CHAPTER 1

THE NATURE OF PROPERTY

1. INTRODUCTION

Two vignettes help to explain the goals of this introductory chapter. The first relates to the photograph. This sign was posted at a for-profit health clinic in Scotland. It is easy to understand in an intuitive way the sense in which the phrase "strictly private" is being used here. But what does the idea of *private* property mean? The question is raised because the audacious message carries with it a veiled threat. A failure to obey can produce legal consequences: one might suffer the humiliation of being carted off the property by the police and perhaps charged criminally, or be sued in a court of law. There is a distinct *public* dimension to the edict, for the state may be called into action. Therefore, the protected interest here is not, strictly, private at all. Moreover, one can think about the relevant "property" as comprising the building and grounds of the clinic. However, the critical aspect about this situation is that the rights asserted serve to frame a relationship among *people*—in this instance as between the owner of the property and any would-be entrant.

The second story is drawn from the largely unremarkable case of *Bowen Estate v Bowen*, 2001 CarswellOnt 3149, 42 ETR (2d) 1 (SCJ). There, a court was called upon to determine the validity of a clause of a will under which the

deceased (the testator) had directed the trustees of his estate to draw the name of one of six persons and to award a platinum diamond ring to the person selected by this lottery. The clause was found to be valid. The case is interesting because it prompts one to think in general about the manner in which we allocate goods. As *Bowen* illustrates, in a world of scarce resources it is perfectly acceptable for a person to be entitled to a valuable object through the combined forces of affection, whimsy and luck.

This chapter, then, explores the meaning of property in law, especially private property, and compares that form of entitlement with other conceptions of ownership. It also considers how we seek to justify the rules for the distribution of goods that currently exist under law.

At the beginning of one's legal education it is tempting to seek the comfort that certainty seems to offer. However, one learns that the image of law as a science with bright-line concepts and cut-and-dried answers is a mirage. In fact, indeterminancy abounds. Nowhere is that more apparent than when confronting the meaning of property in law and the arguments used to justify the forms that property rights take.

2. THE ''PROPERTIES" OF PROPERTY

(a) the meanings of property

CB MacPherson, "The Meaning of Property"
in *Property: Mainstream and Critical Positions*
(Toronto: University of Toronto Press, 1978)
at 1–8, 11–12

1. Problems of Change

The meaning of property is not constant. The actual institution and the way people see it, and hence the meaning they give to the word, all change over time. We shall see that they are changing now. The changes are related to changes in the purposes which society or the dominant classes in society expect the institution of property to serve.

When these expectations change, property becomes a controversial subject: there is not only argument about what the institution of property ought to be, there is also dispute about what it is. For when people have different expectations they are apt to see the facts differently. . . .

2. Property a Right, Not a Thing

As soon as any society, by custom or convention or law, makes a distinction between property and mere physical possession it has in effect defined property as a right. And even primitive societies make this distinction. This holds both for land or flocks or the produce of the hunt which were held in common, and for

such individual property as there was. In both cases, to have property is to have a right in the sense of an enforceable claim to some use or benefit of something, whether it is a right to a share in some common resource or in an individual right in some particular things. What distinguishes property from mere momentary possession is that property is a claim that will be enforced by society or the state, by custom or convention or law.

If there were not this distinction there would be no need for a concept of property: no other concept than mere occupancy or momentary physical possession would be needed. No doubt it is for this reason that philosophers, jurists, and political and social theorists have always treated property as a right, not a thing: a right in the sense of an enforceable claim to some use or benefit of something. . . .

3. Common Property, Private Property, State Property

The definition of property as an enforceable claim of a person to some use or benefit of something is often taken to rule out the idea of common property. But a little analysis will show that it does not.

Society or the state may declare that some things—for example, common lands, public parks, city streets, highways—are for common use. The right to use them is then a property of individuals, in that each member of the society has an enforceable claim to use them. It need not be an unlimited claim. The state may, for instance, have to ration the use of public lands, or it may limit the kinds of uses anyone may make of the streets or of common waters (just as it now limits the uses anyone may make of his property), but the right to use the common things, however limited, is a right of individuals.

This point needs some emphasis, for it can easily be lost sight of. The fact that we need some such term as 'common property', to distinguish such rights from the exclusive individual rights which are private property, may easily lead to our thinking that such common rights are not individual rights. But they are. They are the property of individuals, not of the state. The state indeed creates and enforces the right which each individual has in the things the state declares to be for common use. But so does the state create and enforce the exclusive rights which are private property. In neither case does the fact that the state creates the right make the right the property of state. In both cases what is created is a right of individuals. The state *creates* the rights, the individuals *have* the rights. Common property is created by the guarantee to each individual that he will not be excluded from the use or benefit of something; private property is created by the guarantee that an individual can exclude others from the use or benefit of something. Both kinds of property, being guarantees to individual persons, are individual rights.

In the case of private property the right may, of course, be held by an artificial person, that is, by a corporation or an unincorporated grouping created or recognized by the state as having the same (or similar) property rights as a natural individual. The property which such a group has is the right to the use and benefit, and the right to exclude non-members from the use and benefit, of

the things to which the group has a legal title. Corporate property is thus an extension of the individual private property.

