] In Alberta, for

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[37] *Burrardview Neighbourhood, supra* note 35 at paras. 88-89.
[38] *Ibid.*
[39] *Ibid.* at para. 72.
[40] *W.A.W. Holdings Ltd.* v. *Sundance Beach (Summer Village)* (1980), 27 A.R. 451, [1980] A.J. No. 576 at para. 15, online: QL (AJ) (C.A.). [hereinafter *W.A.W. Holdings*]

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example, if "[i]f a municipality proposes to transfer or grant an estate or interest in . . . land for less than its market value . . . the proposal must be advertised."[41]

Whether these qualifications go to the heart of ownership or are simply limitations on the public owner in question is debatable.[42] Those who administer public property pursuant to legislative authority do not have the same rights as a private owner or the same rights as the State. Generally, they lack open-ended rights of use and control and must administer the property pursuant to statutory objectives. However, if they act within their statutory authority, they are generally answerable to the State rather than the public for decisions regarding land use.[43] In *R* .v *Red Line*, for example, a challenge to the Ottawa Improvement Commission's use of public land was rejected because "[t]he Commissioners appointed by the Dominion are answerable to the Dominion government and not to the Courts as to the way in which the powers entrusted to them are exercised."[44] More recently, the Alberta Court of Appeal held that members of the public, whether inhabitants of a municipality or not, cannot compel a municipality to open up a road allowance. While municipalities hold land dedicated for roads pursuant to the duties spelled out in the *Municipal Government Act*[45] and have a duty to act in the public interest, the public has no right to compel municipalities to open-up or develop the road allowance or to compel any

[41] *Municipal Government Act*, RSA 2000, c. M-26, s. 70(1).
[42] See Harris, *supra* note 4 at 104 -09 for the argument that ownership by such public owners is fundamentally different than private ownership because the content of ownership is derived from prevailing conceptions of private ownership and the legislation.
[43] *R.* v. *Red Line Ltd.*, [1930] O.J. No. 9, online: QL (OJ), (1930), 54 C.C.C. 271 at 280 (C.A.) [hereinafter *R* v. *Red Line* cited to C.C.C.].But see the *Environment Act*, R.S.Y. 2002, c. 76, s. 8(1), which gives a cause of action to Yukon residents where "(b) the Government of the Yukon has failed to meet its responsibilities as trustee of the public trust to protect the natural environment from actual or likely impairment. " The public trust is defined as " the collective interest of the people of the Yukon in the quality of the natural environment and the protection of the natural environment for the benefit of present and future generations": s. 2.
[44] *R.* v. *Red Line .,ibid.*
[45] *Supra* note 41.

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other particular use of that land.[46] In any event, the ownership interest held by these public bodies is not relevant to the content of State ownership because the State is distinct from the bodies it creates and from individuals who have authority to deal with public land.

D. Radical Title

Also excluded from the definition of public land is land subject to the Crown's radical title unless the State also has beneficial ownership of that land. The powers and privileges arising out of radical title are distinct from those arising out of beneficial ownership.[47] On the assertion of sovereignty, the Crown acquired radical title to all land, which is, in essence, the Crown's political title to the territory that comprises Canada. This political title, which is not justiciable in municipal courts[48], results from and is co-extensive with sovereignty and vests an ultimate and allodial ownership interest in all land in the Crown.

This ownership interest, which is peculiar to the Crown, supports the doctrine of tenures and estates and authorizes the Crown to "prescribe what parcels of land and what interests in those parcels should be enjoyed by others."[49] The doctrine of tenures is premised on the idea that the Crown has radical title to and thus, in some sense, owns all land. The Crown does not grant land but rather estates in land,[50] and

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[46] *W.A.W. Holdings*, *supra* note 40 at paras. 15 and 31-34. See Willmore, *supra* note 10 at 382-84 for a discussion of how the fragmented ownership of pubic property between various public bodies with varying and often competing purposes creates inefficiencies in the use of public property because what may be an external cost to one government department is an internal cost overall.

[47] *Hupacasath First Nation* v. *British Columbia (Minister of Forests)* 2005 BCSC 1712, [2005] B.C.J.No. 2653 at para 192, online: QL (BCJ) [hereinafter *Hupacasath* cited to QL].

[48] *Mabo* v. *Queensland (No. 2)*, [1992] 5 C.N.L.R. 1, 175 C.L.R.1, (1992) 107 ALR 1 at 20, per Brennan J. (Aust. H.C.) [hereinafter *Mabo* cited to ALR].

[49] *Ibid.*, at 34.

[50] There are two types of estates in Canada: freehold and leasehold. The fee simple and the life estate are both freehold estates, and the fee simple is for all practical purposes analogous to allodial

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those holding estates in land are tenants of the Crown. The term tenure describes the relationship between the Crown and the tenant. Historically there were a variety of tenures with varying services, but these are primarily of historical interest because the only form of tenure in Canada is free and common socage, a non-restrictive form of holding characterized by certainty of services.[51] The Crown also retains certain rights, called incidents, in relation to land. The only remaining incident is that of escheat, whereby land reverts to the Crown on the failure of inheritance.[52]

Paul Babie argues that because radical title establishes a proprietary relationship between the Crown and land subject to radical title, all land, including land held in fee simple by private persons, is public land.[53] Drawing on J.W. Harris' ownership spectrum, he plots land along a continuum, from fee simple lands, where the Crown has the fewest rights, to land beneficially owned by the Crown, where the Crown has the greatest rights.

Radical title does not, however, vest beneficial ownership in the Crown unless there is no other proprietor[54], does not extinguish pre-existing rights,[55] and does not,

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ownership. While land held in fee simple is held of the Crown, the ownership interest is not limited in time, and there are no incidents attached to ownership other than escheat, which may be easily avoided by the use of a will.

[51] B. Ziff, *Principles of Property Law*, 2d ed. (Scarborough: Carswell, 1996) at 52 [hereinafter *Principles of Property 2*]. But see *Alberta (Attorney General)* v. *Huggard Assets Ltd*, [1953] A.C. 420, (1953), 8 W.W.R. (NS) 561 at 570 (P.C.) where the Privy Council held that Parliament may, by "clear enactment . . . repeal or vary any law as to land tenure" and thus may impose variable royalties with respect to oil and natural gas.

[52] See Ziff, *ibid.* at 50-57 and P. Butt, *Land Law*, 3d ed. (Sydney: LBC Information Services, 1996) at 50-73 for discussions of the doctrine of tenures and estates.

[53] *Supra* note 18 at 19, 113-16 and at 117-144 generally for a description of the Crown's powers in relation to various types of land, including lands beneficially owned by the Crown and fee simple lands. See also *Alberta (Attorney General)* v. *Canada (Attorney General)*, [1928] 3 W.W.R. 97, 1928 CarswellAlta 90 at para. 12, online: eCarswell <http://www.ecarswell.com>, where the Court endorses the view that the phrase "lands, mines and minerals" in s. 109 of the *Constitution Act, 1867* is not restricted to those held in full proprietorship but includes "all interests of the Crown in 'lands, mines and minerals within the Province."

[54] *Mabo, supra* note 48 at 34, per Brennan J., and at 64-65, per Deane and Gaudron JJ.

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by itself, authorize the Crown to exercise the powers and privileges normally associated with beneficial ownership of a fee simple, or any lesser estate or interest in land, such as the right to possess and exploit land or to exclude others from land.[56] In determining the proprietary content of radical title, the Courts have drawn a sharp distinction between the powers and privileges arising out of title to a territory and those arising out beneficial ownership.[57] As stated by Brennan J. in *Mabo*:

> 'The first conception [radical title] pertains to the domain of public law, the second [ownership] to that of private law. Territory is the subject matter of the right of sovereignty or *imperium* while property is the subject matter of the right of ownership or *dominium*. These two rights may or may not co-exist in the Crown in respect of the same area. Land may be held by the Crown as territory but not as property, or as property but not as territory, or in both rights at the same time.'[58]

Thus, radical title is best characterized as a "linking concept" between sovereignty and proprietary rights,[59] something that explains the Crown's position in relation to territory and land but that does not confer use privileges. For the purpose of this thesis, then, public land does not include land subject to the Crown's radical title unless the Crown also has beneficial ownership of that land. Nor will the powers and privileges arising out of radical title be considered in assessing the State's ownership interest because these powers arise out of sovereignty not ownership.

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[55] *Guerin* v. *Canada*, [1984] 2 S.C.R., 1984 CarswellNat 813 at para 40-42, online: eCarswell <http://www.ecarswell.com>. See also B. Donavan, "Common Law Origins of Aboriginal Entitlements to Land" (2003) 29 Man. L.J. 289.

[56] *Hupacasath, supra* note 47 at para. 192: "Although Crown sovereignty extends to all land, Crown decision-making power about the land does not."; *Mabo, supra* note 48 at 32 -36;Donovan, *ibid.*, at para. 6.

[57] The Crown's assertion of sovereignty over a territory is not justiciable in municipal courts, but municipal courts do have jurisdiction to determine the proprietary content of radical title: *Mabo, ibid.* at 20, per Brennan J.

[58] *Ibid.*, at 30.

[59] B. Edgeworth, "Tenure, Allodialism and indigenous rights at common law: English, United States and Australian land law compared after *Mabo* v. *Queensland*" (1994) 23 Anglo-Am L. Rev. 397 at 415.

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E. Public Rights

There are two general types of property over which the public has rights of use that are excluded from the definition of public land for the purpose of this thesis: public trust resources and property intended for use by the public, such as parks, public libraries and common gathering areas. Public land, as it is defined here, is not meant to refer to land over which these rights of use subsist because these rights do not arise out of or peculiarly impact State ownership.

At common law, the public has the right to use certain waterways and the foreshore, called public trust resources, for purposes of navigation and fishing,[60] both of which were historically necessary to survival, and in Canada, settlement.[61] The Crown holds these rights, called the *jus publicum*, in trust for the public. The Crown cannot grant the right to obstruct or abridge the public's enjoyment of public rights,

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[60] There is a public right to fish and navigate in tidal and navigable waters: *R.* v. *Robertson* (1882), 6 S.C.R. 52, 1882 CarswellNat 7 at paras 52 and 56, online: eCarswell <http://www.ecarswell.com> [hereinafter *Robertson* cited to Carswell]; *Re Provincial Fisheries* (1895), 26 S.C.R. 444, 1895 CarswellNat 47 at para. 13 and 97, online: eCarswell <http://www.ecarswell.com> [hereinafter *Re Provincial Fisheries* cited to Carswell]. See also B. von Tigerstrom, "The Public Trust Doctrine in Canada" (1997) 7 J.E.L.P. 379 at 380-88 for a discussion of the English roots of the public trust doctrine and its development in Canada and the United States. In Canada the public has limited rights to access public trust resources for traditional purposes. However, in the United States the public trust doctrine has developed to place positive obligations on the State to preserve public trust property and the public's ability to use it. Additionally, the public has gained increased rights of use in relation to public trust property, such as rights to boat, to enjoy scenic views and to swim. See also J. C. Maguire "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" 7 J. Env. L. & Prac. 1 at 7-8 and 10. Maguire argues that the Crown's interest in public trust resources in "an interest other than that of the provinces in the same" within the meaning of s. 109 of the *Constitution Act, 1867* and that the both federal and provincial executives have a duty to protect it when granting or using public land. See also Carol M. Rose, "The Comedy of the Commons: Custom, Commerce and Inherently Public Property" in *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (San Francisco: Westview Press, 1994) 105 at 115-17 [hereinafter "Comedy of the Commons"] for a discussion of the inherently public nature of public trust resources and competing conceptions of the public as the unorganized public at large and as a governmental body.

[61] *Re Provincial Fisheries, ibid.* at para. 23; *Fort George Lumber Co. v. Grand Trunk Pacific Railway* (1915), 9 W.W.R. 17, 1915 CarswellBC 167 at paras. 4 and 9 (S.C.), online: eCarswell <http://www.ecarswell.com> (F.C.T.D.); von Tigerstrom, *ibid.* at 380-81; Mark D. Walters, "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301 at para. 29: there is a "judicial preoccupation with the public rights of settlers" in early cases dealing with public rights of navigation and fishing.

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but may grant the soil of the shore and any private rights of the Crown.[62] Acquisition of title to the foreshore or bed of waters in which public rights of fishing or navigation exist, whether by prescription or grant, is subject to these public rights.[63]

The public also has a right of passage over highways.[64] This right, like the public rights of fishing and navigation, cannot be granted away "because a transfer of the land only transfers the interest of the grantee, which is subject to the public" right of passage.[65] That right cannot, absent clear legislation, be interfered with by the Crown or any other person.[66]

The *jus publicum*, then, burdens public and private land equally, though it is the State that is charged with the responsibility of protecting public rights. Resources over which public rights subsist may be owned by the State or by private persons, but ownership of them is always subject to the *jus publicum*. While the *jus publicum*

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[62] *Re Provincial Fisheries, ibid.* at para. 97.

[63] *Canada (Attorney General)* v. *Acadia Forest Products Ltd.* (1985), 37 R.P.R. 184, [1985] F.C.J. No. 505 at para. 15, (T.D.), online: QL (FCJ), aff'd (1987), 47 R.P.R. 100, [1987] F.C.J. No. 609, (C.A.), online: QL (FCJ); *Tweedie* v. *R.* (1952), 52 S.C.R. 197, 1915 CarswellNat 47 at para. 52, online: eCarswell <http://www.ecarswell.com>; *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, S.C.J. No. 1 at para. 69, online: QL (SCJ) [hereinafter *Oldman River* cited to QL].

[64] In fact, navigable rivers are considered to be highways: *Dunstan* v. *Hell's Gate Enterprises Ltd.*, [1989] 2 C.N.L.R. 36 , 1987 CarswellBC 375 at para. 31 (C.A.), online: eCarswell <http://www.ecarswell.com> [hereinafter *Hell's Gate* cited to Carswell]. *Gage v. Bates* (1858), 7 U.C.C.P. 116, [1857] O.J. No. 200 at para. 16 (U.C. C.A.), online: QL (OJ). The public has the right, for the purpose of navigation, to use rivers "in a reasonable way" taking into consideration "the rights of others" to do the same: *Ireson v. Holt Timber Co.* (1913), 30 O.L.R. 209, [1913] O.J. No. 21 at para. 80 (C.A.), online: QL (OJ). What constitutes a reasonable use is dependant on the circumstances of each case and capable of expansion: see *D.P.P.* v. *Jones*, *infra* note 66.

[65] *Dunstan* v. *Hell's Gate Enterprise Ltd.*, [1986] 3 C.N.L.R. 47, 1985 CarswellBC 710 at paras. 52 and 53, online: eCarswell http://www.ecarswell.com rev'd on other grounds, *Hell's Gate*, *ibid.*, additional reasons [1988] B.C.W.L.D. 2652, 1988 CarswellBC 1005 (CA), online: eCarswell <http://www.ecarswell.com>.

[66] *Ontario Hydro-Electric Power Commission* v. *Grey* (1924), 55 O.L.R. 339, [1924] O.J. No. 31at para. 21 (C.A.), online: QL (OJ); *W.A.W. Holdings, supra* note 40 at para. 1. In England, the public right of passage over highways has expanded, in the case of highways in which the soil is vested in both private and public owners, to include the right to hold peaceful assemblies and other reasonable activities that do not constitute a public or private nuisance or obstruct passage on the highway: *D.P.P.* v. *Jones*, [1999] 2 A.C. 240, 2 All E.R. 257 at para. 17 (H.L.), per Lord Irvine.

