The Geographies of Property Law: Engagement with Place and Space

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DEDICATION

I dedicate this thesis to the memory of my mum, Sharon Elizabeth Brown and to my son, Ernest Theodore Brown-Dickerson. Mum, thank you for giving me the freedom to pursue challenging things and reminding me to have fun. Ernie, we will pursue challenging things and have fun doing it. I love you both.

ABSTRACT

This PhD thesis takes up the topic of property law and the many ways that property is created, changed and redistributed through the law of expropriation. Situated within law and geography scholarship, this thesis adopts methods from geography, particularly physical geography, to interrogate places of expropriation. The law and geography study is of the place where an historic *de facto* expropriation – erstwhile called constructive expropriation – legal decision takes place. The geographic location is Kingsburg Beach, Nova Scotia; the legal decision is *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General),* 1999 NSCA 98. Taking a place-based research approach to examine expropriation law and situating that law in a specific location highlights the geographies of property, which, I argue, expropriation law ought to focus on. These geographies are constituted by the past and present, the limits and affordances of the physical geography, and the importance of the type of location, which in the location examined, is a beach-place.

First, this thesis constructs a law and geography research methodology and considers how it would apply it to property law broadly. Second, the thesis re-examines the law of expropriation – both *de jure* and *de facto* expropriation – through the lens of geography reframing expropriation law as a place-making tool. Third, the thesis examines the case study site from the perspectives of private property, environmental concerns, the publicness of the location, and Aboriginal land interests. Together these individual focal points guide an understanding of place as both complex and specific, and of the law of expropriation as the tool that affords a changing property landscape. Recent developments in the law of expropriation in Canada indicate that expropriation law remains under-examined and in need of critical interrogation. This PhD thesis undertakes such an interrogation and in doing so provides an important reframing of expropriation law, geography and place.

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ON EXACTITUDE IN SCIENCE

... In that Empire, the Art of Cartography attained such Perfection that the map of a single Province occupied the entirety of a City, and the map of the Empire, the entirety of a Province. In time, those Unconscionable Maps no longer satisfied, and the Cartographers Guilds struck a Map of the Empire whose size was that of the Empire, and which coincided point for point with it. The following Generations, who were not so fond of the Study of Cartography as their Forebears had been, saw that that vast Map was Useless, and not without some Pitilessness was it, that they delivered it up to the Inclemencies of Sun and Winters. In the Deserts of the West, still today, there are Tattered Ruins of that Map, inhabited by Animals and Beggars; in all the Land there is no other Relic of the Disciplines of Geography.

Suárez Miranda, *Viajes de varones prudentes*, Libro IV, Cap. XLV, Lérida, 1658[1]

[1] Jorge Luis Borges, "On exactitude in science" in Jorge Luis Borges, *Collected Fictions,* trans. Andrew Hurley (Penguin Books, 1998) 325. The short story is credited fictionally as authored by Suárez Miranda, *Viajes de varones prudentes*, Libro IV, Cap. XLV, Lérida, 1658.

CHAPTER 1: KINGSBURG BEACH, NOVA SCOTIA, PROPERTY AND GEOGRAPHY

Kingsburg Beach, Kingsburg, Lunenburg, Nova Scotia

44.27751532391371, -64.2570806001028

Kingsburg Beach is located in Kingsburg, in the Municipality of the District of Lunenburg, Nova Scotia. The beach is located at: 44.27751532391371, -64.2570806001028. Kingsburg Beach is 1 kilometre in length and is a sheltered sand beach. Kingsburg itself is part of the Riverport District at the end of the Kingsburg peninsula. The community is approximately 130 kilometres from Halifax Regional Municipality, 30 kilometres from Bridgewater and 25 kilometres from Lunenburg in the province of Nova Scotia in Canada.[1]

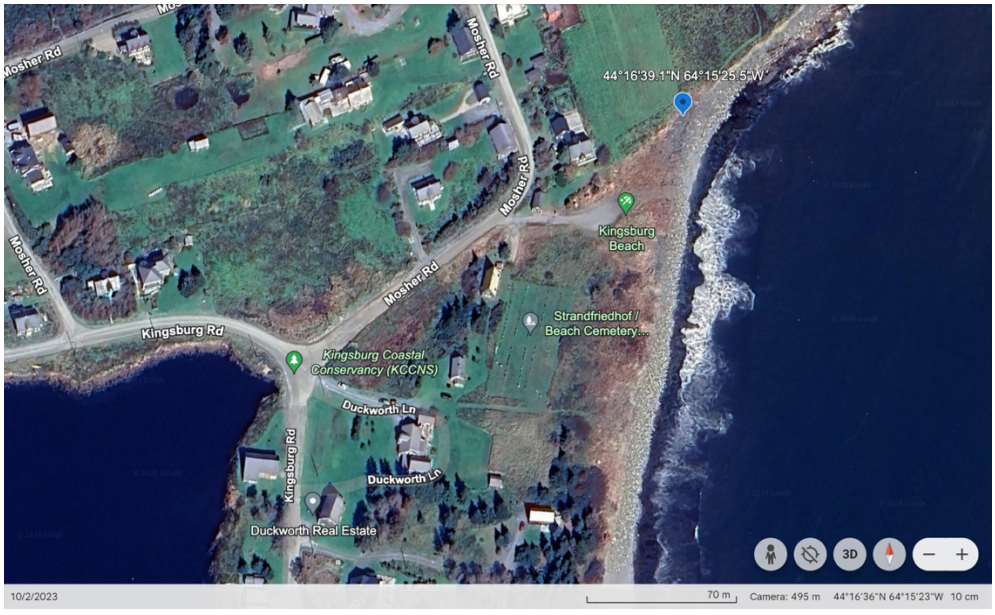


Figure 1.1: Google Earth image of Kingsburg Beach[2]

[1] Nova Scotia, Department of Fisheries and Aquaculture, *Our Coast: Live. Work. Play. Protect. The 2009 State of Nova Scotia's Coast: Technical Report,* (Halifax: DFA, 2009) at 153, online, <coilink.org/20.500.12592/3jhl22x> [perma.cc/C8L8-HPNR].

[2] Google Earth, "Kingsburg Beach: 44°16'38"N 64°15'25"W" (October 2023), online: <earth.google.com> [perma.cc/AX2S-5HGN].

1.1. INTRODUCTION

Kingsburg beach is a quiet beach. It is one kilometre long with a handful of property lots along it, just twenty property lots in total. Some of these lots have built property on them; some do not. Some of the buildings appear older because they are surrounded by historical items like gravestones or run-down fences. Other buildings may be newer, though just how new I wouldn't hazard a guess because all of the buildings have the faded look of properties caught in windy beaches. Running parallel to the beach is a road, Kingsburg Road, which later turns into Kingsburg Beach Road, before coming to a dead-end. The further you go along the road the less pronounced it becomes because it is crowded by reeds that naturally grow on the sand dune on which the road is built. Driving along the road it feels less of a road and more of an extended lane way or perhaps a private road. The distance between each property is wide. "Neighbours" would be used in the loosest sense to describe neighbouring property holders along the beach.

The most straightforward way to reach Kingsburg Beach is by car, though I imagine there would be a way to get to the beach by a mixture of public transport to the closest major road and from there a taxi/rideshare to get to the beach. Surrounding Kingsburg Beach are the villages of Upper Kingsburg, Lower Rose Bay and Lower LaHave, though these villages are not major hubs. The closest town with a sizable population, municipal infrastructure and other amenities is Bridgewater. Bridgewater is 29 kilometres from Kingsburg Beach, little over a 30 minute drive away. It is at Bridgewater that I accessed the land titles office to get property title records of Kingsburg Beach. Once you arrive at Kingsburg beach there is a small parking lot. It is opposite the beach cemetery that contains historical grave markers and down a laneway that goes beyond the houseline that is along the sand dunes. The parking lot is more discernable on Google Earth than it is in real life. From the parking lot is a small path that leads down to the beach.

The two times that I have visited Kingsburg Beach to carry out my field research has made me feel that I am entering a private space. I don't know how to quantify this feeling and certainly not in a way that would be considered relevant to property law, nor to the law of expropriation, the legal subject matter of this thesis. The first time I visited Kingsburg Beach, I was hesitant to go on the beach. I saw someone walking their dog and I asked them if Kingsburg Beach was a public beach. Their response was, "the owners along here don't like to think so."[3]

I felt like it was a private space, despite the list of property titles, survey plan, and title deeds that I had collected from the land titles office, in addition to all the information about the properties contained in the *Mariner Real Estate v Nova Scotia (Attorney General)* case reports of the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal, referred to as the *Mariner Real Estate* decisions.[4] The work of Yi Fu Tuan, a geographical theorist was helpful for me to think as I was walked along which is so much more than the paper records of law reports and property surveys would indicate. Tuan wrote on how people experience, perceive, and give meaning to the physical world, arguing that places become crystallized through human experience and meaning.[5] He also reflects on the sensorial and personal nature of experiencing place which in turn must be understood as guiding how environments are lived and felt. If, as Tuan argues, the world is known through the senses of hearing, smell, taste, and touch,[6] the question to learn about about a place will be what am I experiencing in that particular location?

My field visits to Kingsburg Beach and the surrounding areas of Bridgewater, the whole Kingsburg peninsula, and the historical town of Lunenburg, reveal a tension in the place of

[3] Oral communication to the author, 20 May 2017.
[4] *Mariner Real Estate Ltd. v Nova Scotia (Attorney General),* 1998 CanLII 1757 (NS SC) & *Mariner Real Estate Ltd. v Nova Scotia (Attorney General),* 1999 NSCA 98 [*Mariner Real Estate* decisions].
[5] Yi Fu Tuan, *Space and place: The perspective of experience* (Minneapolis: University of Minnesota Press, 1977) [Tuan, *Space and Place*].
[6] *Ibid* at Chapter Two, "Experiential Perspective."

Kingsburg Beach as a public location. Kingsburg Beach feels like a private space, and it does so in multiple ways. It feels private between neighbours, since each house is hidden from each other by long grasses (at least in the spring and summer months when I visited). It feels private in the way that the road is less of a road and rather a single lane crowded by its natural environment that eventually just stops, forcing the driver to make a turn in someone's driveway. It feels private in the way that the old graveyard goes right up to the edge of a private property, without any clear differentiation between a property that would ordinarily be public (a graveyard) and a (private) home that is bordered by a white picket fence. It feels private in how the beach can be most easily accessed by private car—Kingsburg Beach is not a location that is serviced by public transit.

The public in Kingsburg Beach is not easily discernable. Nor is the private.

1.2. THESIS CONTRIBUTION

Legal processes are processes of place-making; done explicitly or implicitly, done with self-awareness or obliviousness, done through efforts to elevate a concern or to respond to challenges, place-making is an essential component of law. This thesis is a contribution to the area of land and real property law by looking at expropriation law and focusing on the ways in which law captures and overlooks the variety of interests that people have in physical locations and places. Land and real property law do not always or even often incorporate the multiple and divergent interests that arise from the physical location and characteristics of a location in a way that can be supported through legal action. The result of this is that the application of property laws is done with limited incorporation of perspectives, interests, and experiences of land in administrative designs for regulation and in litigation. The incongruity between land and real property as an intimate and personal experience, compared with the legal system's' inability to

recognize these through protected legal interests, is striking. Examples of this include family history and experiences in a place that is propertized through private law, and subsequently the subject of a government expropriation action or restrictions through municipal law. A place of important collective of personal memory could similarly be propertized and regulated through public law processes. The indicators used to categorize property law—of public law versus private law, private property holdings versus publicly held land, between those holding a property title versus those who do not—are not concerned with the variety and magnitude of interests that arise in locations apart from processes of property law. This thesis asks, is property law ignoring interests that arise from physical sites? To answer this question, I use place and space theory to consider the physical places that are the subject of property law.

Utilizing place and space theory I argue that there exist interests in property and land that property law principles either ignore, or have not managed to incorporate into their consideration. Properly constituted, property interests in places are the manifestation of a variety of interests: legal interests organized through property title, claims to the physical natural environment and interests in the built environment (which itself is evidence of histories in a given location). My argument is neither for or against private property, for or against public property, nor for or against the creation of common property. This thesis does not suggest that removing private property systems is possible or even desirable. Instead, it takes the far more pragmatic approach of accepting that "property cannot be wished away."[7] I argue that the potential accounts of place must be broadened because they exist both beyond and through processes of property law. The property interest may be due to underlying private property or public property rights, or it may be due to historical connections. Interests in a place will often follow the underlying land and real property

[7] Antonia Layard, "Public Space: Property, Lines, Interruptions" (2016) 2:1 JL Prop & Soc 1 at 40.

organizing structure, whereby the property title holder enjoys a variety of interests in relation to their title. Equally prevalent are interests in property that exist independently of the property title. These may be individual or collective interests that exist as limits on the rights held by official title holders. Outside interests are sometimes contained in property doctrines like nuisance or they can exist in different areas of law altogether, such as those contained in municipal by-laws. Outside interests also arise in an informal sense through activities, histories, and enjoyment of places which together give rise to claims to a location. In legal terms these interests may be considered "informal" because they are not directly contingent on legally held property titles; but for those concerned the interests are very real indeed. Claims to recognition of interests articulated as informal are often at the heart of property—or place-based—disputes.