Both the kinds of property we have noticed so far are thus, directly or by extension, individual rights. Both are rights of distinct natural or artificial persons. We have now to notice that there is another kind of property which appears not to be an individual right at all. This may be called 'state property': it consists of rights which the state has not only created but has kept for itself or has taken over from private individuals or corporations. . . .

4. The Misconception of Property as Things

In current ordinary language, property generally means things. We commonly refer to a house, a plot of land, a shop, as a property. We advertise 'Properties for Sale' and 'Properties to Let'. What the advertisement describes as being for sale or for rent is the building and the land it stands on. But in fact what is offered, and what constitutes the property, is the legal title, the enforceable exclusive right, to or in the tangible thing. This is more obvious in the case of a lease, where the right is to the use of the thing for a limited period and on certain conditions, than in the case of an outright sale, but in both cases what is transferred is an enforceable exclusive right.

Yet we still speak of property as the thing itself. How did this current usage begin, and how long is it likely to last? It began late in the seventeenth century, and it is not likely to outlast the twentieth.

In ordinary English usage, at least through the seventeenth century, it was well understood that property was a right in something. Indeed, in the seventeenth century, the word property was often used, as a matter of course, in a sense that seems to us extraordinarily wide: men were said to have a property not only in land and goods and in claims on revenue from leases, mortgages, patents, monopolies, and so on, but also a property in their lives and liberties. It would take us too far afield to try to trace the source of that very wide use of the term, but clearly that wide sense is only intelligible while property per se is taken to be a right not a thing.

And there were good reasons then for treating property as the right not the thing. In the first place, the great bulk of property was then property in land, and man's property in a piece of land was generally limited to certain uses of it and was often not freely disposable. Different people might have different rights in the same piece of land, and by law or manorial custom many of those rights were not fully disposable by the current owner of them either by sale or bequest. The property he had was obviously some right in the land, not the land itself. And in the second place, another substantial segment of property consisted of those rights to a revenue which were provided by such things as corporate charters, monopolies granted by the state, tax-farming rights, and the incumbency of various political and ecclesiastical offices. Clearly here too the property was the right, not any specific material thing.

The change in common usage, to treating property as the things themselves, came with the spread of the full capitalist market economy from the seventeenth

century on, and the replacement of the old limited rights in land and other valuable things by virtually unlimited rights. As rights in land became more absolute and parcels of land became more freely marketable commodities, it became natural to think of the land itself as property. And as aggregations of commercial and industrial capital, operating in increasingly free markets and themselves freely marketable overtook in bulk the older kinds of moveable wealth based on charters and monopolies, the capital itself, whether in money or in the form of actual plant, could easily be thought of as the property. The more freely and pervasively the market operated, the more this was so. It appeared to be the things themselves, not just rights in them that were exchanged in the market. In fact the difference was not that things rather than rights in things were exchanged, but that previously unsaleable rights in things were now saleable; or, to put it differently, that limited and not always saleable rights *in* things were being replaced by virtually unlimited and saleable rights *to* things.

As property became increasingly saleable absolute rights to things, the distinction between the right and the thing was easily blurred because, with these changes, the state became more and more an engine for guaranteeing the full right of the individual to the disposal as well as use of things. The state's protection of the right could be so much taken for granted that one did not have to look behind the thing to the right. The thing itself, became, in common parlance, the property. . . .

6. The Need for Justificatory Theories . . .

The most general point is that the institution—any institution—of property is always thought to need justification by some more basic human or social purpose. The reason for this is implicit in two facts we have already seen about the nature of the property: first, that property is a right in the sense of an enforceable claim; second, that while its enforceability is what makes it a *legal* right, the enforceability itself depends on a society's belief that it is a *moral* right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right. This is simply another way of saying that any institution of property requires a justifying theory. The legal right must be grounded in a public belief that it is morally right. Property has always to be justified by something more basic; if it is not so justified, it does not for long remain an enforceable claim. If it is not justified, it does not remain property. . . .

(b) the right to exclude

TW Merrill, "Property and the Right to Exclude"
(1998) 77 Neb L Rev 730 at 730–39 [footnotes omitted]

I. Introduction

The Supreme Court is fond of saying that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." I shall argue in this Essay that the right to exclude others is more than just "one of the most essential" constituents of property—it is the *sine qua non*. Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.

Of course, 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 rights 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. These other rights are obviously valuable and important, and it is not improper to speak of them as part of the standard package of legal rights enjoyed by property owners in most contexts. My claim is simply that in demarcating the line between "property" and "nonproperty"—or "unowned things" (like the air in the upper atmosphere or the resources of the ocean beyond a certain distance from shore)—the right to exclude others is a necessary and sufficient condition of identifying the existence of property. Whatever other sticks may exist in a property owner's bundle of rights in any given context, these other rights are purely contingent in terms of whether we speak of the bundle as property. The right to exclude is in this sense fundamental to the concept of property . . .

II. The Right to Exclude and the Concept of Property

Within the existing literature about the institution of property, there is a broad consensus about several propositions. This consensus does not extend, however, to the precise role that the right to exclude plays in defining that institution. I will briefly enumerate the principal points of consensus, and then turn to the disagreement over how to characterize the role of the right to exclude.