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prevents both the State and private owners from dealing with these resources as they see fit—use must not interfere with the public's rights—it does not flow from or peculiarly affect State ownership. Rather, it creates and preserves public rights of use over what Carol Rose has described as inherently public property—property that by its very nature is subject to holdout or rent seeking by private owners and that is more valuable when open to public use.[67]

The public also has rights of access and use in relation to State or other publicly owned land that is intended for public use, such as public parks. This type of property has been characterized as public or as common to all in the sense that the public is the true owner of the land and has a right to use it. C.B. MacPherson, for instance, argues that public property of this type is really common property, nominally held by the state for its true owners, individual members of the public, who have a proprietary right not to be excluded from it.[68] However, the public, as an indeterminate group, does not own anything[69] and is granted access to public property on terms specified by the State.[70] In other words, public access to State-owned

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[67] "Comedy of the Commons", *supra* note 60 at 143 and 146. Rose argues that public use of roads and waterways for purposes of commerce and even recreational uses of public squares create value and that it would be inappropriate for a private owner to appropriate this value. It is "the publicly created rent" that establishes "a public entitlement to access."

[68] C.B. MacPherson, "The Meaning of Property" in C.B. MacPherson, ed., *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 1 at 4-5.

[69] A. Reeve, *Property* (Hong Kong: MacMillan, 1986) at 32.

[70] See *Green* v. *The Queen in Right of Ontario*, [1978] 2 O.R. 396, 1972 CarswellOnt 438, online: eCarswell <http://www.ecarswell.com> [hereinafter *Green*] where the argument that the province owns provincial parks in trust for the people, and therefore has enforceable obligations in relation to maintenance and public use, was rejected. See also *Canada (AG)* v. *Dupond,* [1978] 2 S.C.R. 770, 1978 CarswellQue 120 at para. 69, online: eCarswell <http://www.ecarswell.com> [hereinafter *Dupond* cited to Carswell] where Beetz J. says "[t]he right to hold public meetings on a highway or in a park is unknown to English law. Far from being the object of a right, the holding of a public meeting on a street or in a park may constitute a trespass against the urban authority in whom the ownership of the street is vested even though no one is obstructed and no injury is done; it may also amount to a nuisance." However, obiter comments in *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139, S.C.J. No. 3, online: QL(SCJ) [hereinafter *Committee for the Commonwealth* cited to SCJ] question this view. In *Committee for the Commonwealth* the Supreme Court held that

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property is an instance of the State exercising its ownership powers to permit access to its property. In this thesis, public "rights" of access to State property will only be considered in so far as they create justiciable claims in relation to State property.[71]

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ownership does not authorize the State to exclude persons from public property if doing so would infringe the right to freedom of expression. In doing so, the Court endorsed the view expressed in American jurisprudence that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . . *Hague* v. *Committee for Industrial Organization*, 307 U.S.496": para. 225. Yet, it is clear that absent a *Charter* right, the public has no right to access public property and that the State may exclude persons from its property.

[71] See chapter 7, part C, below, for discussion of rights to access and use State property arising by virtue of the *Charter*.

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Chapter Three: Legislative Jurisdiction

A. A Distinction: *Imperium* (the Right to Govern) vs. *Dominium* (the Powers of Ownership)

In the western legal tradition and the common law, there is a general distinction between *dominium* and *imperium*. *Dominium* refers to ownership and the powers and privileges associated with ownership.[72] *Imperium* refers to the Crown's sovereign authority to govern a territory—the rights of government. The *Constitution Act, 1867* reflects this basic distinction between *dominium* and *imperium*. Land and the powers of ownership (i.e., *dominium*) are vested in the executive.[73] Legislative jurisdiction (i.e., *imperium*) over that land is vested in Parliament and the provincial legislatures.[74] Thus when the State owns land, it has powers of both *dominium* and *imperium* over that land. It may manage and control public land pursuant to powers and privileges arising out of ownership or through legislation.

As a legislator, the State is generally considered to have the power "to *act like* a private proprietor"—that is, to do what it wants with respect to its property—primarily because in legislating conditions for the management and disposal of public

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[72] See *Mabo* , *supra* note 48 at 30, per Brennan J; *Hupacasath*, *supra* note 47 at para. 192: "[a]lthough Crown sovereignty extends to all land, Crown decision-making power about the land does not"; *Reference re Provincial Fisheries*, [1898] A.C. 700, 1898 CarswellNat 41 at para. 15, online: eCarswell <http://www.ecarswell.com> (Canada P.C.) [hereinafter PC *Provincial Fisheries* cited to Carswell]: there is a "broad distinction between proprietary rights and legislative jurisdiction." And see *Shoal Lake Band of Indians No. 39 v. R.* (1979), 101 D.L.R. (3d) 132, (1979), 25 O.R. (2d) 334 at para. 27 (Ont. H.C.) [hereinafter *Shoal Lake*].

[73] See Chapter 2(a), above.

[74] The *Constitution Act, 1867*, *supra* note 14, provides that each province may make laws for "the management and sale of the public lands belonging to [that] province and of the timber and wood thereon" (s. 92(5)) and for "property and civil rights in [that] province" (s. 92(13)). Canada may make laws for "the public debt and property" of Canada (s. 91(1A)).

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land it may insist upon the same conditions that a private proprietor could.[75] There are, for example, no restrictions on the types of conditions that the State may insert in leases or contracts for the use of public land and no constitutionally binding direction for the use of public land. Further, provincial legislation respecting provincial public land may incidentally affect matters falling within the federal legislative sphere, and federal legislation respecting federal public land may incidentally affect matters falling within the provincial legislative sphere, provided, in both cases, that the legislation is "strictly limited to the control of property."[76]

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[75] Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf, (Scarborough: Carswell, 1997) at 706-708 emphasis added [hereinafter Hogg *Looseleaf*]; La Forest, *supra* note 21 at 170-1, 135 and 164-5; *R* v. *Red Line*, *supra* note 43 at 289.

[76] La Forest, *ibid.* at 170-1, 135 and 164-5. S.I. Bushnell argues that the division of powers means that provincial proprietary powers are more limited than those of a private proprietor, but his argument is based on the proposition that "the provinces do not have any executive or prerogative power outside of section 92(5) to deal with property": Comment (1980) 58 Can. Bar. Rev. 157 at 159 and 162. See also David Thring, "Alberta, Oil, and the Constitution" (1979) Alta. L. Rev. 69 at 75-76 at 74 for a similar argument. However, there is clear authority that the provinces may deal with their property without legislative authority: La Forest, *ibid.* at 143 and 167; Hogg *Looseleaf*, *ibid.* at 708; And see *B.C.(A.G.) v. Andrew and Mount Currie Indian Band* (1991), 54 B.C.L.R. 156 at 187, 1991 CarswellBC 45 at para. 163, online: eCarswell <http://www.ecarswell.com>(C.A.) where Southin J.A. (in dissent but not on this point) says "[i]In the absence of legislation on the matter, i.e. where the disposition of Crown lands remains within the prerogative, the lands of the Crown can be dealt with only by some outward public manifestation of the will of the Crown such as a grant under the Great Seal, letters patent or an order-in-council. Where there is applicable legislation, the requirements of the legislation must be observed before dealing with Crown lands can be effective." See also Brian W. Semkow, "Energy and the New Constitution" (1985) 23 Alta. L. Rev. 101 at 114. Semkow, recognizing the distinction between proprietary and legislative powers, says that provincial proprietary powers over public lands are greater than provincial legislative jurisdiction over public lands "when Parliament has not fully exercised all of its powers under the *Constitution Act*. The proprietary powers . . . [however] are a temporary advantage only, because Parliament, legislating to the full extent of its powers, can reduce these proprietary powers until they are co-extensive with the provincial legislative powers." In short, valid federal legislation may prevent a province from making a particular use of public property, but that does not change the content of the province's ownership interest. Such legislation does not impose restrictions on provincial ownership interests—it is simply valid federal legislation that must be followed by all persons and proprietors. See for example *Saskatchewan Power Corp.* v. *TransCanada Pipelines Ltd.*, [1988] S.J. No. 762, (1988) 56 D.L.R. (4th) 416 at paras. 23, 27, 61 and 123 (C.A.) [hereinafter *Saskatchewan Power Corp* cited to D.L.R.]. Section 53 of the *Petroleum Administration Act*, which provided that "No *person* shall . . . move any gas outside the province of production . . . unless the price paid to acquire that gas is a price approved by . . . the Board" was found to be *intra vires* Canada. This provision affects public and private owners equally. Note also that the division of powers has resulted in the provincial and federal governments having certain immunities that other owners do not have. Federal property, for example, is constitutionally exempt from provincial and municipal land use regulation. Additionally, section 125 of the *Constitution Act,*

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This situation does not, of itself, alter the content of the State's ownership interest because of the distinction between *dominium* and *imperium*. As stated in *Reference re Provincial Fisheries*, there is a "broad distinction between proprietary rights and legislative jurisdiction,"[77] the former relating to rights of property and the latter to rights of government.[78] When the State acts as a proprietor, it acts pursuant to its ownership interest—the State is a legal person with "the power to do anything that other legal persons . . . can do,"[79] including the power to hold, use and sell property, without legislative authority[80] in the same manner as a subject.[81]

Further, ownership provides the State with rights in relation to public land that it does not possess by virtue of its legislative jurisdiction over that land. For example, in drafting contractual conditions for the use of property, the provinces are only indirectly limited by the division of powers: they have the power, as proprietors, to include any conditions in contracts for the use of public lands as a private proprietor does in her lands, but must not run afoul of valid and existing federal legislation. When acting in a legislative capacity they must, of course, limit themselves to matters falling within their legislative sphere. In *Smylie* v. *The Queen*, for example, the Ontario Court of Appeal upheld legislation requiring a condition in Crown timber

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1867 provides that "No lands or Property belonging to Canada or any Province shall be liable to Taxation."

[77] *PC Provincial Fisheries*, *supra* note 72; *Reference re Waters & Water-Powers*, [1929] S.C.R. 200, 1929 CarswellNat 35 at paras. 8-14 and 19-21, online: eCarswell <http://www.ecarswell.com> [hereinafter *Re Water Powers* cited to Carswell].

[78] See also *Manitoba* v. *Air Canada*, [1977] 3 W.W.R. 129, 1977 CarswellMan 38 (Q.B.), online: eCarswell <http://www.ecarswell.com> for a modern example of the distinction between proprietary rights—the right to use airspace above the soil—and legislative jurisdiction—the right to legislate with respect to air above the soil.

[79] Hogg *Looseleaf, supra* note 75 at 707; La Forest, *supra* note 21 at 143.

[80] *Robertson*, *supra* note 60 para 30: "the provincial governments may, without special legislation and in exercise of their right of property [here fisheries], restrict their use in any manner which may seem expedient just as freely as private owners might do." And see La Forest, *supra,* note 21 at 143 and 167.

[81] Paul Lordon, Q.C., *Crown Law* (Butterworths, Vancouver: 1991) at 269.

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licenses stipulating that all timber was to be processed in Canada because the province could demand whatever conditions it saw fit in disposing of its property. Absent the provincial ownership interest, such legislation would have been *ultra vires* as an invasion of the federal trade and commerce power.[82]

In short, when the State acts as a legislator it acts pursuant to powers set out in sections 91 and 92 of the *Constitution Act, 1867*. These sections do not vest any proprietary interest in the State.[83] Thus, legislative jurisdiction over a subject matter, such as federal jurisdiction over "Sea Coast and Inland Fisheries"[84] or "Lands reserved for the Indians"[85] does not vest any proprietary rights in Canada.

Additionally, ownership and legislative jurisdiction may be split between provincial and federal governments, which further highlights the distinction between *dominium* and *imperium*. Navigable rivers, for example, whether owned by a province or not, are subject to federal jurisdiction over navigation and fishing. In such a case, the provincial owner has the power to exercise rights incident to ownership over the river, but the federal government has the exclusive right to

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[82] *Smylie* v. *The Queen* (1900), 27 O.A.R. 172, [1900] O.J. No. 19 at para. 27, online: QL (OJ) (CA). See also *Saskatchewan Power Corp*, supra note 76 at paras. 117-118 where the Court endorsed William D. Moull's argument in "Natural Resources: Provincial Proprietary Rights, the Supreme Court of Canada, and the Resource Amendment to the Constitution" (1983) 21 Alta L. Rev. 472 at 476-77 and 480 that the State's proprietary powers are broader than its legislative power and that the State's proprietary powers enable it to include conditions in contracts for the use and disposition of its land that it could not, due to the division of powers, impose on the authority of its legislative jurisdiction. Though the Court ultimately held that the federal trade and commerce power authorizes federal legislation fixing the price of natural gas entering interprovincial or international trade, which would prevent owners, provincial or private, from selling gas at their chosen price in the circumstances defined in the legislation. See also Semkow, *supra* note 76 at 114: the provinces have greater scope to unilaterally vary royalty rates in leases for oil and natural gas as proprietor than as legislator.

[83] *Roberts* v. *R.*, [1995] F.C.J. No. 1202, 1995 CarswellNat 1892 at para. 222 and 226 (Fed. T.D): "legislative jurisdiction includes the power of administration and control. . . [but] does not confer any proprietary interest in the subject matter."

[84] *Constitution Act, 1867*, *supra* note 14, s. 91(12). See also Dale Gibson's article "The Constitutional Context of Canadian Water Planning" (1969) 7 Alta. L. Rev. 71 for analysis of an analysis of the problems arising out of split ownership and legislative jurisdiction over navigable waters.

[85] *Constitution Act, 1867*, *ibid.*, s. 91(24).

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legislate with respect to navigation. Given that the public right of navigation cannot be interfered with absent legislation, the provincial owner cannot, without statutory authorization from the federal government, "erect any obstruction that substantially interferes with navigation".[86]

B. A Hierarchy: *Imperium* over *Dominium*

However, the *Constitution Act, 1867* also privileges legislative jurisdiction over ownership: the executive power to deal with public land is subject to "the declared will" of Parliament and the provincial legislatures, as the case may be.[87] This raises a question in relation to the content of the State's ownership interest. Does legislative control over public land derogate from the State's ownership interest because the executive must comply with legislation for the use of public land when exercising the rights of a proprietor? Babie, for instance, argues that legislative control over public land in a system of responsible government does change the content of the ownership interest vested in the executive. Before responsible government, the Crown could, pursuant to its prerogative powers, "deal with land . . . in the same way that the common law allows a private person to do so".[88] Responsible government requires the executive, the body in which the Crown's interest is vested, to comply with legislation for the use of public land, and this, says Babie, "removes the quality of self-seekingness normally associated with the exercise of ownership privileges and powers".[89]

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[86] *Oldman River, supra* note 63 at para. 77.
[87] *Brooks-Bidlake & Whittall* v. *British Columbia (Attorney General)*, [1922] 3 W.W.R. 9, (1922), 63 S.C.R. 466 at para 5, per Idington J., aff'd, [1923] A.C. 450, [1923], 2 D.L.R. 189 (P.C.)[hereinafter *SCC Brooks-Bidlake* cited to S.C.R.].
[88] Babie, *supra* note 18 at 234.
[89] *Ibid.* at 245.

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Clearly, existing legislation affects how the executive may exercise the powers and privileges arising out of ownership. There is extensive legislation, usually in the form of Crown land statutes, governing the use, management and disposal of public land.[90] Two fundamental purposes of Crown land statutes are to "impose controls on the Crown's power to grant or otherwise deal with Crown land" and to impose controls on the grantee of Crown land.[91] Any dealings with public land must strictly comply with legislation respecting that land.[92] Legislation *does* limit the executive power to deal with public land as it sees fit and to use ownership as a justification for uses of public land, which limits the power of the executive to act in a self-seeking manner in relation to public land.[93] It is not ownership that justifies decisions respecting the use of public land, but rather ownership powers exercised in compliance with legislative provisions that represent, ultimately, the democratic will for the use of public land.