This thesis is a call to broaden our understanding of how place is created. It is more than an interaction between space and property that I draw out in my work; instead, there exist interactions between people, the built and natural environments and legal structures, that together constitute places. Place is created through legal process, but it is also created independently through community and personal use and histories, and through the environment. Introducing a broader approach to the configurations of place allows for different perspectives about place to be in the law's consideration of properties of and in place. If a place-based approach is taken seriously and adopted it could result in the development of processes for thinking about place being introduced to property law and policy processes in a systematic way. Consideration of the multiple interests held by peoples, interest groups, and community members, in a place would not necessarily interfere with private property titles. Instead, attention to place situates private property titles in its place-based environment, and insights from a place-based analysis could be used to refocus the regulatory framework to require governments and other bodies to articulate the types

of places it wants to create and regulate. Applying a place-based approach to property law issues will require a full articulation of how interference with a private property title fits in with the variety of place-based interests that already exist and are recognized by law. Other areas of law that are deeply connected to common law property include public rights, environmental protection, Aboriginal rights.[8] Focusing on expropriation is an opportunity to think about how a single principle of property law could provide insights and pathways to thinking about place. Introducing legal claims to place through place-based arguments would require that experiences of place be considered by law, and, in some circumstances these new claims will in turn be protected through legal processes.

This thesis considers the ideas, questions, and concepts suggested by a place-based approach to property by asking, how does land and real property law recognize, react to, and incorporate place into its decision-making process in the context of expropriation law? This question is answered through a contextual and case study approach, which examines the location of Kingsburg Beach, Nova Scotia, Canada, and does so through close readings of three distinct case studies on this place. As I answer this question and build an understanding of place in and through property law, my thesis makes three original contributions:

1) This thesis is a contribution to expropriation law. An examination of expropriation law in Canada that considers its theoretical foundations, normative goals and impact on locations, has not been undertaken. This thesis builds a theory of expropriation that is guided by place-based considerations.
2) This thesis contributes to the area of research called "law and geography" by adopting a structured research methodology adapted from geographic thought. I

[8] Margaret Davies, *Property: Meanings, Histories, Theories* (New York: Routledge-Cavendish, 2007) [Davies, *Property*].

develop Charles Gritzner's definition of geography into a methodology that could be used to guide law and geography research.[9] This approach has not been taken by legal geographers in the past.

3) This thesis is a contribution to property law broadly as I construct and use a method that demonstrates how place can be brought in to guide property law. The three case studies are an application of the theory of place and they show that place-based interests are already a part of the concept of property.

1.3. A STARTING POINT: KEY TERMS

The subject of this thesis is both broad and specific. It touches on an area of law—property law—that is the subject of much writing about different perspectives of theory, practice, and critique. Within the broad area of property law, there are many different aspects that could be considered, from searching for justifications for property, to considering frameworks for more equitable use of property, to exploring the symbolic meaning of property within Canadian culture and the list could go on. Likewise, the research branch of law and geography contains many ideas about the potential for developing a more spatialized and contextual approach to law, with some writings specifically on property. I focus on specific issues within this body of work to consider the areas of common law property, particularly the principle of expropriation, geographic analysis and methodology, and place and space theory. Due to this potentially broad foundation, here I clarify the definitions of key terms used throughout this thesis.

[9] Charles F. Gritzner, "What is Where, Why There, and Why Care?" (2002) 101:1 J Geog 38 [Gritzner, "What Is Where?"].

1.3.1. *De Facto* Expropriation

I adopt the term *de facto* expropriation throughout this thesis. *De facto* expropriation refers to expropriation that occurs "in fact" though not formally.[10] *De facto* expropriation is contrasted with *de jure* expropriation, where *de jure* means " 'by law' or 'by right' and is used to describe a practice that exists by right or according to law."[11] The content of *de facto* expropriation, the legal test used to examine instances of *de facto* expropriation and the ideas about property ideals that are contained within the construct of *de facto* expropriation are precisely the concerns of this thesis.

In the past few years, the terminology used to describe *de facto* expropriation has been confused. In a major departure from accepted terminology, the Supreme Court of Canada in the decision *Annapolis Group Inc v Halifax Regional Municipality,* adopted the term "constructive takings" in place of the term *de facto* expropriation.[12] Adoption of the word by the majority of the court was done without examination. The majority simply explained that they adopted it because "in our view it more accurately captures the nature of the state action at issue and the effect on the landowner."[13] They then cited an academic paper wherein the author adopted this term.[14] The minority then adopt the term "*de facto* taking," connecting it to the majority's language choice by simply writing "a *de facto* (or constructive) taking."[15] This too was done without examination. Subsequently in 2024 the term "constructive takings" was used by the SCC in *St. John's (City) v Lynch*,[16] following the use of the term by the Newfoundland and Labrador lower courts.[17] Like the

[10] Cornell Law School, Legal Information Institute, "de facto law" (August 2022), online: < law.cornell.edu> [perma.cc/XE6U-5RJU].
[11] Cornell Law School, Legal Information Institute, "de jure law" (June 2021), online: < law.cornell.edu> [perma.cc/QNY9-LYQA].
[12] *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 [*Annapolis v Halifax*].
[13] *Ibid* at para 17.
[14] *Ibid* at para 17. Malcolm Lavoie, "Canadian Common Law and Civil Law Approaches to Constructive Takings: a Comparative Economic Perspective" (2010) 42 Ottawa Law Review 229.
[15] *Annapolis v Halifax, supra* note 12 at para. 82.
[16] *St. John's (City) v Lynch*, 2024 SCC 17.
[17] *Lynch v St. John's (City),* 2022 NLCA 29.

Annapolis v Halifax case, adoption of "constructive takings" in St. *John's (City) v Lynch* was done without any consideration of the significance of the change of terminology, though perhaps this is less significant because this decision was about the appropriate compensation to be paid for an expropriation, not whether an expropriation had occurred.

For this thesis I have chosen to continue to use the term "*de facto* expropriation" unless I am writing on the above two cases, in which case I will adopt the language used by the courts. I have chosen to retain use of the term *de facto* expropriation for several reasons. First, historically this has been the term used in Canada. At the time of writing, relatively close to the handing down of these decisions, it is not known whether these will be the newly adopted phrases. Second, *de facto* expropriation is the term that was used by the court in the *Mariner Real Estate decisions,*[18] that I examine as the central legal case study of this thesis. Third, the recent changes were done without examination of the terminology that exists to name *de facto* expropriation, without justification for the adoption of different word use and without consistency in the SCC's own jurisprudence in recent years. As such, the legal significance of these various terms remains unclear.[19]

[18] *Supra* note 4.

[19] Though academic responses both in support and against this terminology change have emerged. A positive response to use of the phrase "constructive taking" and adoption of that language throughout can be seen in Eran Kaplinsky, et al, *Ziff's Principles of Property Law*, 8th ed (Toronto: Thomson Reuters Canada, 2023) at 106–09. In Peter W Hogg *Constitutional Law of Canada*, 5th ed (Toronto: Carswell Legal Publications, 2015) (loose-leaf updated 2024, release 1 7/2024) the term "constructive taking" has been adopted without commentary on the correctness or wrongness of this change and going so far as to use the term to explain past decisions even though that language was not captured therein. Negative responses have questioned the legal significance of the language shift and its correctness in the Canadian jurisdiction where expropriation exists as statutory law, as opposed to constitutionally. See, Douglas Harris, "Tending Gardens, Ploughing Fields, and the Unexamined Drift to Constructive Takings at Common Law" (2023) 61:1 Alt L Rev 89; Jim Phillips, "The Invention of Advantage: Annapolis Group v. Halifax Regional Municipality and Canadian De Facto Expropriation" (2023) 61:1 Alt L Rev 79.

1.3.2. Geography

I adopt Yi-Fu Tuan's approach to defining geography for this thesis. As Tuan writes in the introduction to his article, "A View of Geography," "I start with a definition popular during the late 1940s and early 1950s: geography is the study of the earth as the home of people."[20] Taking a definition of geography that recognizes first the natural physical geography and then second the role of people in that place, is attractive for guiding this thesis because it requires that attention be paid first to concrete activities and what categories and terms represent in different places. This approach has been adopted by others. The French geographer Paul Vidal de la Blache defined geography as the "science of places."[21] Vidal sought to demonstrate the role of man as a geographical factor, in which there is continual play of action, reaction, and interaction between human groups and their natural milieus. The landscape is not merely the product of a sequence of natural geographic events but is also the work of people who inhabit, build, and leave their mark in places. This insight was later adopted by an American geographer, Carl Sauer, who describes this as identifying the physical and cultural landscapes of a region.[22] By contrast, the tendency to consider abstract spaces and categories (of class, ethnicity, interests, identities, etc.) and to draw parallels as they occur across time and space does not prioritize the importance of place in its analysis. An important implication of the approach that prioritizes place taken by Vidal, Sauer, Tuan and others is that it has the capacity to understand the whole context of a location on Earth's surface. It requires that the place be taken together, rather than separated into individual points of

[20] Yi-Fu Tuan, "A View of Geography" (1991) 81:1 Geog Rev 99.
[21] Paul Vidal de la Blache, *Principles of Human Geography*, ed by Emmanuel de Martonne, translated by Millicent Todd Bingham (London, UK: Constable and Company, 1926); S.J.K. Baker, "Paul Vidal de la Blache: 1845-1917" in Thomas W. Freeman, ed, *Geographers: Biobibliographical Studies*, (Studies in the History of Geography, *vol 12*)
(London: Bloomsbury Publishing, 2016) 189.
[22] Carl Ortwin Sauer, "The Morphology of Landscape" (1929) 2:2 U Cal Pub in Geog 19.

analysis that are driven by particular concerns to a given research work.[23] For a law and geography work, highlighting a place-first approach is important as an initial step because it requires that the research not be understood only through the lines and boundaries of legal jurisdiction and argument in property law, but also through the many different iterations that go into creating place. These can be through the concrete uses and activities of place, legal understandings of place, and interests in place that may or may not be realized.

1.3.3. Land and Real Property

I use the term "land and real property" to identify the area of property law addressed in this thesis. This reference indicates that within the subject of property law, I look at things *real* and not things *personal*. Things *real* are an essential and unavoidable aspect of place-making through processes of law generally, and arguably the area of law that is *most* impactful on place-making. There is little distinction between land and real property in terms of their legal classification. Blackstone adopted Sir Edward Coke's classification of things *real* in his commentaries. He writes:

> "For *land* says Sir Edward Coke, comprehendeth in its legal signification any ground, soil or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings: for they consist, saith he, of two things; *land*, which is the foundation; and *structure* thereupon: so that if I convey the land or ground, the structure or building passes therewith."[24]

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[23] Jason Hilkovitch & Max Fulkerson, "Paul Vidal de la Blache: A biographical sketch" (25 March 1997), online, <web.archive.org/web/20060909192633/http://wwwstage.valpo.edu/geomet/histphil/test/vidal.html>. See also, Geoffrey J. Martin, & Preston E. James, *All Possible Worlds: A History of Geographical Ideas*, (New York: John Wiley and Sons, 1993) at 193:

> ...[T]hat which geography, in exchange for the help it has received from other sciences, can bring to the common treasury, is the capacity not to break apart what nature has assembled, to understand the correspondence and correlation of things, whether in the setting of the whole surface of the earth, or in the regional setting where things are localized.

[24] William Blackstone, *Commentaries on the Laws of England in Four Books,* 5th ed (Oxford: Clarendon Press, 1773), vol 2 at 17–18, online: <babel.hathitrust.org/cgi/pt?id=njp.32101075718237&seq=157>.

These definitions carry through to the present-day common law of property. *Black's Law Dictionary* defines real property as "land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land."[25] Land is defined as "[a]n immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing in or permanently affixed to it."[26]

In addition to this foundational point, which highlights that land and real property is categorically broad, I adopt the term "land and real property" to indicate a bigger point about the nature of places I consider throughout the thesis. Land and real property is not a fixed, singular type of thing, despite the sense of physicality about this type of property compared to other properties (e.g. intangibles). An example of the sometimes-ephemeral nature of real property is water, which is classified as a *thing real*, even though it is movable and wandering.[27] Peter Butt highlights that the legal understanding of "land" is equally a tangible material thing and a concept to which the name attaches. He explains that a reference to land is a reference to a three-dimensional space and, with this, even if "the contents of the space may be physically severed, destroyed or consumed… the space itself, and so the 'land,' remains immutable."[28] The removal of soil, lumber activities, or the slow change in direction of a river are all examples of how land may be altered without necessarily also changing the property title. Butt's point seems conceptual, but it goes to the heart of this thesis concerning the importance of place and highlights the relevance of the theoretical framework adopted. The term "land and real property" best indicates the interplay between the physical, the natural, the built environment and all the processes of

[25] Bryan Garner, ed, *Black's Law Dictionary,* 10th ed (St. Paul, Minnesota: Thompson Reuters, 2014) sub verbo "real property (18c)" at 1412.
[26] *Ibid,* sub verbo "land, *n* (bef. 12c)" at 1008.
[27] *Ibid,* sub verbo "real property (18c)" at 1412.
[28] Peter Butt, *Land Law*, 2nd ed (Sydney, Australia: Lawbook Co, 1988) at 9.

change that occur within property classified as a thing *real*. Alterations of locations from land into real property (using the definitions adopted by Black's) are part of the place-making processes of law.