A. Points of Consensus

First, nearly everyone agrees that the institution of property is not concerned with scarce resources themselves ("things"), but rather with the rights of persons with respect to such resources. A copy of Tom Wolfe's latest novel sitting in a bookshop is a scarce resource. But considered solely as an object, it is not property. The book can be characterized as property only by invoking certain rights that persons have with respect to it. For example, the book might be said to be the property of the bookshop, meaning that the bookshop has certain rights

with respect to the control and disposition of it. Or the book might be said to be the property of a customer who has purchased it from the bookshop, in which case the customer would have certain rights with respect to the control and disposition of it.

Similarly, there is a consensus that the concept of property includes the rights of persons with respect to both tangible and intangible resources. Most people understand, at least in some dim fashion, that Tom Wolfe has something called a "copyright" in the contents of the book he has written, and that this copyright is Wolfe's property. They understand this to mean that Wolfe has certain rights with respect to reproduction of the book, and that these rights are separate and distinct from the rights that exist with respect to particular physical copies of the book.

There is also a consensus that property means something different than mere possession. In both lay and legal understanding, to speak of possession of scarce resources is to make a statement of fact about which persons are in control of particular resources. Property, in contrast, refers not to a statement of fact but to a norm (or norms). Thus, if I pick up a copy of Tom Wolfe's book in the bookstore and start to read it, I can be said to be in possession of the book. But I cannot be said to own it; it is the property of the bookshop until I pay for it. Moreover, it is understood that property rights generally trump possessory rights. After reading the Tom Wolfe novel in the bookshop for 15 minutes, the shopkeeper may ask me either to buy it or put it down. The shopkeeper is entitled to make this demand, since the bookshop has a property right in the book superior to my possession of it.

Given that property is a norm, there is also a consensus that property cannot exist without some institutional structure that stands ready to enforce it. The usual assumption is that this institution is the state. But it is also possible that it is meaningful to speak of property rights in contexts governed by less formal enforcement mechanisms, such as social ostracism. Thus, it may be possible to speak of property rights in library carrels, or in particular bedrooms in homes, where it is understood that certain persons have normative claims to these scarce resources and that these claims will be enforced by the common consent of those who participate in a particular social unit. With respect to most controversies of concern to lawyers, however, property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Finally, there is a consensus that the concept of property is not limited to private property, but includes also what may be called common property and public property. Private property may be said to exist where one person or a small number of persons (including corporations and not-for-profit organizations) have certain rights with respect to valuable resources. Common property may be said to exist where all qualified members of a particular group or community have equal rights to valuable resources. An example would be a common pasture open to all members of a particular village for the grazing of livestock. Public property may be said to exist where governmental entities have certain rights with respect

to valuable resources, analogous to the rights of private property owners. An example would be a municipal airport.

In sum, there is a general consensus that property refers to particular rights of persons or entities with respect to scarce tangible and intangible resources; that property is distinct from and superior to the mere possession of resources; that the rights associated with property require some institutional structure that stands ready to enforce these rights; and that property may be private, common, or public.

B. Three Schools of Thought Regarding the Right to Exclude

There is, however, much less consensus regarding the nature and content of the particular rights that persons have when they are said to have property. In particular, although it is widely agreed that someone who has property in a resource typically will have at least some right to exclude others from using or interfering with that resource, there is disagreement about how central this right is to the understanding of property. Generally speaking, it is possible to identify three different intellectual traditions regarding the role of the right to exclude. These may be called ''single-variable essentialism,'' ''multiple-variable essentialism,'' and ''nominalism.''

Probably the oldest continuing tradition in attempts to define property is essentialism—the search for the critical element or elements that make up the irreducible core of property in all its manifestations. The patron saint of property essentialism is William Blackstone, the first full-time law professor at an English-speaking university. In fact, Blackstone endorsed not one but two essentialist definitions of property, corresponding to what I call the single-variable and the multiple-variable versions.

The first or single-variable version of essentialism posits that the right to exclude others is the irreducible core attribute of property. Thus, Blackstone [wrote]:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Under this conception, the right to exclude (''sole and despotic dominion'') is both a necessary and sufficient condition of property. Many other scholars in succeeding generations, including Jeremy Bentham, have also appeared to endorse some such notion. Perhaps the best-known exposition of this perspective was provided by the philosopher and New Deal lawyer Felix Cohen. His posthumously-published Socratic dialogue on the nature of private property considers a number of attributes commonly associated with property, and through the positing of examples and counterexamples concludes that only the right to exclude is invariably connected with all forms of property. Cohen vividly summarizes his discussion in a manner suitable for memorialization on the blackboard:

> That is property to which the following label can be attached:
>
> To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen
>
> Endorsed: The state.

Single-variable essentialism also finds extensive if somewhat qualified support in the decisions of the contemporary U.S. Supreme Court. The Court has said of the right to exclude that it is "universally held to be a fundamental element of the property right;" that it is "one of the most essential rights" of property; and that it is "one of the most treasured" rights of property. Although all these statements imply that the right to exclude is not the only right associated with property, no other right has been singled out for such extravagant endorsement by the Court. Moreover, the Court's decisions suggest that governmental interference with the right to exclude is more likely to be considered a taking of property without compensation under the Fifth Amendment than are interferences with other traditional elements of property.