However, such legislation does not necessarily alter the content of the State's ownership interest for two reasons. First, "in a system of responsible government

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[90]Current legislation generally provides a responsible minister with broad, discretionary authority to manage and dispose of public land or crown land, as it is defined in the statute; to transfer land to other ministries; and to delegate powers and duties for the management and disposal of land. Such legislation also sets limitations for the management and disposal of land and provides broad objectives for the use and disposal of land. Decision-makers, including the relevant ministers, have enforceable duties and are answerable to the government authorizing their power and may be answerable to the public, depending on the scope of the legislation. Significant Acts that establish an overall structure for the administration of land include: *Land Act*, R.S.B.C. 1996, c. 245; *Public Lands Act*, R.S.A. 2000, c. P-40; *Provincial Lands Act*, S.S. 1978, c. P-31; *Crown Lands Act*, R.S.M. 1987, c. 340; *Public Lands Act*, R.S.O. 1990, c. P.43; *An Act respecting the lands in the domain of the State*, R.S.Q., c. T-8.1; *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1; *Lands Act*, S.N.L. 1991, c. 36; *Crown Lands Act*, R.S.N.S. 1989, c. 114; *Forest Management Act*, R.S.P.E.I. 2002, c. F-14; *Public Works Act*, R.S.P.E.I. 1988, c. P-34; *Commissioner's Land Act*, R.S.N.W.T. 1988, c. C-11; *Commissioner's Land Act (Nunavut)* R.S.N.W.T. 1988, c. C-11; *Lands Act*, R.S.Y. 2002, c. 132; *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50; *Territorial Lands Act*, R.S.C. 1985, c. T-7; *Yukon Act*, S.C. 2002, c. 7

[91] Butt, *supra* note 52 at 839.

[92] Butt, *ibid.*; *SCC Brooks-Bidlake, supra note 87.*

[93] See Babie, *supra* note 18 at 244-248.

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there is no 'separation of powers' between the executive and legislative branches of government": the executive "draws its personnel and its power to govern from the legislative branch."[94] Legislative restrictions on executive dealings with public land are, in reality, an instance of the State choosing to manage public land through legislation rather than through its proprietary powers. Second, ordinary legislation does not derogate from the content of the State's ownership interest in land but rather imposes controls on the owner of that land. Neither the *Constitution Act, 1867* nor the Courts have limited the content of State ownership,[95] and the State's own enactments, which may be repealed or modified at will, do not do so. The content of the State's ownership interest, even if it may be controlled by Parliament and the provincial legislatures, depends on the nature of the ownership interest vested in the executive. Legislation does not abolish this interest but imposes controls on the executive.

Limitations on the executive power to deal with public land are much like limitations on a trustee's power to deal with land held in trust for another. A trustee who holds a fee simple does not hold a peculiar ownership interest defined by a combination of the powers and privileges arising out of a fee simple estate and the particular limitations imposed by the trust. The fee simple estate held by the trustee is exactly the same as a fee simple held by any other person; however, in exercising the

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[94] P.W. Hogg, *Constitutional Law of Canada*, 1999 Student ed. (Scarborough Ont: Thomson Canada Limited, 1999) at 259 [hereinafter Hogg *Student*].

[95] See Chapter 6 (c), below, and see *Alberta Federal Tax on Natural Gas*, *supra* note 21 at para. 50: "Section 109 [of the *Constitution Act, 1867*] states that the "lands, mines and minerals and royalties" shall "belong" to the Provinces . . . The owner of property to whom one applies the words "belong" or "retain" as in these sections usually enjoys the exclusive right to use and to enjoy it, to control it, to handle it and to dispose of it. These attributes of ownership may be seen from the usual definition of the word: Jowitt: Dictionary of English Law; Black's Law Dictionary. No words in Part VIII would seem to limit those rights."

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powers and privileges arising out of his or her ownership, the trustee must follow the duties imposed by the trust. In essence, while a trustee is not authorized to act in a self-seeking fashion, this is because of the terms of the trust and not the type of ownership interest held.

Similarly, the ownership interest vested in the executive is not modified by ordinary legislation—it is the duties of the executive that are modified. Thus, when considering if a legislative provision prevents the State from making a particular use of public land, one looks to the limitations imposed on the executive and not the bundle of powers and privileges included in the State's ownership interest. And this makes sense because it would lead to unnecessary uncertainty in a number of ways if the content of the State's ownership interest was modified every time Parliament or a provincial legislature varied legislation dealing with public land, which would be the case if the content of the State's ownership interest was defined, even in part, by reference to existing legislation. Canada and all of the provinces, for instance, would have different ownership interests from each other, and a province could have different ownership interests in different tracts of public lands depending on whether or not there was legislation governing that land.

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Chapter Four: The Purpose for Public Land and State Ownership

A. Public Property as Proprietarian

A fundamental question for any property institution is its purpose. Gregory S. Alexander identifies two key purposes for private property: property as commodity and property as propriety. When property is viewed as a commodity it is seen as providing a material base for negative freedom and individual preference satisfaction.[96] When the goal of a property institution is preference satisfaction, something that is often taken to be the object of private property, value is primarily determined by the market. It is through market transactions that property ends up in the hands of those who value it most.[97] Thus, market transactions and the "'almighty buck' . . . [control] the measure of value; not need, and not some other measure of desire."[98]

When property is viewed from a proprietarian perspective, it is seen as providing "the material foundation for creating and maintaining the proper social order."[99] Property is something more than a commodity—a thing—to be traded on the market. When the goal of a property institution is some notion of propriety, the appropriate use and distribution of property—the value of property—is not

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[96] Gregory S. Alexander, "Property as Propriety" (1998), 77 Neb. L. Rev. 667 at 667-668.
[97] Carol M. Rose, "'Takings' and the Practices of Property: Property as Wealth, Property as 'Propriety'" in *Property & Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press, San Francisco, 1994) 49 at 54 [hereinafter "Property as Propriety"]. See also Bruce Ziff *Principles of Property Law*, 4th ed. (Toronto: Carswell, 2006) at 11-12 [hereinafter *Principles of Property 4*] for a discussion and criticism of the classic law and economics justifications for private property, including the idea that private property may be justified by its wealth maximizing potential, i.e., that in a market economy, exclusive and transferable rights in resources means those resources should end up in the hands of those who value them most highly.
[98] Ziff, *Principles of Property 4*, *ibid.* at 9.
[99] Alexander, *supra* note 96 at 668.

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necessarily determined by the market but rather by "a normative conception of the social good that is prior to the market."[100]

These differing conceptions about the purpose of property lead to different ideas about what obligations may be justly imposed on owners. In landlord/tenant law, for example, viewing residential housing not merely as a market asset to be used to increase the wealth of the owner but as a "one of the crucial material conditions that determines whether and how people will flourish personally and as citizens" justifies placing obligations on owners for the benefit of tenants.[101]

Public property tends to be proprietarian because public ownership is generally premised on ownership for a particular purpose that is meant to benefit the public in some manner. That is, it is generally accompanied by an articulable purpose than informs how that property ought to be used and for whose benefit. Municipalities own property for municipal purposes; crown corporations and specific government departments own property for purposes related to their specific mandate. And whether or not these owners hold a fee simple, the powers and privileges arising out of ownership or the powers of the owner are generally restricted by legislation in order to ensure that the owner meets its mandate, whether that mandate is social, economic or political.[102]

Consider also, the example of roads and waterways, and even recreational beaches, which Rose has termed inherently public property because privatizing these resources creates a danger of holdouts and monopolies and because much of the value

[100] Alexander, *supra* note 96 at 669.
[101] Alexander, *ibid.* at 687-88.
[102] See chapter two, part C.

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of these resources results from public use.[103] Public ownership is meant to ensure public access on reasonable terms and prevent private owners from capturing publicly created rent. The value and utility of a road or a system of roads, for example, would be significantly diminished if individual owners along the way had the power to block the road or charge excessive tolls, something that would undermine individual travel and trade and commerce.[104] While public ownership is not essential to ensuring public access, both public access and public ownership is premised on and justified by the important nature of the resource to both individuals and the overall economy.

Take as another example, state ownership of wildlife in the United States. State ownership arose in the nineteenth century as a response to market failures, such as the wasteful slaughter of bison. Bison, along with other wild animals, were considered to be *res nullius*, and this, in conjunction with "the market-driven goal of capturing a saleable surplus", led to overexploitation and waste.[105] State ownership was explicitly premised on providing individual states with the power, independent of legislative jurisdiction, to control the exploitation of this previously open-access and over-exploited resource.[106]

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[103] Rose, Comedy of the Commons", *supra* note 60 at 128-34.

[104] *Ibid.* at 128-30. See also Ziff, *Principles of Property 4*, *supra* note 97 at 19: "Try to picture a world in which all roads, highways, rivers and so on were in private hands. It is hard to visualize how an economy could function when the capricious acts of an owner of some important thoroughfare might bring the commercial sector to its knees." Similar considerations apply for navigable rivers: Michael C. Blumm, "Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine" (1988-1989), 19 Envtl. L. 573 at 580 [hereinafter "Democratization of Western Water Law"].

[105] Dale D. Goble, "Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land" (2005) 35 Environmental Law 1 at 15.

[106] *Ibid.* Goble characterizes the open-access situation as leading to the "tragedy of the market." The problem of waste arises from "the conjunction of the market-driven goal of capturing a saleable surplus and an open-access or common-pool regime in which anyone can capture." It "is the drive for marketable surplus that produces tragedy." See also Michael C. Blumm and Lucus Ritchie, "The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife" (2005) 35 Envtl. L. 673 at 691-96 regarding overexploitation of pigeons and big game and the response

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Further, if the public is actually considered to have a public right or a proprietary right in the resource being held for it, this may result in democratic input for the use of the resource. In the United States, the courts may review decisions that impair or terminate public access to or use of public trust resources. Public decision-makers charged with preserving the trust must provide reasons for their decisions, "justify departures from past practices", allow public participation in the decision-making process, and "consider alternatives to the proposed action,"[107] all of which has a "democratizing influence" on the use of public trust resources.[108] The public has access to the decision-making process.

Public land is no exception in so far as the overall purpose for State ownership is the public interest.[109] Yet the content of the State's ownership interest does not reflect this purpose: the State, subject to recent limitations arising out of the *Charter*, may use public land as it sees fit. This is because it is the political relationship between the State and its citizens that defines the purpose of State ownership of land, and this purpose has not resulted in limitations on the State's ownership interest but rather expectations about how the State will exercise the powers and privileges arising out of ownership. Thus, public land may be viewed as a category of property that *responds* to prevailing notions of propriety as they arise out of the democratic process.

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of state ownership. See also pages 714-715: the states' ownership is conjoined with public trust duties, such as the duty to supervise and preserve the resource and to consider public trust values before approving actions that affect public trust resources. See also *Yanner* v. *Eaton*, [1999] HCA 53, 166 A.L.R. 258 at 265-267 (Aust. HCA) [hereinafter cited to A.L.R.] where State ownership of wildlife is also said to be premised on providing ownership powers for the purpose of regulation.

[107] Blumm, "Democratization of Western Water Law", *supra* note 104 at 590.

[108] *Ibid.* at 595.

[109] *McFarlane* , supra note 7 at 234 and 236; *Bernie*, *supra* note 8 at para. 25; *Forrest*, supra note 9 at para. 12.

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B. A Purpose for Public Land: Political Propriety

On the assertion of sovereignty, the Crown acquired radical title to all land and beneficial ownership of land that was *terra nullius*. Thus, on the assertion of sovereignty, the Crown acquired beneficial ownership to vast tracts of land subject only to pre-existing aboriginal interests, which are those aboriginal interests the Courts have been willing to recognize and which are still being defined.[110]

Assertions of sovereignty and the acquisition of land were not, however, accompanied by any clear purpose or vision for that land. Certainly, the Canadian public domain was a commodity for the imperialist and economic ambitions of colonial powers. Settlement and exploitation of land, which generally involved converting it to private use, was designed to "provide a predictable and stable base for England and later Britain to exploit the land and resources of the region and engage in trade with the colonists."[111] Thus, in some sense the Canadian public domain was, prior to confederation, the private property of the British Crown—to be used according to its imperialist objectives.[112]

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[110] What was in fact and law *terra nullius* is controversial. See *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, S.C.J. No 77 at paras. 30-31, online: QL (SCC), per Lamer C.J.C: "the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1) [of the *Constitution Act, 1982*] because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. Aboriginal rights in relation to land range from usufructory rights based on "practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the rights" to "title itself", which is a *sui generis* interest in land in that it is "held communally; it is inalienable; and it cannot be transferred, sold or surrendered to anyone other than the Crown." See also *Hupacasath, supra* note 47; *First Nation* v. *British Columbia (Minister of Forests)* 2005 BCSC 1712, B.C.J. No. 2653 at paras. 75 and 76, online: QL: (BCJ); *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, S.C.J. No. 108, online: QL (SCJ) where the Supreme Court first articulated the *sui generis* nature of aboriginal title; and *R.* v.*Bernard* 2005 SCC 43, [2005], S.C.R. 220 regarding the right to log on Crown land.

[111] John McLaren, A.R. Buck, and Nancy E. Wright, "Property Rights in the Colonial Imagination and Experience" in John McLaren, A.R. Buck, and Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (UBC Press, Vancouver, 2005) 1 at 6.

[112] See Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America" in John McLaren, A.R. Buck and Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (UBC Press, Vancouver, 2005) 50 who argues that Papal

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The Canadian public domain was also a vast resource to be settled and "improved" and hence was the object not only of the policy objectives of colonial governments but of conflict between various classes of settlers and indigenous inhabitants.[113] Yet, as John C. Weaver notes, in an essay on how the concept of improvement shaped early Canadian land law, the British Crown did not have a clear purpose for acquisition or use of public land:

> "The American public domain was a national asset, while what the British fought for on the distant frontiers of settlement colonies was hazy. Was it for the ambitions of the colonists? Which colonists—the grazers and planters or the working poor? Were they to benefit current or future generations of emigrants? Precisely who would improve the lands that First Peoples allegedly wasted?"[114]

The *Constitution Act, 1867* did little to clarify the purpose for State ownership. Public land was divided between Canada and the provinces and subjected to the legislative jurisdiction of Parliament and the provincial legislatures, as the case may be. But there was no clear statement as to the purpose for State ownership. Case law suggests that one purpose for the particular division of property between Canada and the provinces was to enable them to discharge their respective constitutional functions and duties.[115] These cases, however, do not explain the relationship

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Bulls and royal instruments of colonial powers established rights as between colonizers but not as between colonizers and indigenous peoples.

[113] See generally Ziff *Principles of Property 4*, *supra* note 97 at 26; Rusty Bittermann and Margaret McCallum, "When Private Rights Become Public Wrongs: Property and the State in Prince Edward Island in the 1830's" in John McLaren, A.R. Buck and Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (UBC Press, Vancouver, 2005) 144; John C. Weaver, "Concepts of Economic Improvement and the Social Construction of Property Rights: Highlights from the English-Speaking World" in John McLaren, A.R. Buck and Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (UBC Press, Vancouver, 2005) 79.

[114] Weaver, *ibid.* 87.

[115] *British Columbia (Attorney General)* v. *Canada (Attorney General)*, [1922] 3 S.C.R. 293, 1922 CarswellBC 42 at para. 74, online: eCarswell <http://www.ecarswell.com> [hereinafter *Re Oriental Orders in Council Validation Act*]: " the provisions of *The B.N.A. Act* 102 to 126, in so far as they affect the public lands, contemplate not only the raising of revenue but an object at least as important, the distribution of these lands for the purpose of colonization and settlement . . . the provisions are of a high political nature, they are the attribution of royal territorial rights for the purposes of not only

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between the State and its citizens with respect to public land or provide a normative basis for the use of public land.

What does explain the relationship between the State and citizens with respect to public land, and provide a purpose for State ownership is the relationship between the legislative and executive branches of government and the democratic process. Case law suggests that the State's ownership interest is to be exercised in the public interest and for the public benefit[116] and that the State has, subject to the *Charter*, the same rights in relation to its land as does a private owner. However, this right is controlled by democratically elected bodies, and it is these bodies that must ensure the public interest is met by defining the public interest and creating a scheme for the use of public land.