1.3.4. Place

The definition of place that is adopted to guide this thesis is one centered on physical and tangible place. Take this definition from James Duncan as a starting point: "In a generic sense, a place is a geographical locale of any size or configuration comparable to equally generic meanings of area, region or location."[29] The physical geography is an essential aspect of place for geographers because "place and the differences between places are the very stuff of geography, the raw materials that give the discipline its warrant."[30] Beyond the starting point of place as an observable phenomenon, the meaning of "place" within geographic thought is really enquiring about a much bigger set of concepts about the identification of why a place is important. In short, for a place to be a place, it necessarily has meaning.[31] This meaning is gained through a variety of connections to physical place, including "perceptions of place, senses of place and human dwelling in and memories of place,"[32] and others. People belong to the land and are defined by it.[33] Thus a variety of experiences of place[34] are themselves part of the definition of place, including: emotions, histories, attachments, current claims, personal and group attachments, legal claims and titles,[35] and others. Notably, although place is dependent on physical location, places are not necessarily

[29] Quoted in George Henderson, "Place" in Derek Gregory et al, eds, *The Dictionary of Human Geography* (Oxford: Wiley-Blackwell Publishers Ltd., 2009) at 539.
[30] *Ibid.*
[31] *Ibid.*
[32] Tuan, *Space and Place*, *supra* note 5.
[33] Doreen Massey, "The Conceptualization of Place" in Doreen Massey & Pat Jess, eds, *A Place in the World? Places, Cultures and Globalization,* vol 4 of *Shape of the world* (Oxford: Oxford University Press, 1995) at 45.
[34] Edward C. Relph, *Place and Placelessness* (London: Pion Limited, 1976); Tuan, *Space and Place, supra* note 5.
[35] As will be shown in this thesis.

bounded spaces or territories;[36] instead, places can be experienced differently by different people as perspective mediates claims to place. At the same time, as Massey has argued,[37] places gain meaning from their similarities to other like places. This point is particularly important for understanding how legal understandings create tangible places, and how material place can guide the development of law. Within geographic thought, a "place" is both the beginning point in which an area of interest is identified and part of an ongoing inquiry in which other less tangible matters have provided the sense of a place.

1.3.5. Space

Space is understood "largely as a dimension within which matter is located or a grid within which substantive items are contained."[38] For spatial theorists the intangible and relational quality of space lends itself to capturing phenomena that occur across political, social and economic processes. The relativity of space as something that gains saliency through process and relationships between these institutions can have the effect of hiding intangible structures of power which remain hidden until they become solidified into a singular institution.[39] Perhaps requiring interaction allows forces otherwise overlooked to become identifiable. Indeed this was the point of the "spatial turn," the paradigm shift that drew into relief the role of space as a context for social

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[36] Linda McDowell & Joanne P. Sharp, eds, *A Feminist Glossary of Human Geography* (London: Hodder Education Publishers, 1999) at 201.

[37] See Doreen Massey, *For Space* (London, UK: SAGE Publications, 2005) [Massey, *For Space*]; Doreen Massey, "The Political place of locality studies" (1991) 23:2 Env & Plan A 267.

[38] John Agnew, "Space and Place" in John A. Agnew & David N. Livingstone, eds, *The SAGE Handbook of Geographical Knowledge* (London: SAGE Publications, 2011) 316 at 317 [Agnew, "Space and Place"].

[39] This tendency of spatial processes to embody and hide power structures is at the heart of the work of many critical spatial theorists and legal geographers, which is relied on throughout this thesis. See e.g.: Massey, *For Space, supra* note 38 (on political space); Nicholas K. Blomley, *Law, Space, and the Geographies of Power* (New York: Guilford Press, 1994) [Blomley, *Law, Space, and the Geographies of Power*] (on law's erstwhile hidden spatial structures of power); Nicholas Blomley, David Delaney & Richard T. Ford, "Preface: Where Is Law?" in Nicholas Blomley, David Delaney & Richard T. Ford, eds, *The Legal Geographies Reader: Law, Power and Space*, (Oxford: Blackwell Publishers Ltd., 2001) xiii at xvii [Blomley et al, *The Legal Geographies Reader*] (arguing that arguments about crime, punishment, property, constitutional rights and legal procedure may all turn on tacit and contestable understandings of space).

action (where previously the focus had been almost exclusively on time).[40] For Tuan, the term "space" is an idea that indicates unboundness and possibility, and, with time, "undifferentiated space becomes place as we get to know it better and endow it with value."[41] Massey identifies space as the product of interrelations, as an existing multiplicity, and as ever evolving.[42] The unboundable notions of space require less that a singular definition be settled on, and instead that *processes* of space be interrogated. David Harvey writes:

> [S]pace is neither absolute, relative or relational in itself, but it can become one or all simultaneously depending on the circumstances….The question 'what is space?' is therefore replaced by the question 'how is it that different human practices create and make use of different conceptualizations of space?'[43]

These ideas about space are readily present in literature that has revealed manifestations of spatial relationships across a variety of subjects. The primary focus for spatial theory has been "on modeling interaction over space—migration flows, diffusion of innovation, spacing of settlements as a function of distance to market, land use specialization and industrial location in terms of transportation costs—more than, say, local/regional differences or place characteristics."[44] These ideas of space and the tendency to focus on phenomena that is ever changing is integral to the thinking about space throughout this thesis. Space is phenomenal and general; it is relative and in flux; it refers to movement and relationships that use and reinforce spatial patterns.

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[40] Edward W Soja, "Taking Space Personally" in Barney Warf & Santa Arias, eds, *The Spatial Turn: Interdisciplinary Perspectives* (London: Routledge, 2008) 11 at 12.
[41] Tuan, *Space and Place, supra* note 5 at 6.
[42] Massey, *For Space, supra* note 37 at 9.
[43] David Harvey, "Space as a Keyword" in Noel Castree & Derek Gregory, eds, *David Harvey: A Critical Reader* (Oxford: Blackwell Publishing Ltd., 2006) 270 at 275 [Harvey, "Space as a Keyword"].
[44] Agnew, "Space and Place," *supra* note 38 at 317.

1.3.6. Place and Space

There is a close relationship between the concepts of place and space. Often they are referred to together, with one requiring the other for clarity. If place refers to the physical location only, then space can be understood as the human-oriented systems and relations that operate in that space. However, if "places" refer to unique locations constituted by physical geography and human experience, then space can be understood as nodes of measurement that exist over those places. John A Agnew and David N Livingstone write on this relational quality between space and place identifying the indelible impression one leaves on the other:

> The various meanings of the terms can be used to trace the intellectual trends of the field, particularly disputes between that abstract spatial analysis which tends to view places as nodes in space simply reflective of the spatial imprint of universal physical, social or economic processes and that concrete environmental analysis which conceives of places as milieux that exercise a mediating role on physical, social and economic processes and thus affect how such processes operate. The first is a geometric conception of place as a mere part of space and the second is a phenomenological understanding of a place as a distinctive coming together in space.[45]

This distinction between the different ideas contained in the definitional partnership between "place" and "space" is important for this thesis. Place can be defined by a singular spatial metric (latitude, longitude etc.) or an otherwise non-spatial process that adopts the ideas of spatial-relationality to describe that examined (these could be spatial notions around core-periphery, city-rural, etc.). On the other hand, place can be understood through the self as the experience in, of, and related to a particular location creates the property of place.[46] I adopt this second aspect of "place" for this thesis, and this has in turn impacted the definition of "space" that I adopt.

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[45] *Ibid* at 317.

[46] See generally, Robert D Sack, *Homo Geographicus: A Framework for Action, Awareness, and Moral Concern* (Baltimore: John Hopkins University Press, 1997) at 16.

A thread that is important for this thesis is the idea that "space" is increasingly given priority in modern thought over accounts of place.[47] Spatiality as a term used to refer to placeless location has increased as homogeneity and sameness has developed through globalization. In terms of property, we can see this sense of placelessness in the development of shopping centres and strip malls, that are increasingly homogenous. In some sense, prioritizing either the concepts of place or of space in one's research depends on the subject matter of the research and the investigation. For a body of research that looks at the subject of land and real property, explicit attention to the concept of place so as to include experiences, histories, and ideas, is important and is the content currently missing from land and real property law, and law and geography more broadly.[48]

1.4. LAW AND GEOGRAPHY METHODOLOGY

Increasingly there is awareness of the importance of identifying the methods and processes of law and geography research. In the article "Who's Afraid of Methodology? Advocating a Methodological Turn in Legal Geography," Irus Braverman observes that there is a dearth of work focused on developing a methodology tailored to a "legal geography" or "law and geography"

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[47] Agnew "Space and Place," *supra* note 38 at 317.

Agnew shows that by some accounts space is given priority because place is considered old fashioned and retrograde. That "place" is a reference to past times in which "places" are unique, something that some argue is no longer true. However, I agree with Agnew's critique of this in which they highlight the ongoing importance of unique places, and efforts to push back at homogenous land developments.

[48] Speaking on place and space, Harvey states:

> … The decision to use one or other conception certainly depends on the nature of the phenomena under investigation. The absolute conception may be perfectly adequate for issues of property boundaries and border determinations but it helps me not a whit with the question of what is Tiananmen Square or Ground Zero. I therefore find it helpful – if only as an internal check – to sketch in justifications for the choice of an absolute, relative or relational frame of reference (see David Harvey, "Space as a Key Word" (Paper delivered at the Marx and Philosophy Conference, Institute of Education, University of London, 29 May 2004) at 5. For a similar reprint see also, Harvey, "Space as a Keyword", *supra* note 43 at 275).

research study. As Braverman recognizes, taking a reflective approach to how methodology is used in legal geography is fundamental to the development of research design. This point is even more important when there are two distinct disciplines at the foundation of the merged research endeavour. Braverman writes that a methodological approach "is largely a discipline-specific endeavour, in the sense that different disciplines use, and are defined by, their distinct methodologies."[49] The challenge for legal geography has been how to develop a methodology that embraces both foundational disciplines. The solution, Braverman argues, is to self-consciously adopt a methodological approach that reflects the goals of legal geography:

> Specifically, attention by legal geographers to the craft of scholarship is likely to result in an expansion of the available tools in our methodological arsenal, thus enhancing the richness of legal geography as a tradition and its interdisciplinary potentials. For this to happen, we must engage in discussions about *how* we go about answering the questions we ask—namely, the art of craftsmanship.[50]

Taking this point seriously, I think that guidance on how a law and geography methodology would look is found in concepts and tools in the discipline of geography. The tools for developing this research inquiry that are adopted in this thesis are found in the work of geographers writing on the topic of the definition of the discipline of geography and the implementation of geographic thought.[51]

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[49] Irus Braverman, "Who's Afraid of Methodology? Advocating a Methodological Turn in Legal Geography" in Irus Braverman et al, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Redwood City, California: Stanford University Press, 2014) at 121 [Braverman, "Who's Afraid of Methodology?"].

[50] *Ibid* at 120.

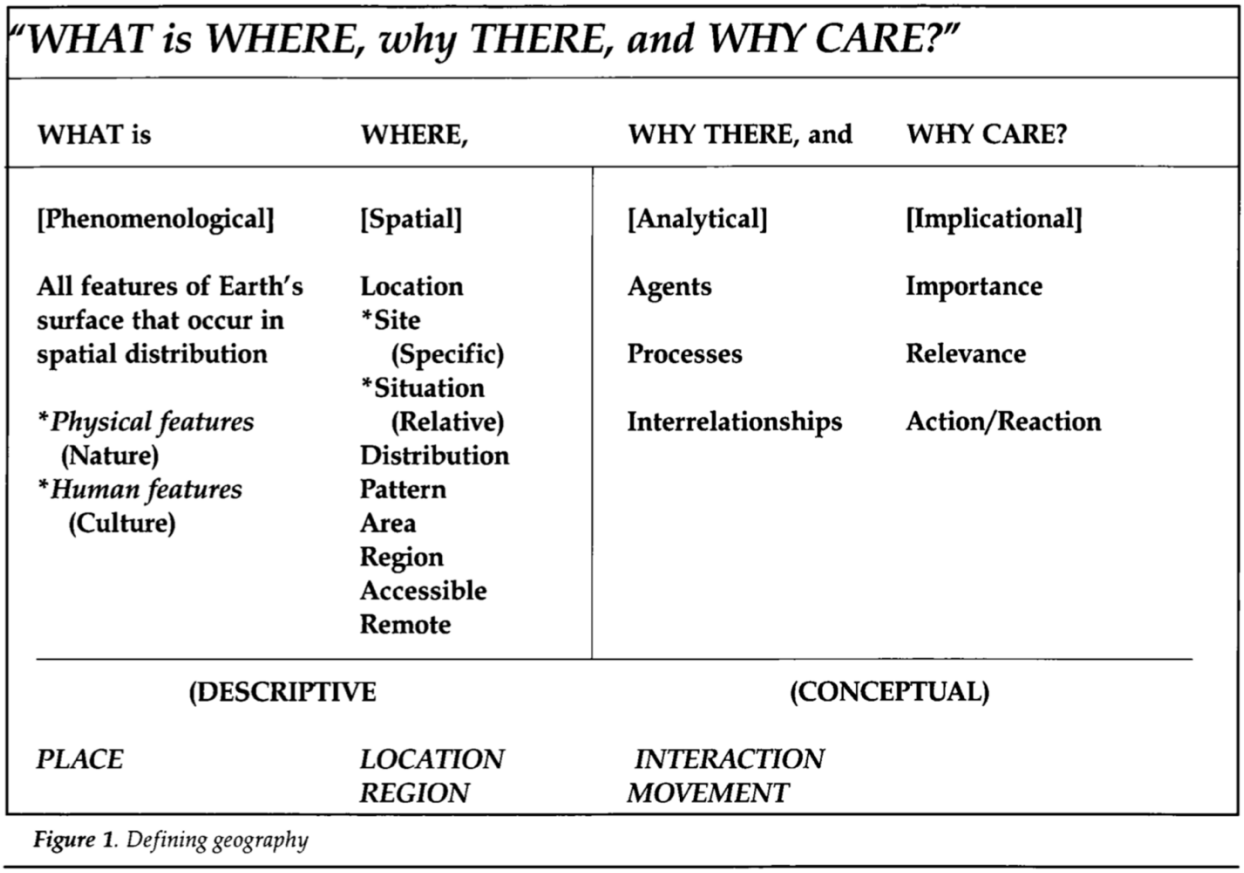
[51] Works relied on include Ronald F Abler, "What Shall We Say? To Whom Should We Speak?" (1987) 77:4 Annals Assoc Am Geog 511; Gritzner, "What Is Where?" *supra* note 9; Kamilla Bahbahani & Niem Tu Huynh, *Teaching about Geographical Thinking: A Professional Resource to Help Teach Six Interrelated Concepts Central to Students' Ability to Think Critically about Geography* in Roland Case & Bob Sharpe, eds, *Tools for Critical Inquiry* (Vancouver & Ottawa: Critical Thinking Consortium & Royal Canadian Geographical Society, 2008) [Bahbahani & Huynh, *Teaching about Geographical Thinking*]; Edward Taaffe, "The Spatial View in Context" (1974) 64:1 Annals Assoc Am Geog 1; Thomas J Baerwald, "Presidential Address: Prospects for Geography as an Interdisciplinary Discipline" (2010) 100:3 Annals Assoc Am Geog 493; Philip J Gersmehl & Carol A Gersmehl, "Wanted: A Concise List of Neurologically Defensible and Assessable Spatial-Thinking Skills" (2006) 8:1 Res Geog Ed 5; Reginald G Golledge, Meredith Marsh & Sarah Battersby, "Matching