The second version of essentialism, also found in Blackstone, posits that the essence of property lies not just in the right to exclude others, but in a larger set of attributes or incidents, of which the right to exclude is just one. Thus, Blackstone II: "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." This version of essentialism holds that property is defined by multiple attributes or incidents. Blackstone describes these multiple attributes as the rights of "free use, enjoyment, and disposal." Curiously, the right to exclude others — which as we have seen is elsewhere deemed by Blackstone to be the defining element of property — fails to make an appearance on this list. Moreover, it would seem that the rights of "free use" and "enjoyment" are arguably redundant, or at least largely overlapping. But these anomalies have been overlooked in subsequent accounts, which have translated the Blackstonian trilogy as the rights of "possession, use, and disposition," or alternatively, the rights to exclude, to use or enjoy, and to transfer.

Under the multiple-variable version of essentialism, the right to exclude is a necessary but not a sufficient condition of property. Without the right to exclude, there is no property. But more than the right to exclude is needed in order to create a package of rights sufficiently impressive to be called property.

This multiple-variable essentialism has also been defended by later generations of commentators. The most elaborate of these efforts is that of Tony Honore, an Oxford legal scholar, who sought to identify the "standard incidents of ownership" that are present when an individual is the "full owner" in a mature, liberal legal system. He concluded that there are eleven such incidents: (1) the right to possess; (2) the right to use; (3) the right to manage; (4) the right to the income of the thing; (5) the right to the capital; (6) the right to security; (7) the incident of transmissibility; (8) the incident of absence of term; (9) the duty to prevent harm; (10) liability to execution; and (11) the incident of residuarity. Honore conceded that not all of these incidents are present in all cases in which

we speak of property. But they represent the paradigm of full ownership, against which various types of incomplete or partial ownership must be understood.

Multiple-variable essentialism also finds some support in the Supreme Court's decisions. On several occasions, the Court has stated that "property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" This of course is the modern variant on Blackstone's original trilogy of rights.

The third school, which I call nominalism, views property as a purely conventional concept with no fixed meaning—an empty vessel that can be filled by each legal system in accordance with its peculiar values and beliefs. On this view, the right to exclude is neither a sufficient nor a necessary condition of property. It may be a feature commonly associated with property, but its presence is not essential; it is entirely optional. A legal system can label as property anything it wants to.

Although traces of the nominalist conception can be found in the Nineteenth Century, it is basically a product of the Legal Realist movement of the Twentieth. For the Realists, property was not defined by a single right or definitive trilogy of rights. Rather it is a "bundle of rights." Moreover, this bundle has no fixed core or constituent elements. It is susceptible of an infinite number of variations, as different "sticks" or "strands" are expanded or diminished, added to or removed from the bundle altogether. Thus, the Realists understood that the universe of things called property is purely a matter of social convention. Perhaps the most influential figure in the development of the nominalist perspective was Wesley Hohfeld. Although Hohfeld apparently never used the bundle of rights metaphor, his analysis of legal concepts as a series of bipolar "jural relations" laid the ground work for a conception of property as a collection of socially-contingent entitlements.

Subsequent Legal Realist scholars took Hohfeld's jural relations and derived from it an extreme form of nominalism. As one Realist writer, Walter Hamilton, stated in an entry on "Property" in the 1937 edition of the *Encyclopedia of the Social Sciences*, property is nothing more than "a euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth." The American Law Institute's *Restatement of Property*, published in 1936, adopted a similarly open-ended definition of property.

This sort of extreme nominalism continues to be found in contemporary writing about property. For example, in an influential essay, Thomas Grey has argued that the concept of property has so many variations and specialized uses that its meaning has "disintegrated." He concludes, in keeping with the sceptical position of the Realists, that "the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term 'property' at all."

Today, the nominalist conception is more-or-less the orthodox understanding of property within the American legal community. Law students have been instructed for years that the bundle of rights metaphor accurately captures the nature of the institution of property. The Supreme Court has also jumped on the nominalist bandwagon, and has on many occasions itself described

property in terms of the bundle of rights metaphor (albeit often in a context where the Court also says that the right to exclude is "among the most essential" of the bundled rights).

These three schools of thought—single-variable essentialism, multiple-variable essentialism, and nominalism—do not exhaust the possibilities with respect to understanding of the nature of property. One of the most sophisticated modern expositions of property by a philosopher is that of Jeremy Waldron. Borrowing a distinction developed by Ronald Dworkin, Waldron argues that private property is best understood as a general "concept," of which the various incidents or elements catalogued by Honore and others embody different "conceptions." He defines the general concept of private property as the understanding that, "in the case of each object, the individual person whose name is attached to that object is to determine how the object shall be used and by whom. His decision is to be upheld by the society as final." This general concept, Waldron argues, takes on different conceptions in different contexts, depending on the type of resource involved, the traditions of the legal system, whether ownership is unified or divided, and so forth. For example, agricultural land may be subject to different types of restrictions on use than is personal property.

From the vantage point of this essay, Waldron's account can be seen as a combination of single-variable essentialism and nominalism. His definition of the core concept of private property—giving a named individual "final" authority to determine how resources "shall be used and by whom"—bears a strong family resemblance to Blackstone's sole and despotic right to exclude. Waldron would not define property solely in terms of this feature, however, but depicts property as morphing into a variety of conceptions in a manner consistent with the bundle of rights metaphor associated with nominalism. For example, he argues that the right of inheritance is entirely contingent and that one could have a system of private property with or without inheritance, without affecting the conclusion that the system was still one of private property . . .