Ownership for the public interest may seem vague and fuzzy—it does not assist in determining what actually is in the public interest or how public land should be used on a day-to-day basis. Rather, it signifies that decisions about public land should be based the objectives of the electorate, whether these be environmental, economic, or social. Likely, any government that takes the idea of the public interest seriously will respond to as broad a segment of the public as possible and attempt to implement land management policies that fairly represent the beliefs and goals of the public rather than simply responding to special interest groups or well-connected and politically powerful groups. Further, a commitment to equality and the values of a

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revenue but for the "purposes of government" as well."; *Smylie* v. *The Queen* , supra note 82 at para. 27; *Burrard* , *supra* note 30 at para. 66.

[116] As will be seen in chapter seven, below, this is a political duty that does not detract from the content of the State's ownership interest, but it does provide a purpose for that ownership.

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liberal democracy also means that ownership should not be for the sole benefit of particular groups.

What this all suggests is that the overall purpose for public land is political and that the manner in which the State exercises its ownership powers will vary with the will of the electorate. This further suggests that public land may be viewed as a property institution based on notions of political propriety—on values that arise out of and are defined by the democratic process.

Public land should be viewed as proprietarian not because it can or should be used to maintain a particular social order or because it can provide the material foundation for particular land use goals. It should be viewed as proprietarian because decisions about the use of public land should respond to the goals of the electorate—to values that are outside of the market. Public land is a category of property that is premised on non-market and non-private interests.

Consider, as a concrete example, a public desire for non-development and preservation of particular resources, such as wetlands or historic sites. Joseph Sax, pointing to urban zoning laws that restrict land uses and may even place positive obligations of preservation or non-development on private owners, notes that conceptions about both private and public property have shifted: people have expectations about how property they do not own should be used. These expectations, which are quite capable of and likely to shift, are based on community values, such as a desire for a particular type of neighbourhood or open-spaces.[117]

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[117] Joseph L. Sax, "Why We Will Not (Should Not) Sell the Public Lands: Changing Conceptions of Private Property" (1983) Utah L. Rev. 313 at 317-20.

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In the case of public desire for non-development, which preserves natural land features and wildlife habitat and affords opportunities for recreation, "[p]ublic control of land use is necessary because of the nature of the benefits . . . that flow from nondevelopment."[118] To illustrate, Sax uses the example of a chateau in France that has historic significance and to which the public is attached, but his analysis will apply to any example, such as public ownership of the Plains of Abraham in Canada or the Parliament Buildings. "Many people are interested both in visiting such places and in preserving them," but even where they are willing to pay "they cannot in general outbid commercial interests for them."[119] Public ownership recognizes the underlying community values and distributes the cost in a fairly uniform manner throughout the community. As Linda Butler puts it, "recognition [or creation] of public property rights . . . may be necessary when our private system no longer allocates interests in resources consistent with crucial aspects of our political ideology."[120]

A proprietarian view of public land, or of other public property, provides interesting possibilities for the role of public property in Canada. Because public property may legitimately respond to non-market interests—to conceptions of the good that are outside of the market—public property may be used to achieve a distribution of resources necessary to maintain minimum standards of living that are acceptable to our society or to provide access to property necessary to facilitate important political values, such as freedom of speech, or social values, such as

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[118] *Ibid.* at 322.
[119] *Ibid.*
[120] Linda Butler, "Environmental Water Rights: An Evolving Concept of Public Property" (1989-1990) 9 Va. Envtl. L.J. 323 at 364.

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environmental preservation. There is nothing wrong with this, and in fact it may be viewed as a positive good for the State to use its property to achieve non-market based property goals.

What those goals are, and what constitutes a desirable distribution of resources, is a matter of political debate. However, if a broad enough segment of society supports a particular use of public property, that use is, subject to *Charter* values and respect for the equal worth of all individuals, a valid use. Thus, if a broad enough segment of society is of the opinion that private property and market distributions of property, while valuable, only respond to the needs and goals of some, it might be appropriate to use public property to fill the void left by private property.[121] State ownership offers an opportunity to deploy public property (material resources) in a manner that complements and corrects the deficiencies of our current regime of private property, whether theses deficiencies are matters of economic inequality, environmental preservation or providing a space for valuable activities.

[121] Discussing justifications for private property, Ziff, *supra* note 97 at 9 notes that "[p]rivatizing the decision-making power over resources inevitably means that some will do quite well (in material terms) and others not. There had better be good reasons for allowing that to happen." Perhaps, whether or not there are good reasons for private property, and whether or not the salutary effects outweigh the deleterious effects, the problem is that private property is incapable of responding to the property needs of all members of society.

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Chapter Five: Ownership

A. Introduction

The question before us is whether the State's ownership interest in land is different from a private ownership interest in land. This is not a straightforward question: A comparison of public and private ownership requires an understanding of what is meant by ownership in the context of private property and how it is usually distinguished from public ownership. Thus, in this part I will outline what I believe to be the most significant features of private ownership and how private ownership is usually distinguished from public ownership.

The purpose of this discussion is not to enter the ongoing debate about what constitutes the irreducible core or essential features of private property, a debate which is not likely to end any time soon.[122] There are and will continue to be competing conceptions of property and ownership. However, it is my claim that these concepts have been sufficiently defined by case law and academic writers in the context of private property to provide a background against which to assess whether public ownership is fundamentally and necessarily different from private ownership.

Relying heavily on concepts drawn from J.W. Harris' work *Property and Justice* and J.E. Penner's work *The Idea of Property in Law*, I will argue that the three most significant incidents of private ownership are the right to exclude, the open-ended right to use, and the right to act in a self-seeking manner. Further, the

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[122] See Thomas W. Merrill, "Property and the Right to Exclude" (1998) 77 Neb. L. Rev. 730 at 731-33 for a summary of "points of consensus" regarding property, namely: "property is not concerned with scarce resources themselves . . . but rather with the rights of persons with respect to such resources"; "that property means something different than mere possession"; and "that property cannot exist without some institutional structure to enforce it."

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importance of self-seekingness lies in its legitimizing power because it is the open-ended right of use that empowers particular uses of property. Self-seekingness does not empower any particular use but rather legitimates uses otherwise authorized by ownership.

B. The Context of Ownership: A System of Property

Property is a legal and a social institution that is fundamentally concerned with organizing individual entitlements to material resources and social wealth.[123] Property responds to what Jeremy Waldron calls "the problem of *allocation*," that is, to "the problem of determining peacefully and reasonably predictably who is to have access to which resources for what purposes and when."[124] Particular systems of property define who is entitled or eligible to be an owner, what may be owned as well as the particular powers and privileges associated with ownership.

Property is inherently controversial because it mediates competing claims to resources and creates power relationships. The rules of property are not mere mechanisms of orderly distribution. Rules governing who is entitled to access and use resources determine "rights as between individuals over objects" and thus must balance and resolve the conflicting and often opposing interests that individuals have in accessing resources.[125] These rules are based as much on ideology as logic and respond to dominant conceptions of the proper social and economic order.[126]

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[123] Harris, *supra* note 4 at 4 and 141-42; Waldron, *supra* note 1 at 32.
[124] Waldron, *ibid.* at 32.
[125] Ziff, *Principles of Property 2*, *supra* note 51 at 45.
[126] See Carol Rose, "Privatization-The Road to Democracy?" (February 2006) at 21, SSRN, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881877> where Rose interrogates the alleged democratizing benefits of privatization, which moves decision-making power from the political arena to private actors. See also Penner, *supra* note 2 at 11-12 who discusses the relationship between interests and rights and notes that "a system of laws and any of the particular laws . . . within it are

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Private property allocates resources directly to individuals to use as they please and has a very individualistic orientation. Penner, for example, argues that private property is justified by the interest individuals have in "exclusively determining the use of things".[127] It is the individual who determines how to use his or her property, and that has intrinsic value because it respects the autonomy of individuals and fosters negative freedom, which is freedom from outside coercion by the state or other individuals. Private property enables individuals to pursue their own plans and projects and according to their own tastes and desires.

Another primary, individualistic purpose of private property is preference satisfaction. Private property, particularly in a market economy, enables individuals to exchange resources so that items of property end up in the hands of those who value them most. Private property is also often viewed as creating value by providing an incentive—the benefit of the resulting value—for investment and hard work.[128]

Ownership, whether public or private, operates within a system of property. Within a system of private property, ownership is the organizing idea for two reasons. First, it defines the nature and extent of an owner's control over property:

> "Where ownership interests do exist, the outer boundary of the control-powers entailed by them is reciprocally related to the trespassory rules which protect them. . . . [and] [s]o far as the content of the relevant trespassory rules is fixed, the perimeter of ownership control-powers is established. . . . Within that perimeter, ownership serves as an irreducible organizing idea. Where trespassory protection runs out, the owner cannot dictate uses. Within the compass of that protection, his use-privileges and control-powers are inferred, not from the content of the

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only justified or legitimate to the extent that they serve our interests." What those interests are, from complying with God's will to maintaining an efficient market, are inherently ideological.

[127] Penner, *ibid.* at 49.

[128] Rose, "Property as Propriety", supra note 97 at 54. Such incentives may also produce staggering waste. Goble, *supra* note 105 at 15 uses the term "tragedy of the market" to describe the waste arising from the rush to claim resources, such as wild animals, in pioneer America.

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> trespassory rules, but from the prevailing conception of the ownership interest itself."[129]

Second, ownership *legitimates* decisions respecting the use and distribution of resources. The rules of property "are organized around the idea that resources are on the whole separate objects each assigned and therefore belonging to some particular individual" who will, because she is the owner, determine how the resource is to be used.[130] As Harris points out, both legal and lay discourse use ownership as "a point of reference" for determining who is entitled to use a resource and to make decisions about its use. Ownership provides a "taken-for-granted background" that affords "innumerable (seemingly uncontroversial) assumptions about what may be done to or with items of social wealth for the obvious reason that someone is their owner." [131]

Ownership is equally controversial, if not more so, than the idea of property. While nearly everyone can agree that some system of property is necessary, and while many will agree that private property is either desirable or justifiable, and in any event it is a dominant form of ownership in Canada, there is little agreement as to the precise nature of ownership, from what its essential features are to what rights should be included in the ownership bundle—or if it is appropriately characterized as a bundle of rights at all.[132] As noted by Waldron, some writers think it is "impossible to define private property."[133]

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[129] Harris, *supra* note 4 at 31-32. Trespassory rules, which protect and define the outer boundaries of the ownership interest, are essential to a property institution; otherwise nothing could be "wrongfully interfered with": 25 and 32.
[130] Waldron, *supra* note 1 at 38.
[131] Harris, *supra* note 4 at 63; Waldron, *ibid.* at 43.
[132] Merrill, *supra* note 122 at 738.
[133] Waldron, *supra* note 1 at 26.

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C. Private Ownership

Nevertheless, private ownership must be defined if it is to be compared to public ownership, and it must be defined in a way that is useful to this comparative project. Because my focus is the content of ownership, private ownership will be defined by reference to its most significant incidents, which I believe are the rights of exclusion, open-ended use and self-seekingness. These rights are usually, subject to case-by-case limitations, part of a full-blooded private ownership interest[134] and are rights that are regularly exercised by private owners and thus constitute the "normal" content of ownership. A full-blooded conception of private ownership will be used because it is the most rigorous standard against which public ownership may be compared. A normal conception of private ownership is one that takes its shape from definitions of ownership used in case law, and focuses on the rights normally attached to private ownership, regardless of whether these rights are strictly essential to private ownership.

Keeping these qualifications in mind, private ownership will be defined as an *in rem* right that vests in an owner the right to exclude, an open-ended right of use, and the right to exercise any and all incidents of ownership in a self-seeking manner. This definition is pragmatic and aims to describe rather than explain private ownership. For the purpose of comparing the content of private and public ownership, questions of how private ownership is justified and its normative purpose may be left aside. What is important are the actual powers and privileges arising out of ownership.

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[134] The term "full-blooded" is taken from Harris' work, *supra* note 4, and refers to the fullest ownership interest.

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i. The Right to Exclude

The right to exclude is included in the definition of private ownership because, regardless of its academic characterization[135], those who own private estates in land hold, as an incident of that ownership, the power to exclude others from it.[136] The right to exclude is "more than the right of physical expulsion; it includes the idea that an owner holds a *monopoly* over whatever rights of use, transfer, income, *etc.*, are recognized as part of a given proprietary package."[137] Significantly, the right to exclude is not a duty to exclude—it authorizes but does not require an owner to exclude others from her property.[138]

The right to exclude protects the particular rights of use conferred by ownership from interference by non-owners. It also makes possible the right of open-ended use because it is not necessary to catalogue the permissible uses of property that will be protected from interference by others. Non-owners simply have a duty of non-interference.

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[135] See Penner, *supra* note 2 at 68-72. Penner considers the right to exclude is not really a right to exclude but rather a right to exclusive use and a correlating duty of non-interference on non-owners because owners do not have any interest in excluding non-owners for no reason but they do have an interest in exclusively using things. See also Harris, *supra* note 4 at 24-26, who considers ownership interests and trespassory rules to be separate parts of the property institution. Trespassory rules presuppose and protect ownership interests by placing duties of non-interference on non-owners. See also Merrill, *supra* note 122 at 730 who argues that the right to exlude is "the sine qua non" of property: "[g]ive someone the right to exlude others from a valued resource . . . and you give them property. And See *Didow* v. *Alberta Power Ltd.*, (1988) 60 Alta. L.R. (2d) 212, [1988] A.J. No. 620, online: QL (AJ) (C.A.) where the ownership interest in the airspace above land was limited to the height necessary for the "ordinary use and enjoyment" of the land, an objective test intended to balance the interest of the landowner in using the land (and her right of exclusion) and the interest of the public in using airspace above a certain height (and their duty of non-interference).

[136] Merrill, *ibid.* at 747.

[137] Ziff, *Principles of Property 4*, *supra* note 97 at 5.

[138] *Ibid.* And see Penner, *supra* note 2 at 74.

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ii. The Open-ended Right of Use

An open-ended right of use is the right to use property in whatever manner one wishes, subject to specific limitations. The particular uses of property authorized by ownership are undefined. Where an open-ended right of use exists, it is not possible to "list the acts that are privileged or empowered" by an ownership interest "even if it stands near the bottom of the spectrum."[139] An owner may use and dispose of her property as she sees fit, provided there is no rule against the use, and provided she does not commit a civil or criminal wrong by that use.

Such rights facilitate the interest individuals have in exclusively determining how resources are to be used. Ownership provides *prima facie* authority for an owner to make particular uses of her property.[140] Thus, when considering whether an owner may use her property in a specific way, one should start with the presumption that her ownership is authority for the impugned use and then look to rules, such as property-independent prohibition and property limitation rules, to determine if the powers and privileges inherent in ownership have been proscribed in any manner.

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[139] Harris, *supra* note 4 at 66. Penner, *ibid.* at 71: Ownership does not institute "a series of positive liberties or powers to use particular things" but rather provides a right of exclusive use and imposes on non-owners the duty to exclude themselves. For the classic formulation of the usual incidents of ownership see A.M. Honoré, "Ownership" in *Making Law Bind* (Oxford: Clarendon Pr., 1987) at 165. "Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the duty to prevent harm, liability to execution, and the incident of residuarity." See also Merrill, *supra* note 122 at 730-31 for a description of the usual incidents of ownership: "those who are given the right to exclude others from a valued resource typically also are given other rights with respect to the resource—such as the right to consume it, to transfigure it, to transfer it, to bequeath or devise it, to pledge it as collateral, to subdivide it into smaller interests, and so forth."

[140] See *Alberta Federal Tax on Natural Gas, supra* note 21 at para. 50 where the Alberta Court of Appeal provided a description of the usual incidents of ownership: "[t]he owner of property to whom one applies the words "belong" or "retain" . . . usually enjoys the exclusive right to use and to enjoy it, to control it, to handle it and to dispose of it. These attributes of ownership may be seen from the usual definition of the word."