A definition of geography by Charles F Gritzner is instructive as a starting point for identifying spatial inquiry tools.[52] Charles Gritzner was Distinguished Professor Emeritus of Geography at South Dakota State University. He wrote on many aspects of geography, largely in the area of human geography but his work that focused on identifying key features of geography and its definition is instructive for this thesis. For Gritzner, the definition of the subject of "geography" was difficult to ascertain. This was because geography has a broad array of research contributions that are developed through a variety of methods and methodological approaches. The diversity in geographic insight found in human geography through to physical and natural geography (and all the variations in between) has tended to obfuscate the point common to *all* geographic research. For Gritzner the essential point of geography is the concern with the "where" question.[53] Seeking to create a singular definition of geography that encompasses its broad contributions, Gritzner defines geography as "WHAT is WHERE, why THERE, and WHY CARE?" (see Figure 1.2).

Geospatial Concepts with Geographic Educational Needs" (2008) 46:1 Geog Res 85; Tim Unwin, *The Place of Geography* (London: Routledge, 1992).

[52] Gritzner, "What is Where?" *ibid* 151.

[53] Gritzner contrasts this with history, which would contain the fundamental points of "when," "time," or even a "temporal methodology" (see Gritzner, *ibid* at 38).



"WHAT is WHERE, why THERE, and WHY CARE?"

WHAT is	WHERE,	WHY THERE, and	WHY CARE?
[Phenomenological]	[Spatial]	[Analytical]	[Implicational]
All features of Earth's surface that occur in spatial distribution *Physical features (Nature) *Human features (Culture)	Location *Site (Specific) *Situation (Relative) Distribution Pattern Area Region Accessible Remote	Agents Processes Interrelationships	Importance Relevance Action/Reaction
(DESCRIPTIVE		(CONCEPTUAL)	
PLACE	LOCATION REGION	INTERACTION MOVEMENT	

Figure 1. *Defining geography*

Figure 1.2: Gritzner's definition of geography[54]

These definitional questions are the methodological approach taken in this thesis. These questions articulate the essential aspects of geographic enquiry and also serve as a tool guiding the research inquiry. The elements of "What," "Where," "Why There," and "Why Care" effectively identify geography as both descriptive and analytical. The questions are the answer to assessing precisely what a law and geography research project looks at. That is, they underscore the importance of "where-ness" for a geographic research question. The questions also provide the tools to guide the research. From this perspective, I understand the questions as a geography

[54] *Ibid* at 39.

methodology, which I will adopt for law and geography research. According to this definition, the essential question is to ask "what" the subject of the research inquiry is. This initial first question is the point at which physical or human geography is selected as the research area. For a law and geography methodology, this first question is important for highlighting what the research focus is and what insights will be derived from the scholarship tradition. From there, the methodology identifies that the spatial question of "where" can be analyzed through a variety of spatial inquiries that may look at location, through either a site-specific approach, or a relational one. For a law and geography study, the location as either an individual site or a set of similar sites is particularly relevant to land and real property law, which adjudicates across sites by identifying of types of property. Examining where a regulation has an impact is an important component of law and geography, and critical engagement with exactly how that "where" is defined is essential.

Together this first part, "What is where," is the descriptive part of the methodological approach. From this the methodology leads into the second part, "why there and why care?" This is the conceptual component of the research in which the mode of analysis and the implications of the research are identified. For a law and geography methodology, the "why there" question necessarily involves analyzing law and its role in the creation and management of the place and location (descriptive aspect of the methodology). The last question, "why care?" is essentially the requirement of justifying why the particular research question matters. For legal research broadly, the importance of geography to law has been identified by legal geographers who have shown that the life of law cannot be separated from the life of space. Attention to space highlights the so often overlooked aspects of space that are politically driven and relationship dependent, which also exist within legal structures. This insight applies as well to this law and geography research which is focused on land and real property law, but with increased attention to place. The importance of

places of properties to people immediately involved in those places cannot be overlooked, and considering the descriptive account of "what is where" in these places forces attention on the ways in which they are understood in legal processes, in peoples' experiences, and in popular understanding. Conflicts around properties, particularly different ideologies around what is important in place, are demonstrated through individual legal conflicts in sites of importance, and it is not likely that the importance attached to place will dissipate.

This adapted research methodology provides clarity about the steps of geographic research methodology, including identifying the mutable characteristics of "where," and provides methodological steps for engaging with the "where" question in a research project. The starting point of this methodology for Gritzner was an effort to provide clarity and simplicity for geographers as they explain the complexity of their discipline. With this, it is clear that Gritzner's audience is geographers, whereas for this thesis, the audience is primarily law. Therefore, I take this geography methodology and use it for the legal audience. This does not mean that aspects of the definition are altered to look like or perform as legal questions (or legal research methodologies); instead, as I have identified above, there are components of legal inquiry that will be brought into this methodological inquiry to answer questions of "what" "where" "why there" and "why care."

The law and geography methodology that is used in my thesis focuses on using geographic enquiry to engage with legalized places of land and real property law. The premise of law and geography is that there is an inherent co-constituted relationship between places of law and places of space. In this methodology, both law and geography require one another for definition, and, given this, it logically follows that the foundational question in geography of assessing where-ness, is also the key question for law and geography. Geographical value judgements exist in

relation to the physical and natural geography as well.[55] The assessments that are currently inscribed in geographic content can be revealed through inquiries that identify judgements in geographical accounts, that uncover stakeholder interests and tensions, and that consider other perspectives about a place. The question of "what is where, why there, and why care?" prioritizes an analysis of just how and why places are important. The existence of legalized spaces is certainly a component of this; however, the where-ness question cannot be answered through this singular lens. The multi-question approach into thinking spatially provides an analytical framework and tools to guide law and geography research work in its engagement with place and space of land and real property case studies.

1.5. METHODS

The methods adopted in this thesis are focused on revealing experiences of place and space. I adopt the law and geography method of carrying out focused, case study-driven research. In this case study tradition, research looks at legal issues or areas of law through the specifics of a single location. Past research has considered issues such as housing insecurity and disadvantage within the city-scape, the informal street business and recreation activities in public locations.[56] All of these examples are location-based engagement with law. Most often case study method has been

[55] See Massey, *For Space, supra* note 37 at 9–15; Nigel Clark, "The Demon-Seed: Bioinvasion as the Unsettling of Environmental Cosmopolitanism" (2002) 19:1/2 Theory, Culture, Soc'y 102; Neil Smith & Phil O'Keefe, "Geography, Marx and the Concept of Nature" in Kay Anderson & Bruce Braun, eds, *Environment: Critical Essays in Human Geography*, Contemporary Foundations of Space and Place (London: Routledge, 2008) 47; Rob Inkpen & Graham Wilson, *Science, Philosophy and Physical Geography,* 2nd ed (London: Routledge, 2013) especially at 14–28; See generally Pauline Couper, *A Student's Introduction to Geographical Thought: Theories, Philosophies, Methodologies* (London, UK: SAGE Publications, 2015).

[56] In order, see Don Mitchell, "The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States" (1997) 29:3 Antipode 303; Antonio Azuela & Rodrigo Meneses-Reyes, "The Everyday Formation of the Urban Space: Law and Poverty in Mexico City" in Irus Braverman et al, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Redwood City, CA: Stanford University Press, 2014) at 167; John Carr, "Legal Geographies-Skating around the Edges of the Law: Urban Skateboarding and the Role of Law in Determining Young Peoples' Place in the City" (2010) 31:7 Urban Geog 988.

conducted in relation to specific cities or types of areas commonly found in cities (although rural communities have been looked at in some studies).[57] This case study method has been important for close reading of how geography is enacted through law in specific locations, or types of locations.

For this thesis, I follow this tradition and conduct my research in the field study location of Kingsburg Beach, Nova Scotia. This place is of interest from the perspective of traditional legal scholarship because it is a site of a legal action concerning the property law principle of expropriation law.[58] The application of the principle of expropriation law at Kingsburg Beach demonstrates a complex network of private property interests and environmental interests that were discussed by the courts. Taking a field study approach to examining where the legal case took place demonstrates that the location of the beach is also the place of broader interests, notably public interests and Aboriginal land interests. In order to examine the ways in which the place of Kingsburg Beach is important, I examine the field study through three case study accounts which are (1) the environment and private property, considered together, (2) public interests and (3) Aboriginal rights.

To examine the site as distinct case studies, I adopt spatial methods of geography as the primary method for carrying out my law and geography research methodology. Spatial analysis is defined as "the quantitative study of phenomena that are located in space."[59] Spatial analysis requires that spatial phenomena are included in the analysis of processes (which are already inherently spatial) to allow for understanding and explanation of the behaviour of (spatial)

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[57] See e.g. the work of Lisa R Pruitt, "The Rural Lawscape: Space Tames Law Tames Space" in Irus Braverman et al, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Redwood City, CA: Stanford University Press, 2014) at 190.

[58] *Mariner Real Estate Ltd v Nova Scotia (Attorney General),* 1999 NSCA 98 [*Mariner Real Estate*, NSCA].

[59] Trevor C Bailey & Anthony C Gatrell, *Interactive Spatial Data Analysis* (Harlow Essex, UK, & New York, NY: Longman Scientific & Technical & John Wiley, 1995) at 7 [Bailey & Gatrell, *Interactive Spatial Data Analysis*].

processes and possible relationship to other spatial phenomena.[60] Spatial analysis is only interested in geo-spaces, which means spaces that relate to locations on Earth's surface.[61] The spatial analysis method requires analysis of the factors, content, and processes that exist in geographically located areas. Geographic coordinates of latitude and longitude can be an aspect of spatial analysis, as can manipulation of geographic location points for visualisation techniques of geographical information systems and cartography. The focus is on using spatial data for purposes of studying the interaction between spatial phenomena. In essence spatial analysis is the analysis of geographic data.

Spatial analysis entails a variety of different techniques from the quantitative to the qualitative. To aid in spatial analysis for this thesis, key concepts from geography provide guidance on how laws and places become spatialized phenomena. In his keynote address to the Association of American Geographers, then president of the society, Reginald G Golledge noted that though a singular definition of geography is difficult to articulate, the foundations of all geographic inquiry can be traced to a simple concern with where things happen. Golledge went on to identify the so-called "primitive" tools on which geographic knowledge is built: place-specific identity, scale, region, location, time, boundary, and distance.[62] These tools are the primary and basic concepts that are used by geographers in their work. Golledge writes that these primitive tools must be acknowledged as the base of the structure of geographic knowledge, without which geographic thought is "speculative and hard to justify or defend."[63] These methodological tools are part of the definition of geography by Gritzner.[64] These concepts, found in spatial analysis, guide the

[60] *Ibid* at 7.
[61] Anthony C Gatrell, *Distance and Space: a geographical perspective* (Oxford: Clarendon Press, 1983).
[62] Reginald G Golledge, "The Nature of Geographic Knowledge" (2002) 92:1 Annals Assoc Am Geog 1 at 7.
[63] *Ibid* at 12.
[64] Gritzner, "What Is Where?" *supra* note 9.

framework and provide common language for assessing the ways in which land and real property laws interact through and in place.

Spatial data come in many varieties, and it is not easy to arrive at a system of classification that is simultaneously exclusive, exhaustive, imaginative, and—relevant for this thesis—that includes data of a legal and geographic nature.[65] For this thesis, the data that are the subject of spatial analysis are found in a variety of legal documents and geographic documents. The spatial data that analyzes are not statistical data, nor un-structured data, nor otherwise numerical in some form (longitudinal, latitudinal, decimal degrees, etc.), as is often imagined to be the types of data relevant to spatial analysis.[66] Instead the guiding measure of the types of data to be analyzed is the following definition:

> Data qualify as "spatial" when their location is known and it has the potential to impact the outcome of an analysis.[67]

The spatial data used here include descriptive accounts of an area and academic literature on a geographic phenomenon. Most notable for their inclusion in a law thesis is the inclusion of texts that are visual in nature, including maps, land surveys, property surveys, and photographs,[68] which are not typically central to legal analysis.