QUESTIONS

1. What implications flow from the absence of consensus about the core meaning of the term property?

2. As Professor Merrill notes, private property is often contrasted with common or public (state) property. Consider first the idea of common property. Merrill gives as an example of this form, "a common pasture open to all members of a given village for the grazing of livestock." Some economists distinguish between two forms of common property. One is described as open access. Here, as the name implies, there are no restrictions on the right of access. Everyone is entitled; no one can be excluded lawfully. By contrast, the common pasture described by Merrill is sometimes referred to by economists as communal property. In what way, if at all, does the idea that everyone has a right to open access goods differ from the idea that for such goods no property rights exist? In what ways, if at all, does communal property differ from private property? See the discussion in Part 4, below.

3. Property is described as "public" when the right of exclusion is reposed in a governmental authority. In what way, if at all, do or should the rules associated with public property differ from those applicable to private ownership?

Yanner v Eaton
(1999) 166 ALR 258 (HCA) [footnotes omitted]

[Murrandoo Yanner, a member of the Gangalidda tribe of Aboriginal Australians, used a traditional harpoon to kill two juvenile estruarine crocodiles. (The other party in this case, Eaton, was the peace officer who laid the charge.) The meat and skins were used for non-commercial purposes. Yanner was charged with taking fauna without legal authority under Queensland's *Fauna Conservation Act 1974* (the "*Fauna Act*"). Under paragraph 54(1)(a) of that Act "a person shall not take, keep, or attempt to take or keep fauna of any kind unless [that person] is the holder of a licence, permit, certificate or other authority granted and issued under this Act."

Yanner asserted that he was exercising his native title right to hunt as protected by the *Native Title Act 1993 (Cth)*. Section 211 of that Act allows native title holders to exercise and enjoy such rights for personal, domestic or non-commercial communal needs, even where a general law prohibits the activity. The classes of activities protected include hunting, fishing, gathering and cultural or spiritual activities.

At trial, Murrandoo Yanner's clan was held to have had a pre-colonization connection within the area from which the crocodile had been taken, and that the hunting of juvenile estuarine crocodiles has a cultural and spiritual significance to the Gangalidda tribe. However, it was submitted that even if there had once been a native title right to hunt estuarine crocodiles, the *Fauna Act* had extinguished that right in 1974 when estuarine crocodiles were declared to be protected fauna. Critical to this argument was section 7 of the *Fauna Act*, which states as follows:

> All fauna, save fauna taken or kept during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority.

(Section 7 was amended in 1984. The words "otherwise than in contravention of this Act" were inserted after the phrase "taken or kept". "Nothing turns on this amendment": Judgment of Gummow J at n. 108.)

According to Australian native title case law (see especially *Mabo v Queensland (No 2)* (1992), 175 CLR 1 (HCA)), a pre-existing native title right will be extinguished by the granting of an inconsistent right. The government argued that section 7 of the *Fauna Act* extinguished this native title right in 1974, and that it could not be revived by the *Native Title Act, 1993*. The case turned on the interpretation of section 7 of the *Fauna Act* that made fauna "property" of the Crown. If the High Court interpreted this section so as to give the Crown absolute or full beneficial ownership of fauna, Yanner's right to hunt estuarine crocodiles would have been extinguished in 1974, and therefore it would afford no defence to the charge under the *Fauna Act*. If, however, this Act gave the Crown less than

full beneficial ownership, then Yanner's right to hunt would be protected by the *Native Title Act*, and he would be exempt from the licencing requirement.

Yanner won at trial. However, the Queensland Court of Appeal reversed that decision and ordered that the case be sent back to Magistrate's Court. Yanner then appealed to the High Court of Australia.]

Gleeson CJ, Gaudron, Kirby, and Hayne JJ: . . .

"*Property*"

The word "property" is often used to refer to something that belongs to another. But in the *Fauna Act*, as elsewhere in the law, "property" does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of "property" may be elusive. Usually it is treated as a "bundle of rights". But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that "the ultimate fact about property is that it does not really exist: it is mere illusion". Considering whether, or to what extent, there can be property in knowledge or information or property in human tissue may illustrate some of the difficulties in deciding what is meant by "property" in a subject matter. So too, identifying the apparent circularity of reasoning from the availability of specific performance in protection of property rights in a chattel to the conclusion that the rights protected are proprietary may illustrate some of the limits to the use of "property" as an analytical tool. No doubt the examples could be multiplied.

Nevertheless, as Professor Gray also says, "An extensive frame of reference is created by the notion that 'property' consists primarily in control over access. Much of our false thinking about property stems from the residual perception that 'property' is itself a thing or resource rather than a legally endorsed concentration of power over things and resources."

"Property" is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not "a monolithic notion of standard content and invariable intensity". That is why, in the context of a testator's will, "property" has been said to be "the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have".

Because "property" is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter. To say that person A has property in item B invites the question what is the interest that A has in B? The statement that A has property in B will usually provoke further questions of classification. Is the interest real or personal? Is the item tangible or intangible? Is the interest legal or equitable? For present purposes, however, the important question is what interest in fauna was vested in the Crown when the *Fauna Act* provided that some fauna was "the property of the Crown and under the control of the Fauna Authority"?