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An open-ended right of use is not essential to private ownership, as evidenced by the existence of what Harris terms "non-ownership proprietary interests", such as an easement or a profit a prendre.[141] Yet, full-blooded private ownership interests, including estates in land, confer an open-ended right of use on the owner, and this right is part of the normal content of a full-blooded ownership interest.[142]

iii. Self-seekingness

The right to exercise the powers and privileges arising out of ownership in a self-seeking manner is also a part of the normal content of a full-blooded ownership interest.[143] The power to act in a self-seeking manner is not the right to do whatever one wishes with one's property. The right to do what one wishes with one's property, as discussed above, arises out of the open-ended nature of the right to use.

The right to act in a self-seeking manner is the right to make particular uses of one's property without justifying that use. An owner acts entirely within the powers and privileges arising out of ownership when she uses her property in a way that most would consider morally reprehensible and may even, generally speaking, freely destroy[144] or deny access to her property, for any reason or for no reason whatsoever, even when others are in desperate need and that need could be alleviated

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[141] Harris, *supra* note 4 at 56.

[142] Modern planning law, however, severely derogates from open ended rights of use. In Alberta, for example, section 639 of the *Municipal Government Act, supra* note 41 provides that "[e]very municipality must pass a land use bylaw." Land use bylaws generally "permit" particular uses of land, such as extensive agriculture, and landowners are restricted to using their land for the permitted uses.

[143] *Harris, supra* note 4 at 5.

[144] *R* v. *Surrette* (1993), 82 C.C.C. (3d) 36, 123 N.S.R. (2d) 152 at para. 14 (C.A); *R* v. *Power* (1995), 141 N.S.R. (2d) 161, [1995] N.S.J. No. 141 at para. 11 (S.C.), online: QL (NSJ): "[o]ne may not be convicted of mischief in relation to her own property because an essential element of the offence is that the accused person acted without legal justification, and ownership provides a legal justification for destroying or damaging one's own property." For an analysis of individual and societal benefits arising from the right to destroy property see L.J. Strahilevitz, "The Right to Destroy" (2005) 114 Yale L.J. 781.

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by use of the property.[145] Self-seekingness authorizes an owner to "defend any use or exercise of power by pointing out that, as owner, he is at liberty to suit himself."[146] An owner's use of her property and her reasons for that use are her own. The power to act in a self-seeking manner insulates an owner's use of property from review.

Exploiting property in a self-seeking manner is strongly associated with private property. Such an entitlement ensures the "privateness" of an ownership interest by enabling an owner to exclude from consideration all interests save her own when using her property. At first glance, the power to act in a self-seeking manner may seem to be the power to act selfishly, particularly given that such a right legitimates not only eccentric but morally questionable uses of property. However, such a right protects significant interests underlying private ownership, such as the interest individuals have in exclusively determining the use of resources[147] and the interest individuals have in autonomy and self-determination. Owners value and use their property for a wide range of purposes. Property may be used for profitable market transactions; it may be held to satisfy an owner's sentimental attachment to a thing; it may be used for the benefit of others; and it may be used for eccentric purposes or destroyed to satisfy some objective of the owner, whether selfish or not. The important point is that ownership justifies the use, and that there are a variety of interests underlying this right. In my view, this suggests that the importance of self-

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[145] *Southwark London Borough Council* v. *Williams*, [1971] 1 Ch. 734 [hereinafter *Southwark London*]: necessity (caused by homelessness) is no defence to trespass even where the realty (unoccupied housing) in question is owned by a public authority. This case has been cited with approval by Canadian Courts: *R.* v. *Clarke* [1998] O.J. No. 5259, (1998) 23 C.R. (5th) 329 at para. 48 (Prov. Ct.).

[146] See Harris, *supra* note 4 at 31 and 65; Waldron, *supra* note 1 at 39; and Babie, *supra* note 18 at 49-40.

[147] Penner, *supra* note 2 at 49-50.

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seekingness is that it legitimates an owner's decision—legally and often morally—for the use of her property *on the basis of ownership* rather than through an assessment of the value of any particular use.

At the same time, while self-seekingness is part of what I call the "normal" content of a full-blooded ownership interest, it is not essential to private ownership. There are two common types of limitations on self-seeking behaviour that affect how owners are permitted to use property: duties that limit self-seeking behaviour that are linked to an owner making particular uses of her property, which I shall term Use-based duties; and duties that are linked to an owner having an obligation to consider an interest other than her own, which I shall term Interest-based duties.

Use-based duties include duties arising out of human rights legislation and the common law that limit the right to use ownership as a justification for a particular use. For example, innkeepers are prohibited by human rights legislation from excluding members of the public on the basis of race and sex. They are also bound by the common law to provide accommodation to any member of the travelling public.[148] These duties are dependent upon the owner using her property as an Inn or whatever particular use is caught by the rule. Importantly, the duty may be shaken off merely by altering the use of the property. The owner is free to cease operating a public establishment and then may exclude whomever she pleases.

Use-based duties are aimed at preventing a certain type of behaviour regardless of ownership. Thus someone operating an Inn or a shopping mall or a

[148] *Robins & Co.* v. *Gray* [1895] C.C.S. NO. 86, 2 Q.B. 50; *Lamond* v. *Richard,* [1897] 1 Q.B. 541, 66 L.J.Q.B. 315; *King* v. *Barclay* (1960), 31 W.W.R. 451, 1960 CarswellAlta 33, aff'd (1961), 35 W.W.R. 240, 1961 CarswellAlta 36 (C.A.). Here, ownership authorized Innkeepers to exclude non-travelers for any reason.

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convenience store, whether an owner in fee simple, a lessee, a mere licensee or a manager, is prohibited from certain types of behaviour, such as racial discrimination, and thus may not exclude black people from the premises because they are black. Or there may be a duty to assist certain members of the public in accessing services by, for example, providing wheelchair accessible entrances. The owner is not bound as an owner to consider the interests of others but rather is bound as a service-provider to meet certain standards of conduct.[149]

Interest-based duties, by contrast, arise when an owner is bound to consider an interest other than her own when making a decision regarding the use of her property. Modern zoning law is a good example of Interest-based duties. Land is divided into zones, and within any particular zone, only certain uses are permitted. Permitted uses are increasingly premised on the interest non-owners have in controlling land use to maintain a particular type of neighbourhood by requiring or preventing certain types of development.[150] Owners may be prevented from building a shopping mall in a residential area even if the shopping mall does not otherwise constitute a nuisance. Owners may also have positive duties of preservation or non-development. People have expectations about how property they do not own should be used, and these

[149] Use-based duties are different from property-independent prohibitions. There are innumerable restrictions on the use of property that have nothing to do with ownership. Thus, to use a common example, prohibitions against homicide have the effect of limiting how knives may be used, and one may not justify homicide by arguing that one owns the knife used to commit the crime and was free to do what she wished with the knife. This is not a limitation on the powers and privileges arising out of ownership or on the right to use ownership as a justification for the use of property. It is a prohibition against harmful conduct.

[150] Sax, *supra* note 117 at 317-20.

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expectations are being implemented through land use bylaws passed by municipalities.[151]

The State, like a private owner, will be subject to many Use-based duties as well as to Interest-based duties. The important question is whether the State is subject to peculiar duties because of the nature of the ownership interest it holds or because it is the State. That is, what duties arising out of ownership, if any, are unique to the State?

D. Public Ownership

It is generally accepted that public ownership may include rights of exclusive use and that these rights, as in the case of private ownership, are open-ended. In so far as ownership consists of rights of use and exclusion, there is no theoretical barrier to private and public owners holding the same type of ownership interest. C.B. MacPherson, for instance, defines property as "an enforceable claim" to the use or benefit of something and considers public and private ownership to be the same:

> The rights which the state holds and exercises in respect of [state property], the rights which compromise the state's property in these things are akin to private property rights, for they consist of the right to the use and benefit, and the right to exclude others from the use and benefit, of something.[152]

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[151] *Ibid.* And see *Municipal Government Act*, *supra* note 41, s. 654(2): "A subdivision authority may approve an application for subdivision approval even though the propososed subdivision does not comply with the land use bylaw if, in its opinion, (a) the proposed subdivision would not (i) unduly interfere with the amenities of the neighbourhood, or (ii) materially interfere with the use, enjoyment or value of neighbouring parcels."

[152] MacPherson, *supra* note 68 at 5. Reeve, *supra* note 69 at 35-36, has a similar view and argues that a change in the owner does not necessitate a change in the content of ownership: "[p]ublic ownership works in the same way as private ownership, and there is simply a difference in the agency which holds the property. A share in a company is property; the state has some shares; 'public' is substituted for 'the state', and the shares are said to be publicly owned. If the shareholding is large enough, it is said that the company is publicly owned. This is misleading for three reasons. First, it is the state and not the public which is the owner. Secondly, it is the shares rather than the company which is owned. Thirdly, public ownership is usually advocated as the negation of private ownership, and no such negation here occurs." See also Merrill, *supra* note 122 at 749 who says "[p]ublic property is simply property in which the right to exclude is exercised by a designated governmental entity." See also Ziff, *Principles of Property 4*, *supra* note 97 at 6 who queries whether public ownership is necessarily

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Self-seekingness, however, is said to be peculiar to private ownership. Waldron, focusing on the normative function of ownership within a property institution, argues that public and private ownership, despite any similarities between rights of use and exclusion, are fundamentally different from each other. Private ownership is a particular response to the problem of allocation, "of determining which, among the many competing claims on the resources available for use in [a] society, are to be satisfied, when, by whom and under what conditions."[153] In systems of private property, ownership authorizes private owners to make such determinations by reference to their own interests and legitimates their decisions.[154] Systems of public property respond to the same problem, that of allocation. However, decisions regarding how resources are to be used and for whose benefit are made "by reference to the collective interests of society as a whole."[155] Implicit in this argument is the idea that it is not ownership but the public interest that legitimates particular uses of public property.

However, the fact that the State or some other public owner acts by reference to the public interest does not necessarily alter the content of its ownership interest. That a private owner acts by reference to her own interests, and the State by reference to the public interest, which is (or should be) synonymous with the State's own interest, is not a distinction between the content of private and public ownership

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different from private ownership given that "the overarching obligation of the state to deploy its property in the public interest is not justiciable."

[153] Waldron, *supra* note 1 at 39.
[154] *Ibid.* at 39 and 43.
[155] *Ibid.* at 40.

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unless it deprives the State of the legal right to use ownership as a justification for the use of property.

Harris argues that those with title to public property are not really owners but rather quasi-owners because the powers and privileges arising out of the ownership of public property are derived from borrowed conceptions of private ownership and the social function of the owner:

> [T]he privileged domain . . . afforded to officials falls nowhere along the ownership spectrum since it lacks the crucial feature of legitimate, self-seeking exploitation. Exploitation is governed by conceptions of social function which vary according to the public enterprise in question, but which uniformly do not include the idea that the officials, or any personified complex of them, may, *prima facie*, do what they like with 'their' assets.[156]

This is an important distinction between public and private ownership but is not universally applicable to all public property. Public property, as a general concept, usually refers to ownership by some type of public or governmental body and is usually premised on ownership for the benefit of some notion of "the public." However, actual systems of public property—the implementation of the concept—are capable of variation, and within a system of public property the content of ownership may, but need not, be qualified or modified by reference to the public interest being served. As will be argued below, the content of the State's ownership interest, unlike the ownership interest of other public bodies, is neither derived from nor limited by its social function or any of the interests that it serves.

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[156] Harris, *supra* note 4 at 105.

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Chapter Six: State Ownership

A. Introduction

In this part I will assess the State's ownership interest in public land through an analysis of the *Constitution Act, 1867* to determine the degree to which State ownership differs from private ownership. The nature of the ownership interest vested in the State by the *Constitution Act, 1867*—the Crown's interest—and judicial interpretation of the powers and privileges arising out of State ownership both support the conclusion that, but for the *Charter*, the State's ownership interest in land is the same as a private ownership interest in land. The State has the same rights of exclusion and use as does a private owner and is not restricted from acting in a self-seeking manner despite having a political duty to act in the public interest. Limitations on the use of public land do not arise out of the content of ownership—they are political not legal.

B. The Crown's Interest

Historically, the Crown's ownership interest is as plenary as a private ownership interest. At common law, the Crown had unfettered discretion to use and dispose of its land and the revenues arising from its land as it saw fit.[157] The advent of responsible government, however, subjected this ownership interest to the legislative jurisdiction of elected bodies. In England, Parliament began asserting control over

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[157] See La Forest, *supra* note 21 at 11-14 for a history of Crown ownership of land in Canada. Prior to Confederation the Crown had unfettered discretion to use and dispose of public land in Canada. This discretion was limited under the civil list system whereby the Crown was given revenues in exchange for agreeing to restrictions on its right to dispose of its land and to having the revenues arising from public land be paid into a consolidated revenue fund controlled by the English Parliament. Under the *Constitution Act, 1867,* the Crown permanently surrendered the right to act in a self-seeking manner with respect to its land. See also Babie, *supra* note 18 at 234 and Hogg *Looseleaf*, supra note 75 at 707-708. Babie says prior to responsible government the Crown had the prerogative power to deal with land in the same manner as a private owner. Hogg considers the Crown to still have this power but says it is an ordinary common law power arising out of the Crown's status as a legal person.

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the revenues arising out of public land in 1665 through the civil list system. Under the civil list system, which is still in place in England, the Crown surrenders revenues from Crown lands into a consolidated revenue fund to be appropriated by Parliament for public purposes in exchange for a yearly sum from Parliament. Not long after, in 1702, the English Parliament began imposing statutory restrictions against alienation of public land through the *Crown Lands Act*, which deemed dispositions that did not comply with the Act to be void.[158]

In pre-Confederation Canada, the Crown retained an unfettered right to use revenue from public land until 1837 when the civil list system was extended to colonial lands. Revenues were surrendered first to the consolidated revenue fund of Great Britain, controlled by the British Parliament, and later to the executive branch of the provincial governments, and therefore subject to the control of the legislatures of the colonies, which were composed of legislative assemblies and legislative councils (an upper house). Significantly, the content of the Crown's ownership interest was not modified—the right to exercise the powers and privileges incident to the Crown's ownership was vested in the executive and subjected to legislative control.[159]

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[158] See La Forest, *ibid.*, at 1 to 5; *Halsbury's Laws of England*, vol. 12(1), 4th ed. Re-issue (London: Butterworths, 1988) at para. 70, 205 and 308. Restrictions on the Crown's power to deal with Crown lands are legislative and thus will vary with the will of the legislating body.

[159] La Forest, *ibid.* at 6-20; *Halsbury's Laws of England*, *ibid.* at paras. 70 and 201-209: Prior to the Norman Conquest, Saxon kings held two types of land: hereditary lands to pass on to heirs and personal lands to use and dispose of as seen fit. After the Norman Conquest, it was "established that all Royal Lands were of the same nature at the disposal of the monarch." While the monarch was expected to use Royal Lands for purposes of government as well as personal purposes, there was "no distinction . . . between public and private revenues": para. 203. See also Hogg Student, *supra* note 94 at 243-245: In pre-confederation Canada, there were real conflicts between the legislative assemblies of the colonies and their executive bodies. Executive power was vested in a British-appointed governor and a local executive council appointed by him. The governor and executive council often acted contrary to the wishes of the legislative bodies.