Traditionally law and legal scholarship is systematically organized in various legal domains such as constitutional law, administrative law, criminal law, private law and procedural law. Positive property law is correctly considered to be a private law subject: This is particularly true in the context of privately owned real estate. However, this thesis takes a broad approach to

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[65] Nikos Mamoulis, *Spatial Data Management*, Synthesis Lectures on Data Management, No 21 (San Rafael, California: Morgan & Claypool, 2012) at 2–7.

[66] Though they are the data used for research using "spatial data analysis" (see Bailey & Gatrell, *Interactive Spatial Data Analysis, supra* note 59).

[67] Tony H Grubesic & Jake R Nelson, "Spatial Analysis" (31 March 2016) in Barney Warf, ed, *Oxford Bibliographies in Geography*, online: <dx.doi.org/10.1093/obo/9780199874002-0125> [perma.cc/SYP5-BGU8].

[68] Alan Mckee, *Textual Analysis: A Beginner's Guide* (London: SAGE Publications, 2003), ch 1 at 4.

property, adopting an account of property that is both private and public in nature. Private law sets the rules between people, while public law sets the rules between the public and society.[69] Thus, the sources of property law analyzed reflect this dual commentary: private property law principles as is contained in *Blackstone's Commentaries*, are interpreted with as much weight as public property law principles as is contained in city by-laws.

In order to access the variety of data I need to implement the law and geography methodology, I carried out archival research and field research. The archival and field research focused on the geographic location of Kingsburg Beach, Nova Scotia. Archival research was undertaken in the Nova Scotia and National archives. The types of data I focused on in the archival research were all concerned with answering the questions "what is where, why there, and why care?" Underpinning these questions is attention to legal aspects of land and real property law in the case study location. The types of spatial data I accessed through archival research include historical land titling documents, conveyancing documents, paintings of the locations at different points in time, information about traditional Indigenous land areas, information about family land-holdings, original land patents and grants, cartographic renderings representing different points in time, land surveys, and information about characteristics of the land as recorded in diaries, letters, and by explorers. Throughout these documents, reference to spatial points and locations are prevalent. Incorporating this variety of documents into a spatial analysis accounts for places in a way that is reflective of the multitude of experiences and histories in a place. In essence the spatial analysis is an assessment of the sense of place.

In addition to the archival research, I carried out field research in the case study location. Field research is the systematic observation and collection of otherwise unavailable (primary)

[69] Government of Canada, "What is the law?" (last modified 1 Sep 2021), online: <justice.gc.ca/eng/csj-sjc/just/02.html>.

data.[70] Field work enables direct learning and interpreting of the spatial expression of physical processes as preserved in the landscape. Some types of field research data I collected include photographs, handwritten maps, and personal observations about the area's physical geography, which includes the natural and built environments. I completed field research visits in Kingsbury Beach on two separate occasions. I used archival and field research in addition to traditional types of legal information used in issues of land and real property law, including primary legal documents (such as by-laws, statutes, regulations, and case-law), and also secondary legal documents including scholarly journal articles, opinion pieces, news reports, and government policy documents, among others.

The variety of texts used to provide information about the places in the case studies highlights another analytical requirement: how to interpret a diverse collection of texts. To answer this question, it is useful to interrogate geographic and legal data in the case study location through the lens of spatial narrative. The texts about place are insightful because they offer diverse arguments for how property law ought to operate in relation to a given topic, issue, or place. Information about those places guides how we understand that place. The connection between place and narrative leads my research towards the second set of research methods used in this thesis: legal storytelling.[71] Broadly legal storytelling or legal narrative uses story telling as an ongoing activity of law and lawyers, as it selects facts and shapes an understanding of event, towards the goal of adjudication. For Robert Cover, narration is the process of creating the law:

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[70] John F. Lounsbury and Frank T. Aldrich, *Introduction to Geographic Field Methods and Techniques*, 2nd ed (Columbus: Charles E. Merrill Publishing, 1986).

[71] For examples of narrative scholarship that focus on property law, see Carol M Rose, "Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory" (1990) 2:1 Yale JL & Human 37 [Rose, "Property as Storytelling"]; Kate Green, "Being Here: What a Woman Can Say about Land Law" in Anne Bottomley, ed, *Feminist Perspectives on the Foundational Subjects of Law* (London: Routledge-Cavendish, 1996) 87.

> Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative – that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.[72]

Narration is created through processes contained in legal texts, from statute to case law to policy developments. A narrative can serve all manner of purposes and will not be automatically subversive or a critique of the status quo.[73] Instead, identifying narrative in the law may be done for purposes of highlighting false claims of neutrality, to identify tropes of victim and perpetrator that are weighted heavily in legal processes, or to pay attention to legal arguments that rely on norms to develop the narrative.[74]

In property law, narration functions as an essential component of how claims to property are constructed through law. Narration highlights the role of property in processes of social and political life.[75] The gatekeeper role of narration in property law is strong. Tropes of property law—of title, of use, of permissible takings—tell a story about allowable claims to properties and land, and they also provide the legal tools for activities in relation to property. These procedural aspects of law that create allowable information are significant, as the practice of property serves to create property narratives and to reinforce powerful property structures.[76] Simultaneously, as Carol Rose has identified, narrative is required within property law to smooth over gaps in property laws and

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[72] Robert M Cover, "The Supreme Court, 1982 Term—Foreword: Nomos and Narrative" (1983) 97:1 Harv L Rev 4 at 9. See also Jane B Baron & Julia Epstein, "Is Law Narrative?" (1997) 45:1 Buff L Rev 141; Austin Sarat, ed, *Law and Literature Reconsidered: Special Issue*, Studies in Law, Politics, and Society, vol 43 (Bingley, UK: Emerald Group, 2008) [Baron & Epstein, "Is Law Narrative?"].

[73] Susan Bandes, "Empathy, Narrative and Victim Impact Statements" (1996) 63:2 U Chicago L Rev 361 at 385:

> When we tell law stories ... we may be merely reproducing the conventional narrative, with its implicit, existing norms. ... Narrative ... is a tool that can be used either to perpetuate the status quo, or to challenge it to move the law forward.

[74] Baron & Epstein, "Is Law Narrative?" *supra* note 72.

[75] See for example Davies, *Property, supra* note 8.

[76] *Ibid.*

processes, which have not sufficiently accounted for outsider individuals who operate in un-anticipated ways.[77]

Within the broad body of work on narration in the law, this work takes an approach of "spatial narrative" analysis. Spatial narrative mirrors the diversity of critical thought highlighted within narrative-methods broadly, but as the name suggests, it focuses on encounters that are spatialized. Employing narrative method for place analysis provides competing narratives of law in place.[78] Spatial narrative builds on traditional ontological approaches to narration, but it highlights the geographically performative aspect of it. Sheila Dawn Gill explains what a spatial narrative does in the following terms:

> To perform a geography is to mobilize a story about a place: the dramatization of a spatial narrative that in turn limns out the nature and the location of the subject doing the telling. Geography, after all, is a story told from a particular point of view, about a space that only becomes a "place" through someone's authoritative telling ("mapping") of it, and by people's continued production (or "performance") of it within the authorized terms of reference.[79]

For Gill, spatialized narratives can be used to capture aspects of activities that are overlooked (Gill's research focuses on carceral spaces and boundaries of rights). The telling of the spatial narrative is essential not only because it is a new perspective offered to counteract traditional juridical narratives, but because as legal geographers inform us legal activities are inherently spatialized ones. To overlook a spatial narrative is to miss (or deliberately ignore) entire components of how a context operates. Using spatial narration and how it makes sense of property and how it is created through property laws in particular, forces us to consider law's meaning

[77] Rose, "Property as Storytelling," *supra* note 71 at 48–53.
[78] *Ibid.*
[79] Sheila Dawn Gill, "The Unspeakability of Racism: Mapping Law's Complicity in Manitoba's Racialized Spaces" (2000) 15:2 CJLS 131 at 132.

making habits[80] in and through spatiality. This focus is particularly important as an antidote to the apparent a-spatiality of laws, a falsehood long highlighted by legal geographers.[81]

Geographical performative aspects of land and property law include processes of place-making and of spatialized movement.[82] These may exist on a large scale and be concerned with the details of property-related indicators, such as, fences or trees that are placed on parcels of property as indicators of the existence of a property title.[83] They may also exist on a small scale, as processes of property law are replicated across legal property titles and through recognition of similar types of properties. David Delaney describes these aspects of spatialized movement and their impact on property law as a collection of spatial assemblages.[84] *Property* is an exercise in assessing disparate data—geospatial, case records, property history, aspects of public law that impact private property—that are together recombined to assemble a coherent spatial narrative of a chain of property events. *Property law* ought to be reflective of this process. The outcome of the assemblage requires that properties be placed into a spatial order: public versus private, direct title holders versus property bystanders, the immediate community against the broader society. The form of a property spatial narrative either provides support for or undermines ones property-related claim. The manner in which culturally and historically contingent legal knowledge engenders,

[80] To borrow a phrase from Richard K Sherwin, "Law Frames: Historical Truth and Narrative Necessity in a Criminal Case" (1994) 47:1 Stan L Rev 39 at 81.

[81] See for example, Irus Braverman, Nicholas Blomley, David Delaney and Alexander Kedar, eds, *The Expanding Spaces of Law: a Timely Legal Geography* (Stanford, Stanford University Press, 2014) [Braverman et al, eds, *The Expanding Spaces of Law*]; Nicholas K. Blomley David Delaney & Richard T. Ford**,** eds., *The Legal Geographies Reader: law, power, and space* (Oxford; Malden, Mass.,: Blackwell Publishers, 2001); Wesley Pue, "Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11 Urban Geography 566.

[82] See e.g. David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making* (New York: Routledge, 2010) [Delaney, *Spatial, Legal, Pragmatics*]; Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (London: Routledge, 2014); Davies, *Property, supra* note 86; Nicole Graham, *Lawscape: Property, Environment, Law* (New York: Routledge, 2011).

[83] Irus Braverman, "Hidden in Plain View: Legal Geography from a Visual Perspective" (2011) 7:2 JL Culture Human 173.

[84] See Delaney, *Spatial, Legal, Pragmatics, supra* note 82 at 15–18.

disseminates, and holds up concepts of property in place is as much dependent on the narrative around geography as it is about narrative around property.

1.6. CASE STUDIES OF PLACE IN LAND AND REAL PROPERTY LAW

This thesis takes the location of Kingsburg Beach, Nova Scotia, as the geographic location for the case studies and considers the multiple ways in which it is of interest to different groups for a host of different reasons: commercial activities, recreational activities, public and private activities, individual and community historical uses of places, emotional connection, Indigenous rights, and so on. The interests examined are sometimes protected within property law and sometimes not. From the perspective of place-space theory that motivates this work,[85] different experiences in place are tangible factors that go towards the importance given to a specific place and ought to be recognized as interests that should be considered.

To examine these notably divergent interests, this thesis uses the research questions, "What is where, why there, and why care?" to consider these often-conflicting perspectives as they create a sense of place in the location of Kingsburg Beach, Nova Scotia. These questions are essentially a tool for geographic examination to take seriously the ways in which a location matters, and asking these questions allows for materials to be systematically examined as property is constructed in place. The perspectives that are unearthed by this analysis are grouped in four different subject areas that view the beach in markedly different ways. The places revealed are (1) the beach as a place of the environment and as a place of the private property owner, (2) the beach as a place of and for the public, and (3) the beach as a place of Indigenous land. I refer to these perspectives as "case studies" and the first two, private property and the environment, together

[85] Particularly in the work of Yi-Fu Tuan (see Tuan, *Space and Place, supra* note 5).

create case study one. These case studies are distinct and entail different analyses as the applicable laws and the discerned geographies are different. In this way, this thesis examines one geographic location through three case studies.

The examinations of the case studies arise both from the legalization of the beach which is subject to regulation and common law court decisions, as well as from the geography of the beach area. Kingsburg Beach is the site of legal actions that have considered rights to this locations through claims in property law. The property law principle of expropriation is the central legal issue in the *Mariner Real Estate v Nova Scotia (Attorney General)* decisions of the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal, referred to as the *Mariner Real Estate* decisions.[86] Based on the arguments brought in the course of these decisions two perspectives arise as to how the beach ought to be managed through legal process: first that the beach requires environmental protection and second, that the beach is the subject of private property. These two perspectives on the role of the beach reference the legal framework relating to property and administrative law, but examination of the arguments reveal different descriptions of the location and underlying assumptions about the nature of place. Environmental protection and private property are the first case study.

The next two case studies are perspectives not directly emanating from the *Mariner Real Estate* decisions, but are nonetheless relevant to the location of Kingsburg Beach as part of land and real property law broadly. Case study two examines the beach as a place for the public. How the public may be manifested in the beach area through the doctrine of expropriation and related policy has not been explicitly addressed yet by the courts, so this case study newly introduces this analysis to the location by examining how public property and public access could exist in

[86] *Mariner Real Estate decisions*, *supra* note 4.

Kingsburg Beach. The third case study examines the beach as a place of Indigenous land. Constitutionally recognized Aboriginal rights are not at issue in the *Mariner Real Estate* decisions, is not contained in the statutory framework relating to expropriation, nor is it mentioned in the administrative regulation of Kingsburg Beach. This case study introduces the examination of Aboriginal title in the area of Kingsburg Beach as a part of the broader approach to place which this thesis argues for: How can multifaceted, historical, current, and personal accounts of place be better adjudicated through processes of land and real property?