The respondent's submission (which the Commonwealth supported) was that s. 7(1) of the *Fauna Act* gave full beneficial, or absolute, ownership of the fauna to the Crown. In part this submission was founded on the dictum noted earlier, that

"property" is "the most comprehensive of all the terms which can be used". But the very fact that the word is so comprehensive presents the problem, not the answer to it. "Property" comprehends a wide variety of different forms of interests; its use in the Act does not, without more, signify what form of interest is created.

There are several reasons to conclude that the "property" conferred on the Crown is not accurately described as "full beneficial, or absolute, ownership". First, there is the difficulty in identifying what fauna is owned by the Crown. Is the *Fauna Act* to be read as purporting to deal with the ownership of all fauna that is located within the territorial boundaries of the State but only for so long as the fauna is within those boundaries, or does it deal with all fauna that has at any time been located within those boundaries? That is, does the *Fauna Act* purport to give the Crown ownership of migratory birds only as they pass through Queensland, or does it purport to give ownership to the Crown of every bird that has ever crossed the Queensland border?

Secondly, assuming that the subject matter of the asserted ownership could be identified or some suitable criterion of identification could be determined, what exactly is meant by saying that the Crown has full beneficial, or absolute, ownership of a wild bird or animal? The respondent (and the Commonwealth) sought to equate the Crown's property in fauna with an individual's ownership of a domestic animal. That is, it was sought to attribute to the Crown what Pollock called "the entirety of the powers of use and disposal allowed by law".

At common law, wild animals were the subject of only the most limited property rights. At common law there could be no "absolute property", but only "qualified property" in fire, light, air, water and wild animals. An action for trespass or conversion would lie against a person taking wild animals that had been tamed, or a person taking young wild animals born on the land and not yet old enough to fly or run away, and a land owner had the exclusive right to hunt, take and kill wild animals on his own land. Otherwise no person had property in a wild animal.

"Ownership" connotes a legal right to have and to dispose of possession and enjoyment of the subject matter. But the subject matter dealt with by the *Fauna Act* is, with very limited exceptions, intended by that Act always to remain outside the possession of, and beyond disposition by, humans. As Holmes J. said in *Missouri v. Holland* [252 US 416 (1920)]: "Wild birds are not in the possession of anyone; and possession is the beginning of ownership."

Thirdly, there are several aspects of the *Fauna Act* which tend to suggest that the property in fauna conferred on the Crown may not easily be equated with the property an individual may have in a domestic animal. The property rights of the Crown would come and go according to the operation of the exception contained in s. 7(1) of fauna taken or kept "otherwise than in contravention of this Act during an open season with respect to that fauna". As open seasons were declared and fauna taken, what otherwise was the property of the Crown, ceased to be. Next there are the references in ss. 71(2) and 83(3) to forfeiture of fauna to the Crown. Even accepting that s. 84 says that these sections shall not prejudice or affect the rights of the Crown conferred by s. 7, why were ss. 71(2) and 83(3)

necessary if the Crown owned the fauna? Then there are the provisions of s. 7(2) that "[l]iability at law shall not attach to the Crown by reason only of the vesting of fauna in the Crown pursuant to this section". The Crown's property is property with no responsibility. None of these aspects of the *Fauna Act* concludes the question what is meant by "property of the Crown", but each tends to suggest that it is an unusual kind of property and is less than full beneficial, or absolute, ownership.

Fourthly, it is necessary to consider why property in some fauna is vested in the Crown. Provisions vesting property in fauna in the Crown were introduced into Queensland legislation at the same time as provisions imposing a royalty on the skins of animals or birds taken or killed in Queensland. A "royalty" is a fee exacted by someone having property in a resource from someone who exploits that resource. As was pointed out in *Stanton v. Federal Commissioner of Taxation*:

> . . . the modern applications of the term [royalty] seem to fall under two heads, namely the payments which the grantees of monopolies such as patents and copyrights receive under licences and payments which the owner of the soil obtains in respect of the taking of some special thing forming part of it or attached to it which he suffers to be taken.

That being so, the drafter of the early Queensland fauna legislation may well have seen it as desirable (if not positively essential) to provide for the vesting of some property in fauna in the Crown as a necessary step in creating a royalty system. Further, the statutory vesting of property in fauna in the Crown may also owe much to a perceived need to differentiate the levy imposed by the successive Queensland fauna statutes from an excise. For that reason it may well have been thought important to make the levy as similar as possible not only to traditional royalties recognised in Australia and imposed by a proprietor for taking minerals or timber from land, but also to some other rights (such as warren and piscary) which never made the journey from England to Australia.

In light of all these considerations, the statutory vesting of "property" in the Crown by the successive Queensland fauna Acts can be seen to be nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource". So much was acknowledged in the second reading speech on the Bill which first vested property in fauna in the Crown. The Minister said:

> It [the fur industry] is an industry that really belongs to the people, and although the Bill, amongst other things, makes it quite clear that the native animals of the State belong to the people of the State, I do not think there is any doubt in the minds of any one regarding that question already. The native animals belong to the people in just the same way as the timber and the minerals belong to the people, and they cannot be sold without permission.