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At Confederation, the *Constitution Act, 1867* apportioned public property between the executive branches of Canada and the provinces and permanently subjected both the Crown's ownership interest and the revenues from public property to legislative control.[160] The *Constitution Act, 1867*, however, did not alter title to public lands. In Canada all public land, that is, land "owned" by either the federal or provincial government, is, and always has been, vested in the Crown.[161] The property right that is actually vested in the State is the right to administer and control the entire beneficial interest of the Crown. As stated by Lord Watson in *St. Catharine*:

> [W]henever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a Province, these expressions merely import that the right to its beneficial use, or its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested the Crown.[162]

Nor did the *Constitution Act, 1867* alter the content of the Crown's ownership interest in that land. Rather, the *Constitution Act, 1867* transferred the administration and control of the Crown's entire beneficial interest in public land in Canada to the executive branch of the State:

> The Confederation Act was enacted with the background of the constitutional development in the older provinces; and in this the control of public land and their

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[160] *Supra* note 14. See sections 108, 109 and 117 for the division of property; sections 91 and 92 for the division of legislative power; and sections 102 and 126 regarding control revenues arising from public land. Section 109 vests ownership of lands, mines, minerals and royalties within a province in that province. Section 117 provides that the provinces own all of their public property not otherwise disposed of by the *Constitution Act, 1867*. Section 108 vests specified public works and properties listed in schedule 3 to the *Constitution Act, 1867* in Canada. Sections 102and 126 provide for the creation of a consolidated revenue fund for Canada and each province into which all duties and revenues arising out of public property are payable and which may be appropriated by Parliament and the legislatures for public purposes.

[161] *St. Catharines Milling & Lumber Co.* v. *R.* (1889), L.R. 14 App. Cas. 46,1888 CarswellNat. 20 at para. 9, online: eCarswell <http://www.ecarswell.com> (P.C.) [hereinafter *St. Catharines* cited to Carswell].

[162] *Ibid.* This case involved a dispute between Canada and Ontario over the right to dispose of timber on public land. The Privy Council held that because the land belonged to Ontario under s. 109 of the *Constitution Act, 1867*, the surrender of an Aboriginal interest burdening the land did not convey the land to Canada but rather relieved Ontario's title of a burden. Accordingly, Ontario was entitled to dispose of the timber.

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> revenues played a major part. There are two aspects of that control, however, and they must be distinguished. The public lands in the Province are vested in the Sovereign in his body politic, in right of the Crown; but the right and power to deal with them by grant, lease or other mode and to dispose of their revenue is, by the prerogative, *as full as if they were held in his personal capacity.*[163]

C. Judicial interpretation of the proprietary provisions of the *Constitution Act, 1867*

That the Crown's ownership interest is historically as plenary as a private ownership interest does not, of course, mean that the State's ownership interest is the same as a private ownership interest. Ownership is a malleable concept, capable of change over time. The fact that one owns, or has title to, a resource is not conclusive as to the type of ownership interest held, particularly where the proprietary rights of states are concerned.[164] For example, in *Yanner* v. *Eaton*, a legislative provision that all fauna are "the property of the Crown" was interpreted to mean not that the Crown had beneficial ownership of the fauna in a manner similar to that of a private proprietor but rather various statutory and regulatory rights in relation to the fauna.[165] The content of the term property was derived from other provisions in the legislation

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[163] *Higbie*, *supra* note 29 at para. 158, emphasis added. See also *Ontario Mining Company* v. *Seybold*, [1903] A.C. 73 at 79, 1902 CarswellOnt 68 at para. 3, online: eCarswell <http://www.ecarswell.com> where Lord Davey notes that the Crown's ownership powers "can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated." The Crown is both head of State and a legal person with the "the power to do anything that other legal persons . . . can do": *Hogg Looseleaf*, *supra* note 75 at 707; La Forest, *supra* note 21 at 143. Its powers, which are necessarily exercised by its servants and agents, are distributed between the legislative, executive and judicial branches of government: Lordon, *supra* note 81at 7, and "[t]he executive may act pursuant to specific constitutional or statutory authority, pursuant to common law or prerogative authority, or in ways that are purely incidental to the Crown's status as a person or a corporation sole": Lordon, *ibid.* at 17.

[164] See Willmore, *supra* note 10 at 5-6. Willmore identifies and discusses three models of state-ownership: a public obligation model, a dualist model and a private model. Under the public obligation model "land is held subject to *defined* collective obligations" (emphasis added). See also Harris, *supra* note 4 at 78-80 who points out that the term ownership may be used to signify a relationship, that of title, to a resource or to the powers and privileges arising out of that relationship. The fact that one has title to a resource is not conclusive as to the type of ownership interest held.

[165] *Supra* note 106.

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and interpreted as giving the Crown nominal ownership over what has previously been *res nullius* so that it could regulate the resource for the public benefit.[166] Similarly in *Re Provincial Fisheries*, the Crown's ownership of non-tidal but navigable waters was interpreted, contrary to the rule under the English common law, as being subject to the public right of fishing because, in large part, to hold otherwise would result in "hardship and inconvenience . . . to the pioneers of settlement", thereby subjecting a particular resource to the public interest.[167] Thus, the State's ownership interest, like any ownership interest, is dependent on ongoing judicial interpretation.

Nevertheless, the proprietary provisions of the *Constitution Act, 1867*, which say that certain property "belongs" to the State and that the State has "property" in certain things, and section 109 in particular, have been interpreted as meaning that the State has all of the powers and privileges arising out of full beneficial ownership of land.[168] This is partly because it is the Crown's ownership interest that is vested in the State[169] and partly because there is nothing in the *Constitution Act, 1867* that derogates from the content of the State's ownership interest. Distinctions are not drawn between public and private ownership when assessing the powers of use and control arising out of ownership. The State owns public land in the "usual" manner and, therefore, enjoys all of the ordinary incidents attached to ownership:

> It is . . . difficult to see in Part VIII of the *British North America Act* any such restriction on the ordinary rights of ownership. Section 109 states that the "lands, mines and minerals and royalties" shall "belong" to the Provinces. Section 117 says that the Provinces shall "retain all their respective Public property". Section

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[166] *Ibid.* at 265-267.
[167] *Re Provincial Fisheries*, *supra* note 60 at para. 23.
[168] *St. Catharines*, *supra* note 161at para. 12; *Higbie*, *supra* note 29 at para. 158; *SCC Brooks-Bidlake*, *supra* note 87 at paras. 4 and 16.
[169] *Higbie*, *ibid.*, emphasis added.

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> 125 says that "no lands or property belonging to" any Province shall be taxed. Nothing in that wording seems to relegate either Canada or a Province to any inferior rank of ownership. The owner of property to whom one applies the words "belong" or "retain" as in these sections usually enjoys the exclusive right to use and to enjoy it, to control it, to handle it and to dispose of it. These attributes of ownership may be seen from the usual definition of the word: Jowitt: Dictionary of English Law; Black's Law Dictionary. No words in Part VIII would seem to limit those rights. [170]

The State holds the exclusive right to fix the conditions upon which public property is granted.[171] It may, *without legislative authority*,[172] include any terms in "leases, licences or other instruments" [173] that a private proprietor could[174], including, prior to the *Charter*, racially discriminatory conditions.[175] The State may, without resort to legislation, exclude trespassers from its land[176] and may grant or deny access to its property as it sees fit and in doing so may —now subject only to the *Charter*—

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[170] *Alberta Federal Tax on Natural Gas*, *supra* note 21at para. 50. See also *Hogg Looseleaf*, *supra* note 75 at 706-707 and La Forest, *supra* note 21at 143. The State is not subject to the same liabilities as a private owner and by virtue of its prerogative powers has some additional powers over its property, but these arise out of the royal prerogative and not ownership.

[171] *Re Oriental Orders in Council Validation Act*, *supra* note 115 at para. 66.

[172] *Robertson*, *supra* note 60 at para. 60: "the provincial governments may, without special legislation and in exercise of their right of property [here fisheries], restrict their use in any manner which may seem expedient just as freely as private owners might do." *Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792, 1967 CarswellNat 258 at para. 16, online: eCarswell <http://www.ecarswell.com>. See also La Forest, *supra,* note 21 at 143 and 167.

[173] Hogg *Looseleaf*, *supra* note 75 at 708. See also La Forest, *ibid.* at 143 and Lordon, *supra* note 81at 96.

[174] Lordon, *ibid.*, characterizes the Crown's power to administer and dispose of public property as a prerogative power that is exercised subject to applicable legislation. Hogg, *ibid.*, characterizes the Crown's power to administer and dispose of public property as an ordinary common law power arising out of the Crown's status as a person: "The federal and provincial governments have full executive powers over their respective public properties. It is neither necessary nor accurate to invoke the royal prerogative to explain the Crown's power over its property. As a legal person, the Crown in right of Canada or the Crown in right of a province has the power to do anything that other legal persons . . . can do. Thus, unless there are legislative or constitutional restrictions applicable to a piece of public property, it may be sold, mortgaged, leased, licensed or managed at the pleasure of the responsible government, and without the necessity of legislation."

[175] *SCC Brooks-Bidlake*, *supra* note 87 at paras. 33-37; *Brooks-Bidlake* v. *Attorney General for British Columbia,* [1923] A.C. 450, [1923], 2 D.L.R. 189 at 192-93 (P.C.) [hereinafter *PC Brooks-Bidlake].*

[176] *Palmer* v. *Alberta (Sustainable Resource Development)*, (2003) 123 A.C.W.S. (3d) 79, 2003 ABQB 348 at para. 13 [hereinafter *Palmer*].

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arbitrarily and unevenly distribute the benefits of public property between citizens.[177] In short, the State and "those duly empowered to act and acting on behalf of the [State]" may, when dealing with public land, "make whatever bargain they may deem proper."[178]

Additionally, other than recent rights arising out of the *Charter*, discussed in chapter seven, the public has no right in law gain to access or to use public land, and unauthorized entry onto State-owned lands constitutes trespass.[179] The public has no right to take fish from provincially owned, non-navigable rivers or timber from provincially owned land.[180] Mandamus does not lie against discretionary, ministerial decisions regarding the use or disposition of public land.[181]

Overall, judicial interpretation of the content of the State's ownership interest has favoured the view that the State's ownership interest is, *prima facie*, the same as a private ownership interest. The State has the same rights of use and exclusion as a private owner and is generally entitled to justify decisions for the use of land on the

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[177] See *R.* v. *Red Line Ltd.*, *supra* note 43 at 289, per Orde J.A. who responded to an argument that the terms on which access to public property was granted unfairly benefited one company at the expense of another as follows: "It is argued that the by-law is . . . discriminatory. But why may it not be discriminatory? . . . If the Federal District Commission sees fit, with government approval, to exclude some persons or their vehicles from their property, that is from the property of the Dominion government, and to admit others, who is to prevent it? May the government, through its own administrative body, not do what it pleases, subject to the control of the parliament of Canada, with its own? I can see no more reason why the Commission, with government approval, may not exclude whom it pleases from its grounds than why the government of Canada may not exclude whom it pleases or what vehicle it pleases from the grounds surrounding the Parliament Buildings at Ottawa."

[178] *SCC Brooks-Bidlake* , *supra* note 87 at para. 4. And see paras. 5 and 16, per Idington J.

[179] *Palmer*, *supra* note 176 at para. 13; *Forrest*, *supra* note 9 at para. 12. See also *Southwark London, supra* note 145: necessity (caused by homelessness) is no defence to trespass even where the realty (unoccupied housing) in question is owned by a public authority.

[180] *Robertson*, *supra* note 60 at para 60. Here the court distinguishes between private, non-navigable fisheries owned by the province and public, navigable rivers in which the public has a right to fish.

[181] *Cook* v. *Alberta (Minister of Environmental Protection)* (1999), 241 A.R. 25, [1999] A.J. No. 170, online: QL (AJ) (Q.B.) [hereinafter *Cook* cited to QL].

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basis of ownership. Further, the public is not generally considered to have justiciable rights in relation to public land.

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Chapter Seven: Limitations on State Ownership

A. Introduction

In this chapter, I will assess limitations on the State's ownership interest and its power to act in a self-seeking manner by exploring two potential limitations on the content of the State's ownership interest. First, I will assess how the State's duty to act in the public interest affects the content of its ownership interest. Second, I will provide an analysis of how the *Charter* affects the State's power to deal with public land and how this affects the content of the State's ownership interest in public land.

B. The Public Interest

It is commonly understood that the powers and privileges arising out of State ownership are to be exercised "in the public interest", something that is frequently mentioned but never defined in case law:

> [T]he Natural Resources Transfer Agreement . . . [placed] ownership of all the natural resources formerly owned by the Crown in right of Canada in the Crown in right of Alberta. The right of ownership carried with it, as a necessary incident, the right in the *public interest* to possess, enjoy, sell or otherwise dispose of such resources, and revenues therefrom, subject only to such laws as the Parliament of Canada might validly enact in pursuance of its legislative authority.[182]

This duty to act in the public interest has been equated with disentitling the State from using property in a self-seeking manner and has been the basis for distinctions between public and private property.[183] Babie, for instance, in an analysis of Australian public land, argues that state ownership in Australia is fundamentally different from private ownership because, among other things, the Australian state

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[182] *Reference re: Proposed Federal Tax on Exported Natural Gas* (1982) 37 A.R. 541, [1982] 1 S.C.R. 1004 at 1056 [*emphasis added*]. And see *Forrest*, *supra* note 9 at para. 12. "While property [Crown land] owned by the Crown is only to be administered by the Crown for the benefit of its citizens, and not for its own benefit, the Crown has the right to limit access."

[183] Babie, *supra* note 18 at 74-77.

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has a political duty to act in the public interest, and thus the state, unlike a private owner "must act in accordance with the common or social good, or at least have those objectives in mind when acting."[184]

Yet, Canadian case law suggests that the State's ownership interest is the same as a private ownership interest *and* that the State has a duty to act in the public interest, something that seems inherently contradictory because private owners have no duty to exercise their ownership powers in the public interest and are perfectly entitled to use their property in a manner that seems morally reprehensible to their neighbours and fellow citizens. The essence of self-seekingness is that ownership itself justifies and legitimates an owner's use or misuse of his or her property rather than the motivations of the owner or the end result of that particular use.

This apparent contradiction may be explained by the nature of the State's duty to act in the public interest. The State's duty to act in the public interest is a political duty. Decisions regarding the use and disposal of public land are matters for ministerial discretion and administration, subject only to limitations imposed by Parliament or the provincial legislatures.[185] While the courts may enforce limitations on the use of public land imposed by legislation, the courts may not enforce the political obligation either by defining the public interest[186] or by requiring a particular

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[184] *Ibid.* at 74-75.

[185] See *Higbie* supra note 29 at para. 64-69 regarding ministerial discretion absent statutory authority; See *Cook*, *supra* note 181 at para. 62 regarding ministerial discretion exercised pursuant to statute: an application to review the Minister's refusal to lease public land to the applicants was unsuccessful because absent abuse of discretion or bad faith the Court cannot interfere with the Minister's decision, and in any event mandamus is not available to "force the Minister to exercise his discretion in a particular way." *Cook* was varied by (2001) 293 A.R. 237, [2001] A.J. No. 1469(C.A.) at para. 50-52, requiring the Minister, as a matter of procedural fairness, to give reasons, but this point was affirmed at paras. 34-35.

[186] See *Re Oriental Orders in Council Validation Act*, *supra* note 115 at para. 36 where Idington J. says "[t]he mode of administration of any of the properties in question seems as much subject to the will of

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use of public property.[187] As a political obligation, the duty to act in the public interest means that ministers and agents of the State are responsible to Parliament and the legislatures for their use of public land.[188] The courts may not interfere with this discretion or with Parliament's or a provincial legislature's supervision of this discretion[189] and may quash ministerial decisions only if they are made in bad faith or constitute an abuse of discretion.[190]

Further, the courts consider the lack of limitations on State ownership as being consistent with the State's obligation to exercise their proprietary powers in the public interest. Parliament and the provincial legislatures are the guardians of the public interest, and it is presumed that their decisions for the use of public land will be in the public interest.[191] The effectiveness of a political duty in actually limiting misuse of public land will vary with the State's efforts to fulfill it. Steven Kennet, for example, argues that statutory provisions for the management and administration of public land should, but do not, provide a clear normative basis for decision making. He says a

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the Legislature as that of any private owner to the will of the owner thereof" and at paras.38-39 where he says with respect to the argument that such legislation is against public policy, the legislature controls public policy so far as it is supported by public opinion. And see *W.A.W. Holdings*, *supra* note 40 at paras. 28 and 34 where the court says that a municipal council's decision to not open a road allowance because it was in the best interests of the inhabitants of Sundance Beach but not of the public generally was in the public interest because "where the council . . . is acting in what they perceive to be the best interests of ratepayers and inhabitants, they are acting in the public interest."