The case study method is one of the main approaches adopted in law and geography literature.[87] A case study approach takes a specific place, perhaps a named city or neighbourhood or connected regions, and analyzes geographic components of law in relation to that location. Law and geography has adopted the case study method because it allows for the previously overlooked but nonetheless inherently spatial components of law to be examined in situ. Through the case study method particularities of space and time that exist uniquely in one location are analyzed, and perhaps thereafter similarities can be brought out across time and space in comparison with other similar or dissimilar places (depending on the goal of the research). Of course, as the research name indicates, a law and geography case study approach focuses on revealing a detailed account of a specific context understood through a spatial lens. The case study method requires that the spatial manifestations of laws found overtly in statutes relating to a place, or covertly in regulations, which also impact a place, be used in the analysis. Geographic information, tools, and ideas are prioritized because they allow examination of how law acts in place. Attention must be given to the role of geography, as it provides opportunities and limitations in how law can be realized. A key take away from the law and geography case-study method is that law acts in

[87] Braverman et al, eds, *The Expanding Spaces of Law*, *supra* note 81 at 1–18.

unforeseen ways, and consideration of space, place, and the geography of location, are essential to knowing how law acts in practice, and also for revealing possibilities for how it may be developed.

The case study approach is used to analyze a single physical location, from different perspectives: underlying property rights and claims, public rights of access, community rights, private property owners' rights, and in some cases consideration of the rights of the place itself. It is a central tenet of this thesis that "property" is connected to the geography, land, and location, in all of its manifestations. Organizing interrogation of the location and the different case study perspectives around the geography of Kingsburg Beach necessitates examination of the concept of "property" broadly to include not just the details of private property law, but other laws and processes that are connected to place. These include the existing legal actions that use geographic material, related content about claims to place that have not necessarily been adjudicated, and to consider the ways in which the geography has been measured. However, the processes and steps of property law, municipal law, public law, and so on do not all occur at the same time. Instead, although law and geography are never autonomous (law has to occur somewhere), law mediates places to meet its policy goals (of settling, ensuring service, land systems orders) and is selective in how it mediates place. These selective actions have led to some of the major critiques of property, by law and geography alike, which is, that law disenfranchises through its selective enforcement of property regimes.[88]

Kingsburg Beach is a landscape of natural significance that has gone through processes of propertization either directly through the auspices of different land and real property laws,

[88] See Davies, *Property, supra* note 8 for a critique of the use of property regimes to reinforce capitalist regimes; Brenda Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership*, Global and Insurgent Legalities (Durham: Duke University Press, 2018) for a critique of selective property regimes as they were applied and used to build properties toward the goal of colonial expansion; Alexandre (Sandy) Kedar, "On the Legal Geography of Ethnocratic Settler States: Notes towards a Research Agenda" in Jane Holder and Carolyn Harrison, eds, *Law and Geography*, Current Legal Issues, vol 5 (Oxford: Oxford University Press, 2003) 401 for a critique of the use of land areas to support both capitalist and racist property regimes.

including private property rights and public property interests. The case studies are important as they are different examples of how properties are subject to common tensions that occur between different collective public interests and private interests that can be constructed in law as claims to that place. These entail potential encroachment on property rights either by private property developers privatizing public lands, or public interests in land impacting a private property owner's ability to develop their property.

1.7. OUTLINE OF THESIS:

This chapter has introduced the research topic and the thesis argument, provided an overview of law and geography research, and identified the methods, and methodology of the thesis. I am thus indebted to the work of legal geographers, as they have revealed the multiplicities of spatiality in law, and thus this thesis develops these insights by foregrounding the importance of the unique physical geography of a location in its analysis. The methodology adopted is founded in the discipline of geography, highlighting in particular the work of Gritzner and the methods for cultivating geography-driven research analysis. As the thesis develops, it will be seen that this approach allows for analyses that foreground physical geography as the central component of property and inherent to land and real property law. Currently, places are spatialized through legal processes of property law in ways that provide limited opportunity for diverse accounts of property interests. Asserting "place" as the initial analytical step for recognizing interests in a location requires that the physical geography and related processes be acknowledged as the determinative and organizing factors for property, while revealing otherwise hidden interests.

Chapter Two builds on the central insight arising from law and geography scholarship that law is spatially situated and that spatiality is an essential aspect within law by turning to look more closely at the interplay between place, space, land and real property, and law. Bringing together

these components, the focus is on why place matters and how that is performed in and through legal processes of land/real property. Place-making does not occur in one discipline alone, nor through an emerging standalone law and geography; instead, the geographies of land and real property law are equal components in the process of place-making. This point is important because it is through the siloed disciplinary pursuits that places are engaged with, created, and regulated. These two disciplines of law and geography can often overlap, as geography features in a set of laws relating to a place, but geography also exists separately as interpretations of place that feature in personal experiences, historical accounts, or community experience. Chapter Two uses the theoretical insights from thinkers on space and place to consider how place is created through processes of both law and geography and to highlight the interplay between material place and unknown, intangible space. Though the focus in law and geography scholarship has been on spatial interpretation and law, referring back to the role of physical location highlights the discursive way in which even the materiality of a place can be interpreted. Disputes between interpretations, particularly property law disputes can be attributed to these different theories of place. Using organizational tools from geography, that are centered on uncovering what is important about a place, helps to systematically interpret space examine and ultimately may provide the tools for incorporation of multiple geographies of land into the application of land and real property laws.

Chapter Three introduces the law of expropriation. *Mariner Real Estate v. Nova Scotia*,[89] a foundational Canadian case on expropriation and particularly *de facto* expropriation, and Kingsburg Beach, where the case is located, is the case examined in this thesis. The chapter begins exploration of this case study location by bringing together the subjects of property, geography, and law to consider the specific property principle of expropriation law. Examining expropriation

[89] *Mariner Real Estate,* NSCA, *supra* note 58.

law is certainly necessitated by the *Mariner Real Estate* decisions themselves, which was argued on this basis. At the same time, highlighting just one principle from the corpus of property law is an opportunity to bring into focus the ways in which law can observe, use, ignore, and create place, as expropriation law is adopted as a tool for public–private regulation of Kingsburg Beach. The law of expropriation is particularly relevant for a thesis that examines place, since it is a property principle that operationalizes a process of considering, prioritizing, and ultimately enacting various concepts of place. Chapter Three introduces the principle of expropriation and *de facto* expropriation, arguing that the use of expropriation in Canada largely demonstrate a property-centric examination of property rights that are displaced from the nuances of location, I turn to "place" as a possible metric to be used within expropriation law. The story of Kingsburg Beach is simultaneously a legal story and a geography story. Chapter Three explains how the geographic and the legal exist in the physical places of land and real property and how the technical principle of expropriation law holds a central role for creating the legal geography of the beach.

The next three chapters, Chapters Four, Five, and Six, are the case study perspectives on Kingsburg Beach, Nova Scotia. These three chapters consider accounts of that location by reflecting on how the geography of a specific location can be described, recorded and ultimately adjudicated on to create different interests (legal and non-legal). The case study section of this thesis considers the intersection between legal adjudication of expropriation and geographic interpretation focused on physical place. It does so by highlighting distinct aspects of the Mariner Real Estate Ltd expropriation location, Kingsburg Beach, which are first, private property and environmental place, which are considered together, second, the public, and, third, Indigenous land interests. These aspects are approached as separate case studies to examine the way that a place such as Kingsburg Beach could be shaped through an expropriation analysis. In addition, Chapter

Four on private property and environmental place, and Chapter Five on the public, are directly part of expropriation law. The type of questions considered throughout the three case studies include the following: does legal adjudication implicitly adopt specific geographic policy outcomes? What is the interaction between the physical geography and human geography in places of expropriation? How do historical, present and future geographies of place fit into consideration of expropriation? Using the geographic methodology, the analysis is guided by the Gritzner framework which asks "What is where, why there and why care?"[90] can be answered distinctly depending on how the physical geography is characterized.

Chapter Four introduces a place-based perspective on Kingsburg Beach by re-examining the *Mariner Real Estate* decisions through the lens of environmental concern and private property interests, perspectives that were in tension in analysis at both levels of court. The environmental aspects of the beach area have been emphasized in the development of public policy in Nova Scotia, in scientific reporting, and throughout the legal proceedings of the *Mariner Real Estate* decisions. Environmental concerns have centred on vegetation, wildlife and the health of the ecology of the beach, particularly the rate of erosion. Place and space theory provides insight into how these pieces have together developed an interpretation of Kingsburg Beach as a place that requires environmental protection. At the same time, private properties in Kingsburg Beach are part of the Nova Scotia structured property titling system. Historicism in the built environment of the lots (one of which contains a community cemetery), and the beach itself holds a cultural, economic and personal significance for those title holders. These aspects are not simply "legal interests" in a location in the property law sense but are also part of the unique ways in which place comes to matter to people.

[90] Gritzner, "What Is Where?" *supra* note 9.

Chapter Five introduces another perspective on Kingsburg Beach: the beach as a place for and of the public. This chapter turns to thinking about the role of the public in places of the beach in Nova Scotia. The publicness of the beach is not something that is directly considered in the *Mariner Real Estate* decisions and so possible configurations of the beach as a type of public place is not explicitly specified in the legal framework. Some hints for how the public in Kingsburg Beach could be understood may be pulled from aspects of the statutory framework: one possibility is that beaches may be preserved generally for people in Nova Scotia, based on discussions in Parliament, or perhaps environmental concerns are the most important consideration, as the focus of the case law discussion suggests. However, these representations do not present a clear or detailed direction for how public rights to place may feature in or guide issues of place and expropriation law. A truism from place and space theorists is that undifferentiated space (political, social, legal) is difficult to account for and translate into tangible and actionable locations (or places). Drawing on these insights, this chapter argues that without a firm understanding of who or what the public is in the beach it is difficult to regulate undifferentiated public-beach areas into actionable place-based interests.

Chapter Six introduces the final case study on Kingsburg Beach: the beach as a place of Aboriginal land interests. Consideration of Aboriginal title at Kingsburg Beach is an aspect that was not addressed by the courts in the *Mariner Real Estate* decisions and related consideration of the beach as public place. It is important for this thesis to incorporate Aboriginal title and rights in the analysis of the place of Kingsburg Beach because of their centrality to all land and real property in Canada. The properties along the beach—whether considered from a private property perspective, environmental concerns, or the public's access to the beach—come from the same land. Though a simple point, this is a foundational factor that must animate our understanding of

land and real property. These interests are constructed through different regulatory frameworks that exist in the one location. Thinking through place in the Tuan and Massey approaches requires that histories be brought to bear to accounts of the importance of place. The histories of Kingsburg Beach also entail Mi'kmaq land interests, relationships, and histories, even though the premises of expropriation law do not directly discuss or incorporate Indigenous interests in the land. If places, lands, and properties are built from the same land and the goal is to introduce place to how property is understood, it would be incongruous to not also consider Indigenous lands.

Having examined the different aspects of place that can exist in locations like Kingsburg Beach, Chapter Seven turns to look at the policy implications of introducing the notion of place to how land and real property is developed. It is clear that land and real property law is not always successful at recognizing — and protecting — the multiple, overlapping and iterative interests that can exist in places of land and real property. In essence turning to look at the importance of the concept of "place" is a call to introduce a multifaceted, responsive, and ultimately more complex approach to thinking about land and real property. To manage this complexity I argue for the creation of a "Forum for Place." This Forum would be for the adjudication of land and property law matters, including expropriation. Developing tools for introducing "place" into law is important as a legal and policy response to the challenge of embracing complexity in place, while not undermining how the property system functions.

Chapter Eight, in conclusion, offers final thoughts on the three contributions that this thesis makes. These contributions are, first, an examination of expropriation law, its histories, its use and its future utility, second, the methodology of law and geography that I created and used throughout this thesis, and third, reflection on the importance of situating property in place-based interests. Taking a law and geography approach to examining property law — for this thesis, the law of

expropriation — is both intuitive, as land and real property are inherently located, and conceptually challenging, as it requires re-framing elements of place which already exist in both law and geography. Identifying and naming place-based interests is the goal of this thesis, and adoption of a law and geography methodology is essential for guiding analysis and adjudication of expropriatory action (and other areas of property law).

CHAPTER 2: ON THE GEOGRAPHIES OF LAND AND REAL PROPERTY LAW: THEORY, METHODOLOGY, AND METHODS

> [L]egal actors (broadly defined) are influenced by their ideas about place, or by what they think places are like. What place is (or should be) private and secure from the law's intervention? How should a state guard its borders? How are places defined and redefined in conflicts over welfare obligations, belonging and citizenship?
>
> These questions are important not simply because the law may have inaccurate or incomplete conceptions of such places, but because the law can so deeply influence the nature of place and can define the kinds of activities that are appropriate in particular places.[1]

2.1. INTRODUCTION

Chapter Two introduces the geographies of land and real property and the law of land and real property as two connected elements that together constitute land and property law. Building on the work of legal geographers who have shown that law—like all social processes—is spatially situated, this chapter develops these insights to consider how law is situated in place. Introducing geography as a structural component allows use to evaluate how land and real property law is defined, how laws in this area are used, and ultimately how the law is both a limitation and opportunity for how land and real properties can be created. While the role of physical place as both the site for and the manifestation of real properties is logically apparent, its immediacy is deceptive and could lead to complacency as we strive to understand the impact of geography on law. While land and real properties are derived from the geographic places of which they are a

[1] Benjamin Forest, "Placing the Law in Geography" (2000) 28:1 Hist Geog 5 at 9.

part, the impact of how a geographic place is interpreted and how that in turn is reflected in applicable laws is not immediately apparent. A re-reading of land and property law understood through theories of place and space reveals the importance of geographic processes to the creation of lands, properties, places, and spaces. The work of Gritzner in his definition of geography, "what is where, why there, and why care?" provides the framework for this chapter, as I use it to explore the ways in which geography could be brought into property analysis and to demonstrate how the methodology will be applied.[2]

First, this chapter explains how using Gritzner's descriptive questions of "What is Where, Why There, and Why Care?" can guide a reimagining of land and property law as constructed by theories of place and space. Focusing on physical geography requires a re-examination of the meaning of "place" and how that is reflected in property laws. Second, this chapter then considers how place and space theory can contribute to this re-examination of place. Essentially the descriptive account of "what is where" focuses the inquiry on the ways in which places of physical geography are themselves subject to descriptive representation. Three implications are reflected on in this chapter: (1) the possibility of interpreting the place and representation of space in a given location; (2) the manifestation of the geographic imagination in law; and (3) the importance of location and permanency for how land and real property law perceives place. The chapter concludes with some comments on the analytical and conceptual components of Gritzner's questions asking "why there, and why care," although these components are considered with more depth through application in the case studies. Ultimately, the goal of this thesis is to consider land and real property as place-making enterprises—which in turn opens up possibilities for recognition of different interests held in a given piece of land and real property. By interrogating geography

[2] Charles F Gritzner, "What Is Where, Why There, and Why Care?" (2002) 101:1 J Geog 38 [Gritzner, "What Is Where?"].

as animated through spatial theory, this chapter identifies that places are indeed interpreted and that land and real property law is a fundamental part of that process.