Roscoe Pound explained why wild animals and other things not the subject of private ownership are spoken of as being publicly owned. He said:

> We are also tending to limit the idea of discovery and occupation by making res nullius (eg, wild game) into res publicae and to justify a more stringent regulation of individual use of res communes (eg, of the use of running water for irrigation or for

> power) by declaring that they are the property of the state or are "owned by the state in trust for the people." It should be said, however, that while in form our courts and legislatures seem thus to have reduced everything but the air and the high seas to ownership, in fact the so-called state ownership of res communes and res nullius is only a sort of guardianship for social purposes. It is imperium, not dominium. The state as a corporation does not own a river as it owns the furniture in the state house. *It does not own wild game as it owns the cash in the vaults of the treasury*. What is meant is that conservation of important social resources requires regulation of the use of res communes to eliminate friction and prevent waste, and requires limitation of the times when, places where, and persons by whom res nullius may be acquired in order to prevent their extermination. *Our modern way of putting it is only an incident of the nineteenth-century dogma that everything must be owned.*

The "property" which the *Fauna Act* and its predecessors vested in the Crown was therefore no more than the aggregate of the various rights of control by the Executive that the legislation created. So far as now relevant those were rights to limit what fauna might be taken and how it might be taken, rights to possession of fauna that had been reduced to possession, and rights to receive royalty in respect of fauna that was taken, (all coupled with, or supported by, a prohibition against taking or keeping fauna except in accordance with the Act . . .). Those rights are less than the rights of full beneficial, or absolute, ownership. Taken as a whole the effect of the *Fauna Act* was to establish a regime forbidding the taking or keeping of fauna except pursuant to licence granted by or under the Act . . .

The appeal should be allowed, the orders of the Court of Appeal of Queensland set aside and in lieu it should be ordered that the order *nisi* be discharged.

McHugh J (dissenting): . . .

In its natural and ordinary meaning, s. 7 vests in the Crown, and takes away from everyone else, the right to deal with fauna as defined by the Act. Other provisions of the Act give a right to apply for a licence to take fauna. But s. 7 destroyed all existing rights to take fauna. At common law, the only right of property in wild animals was "the exclusive right to catch, kill and appropriate such animals which is sometimes called by the law a reduction of them into possession." That right arose from the possession of land on which the animals happened to be or from a Crown grant to enter another's land for the purpose of catching, killing or appropriating wild game. No doubt in Australia, the existence of common law native title rights meant that Aboriginals had similar rights over fauna.

Section 7 of the Act reverses the common law rules and vests all rights of catching, killing and appropriating fauna in Queensland in the Crown. It therefore gives to the Crown the sole right of catching, killing and appropriating fauna in Queensland together with the right to exclude every other person from catching, killing and appropriating that fauna. If the term "property" has any recognisable meaning in the Act, it must at least have conferred those rights on the Crown and taken them away from every other person once the Act was proclaimed . . .

Undoubtedly, s. 7 does more than give to the Crown the exclusive right to kill, take or appropriate fauna and to take away from others any pre-existing right to do those things. The section gives to the Crown every right, power, privilege and benefit that does or will exist in respect of fauna together with the right, subject to the Act, to exclude every other person from enjoying those rights, powers, privileges and benefits. That is the ordinary meaning of property, although, of course, the term can have a more limited meaning depending upon the terms of the instrument which creates it. Whatever else property may mean in a particular context, it describes a relationship between owner and object by reference to the power of the owner to deal with the object to the exclusion of all others, except a joint owner.

The appellant would have it that s. 7 has a more limited meaning than that set out in the previous paragraph. His argument suggests that the property in fauna in Queensland vests in the Crown only upon other persons taking or dealing with the fauna. Another version of the argument is that the Act has effectively created a new, negative form of property — that property in s. 7 is no more than a label which describes what the Crown notionally has after the Act has identified the circumstances in which others may take, possess and pay royalties to the Crown in respect of fauna.

If "property" in s. 7 meant no more than the residue of other people's rights or the measure of the Crown's entitlement to royalties, it would seem to serve little purpose, if indeed it serves any purpose at all. I see no indication in the Act that "property" in s. 7 has such a limited function or meaning. Words in legislative instruments should not be read as if they were buildings on a movie set—structures with the appearance of reality but having no substance behind them. When the Queensland legislature declared that the property in fauna is vested in the Crown, it should be taken to have meant what it said. That being so, the ordinary meaning of property should not be ignored. "Property" in s. 7 should not be taken as meaning no more than the residue of control over fauna which the Crown has after others have carved out their entitlements to take and keep fauna pursuant to a licence granted by or under the Act. That is to turn the Act on its head. The content of s. 7 is the starting point for, not the result of, determining the Crown's power over fauna in Queensland.

The short answer to the appellant's arguments is that s. 7 says that all fauna *is* the property of the Crown. Acts of Parliament speak from their enactment. Consequently, the ordinary and natural meaning of s. 7 is that, after the commencement of the Act, the property in fauna is and always remains in the Crown until it disposes of it or a person, acting in accordance with the Act, puts an end to the Crown's property in particular fauna. Moreover, the fauna is and remains "under the control of the Fauna Authority." To the absolute rule that property in fauna in Queensland is in the Crown, s. 7(1) contains an exception — when fauna is taken in open season in accordance with the Act, the property in the fauna passes to the person who has taken it. However, I cannot see how that exception provides any ground for thinking that the nature of the property that the Crown has in the fauna is less than every right, power, privilege and benefit that does or will exist in respect of the fauna or that from the commencement of the Act the Crown did not have the right to exclude every other person from

enjoying those rights, powers, privileges and benefits. To contend that the Crown obtains no property in fauna until it is taken, killed or appropriated is to deny the plain words of s. 7(1).