[187] *Cook, supra* note 181 at para. 62. Nor does the State have a duty to ensure a minimum standard of living, something which necessarily involves access to a certain amount of material resources: *Gosselin* v. *Québec* 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 81, per McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ. But see L'heureux-Dube at para. 99 and 141 and Arbour J.J. at para. 308, 327, 331, and 358 dissenting.

[188] *Lordon*, supra note 81 at 13-14 and 35.

[189] *Canada (Attorney General)* v. *Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, [1989] S.C.J. No. 80 at paras. 59 and 68-70, online: QL (SCJ); *Shaw* v. *R.*, [1980] 2 F.C. 608 at para. 28, 1980 CarswellNat 63, online: eCarswell <http://www.ecarswell.com> (Fed. T.D.)

[190] *Cook*, supra note 181.

[191] *Forrest, supra* note 9 at para. 14. It is "in the public interest to see that the regulatory provisions established by the Ministry of the Crown to administer the recreational lands in their care should be obeyed."; *Smylie* v. *The Queen*, *supra* note 82; *Committee for the Commonwealth*, *supra* note 70 at para. 16.

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clear legislative scheme for the use of public land is necessary to, among other things, limit the discretionary power of public land managers and increase accountability to the public:

> public land management is particularly difficult to police through political and electoral channels because of the incremental nature of many decisions, the intense competition for space on crowded political agendas, and strong incentives for effective back-room lobbying by concentrated interests.[192]

The obligation to act in the public interest, then, is a political restraint against self-seekingness.[193] What this means is that limitations on the use of public land arise out of the Court's supervision of the State's power of governance—not out of the content of the State's ownership interest. Fundamentally, it is a distinction between *dominium* and *imperium*. As such, the idea that the State has a duty to act in the public interest fosters legitimate expectations that the State will in fact do so and thus should affect how public land is used. Nevertheless, this duty is external to the content of ownership. It is not a source of or a limitation on rights of use or exclusion. It does not prevent the State from making particular uses of public land, and it does not impose justiciable obligations on the State for the use of public land. From a

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[192] "New Directions for Public Land Law" (1998) 8 J.E.L.P. 1 at 43. See also Steven A. Kennett and Monique M. Ross, "In Search of Public Land Law in Alberta" (1998) 8 J.E.L.P. 131 at 146: ministerial and administrative discretion to dispose of Alberta's public lands and resources is largely unfettered expect by some protected areas legislation.
See also Epstein, R.A., "In and out of Public Solution: The Hidden Perils of Property Transfer" (July 2001) U Chicago Law & Economics, Olin Working Paper No. 129, available at SSRN:http://ssrn.com/abstract+279178. Epstein considers the situation in the United States to be much the same: "public property should be treated as property held in common whereby the people of the locality, state, or nation, have the collective right to exclude the outsider, but share among themselves the rights in property as *res communi*." Under such an approach, a minimum condition would be "a rejection of the idea that individual members of the public have no access or use rights to public property at all": p. 21. "Yet judicial thinking takes just the opposite view, chiefly by washing its hands of any supervision over public property", which means that the "state can allow the removal of minerals or oil and gas from private lands—through open bids or sweetheart deals. It can dispose of certain lands that it does not need to ordinary citizens—at public auction or at bargain prices to the well-connected": p. 25.
[193] Babie, *supra* note 18 at 72-77.

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legal perspective, State ownership justifies and legitimates decisions for the use of public land.

This distinction may be illustrated by reference to the public trust doctrine in the United States. In the United States the individual states hold public trust resources, such as navigable waters and the lands beneath them, in trust for the public. American courts have interpreted this trust as imposing justiciable limitations on dealings with lands impressed with such a trust. The states' dealings with such resources must "preserve and assure the public's ability to fully use and enjoy public trust resources for uses that are consistent with the purpose of the trust" and may only "convey private property interests in public trust resources if the public trust is not substantially impaired".[194] These limitations actually prevent the owner from making particular uses of certain lands, and do derogate from the ownership interest in those lands. There are no such limitations on the State's use of public land in Canada.[195] Thus, if the State were to make a patently unreasonable use of public land—perhaps to burn the Parliament building for no discernable reason whatsoever—one would not look to the content of the State's ownership interest to assess the validity of that decision. The remedy, if there is one, would lie elsewhere.

[194] Maguire, *supra* note 60 at 4; Butler, *supra* note 120 at 331-33. Note, there is some desire to expand the public trust doctrine in Canada: S. Kidd, "Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada (2006) 16 J. Env. L. & Prac. 187; A. Gage, "Public Rights and the Lost Principle of Statutory Interpretation" (2005) 15 J. Env. L. & Prac. 107.
[195] See for example, *Green*, *supra* note 70.

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C. The *Charter*

i. Overview

The *Canadian Charter of Rights and Freedoms*[196] addresses neither public land nor State ownership, and thus does not explicitly alter the content of State ownership. The purpose of the *Charter* is not to regulate the use of public land or to provide a normative basis for the use of public land, but rather, as set out in section 1, to guarantee "the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[197]

Nevertheless, the *Charter* alters the content of the State's ownership interest in public land by limiting the State's right of exclusion, one of the most fundamental rights held by an owner, and the right otherwise held by the State to use public land (and other public property) in a self-seeking manner. As set out above, self-seekingness involves an owner's power to make particular uses of her property without justifying that use and insulates that use and the reasons for that use from legal review. Ownership itself is the justification for any particular use. The *Charter* abolishes the State's power to use ownership as a justification for its use of public land if that use violates a right or freedom guaranteed by the *Charter*. In such a case, the particular use of public property must be justified under section 1, which involves balancing the State's interest in using its property in a meritorious manner against the

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[196] *Supra* note 15.
[197] *Ibid.*, s 1.

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infringed right.[198] Such restrictions, being embedded in the *Charter*, apply only to State ownership and not private ownership.

ii. *Charter* Rights

The *Charter* guarantees fundamental freedoms[199], including freedom of expression and peaceful assembly, democratic rights[200], mobility rights,[201] legal rights,[202] and equality rights, including the right to equal treatment "before and under the law" and "equal benefit of the law without discrimination . . . based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[203]

These rights are guaranteed against infringement by all types of government action. Section 32 of the *Charter* provides that the *Charter* applies to "the Parliament and government of Canada" and "to the legislatures and government of each province."[204] This provision has been interpreted as requiring the "legislative,

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[198] Note, Parliament or a provincial legislature may legislate for the State's ownership interest to be exercised in a manner contrary to the *Charter* so far as authorized by section 33. Section 33(1) of the *Charter* authorizes "Parliament or the legislature of a province [to] expressly declare in an Act . . . that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15".

[199] *Charter*, *supra* note 15, s 2: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association."

[200] *Ibid.*, s 3: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

[201] *Ibid.*, s. 6(1): "Every citizen of Canada has the right to enter, remain in and leave Canada."

[202] *Ibid.*, ss, 7-14.

[203] *Ibid.*, s. 15(1): "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability", and s. 15(2): "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[204] *Ibid.*, s. 32(1): "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislatures and government of each province in respect of all matters within the authority of the legislature of each province."

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executive and administrative branches of government,"[205] those exercising statutory authority or acting pursuant to statutory authority[206], private actors acting "on behalf of the government or in furtherance of some specific governmental policy or program"[207] and those "exercising the Crown's legal right to manage its property"[208] to comply with the *Charter.*

iii. Impact on Public Land

The State's duty to comply with the *Charter* limits the manner in which the State may use public land to uses that are consistent with the *Charter,* subject to sections 1 and 33. Whether a particular use of public land violates the rights guaranteed by the *Charter* will depend on an analysis of the purpose and effect of the government action in question under the established tests for infringement of that right,[209] which means that actual limitations on the use of public land will vary according the judicial interpretation of particular sections of the *Charter.*

Pre-*Charter* cases establishing that the State may attach racially discriminatory conditions to licenses for the use of public land[210] will obviously no

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[205] *R.W.D.S.U.* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, S.C.J. No. 75 at para. 34, online: QL (SCJ). See also *Operation Dismantle Inc.* v. *The Queen*, [1985] 1 S.C.R. 441, S.C.J. No. 22 at paras. 28, 50 and 64, online: QL (SCJ): While the court cannot "second guess" discretionary executive decisions regarding national defence, it must ensure those decisions do not violate the *Charter* rights of individuals. This should apply equally to decisions regarding the use of property. See also P.W. Noonan, *The Crown and Constitutional Law in Canada* (Calgary: Snipnoon Publications, 1998) at 82 for a discussion of *Operation Dismantle* and the applicability of the *Charter* to all executive action.

[206] *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, S.C.J. No. 45 at para. 87, online: QL (SCJ), per Lamer J. dissenting in part but not on this point.

[207] *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, S.C.J. No. 86, online: QL (SCJ) at para. 42.

[208] *Committee for the Commonwealth, supra* note 70 at para. 45, per La Forest J and at para. 101 per L-Heureux-Dube.

[209] See *Watson* v. *Burnaby (City)* (1994), 22 M.P.L.R. (2d) 136, [1994] B.C.J. No. 1413, online: QL (BCJ) (S.C.) considering whether allowing the construction of a Masonic lodge on public property violated the section 2(a) guarantee of freedom of religion (paras. 20 to 26) or the section 15 equality rights (paras. 27 to 39); *Committee for the Commonwealth, ibid.*

[210] *PC Brooks-Bidlake, supra* note 175.

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longer apply[211] subject to sections 1[212], 15(2)[213] and 33.[214] However, cases establishing that the State may unevenly or arbitrarily distribute the benefits or public land[215] should not be affected, provided a protected right is not infringed. Additionally, private actors should be able to use public land for private purposes in a manner that would violate the *Charter* if the action were undertaken by the government, provided the particular use of the property does not attract the application of the *Charter*, as it would, for example, if the property were being used to further a government purpose.

The *Charter* also limits the State's right to exclude the public from its property if the exclusion is for the purpose of or has the effect of violating a *Charter* right.[216] In *Committee for the Commonwealth* the Supreme Court unanimously held that a prohibition against distributing political pamphlets at a government-owned airport violated section 2(b) of the *Charter*.[217] Lamer C.J.C., McLachlin J. and L-Heureux-Dube J. all set out different approaches for determining whether restrictions on access to government property for expressive purposes violate section 2(b) but

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[211] *Charter*, *supra* note 15, s. 15(1): s. 15(1): "15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[212] *Ibid.*, s. 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[213] *Ibid.*, s. 15(2): "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[214] *Ibid.*, s. 33: "33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."

[215] *R* v. *Red Line*, *supra* note 43 at 289.

[216] *Committee for the Commonwealth*, *supra* note 70; *Montreal (City)* v. *2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, S.C.J. No. 63 at para. 74, online: QL (SCJ) [hereinafter *Montreal City* cited to QL].

[217] *Committee for the Commonwealth*, *ibid.*

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were unanimous in the conclusion that the State must permit some access to its property for expressive purposes and that *ownership itself is incapable justifying exclusion* from public property where expressive rights are implicated.

Lamer C.J.C. held that the State may not unjustifiably limit expression on its property or access to its property for expressive purposes if the intended expression is compatible with the State's use of its property.[218] McLachlin J. held that non-content based restrictions on expression on government property violate section 2(b) if the expression advances the values underlying freedom of expression and must be justified under section 1. However, she distinguished between public forums, which are already open to the public and associated with advancing the values underlying freedom of expression, and private forums, which are not open to the public and where expression will not usually advance the values underlying freedom of expression.[219] L'Heureux-Dube J. held that any restrictions on expression on government property violate section 2(b) and must be justified under section 1.[220] Like McLachlin J., she distinguished between public and private arenas, and restrictions on expression in public arenas will be more difficult to justify. "The traditional openness of . . . property for expressive activity", "[w]hether the public is ordinarily admitted to the property as of right" and "[t]he compatibility of the property's purpose with expressive activities" are factors in determining whether a place is a public arena.[221]

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[218] *Ibid* at. para. 17.
[219] *Ibid* at paras. 242 and 248-51.
[220] *Ibid* at para. 110. Note, L'Heureux-Dube's approach was overruled in *Montreal City*, *supra* note 216 at para. 71: "the application of s. 2(b) is not attracted by the mere fact of government ownership."
[221] *Committee for the Commonwealth*, *ibid* at paras. 135-36 and 147-48.

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In *Montreal City*[222] the Court clarified that the nature of the place in question is a significant factor in determining whether the State must permit public access for expressive purposes. Expression is protected in places "where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve."[223] The primary factors in determining whether one would expect constitutional protection for free expression are the historical and actual function of the place. Places that are traditionally used for expressive purpose are *prima facie* open to the public for expressive purposes. However, if the actual function of the place requires "privacy and limited access", section 2(b) is not triggered.[224]

Read together, these judgments establish that the State must permit access to public property that is traditionally used by the public for expressive purposes where the expression is compatible with the State's use of its property and where the expression advances the values underlying the right to freedom of expression, unless limitations are justified under section 1.[225]

iv. Impact on the Nature of State Ownership

Committee for the Commonwealth alters the content of the State's ownership interest. La Forest J., while agreeing that prohibitions against distributing political

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[222] *Supra* note 216.
[223] *Ibid.* at para. 74. The purpose of section 2(b) is to protect expression for the purpose of democratic discourse, truth finding and self-fulfilment.
[224] *Ibid.* at 75-76.
[225] In "Out of Place: Comment on *Committee for the Commonwealth of Canada* v. *Canada*" (1993) 38 McGill L.J. 204 at 208 [hereinafter "Out of Place"] Richard Moon notes that all three judgments in *Committee for the Commonwealth* "give either complete or partial priority to the state's use of its property over communicative access" and "are inclined to see a judicially defined right of access as a special exception to the exclusive control of the property owner." *Montreal City*, *supra* note 216 partially confirms this view by endorsing the more restrictive approaches set out in *Committee for the Commonwealth*, though it also confirms that some types of property are *prima facie* open to the public.

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pamphlets at a government-owned airport violated section 2(b), disagreed with the Court's analysis of ownership, saying "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*."[226] Justice La Forest's point underscores the idea that the *Charter* does not necessitate a modification to the content of State ownership. The *Charter* could be interpreted as limiting the State's use of its property in the same manner as human rights codes limit a private owner's use of her property[227] in which case the *Charter* is akin to a property-independent prohibition or a Use-based restriction on self-seekingness as opposed to a limitation on the content of ownership.[228] Such an interpretation would likely not require the State to permit access to its property but would prevent it from using and disposing of its property in a manner that violates the *Charter* and from imposing restrictions on expression on its property if the public was otherwise entitled to access the property. In other words, the State could avoid the *Charter* by changing the use of public lands to one that does not implicate a *Charter* right.

Justice La Forest's interpretation of section 2(b) is supported by earlier jurisprudence. Prior to the *Charter*, the executive branch of the State was entitled, as an owner, to use public property as it saw fit, subject to the will of the legislatures and

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[226] *Committee for the Commonwealth*, *supra* note 70 at para. 45.

[227] See, for example, the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, which prohibits owners, as well as non-owners, from discriminating on the basis of "race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of [a] person or class of persons" in the provision of "any goods, services, accommodation or facilities that are customarily available to the public": s. 4(1)(b) or in the imposition of terms and conditions in rental agreements: s. 5. All provinces have similar legislation.