2.2. LAW AND GEOGRAPHY, PROPERTY LAW, AND PHYSICAL PLACE

This thesis is a contribution to the field of "law and geography." Law and geography scholarship argues that law is inherently spatialized and manifests itself in various contextual ways; likewise, spatial ideas are integral aspects of law, though they are often unrecognized within the legal profession. Scholarship in this area is variously called "legal geography," "critical legal geography," or "law and geography." Strictly understood, the different names indicate the connection between a stream of research and its broader academic lineage. Thus, the name "critical legal geography" picks up elements of critical legal scholarship and foregrounds Foucauldian analysis of power relations in its work. Conversely "legal geography" indicates scholarship that is a subset of geography scholarship more broadly (in the same way as political geography or cultural geography), and logically such work would adopt geography-based methods and methodology in its research, but does not necessarily adopt a "critical" analysis (as critical legal geography scholarship does overtly). In reality, "legal geography" has emerged as the most common name for any research at the epicentre of the two elements of "law" and "geography." The theoretical frameworks guiding law and geography research are often unnamed but lean toward critical scholarship (both small c and large C).

In this thesis I adopt the term "law and geography" as the best indicator of the insights produced by this body of research, which is multidisciplinary in nature and takes the aspects of law and geography as equally important. The *International Encyclopedia of the Social & Behavioral Sciences* offers the following definition of "law and geography":

> Law and geography should be defined as the analysis of the manner in which law, as a set of processes, texts, and practices, is shaped by the geographic dimensions of social and political life, and the ways in which the geography of social life is in turn structured by law.[3]

Thus, legal geographers argue that law is not an inert set of rules, but instead is performed through multiple processes, texts, and practices. This foundational point that law cannot be separated from its spatial incidents, but is instead constituted through them, has informed the research agenda of law and geography scholarship. As is also indicated in this definition, for the most part law and geography scholarship has prioritized space-based insights by focusing on relationships and processes that create, maintain, and manipulate space. According to this approach, the role of intangible social, legal, and political relationships is an integral aspect to how law functions in practice. I adopt an approach that builds on these insights by not leaving behind examination of the close relationship between space and place and how they manifest in physical geographies. "Space-based" insights are to be differentiated from "place-based" insights,[4] and space cannot be examined without attention to the physical manifestation of geographic processes. For this thesis, adopting the term "law and geography" best encapsulates the dual role of legal institutions and geography institutions, which, though they remain distinct, are both preoccupied with examination of intangible processes that create physical place. In turn, processes of law and geography together create propertied places.

2.1.1. Law and Geography: Research

The work of law and geography research is to interrogate how spatial and place-based practices are implemented in and through legal processes. A key contention made by legal

[3] Nicholas Blomley & Joshua Labove, "Law and Geography" in James D Wright, ed, *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed (Amsterdam: Elsevier, 2015) vol 13, 474 at 474.
[4] On the distinction between space and place see Chapter One, *above*, at section 1.2.

geographers is that "in the world of lived social relations and experience, aspects of the social that are analytically identified as either legal or spatial are conjoined and co-constituted."[5] Law is both an active agent in formulating the rules and processes by which space is interpreted, and these rules and processes in turn are required to navigate existing inherently spatialized political, social, and organizational requirements.

The foundational point made by law and geography scholarship is that—from its perspective—geography, spatial analysis, and spatial thought is missing from the law. Canadian legal scholar Wesley Pue has gone so far as to categorize law as a "profoundly antigeographic faith," and introducing spatial awareness to law (legal analysis and research) is deeply challenging to the very precepts of law because it rejects the generalizing contained within broad legal principles. For Pue, the distinction is between abstract processes of law and the specifics of a given context:

> First, in its insistence on place, context, locality, (and) spatiality, geography is the very denial of any abstract principles of the type that the formal legal rationality of modernity presumes. Geography is, in this sense, fundamentally corrosive of law and implies both a rejection of totalizing legal systems and a transcendence of limited visions of legal order.[6]

The implications of a spatial insurrection for law are many, but for Pue one of the central points to come from the identification of the centrality of space is that ultimately it challenges notions of legal expertise as a decontextualized form of specialist knowledge.[7] Instead, in Pue's argument, law can only be correctly understood with reference to its many spatial manifestations, and, in turn, these are spatially manifested through the activities of all social actors.[8]

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[5] Irus Braverman et al, "Introduction: Expanding the Spaces of Law" in Irus Braverman et al, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Redwood City, Calif: Stanford University Press, 2014) at 1 [Braverman et al, "Introduction"].

[6] Wesley Pue, "Wrestling with Law: (Geographical) Specificity vs (Legal) Abstraction" (1990) 11:6 Urban Geog 566 at 577.

[7] *Ibid* at 578.

[8] *Ibid* at 577.

Law and geography has primarily drawn on human geography to develop critical perspectives on the spatial manifestations of law. Human geography is defined as "[t]he geographical study of those features and phenomena of the earth's surface which relate directly to or are due to man and his activities."[9] Human geography concentrates on the spatial organization and processes shaping the lives and activities of people, and their interactions with places. Though law and geography has been primarily concerned with human geography as it is used to interrogate peoples' experiences with law, by and large this is not a self-consciously explained aspect of law and geography research. Logically, looking at spatial processes as they affect human experience results in law and geography scholarship that also highlights issues critical to people's interaction with law or regulation by law. Thus, a key component of law and geography research has been the interrogation of intersections between law, space, and society, with a keen focus on the politics and power of space. Vera Chouinard emphasizes the central role of law as a conduit for space in the following way:

> Without explanations of the multiple facets of legal power (i.e., relations, practices, discourses, texts) and how that power is deployed, it is argued that we cannot hope to learn how to challenge the exclusion and oppression of disadvantaged groups within the legal process.[10]

There is a critical need to incorporate spatial understandings into research about law because spatial relations are deeply embedded in societal structures, of which law is one example. In the introduction to the collected volume *The Legal Geographies Reader*, the editors identify three significant consequences of this process.[11] First, the authors explain that identifying space as

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[9] Laurence Dudley Stamp, ed, *Longmans Dictionary of Geography* (London: Longmans, 1966) *sub verbo* "human geography" at 194.

[10] Vera Chouinard, "Geography, Law and Legal Struggles: Which Ways Ahead?" (1994) 18:4 Progress Hum Geog 415.

[11] See generally Nicholas Blomley, David Delaney & Richard T Ford, eds, *The Legal Geographies Reader: Law, Power and Space* (Oxford: Blackwell Publishers Ltd., 2001) [Blomley et al, *Legal Geographies Reader*].

a factor in legal adjudication challenges the presumed stabilities and foundations of legal regulation. Challenging these stabilities reveals new opportunities for rethinking legal questions:[12] "[A]rguments about crime, punishment, property, constitutional rights and legal procedure may all turn on tacit and contestable understandings of space."[13] Second, paying attention to space reveals through "what actual practices in relation to what social or political projects"[14] social space is constructed in relation to the legal. Hence, "spaces of experience and imagination are profoundly moulded by inherited legal notions such as rights, ownership, and sovereignty."[15] Third, understanding the spatial in terms of the "spatio-legal" provides new insight into law's role in creating social space.[16] Recognizing that "institutionalized academic segregation and myopia notwithstanding … 'law' and 'geography' do not name discrete legal factors that shape some third pre-legal aspatial entity called 'society'";[17] instead, the legal and the spatial should be understood as factors of equal weight in a "socio-material" reality.[18]

These insights have been used to interrogate a great diversity of subjects, but with the common thread that the law and geography research looks at the intersection between people, spatial structures, and interactions, from the perspective that law is but one of many social and political structures that affect and create spatial norms. Works in this tradition have included looking at the regulation of state borders through legal and non-legal indicators, experiences of migrant workers in city areas,[19] and manipulation of city spaces to exclude or limit spaces with

[12] *Ibid* at xvii.
[13] *Ibid* at xvii.
[14] *Ibid* at xvii.
[15] *Ibid* at xviii.
[16] *Ibid* at xviii.
[17] *Ibid* at xiii.
[18] *Ibid* at xviii.
[19] Jamie CY Liew, "Finding Order in Calgary's Cash Corner: Using Legal Pluralism to Craft Legal Remedies for Conflicts Involving Marginalized Persons in Public Spaces" (2015) 52:3 Alta L Rev 605.

street-involved people.[20] Likewise in the edited volume *The Expanding Spaces of Law*, the contributing authors strengthen the scholarship's tradition of carrying out detailed case study analyses of specific contexts.[21] The text covers subject matter content as diverse as comparative law,[22] spatiotemporal analysis,[23] labour rights constituted through spatial relations,[24] access to services in the rural United States,[25] and regulation of street food carts in Mexico City.[26] These works have followed in the tradition wherein space is identified as an integral aspect to the functioning of law, and space is constituted through the spatial interactions that occur across all social institutions. The focus within these works has largely been on the encounters between people in space with legal institutions that also exist in space.

2.1.2. Law and Geography and Property

Law and geography research that looks at property continues the human geography tradition found in law and geography broadly by focusing on the role of political and social institutions as they create and use the institution of property within their structures. By focusing on insights found in human geography, law and geography scholarship is well positioned to interrogate the existence of spatialized property use, ownership, and access. An essential aspect of bringing geography insights to bear on how property law functions is the consideration of the ways in which spatial, political, social, and cultural processes are embedded in property law. As

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[20] Nicholas Blomley, "The Right to Pass Freely: Circulation, Begging, and the Bounded Self" (2010) 19:3 Soc & Legal Stud 331.
[21] Irus Braverman et al, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Redwood City, Calif: Stanford University Press, 2014) [Braverman et al, *Expanding Spaces of Law*].
[22] Alexandre (Sandy) Kedar, "Expanding Legal Geographies: A Call for a Critical Comparative Approach" in Braverman et al, *ibid* at 95.
[23] Mariana Valverde, "'Time Thickens, Takes on Flesh': Spatiotemporal Dynamics in Law" in Braverman et al., *supra* note 21 at 53.
[24] David Delaney, "At Work in the Nomosphere: The Spatiolegal Production of Emotions at Work" in Braverman et al., *supra* note 21 at 239.
[25] Lisa R Pruitt, "The Rural Lawscape: Space Tames Law Tames Space" in Braverman et al., *supra* note 21 at 190.
[26] Antonio Azuela & Rodrigo Meneses-Reyes, "The Everyday Formation of the Urban Space: Law and Poverty in Mexico City" in Braverman et al., *supra* note 21 at 167.

Nicholas Blomley observes, "one important elaboration of this claim has been through an exploration of the way in which political consciousness and social action are constituted in concrete localized spatial settings."[27] Not only is property a tool for spatial organization separating the public from the private and the collective from the individual, but both public and private space are also tightly managed and regulated. Thus, law and geography on the subject of property not only asks that we consider that property organizes, but also that we pay an antecedent attention to the types of spatialization that are protected through property.

Though every property parcel relies on the central components of physical place and law, and so would seem to be a logical fit with considerations of geographical thought, there is a dearth of law and geography research focused explicitly on property and, conversely, of property law scholarship focused explicitly on geography. This gap may be because of the materiality of land and real property, which contributes to assumptions about the geography of property. Perhaps because of the seemingly obvious connection between the elements of geography, space, and property, research that has considered this confluence has engaged with the notion of property in overlapping and sometimes indistinct ways. I identify three specific ways that the confluence between geography, space, and, property has been explored. First is property as an idea; this is work that considers the linkages between law and spatiality, broadly considering property as an institution that holds particular significance within society as a structure of power. The second way is as a contribution to property theory, in which spatial implications are identified as missing from traditional property theory and insights from spatial thought explicitly or implicitly are brought into a property theory framework. The third way is work that has focused specifically on principles of common law property by interrogating how principles of property law serve as the operative

[27] Nicholas K Blomley, *Law, Space, and the Geographies of Power* (New York: Guilford Press, 1994) at 42.

tool for enacting space. These three elements are all relevant to this thesis, but the third category holds particular importance because it considers expropriation law.