It is also to deny the assumption on which s. 7(2) of the Act is based. That assumption is that, but for s. 7(2), the Crown's ownership of the fauna might make it liable for the damage or harm that particular birds or mammals might cause while at large.

Consider also some of the consequences of upholding the appellant's arguments. The Crown would obtain property in fauna only when a bird, mammal or declared animal was killed, taken, or otherwise appropriated by a third party. Presumably, the Crown would lose its property as soon as the third party gave up possession of it—at all events if that party set the bird or mammal free. The arguments of the appellant must also mean that "the control of the Fauna Authority" only commences when a third party has killed, taken or appropriated fauna. Presumably, the hapless officers of the Authority, seeing an unlicensed person about to kill or otherwise take or deal with fauna, would have no statutory authority to act until the unlicensed person takes action. Until death, taking or appropriation had occurred, the officers would have no more legal authority to act to protect the bird or mammal than any other citizen.

The appellant contended that it would be absurd for the legislature to have intended that the Crown should have property in wild animals before they were caught. Illustrations were given during argument—the migratory bird flying through Queensland being one example. Once it is perceived that the purpose of the Act is to put an end to arguments about who has the property in or the right to hunt fauna as defined, I see nothing absurd in the legislature of Queensland giving to the Crown the property in all fauna in Queensland—even migratory birds. In any event, it leads to no more absurd results than the opposing contention which would vest property in the Crown when a young boy trapped a migratory bird but would divest it when he let it go, making property in fauna in Queensland depend upon a kind of statutory version of what old system conveyancers called springing and shifting uses.

Nor is there anything unusual in a person having property in an object of which he or she is unaware. The common law has long recognised that a person may have property in an object although he or she was unaware of its existence. Thus in *R. v. Rowe* [(1859), 169 ER 1180], an indictment for larceny charged the accused with stealing a piece of iron from the bed of a canal and laid the property in the iron in the canal owner who apparently did not know of its existence. The Court of Crown Cases Reserved held that the indictment was good.

By declaring (s. 7) that the property in fauna in Queensland is vested in the Crown and then in subsequent sections defining the circumstances in which others may take that property, the Act proclaimed upon its commencement that henceforth no one, land owner, Aboriginal or holder of a grant from the Crown, had any right to kill, take or appropriate fauna as defined. That being so, the appellant had no right which the *Native Title Act* protected when it came into force . . .

The appeal must be dismissed.

NOTE

The concurring opinion of Gummow J and the dissenting opinion of Callinan J have been omitted.

QUESTIONS

1. How did the majority define property within the meaning of the *Fauna Act*? What was Justice McHugh's definition? Which do you prefer?

2. Categorize the definitions of "property" found in *Yanner* using the labels proposed by Professor Merrill.

3. How would you describe the different approaches to statutory interpretation in *Yanner*?

Harrison v Carswell
[1976] 2 SCR 200, 1975 CarswellMan 58

Dickson J:

The respondent, Sophie Carswell, was charged under The Petty Trespasses Act, R.S.M. 1970, c. P50, with four offences (one on each of four days) of unlawfully trespassing upon the premises of the Fairview Corporation Limited, trading under the firm name and style of Polo Park Shopping Centre, located in the City of Winnipeg, after having been requested by the owner not to enter on or come upon the premises. The appellant, Peter Harrison, manager of Polo Park Shopping Centre, swore the informations. The charges were dismissed by the Provincial Judge but on a trial de novo in the County Court Mrs. Carswell was convicted and fined $10 on each of the charges. The convictions were set aside by the Manitoba Court of Appeal [[1974] 4 WWR 394] (Freedman C.J.M. and Matas J.A., with Guy J.A. dissenting) and the present appeal followed by leave of this Court.

With great respect, I am unable to agree with the majority reasons, delivered in the Court of Appeal by Freedman C.J.M., for I find it difficult, indeed impossible, to make any well-founded distinction between this case and *Peters v. The Queen* (1971), 2 C.C.C. (2d) 339n, 17 D.L.R. (3d) 128, decided by this Court four years ago in a unanimous decision of the full bench. The constitutional issue raised in *Peters* no longer concerns us; the only other issue was whether the owner of a shopping plaza had sufficient control or possession of the common areas, having regard to the unrestricted invitation to the public to enter upon the premises, as to enable it to invoke the remedy of trespass. The Court decided it did. That case and the present case came to us on much the same facts; picketing within a shopping centre in connection with a labour dispute. In *Peters* the picketing was carried out by the president of the Brampton Labour Council and seven other persons, carrying placards and distributing leaflets in front of a Safeway store, seeking a boycott of Safeway for selling California grapes. In the present case the picketing was carried out by Mrs. Carswell and 11 other persons carrying placards and distributing leaflets in front of the premises of their employer, Dominion Stores. In both instances the picketing was peaceful. . . .