[228] See Harris, *supra* note 4 at 32-33 for a discussion of property-independent prohibitions that limit private owners' use of their property. Property-independent prohibitions are rules against conduct and "merely exhibit the obvious point that human relations are governed by institutions other than property." And see chapter 5 (c)(iii) for a discussion of use-based restrictions on self-seekingness.

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public opinion, and could justify particular uses of public property by reference to nothing more than ownership. Thus one finds comments sprinkled throughout case law to the effect that the State may use its property, land in particular, as it sees fit because—and for no other reason—it owns the property in question: provincial governments may restrict access to fisheries "in any manner which may seem expedient just as freely as private owners might do"[229] and may "make whatever bargain . . . [deemed] proper" for the use of public property, including bargains that exclude particular classes of persons—just as a private owner may do so.[230] The federal government may "do what it pleases . . . with its own" and deny and permit access to its property in an explicitly discriminatory fashion.[231]

Earlier *Charter* jurisprudence also denied that section 2(b) provided rights of access to public property. In *New Brunswick Broadcasting Co.* v. *Canadian Radio-television and Telecommunications Commission*, the Federal Court of Appeal said that section 2(b) does not give any right to use or access radio frequencies, which are public property, because freedom of expression "is not a freedom to use someone else's property."[232]

Alternatively, rights to access public property for expressive purposes could be characterized as limited public rights that arise not out of the State's ownership but out of the nature of the property itself. As suggested by Carol Rose, property that is peculiarly suited to fostering political speech could be viewed as a new kind of public trust property: "these properties are needed for the public's political communication,

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[229] *Robertson*, *supra* note 60 at para. 60.
[230] *SCC Brooks-Bidlake*, *supra* note 87 at paras. 4-5 and 16-17, per Idington J.
[231] *R* v. *Red Line*, *supra* note 43 at 289.
[232] *New Brunswick Broadcasting Co.* v. *Canadian Radio-television and Telecommunications Commission*, (1984), 55 N.R. 143, [1984] 2 F.C. 410 at para. 26 (C.A.).

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and thus even governments hold them only in trust and with only limited abilities to divest the public of its trust rights."[233] This characterization would recognize the State's ownership interest and broaden the public's right to access certain types of property for political speech. Property that is particularly suited to political expression, whether publicly or privately owned, would be subject to the public's rights of expression.

Nevertheless, the majority's approach to public property in *Committee for the Commonwealth* has prevailed.[234] This approach views public property as being fundamentally different from private property and significantly alters the content of State ownership:

> The very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns. The *"quasi-fiduciary" nature of the government's right of ownership* was indeed clearly set out by the U.S. Supreme Court in *Hague* v. *Committee for Industrial Organization*, *supra*, at pp. 515-16:
>
> > "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."
> > . . .
>
> [A]s a consequence of its *special nature*, the government's right of ownership cannot of itself authorize an infringement of the freedom guaranteed by s. 2(b) of the *Charter*.[235]

This approach alters the content of State ownership but only where the *Charter* is engaged. Prior to the *Charter*, the State owned and used public property

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[233] Rose, "Comedy of the Commons", *supra* note 60 at 148.

[234] *Ramsden* v. *Peterborough (City)*, [1993], 2 S.C.R. 1084, S.C.J. No. 87 at para. 28, online: QL (SCJ) [hereinafter *Ramsden* cited to S.C.J.].

[235] *Committee for the Commonwealth*, *supra* note 70 at paras. 14-15 per Lamer C.J.C. See also L-Heurdeux-dube J. at para. 119. The Court does not refer to or distinguish *Dupond, supra* note 70 where the Supreme Court held "[t]he right to hold public meetings on a highway or in a park is unknown to English law. Far from being the object of a right, the holding of a public meeting on a street or in a park may constitute a trespass against the urban authority in whom the ownership of the street is vested even though no one is obstructed and no injury is done; it may also amount to a nuisance."

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for "the citizens' benefit and use" but this was not interpreted as requiring the State to permit access to its property and did not provide citizens with justiciable claims in relation to public property. The State was entitled, as an owner, to use public property as it saw fit, and could justify particular uses of public property by reference to nothing more than ownership. *Committee for the Commonwealth*, however, and later jurisprudence limits the State's power to exclude others from its property and cuts into the content of the State's ownership interest. The State is not merely prevented from acting in a particular way—ownership no longer authorizes exclusion.

Interpreting section 2(b) as requiring the State to permit access to its property where a denial of access infringes the right to freedom of expression means that the State must justify some uses of public property under section 1 of the *Charter*. Under section 1, the rights and freedoms guaranteed by the *Charter* are subject to limits that are prescribed by law and that can be demonstrably justified in a free and democratic society. As established in *R.* v. *Oakes,* limitations on the rights and freedoms guaranteed by the *Charter* must be prescribed by law; the objective sought to be achieved "must be 'of sufficient importance to warrant overriding a constitutionally protected right"; and the means chosen to achieve that objective must be reasonable. To be reasonable, a limit must "rationally connected to the objective" sought to be achieved, and must impair the right or freedom in question "as little as possible", and the effects arising out of the limitation and the objective sought to be achieved must be proportional.[236] Ownership itself no longer justifies all uses of public land.

[236] *R. v. Oakes*, [1986] 1 S.C.R. 103, (1986), 65 N.R. 87 (S.C.C.) at paras. 69-70.

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The degree to which the use of public land will be affected by this change in the State's ownership interest remains to be seen.[237] The *Charter* is aimed at guaranteeing fundamental rights and freedoms and does not directly provide a normative basis for the use of public property. Generally, the State will still determine how to use public land and, to a large degree, who will benefit from and be given rights in relation to public land, provided the particular use does not violate the rights guaranteed by the *Charter*. These limitations should not usually impose a significant burden on the State because the State already has a political obligation to use and manage public land for the benefit of the public. That the State may not discriminate on the basis of race, sex, colour or similar grounds when determining how to use public land or distribute the benefits arising out of public land may be viewed as providing some minimal content to the idea of the public interest.

Rights of access to public property for expressive purposes impose greater obligations on the State. While the State is still entitled to determine how to use its property, the State (and other public owners) must permit access to certain types of public property for expressive purposes where the expression is compatible with the

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[237] In *Gosselin* c. *Québec*, *supra* note 187 the Supreme Court rejected the argument that section 7 of the *Charter* places a positive obligation on the State to ensure a minimum standard of living (per McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ. at para. 76-81; But L'heureux-Dube at para. 99 and Arbour J.J. at para. 308 provided a strong dissent, arguing that s. 7 of the Charter imposes a positive obligation on the State to protect life, liberty and security of the person (327). While "[q]uestions of resource allocation typically involve delicate matters of policy" (331) . . . "a minimum level of welfare is so closely connected to issues related to one's basic health (or security of the person), and potentially even to one's survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it" (358). And see R. Moon, "Out of Place", *supra* note 225 where *Committee for the Commonwealth* is severely criticized for balancing the right to access property under section 2(b) and unnecessarily distinguishing between public and private forums. Moon notes that all "three judgments give either complete or partial priority to the state's use of its property over communicative access" and "are inclined to see a judicially defined right of access as a special exception to the exclusive control of the property owner." Such an approach gives priority to the State's and other public owner's use of their property and where the compatibility test is used may avoid balancing competing interests for the use of the property in question at all.

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State's use of the property and where the expression advances the values underlying the right to freedom of expression, unless limitations are justified under section 1.

To date most jurisprudence has focused on municipally owned property. The courts have held that municipalities may not ban all postering on their property[238] and must justify prohibitions against political posters on utility poles[239]; that naturalized gardening on a city-owned road allowance is protected under section 2(b)[240]; that political protesters may affix stickers to public property[241]; and that city by-laws prohibiting all newspaper vending boxes on city property may violate section 2(b).[242] Additionally, peaceful picketing[243] is a protected form of expression in both labour[244] and non-labour[245]contexts, so picketers should be entitled to picket on public property, subject to reasonable limitations and prohibitions.[246]

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[238] *Ramsden*, *supra* note 234 at para. 46.
[239] *Orchard* v. *Edmonton (City)* (1990), 110 A.R. 328, [1990] A.J. No. 940 at para. 31(Q.B.) (*sub nom Edmonton (City)* v. *Forget*).
[240] *Counter* v. *Toronto (City)* (2002), 33 M.P.L.R. (3d) 109, [2002] O.J. No. 4112 at para. 30 (S.C.), aff'd (2003), 39 M.P.L.R. (3d) 308, [2003] O.J. No. 1940 (C.A.).
[241] *R* v. *Kealey*, (1996), 38 M.P.L.R. (2d) 196, [1996] Q.J. No. 559 at para. 14, online: QL (QJ) (C.A.) [hereinafter *Kealey*].
[242] *Re Canadian Newspaper Co. Ltd.* v. *Director of Public Roads & Traffic Services of the City of Quebec et al*, [1987] R.J.Q. 1078, online: QL (QJ), (1986) 36 D.L.R. (4th) 641 at 661-62. This decision has not been overruled but has generally not been followed. See, for example, *Canadian Newspaper Co.* v. *Victoria (City)*, 1987 CarswellBC 394, [1988] 2 W.W.R. 221 (S.C. Chambers), aff'd [1990] 2 W.W.R. 1, 1989 CarswellBC 200 (C.A.) [hereinafter *Canadian Newspaper* v. *Victoria*].
[243] "The term "picketing" attaches to a wide range of diverse activities" and has both a physical and an expressive component but "however defined, always involves expressive action" and "engages . . . freedom of expression": *Pepsi-Cola Canada Beverages (West) Ltd.* v. *R.W.D.S.U., Local 558*, [2002] 1 S.C.R. 156 at paras. 26 and 32, 2002 CarswellSask 22, online: eCarswell <http://www.ecarswell.com>.
[244] *K Mart Canada Ltd.* v. *U.F.C.W., Local 1518*, [1999] 2 S.C.R. 1083 at para. 40, 1999 CarswellBC 1909, online: eCarswell <http://www.ecarswell.com>.
[245] *Halifax Antiques Ltd.* v. *Hildebrand* (1985), 22 D.L.R. (4th) 289, 1985 CarswellNS 329 at para. 27, online: eCarswell <http://www.ecarswell.com> (S.C.).
[246] Picketing is highly regulated in the labour relations context, and any assessment of when picketing will be permitted must consider labour statutes and case law.

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These rights of access are essential for meaningful freedom of expression to exist.[247] However, the State and other public owners must now balance the interest of the public as a whole against individual and corporate rights that are not always consistent with the public interest. The State administers its property "for the benefit of the citizens as a whole . . . who have an interest in seeing that the properties are administered and operated in a manner consistent with their intended purpose."[248] Rights to access and use public property, which are not limited to individuals, have been characterized as "a limited form of expropriation"[249] of public property by private actors. Additionally, they create regulatory and clean-up expenses that must come out of public budgets.[250]

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[247] *Committee for the Commonwealth, supra* note 70 at para. 127; R. Moon, "Access to Public and Private Property under Freedom of Expression" (1988) 20 Ottawa L. Rev. 339 [hereinafter "Access to Public and Private Property"]. Moon argues that freedom of expression requires control over certain types of personal property as well as access to public and private property; "Out of Place", *supra* note 225 at 209: Moon argues that the established model for adjudicating claims of access, which "focuses on a particular state act that restricts expression rather than on the larger system of property distribution and use" fails to assess the overall space for expression and communication.

[248] *Committee for the Commonwealth, supra* note 70 at para. 16.

[249] See *Canadian Newspaper* v. *Victoria, supra* note 242 at para. 34 where the Court held that the City's refusal to allow newspaper vending machines on its streets did not infringe section 2(b) because it was not "a prohibition against the distribution of newspapers" but against "placing objects on the streets" in order to preserve "the unique aesthetic appearance of the City" and its tourist appeal. In refusing the appeal, the Court of Appeal stated that compelling the City to "permit vending boxes to be placed on city property denies it the opportunity to control the property of all its citizens and works a limited form of expropriation": *Canadian Newspaper Co.* v. *Victoria (City)*, [1990] 2 W.W.R. 1, 1989 CarswellBC 200 at para. 43, online: eCarswell <http://www.ecarswell.com> (C.A.)

[250] The cost of permitting access to public property for expressive purposes appears to have fallen primarily on municipalities because it is usually municipal property to which access is sought. For example, municipalities may not prohibit all postering on public property but may limit postering to specific areas and regulate the size of posters, how posters are to be affixed to public property and for how long posters may remain on public property: *Ramsden, supra* note 234 at para. 45-46, which means that municipalities will bear the cost of providing venues for expression and for administering and enforcing regulatory schemes associated with such venues: B.I. Colangelo, "Keep off the Grass: By-law Prohibits Federal Election Signs on Public Property—Case Comment: *Beaumier* v. *Brampton (City)* (Oct. 1998) 46 M.P.L.R. (2d) 37 at 39, including the clean-up costs of expressive activity: See *Kealey, supra* note 241 where a conviction for damaging public property by placing political stickers on guard rails that belonged to the City of Hull was quashed because affixing the stickers to the property was a form of political expression and there was an "absence of any real abuse or damage to the public property", with clean-up costs of $163.96.

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Chapter Eight: Conclusion

Private and public ownership are both particular responses to the problem of allocation, of distributing resources and rights in relation to resources. The primary distinction between these types of ownership is often said to be that private ownership authorizes self-seekingness while public ownership imposes a duty to act for the public benefit, however it happens to be defined. Case law supports the idea that State ownership is premised on ownership for some notion of the "public benefit", and decisions respecting the use and disposition of public land are to be made in the public interest. Thus the public interest is one of the fundamental interests underlying State ownership, and State ownership may only be justified to the extent that it serves the public interest.

However, the fact that the public interest is the primary interest underlying State ownership does not necessitate a change to the content of ownership. That is, it does not require that the State hold different rights in relation to resources than private persons. Private ownership confers open-ended and exclusive rights of use and control over resources and the right to exercise the powers and privileges arising out of ownership in a self-seeking manner. Public ownership may confer the exact same rights, and, indeed, until recent changes to the content of State ownership under the *Charter*, State ownership did because the proprietary provisions of the *Constitution Act, 1867* have been interpreted as meaning that State ownership *is* generally the same as private ownership. That a private owner acts by reference to her own interests and the State by reference to the public interest, which is (or should be) synonymous with the State's own interest, is not a distinction between the content

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of private and State ownership but rather a distinction between the interests served by systems of private and public property.

Interpreting the *Charter* as providing rights in relation to public property has effected significant changes in the content of the State's ownership interest by limiting the State's right to exclude persons from its property and by limiting the State's right to use ownership as a justification for decisions respecting public property. *Committee for the Commonwealth* and later *Charter* jurisprudence proceed on the presumption that public ownership is fundamentally different than private ownership—that it is quasi-fiduciary. Yet, prior to *Committee for the Commonwealth*, limitations on the State's use of public land were political, and the public interest was defined through the democratic process. Thus, the *Charter* has changed the content of the State's ownership interest.

The courts should acknowledge that the *Charter* has changed the content of the State's ownership interest. If State ownership is to be interpreted as quasi-fiduciary and if the powers and privileges arising out of State ownership are to be limited by *Charter* values, a better understanding of this type of ownership is needed. It is one thing to say that the State must comply with the *Charter*; it is another to say that the State has a quasi-fiduciary ownership interest. What is the nature of the State's fiduciary duties? Currently, the only justiciable rights in relation to public land are those that arise out of the *Charter*. But why define the State's ownership interest as quasi-fiduciary if the only rights of the public are those arising out of the *Charter*? While a quasi-fiduciary ownership interest based on the *Charter* has given the public new rights in relation to public property, it is also capable of narrowly limiting the

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State's duties because under the *Charter* the public does not have the right to provide input into land use decisions. Recognizing the State's ownership interest as quasi-fiduciary ownership could be a step towards recognizing, or more accurately creating, public rights similar to those under the public trust doctrine.

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