Research that has looked at the intersection between property and spatial organization has critiqued property as a process of boundary-making.[28] Boundaries are created through parcelling of land, which in turn rely on formulaic legal rules for management of property and embed notions of propriety, classism, and capitalism into these property parcels.[29] The impact of these bounded properties is that property holds and reinforces these spatialized systems of propriety, classism, and capitalism and separating property parcels from their immediate geography. Property is built and separated from its surroundings.[30] Blomley observes that property processes are quite literally the process of cutting into land through the construction of physical boundaries, such as fencing, which is replicated through social processes that enforce boundaries through a variety of subtle and overt processes. This is a form of enacting property, but it is not formally law.[31] Property processes serve to "bracket" and separate property from its surrounding context,[32] often through violent means,[33] a phenomenon that can be seen in the propertization of land for purposes of the property title system, particularly Indigenous lands.[34] Antonia Layard has made similar

[28] On this generally, see Nicole Graham, *Lawscape: Property, Environment, Law* (New York: Routledge, 2011); Antonia Layard, "Public Space: Property, Lines, Interruptions" (2016) 2:1 JL Property Soc 1 [Layard, "Public Space"]; Alexandra Flynn & Donald Leffers, "The Properties of Planning: An Evolving Landscape" (2017) 27 JL & Soc Pol'y 1; Nicholas Blomley, "Cuts, Flows, and the Geographies of Property" (2011) 7:2 L Cult Human 203 [Blomley, "Cuts, Flows, and the Geographies of Property"]; Nicholas Blomley, "Disentangling Law: The Practice of Bracketing" (2014) 10:1 Ann Rev L Soc Sci 133 [Blomley, "Disentangling Law"].

[29] Margaret Davies, *Property: Meanings, Histories, Theories* (New York: Routledge-Cavendish, 2007) [Davies, *Property*].

[30] Nicholas Blomley, "Law, Property, and the Geography of Violence: The Frontier, the Survey and the Grid" (2003) 93:1 Annals Assoc Am Geog 121 [Blomley, "Law, Property, and the Geography of Violence"]; Blomley, "Cuts, Flows, and the Geographies of Property," *supra* note 28; Blomley, "Disentangling Law," *supra* note 28.

[31] Brenda Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership*, Global and Insurgent Legalities (Durham: Duke University Press, 2018).

[32] See e.g. Nicholas Blomley, "The Properties of Space: History, Geography, and Gentrification" (1997) 18:4 Urban Geog 286; Nicholas Blomley, "Landscapes of Property" (1998) 32:3 L & Soc Rev 567; Blomley, "Law, Property, and the Geography of Violence," *supra* note 30; Blomley, "Cuts, Flows, and the Geographies of Property," *supra* note 28; Blomley, "Disentangling Law," *supra* note 28.

[33] Blomley, "Cuts, Flows, and the Geographies of Property," *supra* note 28 at 208.

[34] Nicholas Blomley, "Making Space for Property" (2014) 104:6 Annals Assoc Am Geog 1291 at 1297.

observations in relation to public property, which she argues is a related part of systems of private properties. For Layard, "property thinking" can be manifested in law and in popular understandings of property that are articulated through a continuum that contains concepts of private and public properties.[35] The property thinking that is encased within property, and which law and geography highlights, is centred on maintaining property boundaries across *all* spaces, both public and private. These, in addition to the increasing privatization of public lands (Crown), create more formalized and tightly controlled ways of accessing lands and more limited ways for the access and use of property. Continuing the human focus, Layard argues that the prevalence of property thinking even in places of public property has the impact of denying the non-property-title derived ways that people use public property and of limiting the ability for public use of public space, notably for expression.[36]

Understanding property as constituted through space and place is essential for refocusing the disjunction between structures of property as bounded and human-centred spatial relations that exist across property lines.[37] In her 2014 monograph *Subversive Property*,[38] Sarah Keenan tackles the relationship between property, geography, and the individual by using the concept of belonging from geographer Doreen Massey.[39] She argues that property tropes create spaces for the realization of property commonly understood, but that these tropes can also be deployed in new or unforeseen ways to create new forms of property, which she terms "subversive property."[40] Keenan urges property scholars to embrace more deeply the spatial turn into their study of law, which she argues

[35] Layard, "Public Space," *supra* note 28.
[36] *Ibid* at 37, 43–44; see also Jonathan Mitchell, "What Public Presence? Access, Commons and Property Rights" (2008) 17:3 Soc & Leg Stud 351 at 363.
[37] Layard, "Public Spaces," *supra* note 28 at 37.
[38] Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (London: Routledge, 2014) [Keenan, *Subversive Property*].
[39] Doreen Massey, *For Space* (London, UK: SAGE Publications, 2005) [Massey, *For Space*].
[40] Keenan, *Subversive Property, supra* note 38 at 5.

has only begun to understand how "space might be usefully re-conceptualized in law."[41] For Keenan, space is integral to the very existence of property, for "property can be understood as a spatially contingent relation of belonging,"[42] rather than being concerned about the subject—the thing—of property. Similarly, critiquing properties as exclusionary spaces, Lucy Finchett-Maddock focuses on systems of property squatters as hyper-local legal geographies that exist in conflict with formal property law structures and so create oppositional property structures.[43] These are both examples of law and geography scholarship in the area of property that have built on the insights about spatial interactions and have highlighted how they are often contradictory, occur in informal and formal ways, and can be overlooked by authorities or successive owners or holders of property interests. For these writers, property is another way in which people can be spatially disenfranchised and enfranchised thus considering spatiality can be used to interrogate "property" as a cultural idea that is used to signify status, expression, and political capital.[44]

Scholarship that considers how spatiality features in the application of a specific property law rule or principle is the least prevalent within the literature. Two examples of scholarship that look at technical aspects of property law from the perspective of space stand out. These consider the law of expropriation and the law of adverse possession. In a piece titled "Property Rights and the Economy of Nature," Joseph L Sax writes about geography, economics of property law, and expropriation of private properties along a beach in South Carolina.[45] Considering the application of the principle of de facto expropriation in the US decision *Lucas v South Carolina Coastal*

[41] *Ibid* at 5.
[42] *Ibid* at 6.
[43] Lucy Finchett-Maddock, *Protest, Property and the Commons: Performances of Law and Resistance* (New York: Routledge, 2016).
[44] Davies, *Property, supra* note 29; For an example of this, see Layard, "Public Space," *supra* note 28.
[45] Joseph L. Sax, "Property Rights and the Economy of Nature: Understanding *Lucas v. South Carolina Coastal Council*" (1992-1993) 45 Stan. L. Rev 1433. [Sax, "Property Rights and the Economy of Nature"].

Council,[46] Sax argues that the case demonstrates a tension between property law as a functional tool to achieve the goals of the economy[47] and as regulation to retain the natural and ecological aspects of a property.[48] On resolving the tension between these perspectives, Sax brings his analysis back to property law and speculates that in part Justice Scalia (who wrote the lead opinion at the Supreme Court of the United States) sought to ensure that states cannot regulate by requiring that private property holders retain their properties in a natural state.

I would bring attention to a second piece of scholarship centred on a common law property principle, "The Changing Architectures of Adverse Possession and a Political Aesthetics of Squatting" by Lucy Finchett-Maddock.[49] In this piece Finchett-Maddock (writing about laws in the United Kingdom) critiques a statute that criminalized squatting in residential buildings and thus removed rights of adverse possession, a common law property principle.[50] Adverse possession is a principle that allows for encroachments on private property systems by recognizing the adverse possessor as someone who exists outside of the named private property title and yet still exists in the broader system of property.[51] Like Sax, Finchett-Maddock brings her analysis back to property law, observing that the principle of adverse possession allows for redistribution based on use and behaviour and not on the abstract paper title.[52] Removing the tool of adverse

[46] 505 US 1003 (1992).
[47] Sax, "Property Rights and the Economy of Nature," *supra* note 45 at 1438.
[48] *Ibid* at 1437–39.
[49] Lucy Finchett-Maddock, "The Changing Architectures of Adverse Possession and a Political Aesthetics of Squatting" in Lorna Fox O'Mahony, David O'Mahony & Robin Hickey, eds, *Moral Rhetoric and the Criminalisation of Squatting: Vulnerable Demons?* (New York: Routledge, 2015) 204 [Finchett-Maddock, "Changing Architectures"].
[50] The criminalization of squatting occurred through amendments to the *Legal Aid Sentencing and Punishment of Offenders Act 2012* (see Finchett-Maddock, *ibid* at 206).
[51] Finchett-Maddock, "Changing Architectures," *supra* note 49 at 206–10.
[52] *Ibid* at 217.

possession (in the UK context) in fact is a removal of one of the ways that land use, as an observable phenomenon and worthy of legal protection, exists within the property system.[53]

It is notable that both of these works consider common law property principles that are situated at the divide between public and private properties, and of course Sax's piece directly considers expropriation law. Mediating between the public and private of properties through the use of common law property principles is an integral aspect of property law and place-making. The details of how a common law property principle functions to create properties is inherently an action in spatiality. It is through the use of a specific property principle that the abstract notions of space become concretized, because the enacting of property principles will decide the way in which a property may be used. Bringing spatial thought explicitly into the assessment of how property law rules operate is an important step for considering how geography is itself part of the architecture of property. The process of bringing spatial thought to bear on property requires attention to technical property law rules for they reveal the implicit and explicit ways that choices are made about places and how they ought to be regulated.[54]

However, focusing on geographic insights solely through the lens of spatiality as a stand in for laws' spatiality does not allow for full appreciation of the role of the physical places that are the subject of property. The spatiality of law may be a reference to legal structures themselves, which are intangible first and foremost, but can also be a reference to political and social structures, as is included in research that takes a broader law and society type approach to examining spatial structures. Some law and geography work has shown an implicit recognition of the importance of

[53] Finchett-Maddock relies on the work of Carl Schmitt, in his "Nomos of the Earth," to support her argument about the importance of order through land management systems. See Finchett-Maddock, *ibid* at 218–20.

[54] Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory" (2009) 18:2 Soc & Leg Stud 139 [Valverde, Jurisdiction and Scale"]; Annelise Riles, "A New Agenda for the Cultural Study of Law: Taking on the Technicalities" (2005) 53:3 Buff L Rev 973.

physical place within research on property. As the introductory quote referenced in this chapter indicates, Benjamin Forest, a geographer, raises questions about what place is or should be and the importance of how law ought to intervene or refrain from intervening in those places.[55] Forest argues that while law is driven by its internal logic and rational thought, it is simultaneously constrained by geographic contexts.[56] Although the constraint of physical location is an unavoidable reality, law as a discipline does not always account for this type of space in its analysis.

The ways in which property and geographical thought have been considered together in the literature, whether it be to think about property as an idea, to contribute to property theory, or to pinpoint and examine a specific area of property law, are relevant to this thesis. Together these themes have shown that, although spatial concepts are implicitly prevalent throughout the concept of property, law and geography scholarship undertakes the more explicit analysis of the centrality of spatiality to property law. Law and geography scholarship uses these concepts to critically analyze the impacts of property and its manifestations and justifications for property systems. Looking at property through a law and geography lens has the potential to bring into focus aspects of space, particularly its plural and dynamic iterations, and aspects of place, particularly that it is created through spatial choices and the physical geography.

2.1.3. Physical Geography and Place

By contrast to the law and geography scholarship has not typically emphasized physical geography to the same extent as human geography. Physical geography is "the study of spatial and environmental processes that shape the natural world."[57] A physical or natural geography research

[55] Forest, *supra* note 1 at 9.
[56] *Ibid*.
[57] Alisdair Rogers, Noel Castree and Rob Kitchin, *A Dictionary of Human Geography* (Oxford: Oxford University

work could look at such factors as the atmosphere, landscapes, geomorphology, historical geography, or topology. Within a given research work, the type of scientific inquiry taken, whether it be to look at the geology or the atmosphere, will have an impact on the research methodology and methods used. In particular, a physical geography approach would consider explore scientific approaches to measuring and studying these impacts, as contrasted with a human geography approach which would consider the social aspects of space and is likely to use insights from traditions such as sociology or anthropology.[58] The connections between human geography, concepts of space, and traditions of sociology or anthropology are foregrounded and prevalent in law and geography scholarship. In this thesis, I build on insights from this body of work that has highlighted the importance of spatial manifestations of legal processes, but I do so by incorporating insights from physical geography. In contrast to analyzing law and its relations through the lens of human geography, incorporating physical geography into a law and geography research work foregrounds a concern with the ways in which law, its processes, and its interventions constitute the physical landscape.

Physical geography is not completely separate from human geography; instead, physical geography focuses on the physical places with the goal of "[understanding] how the Earth's physical environment is the basis for, and is affected by, human activity."[59] The connection between physical geography and human geography has varied over time. Historically in the nineteenth and twentieth centuries, the connections between these two approaches were commonly incorporated into research. Writing at this time, geographer Arthur Miller argued that the study of

Press, 2013) *sub verbo* "physical geography."

[58] *Ibid.*

[59] Kenneth John Gregory, *The Changing Nature of Physical Geography* (London: Arnold, 2000) at 9, online: <archive.org> [perma.cc/G6QK-65X3]

physical geography was integral for revealing more subtle or less tangible aspects of geography. As he cautioned:

> … to hurry on content with a few shallow remarks based on perfunctory observation of the physical elements of the environment may result in overlooking or falsifying the natural intimacy of relation that nearly always exists between the physical and the cultural landscape.[60]

For Miller, physical place has an intimate connection with the cultural landscape. The reference to cultural landscape can be broadened to also include human landscapes generally and, as is specifically considered in this thesis, legal landscapes. The approach taken by Miller is a more substantive approach to interrogating the role of physical sites as they contribute to the creation of place and space. Miller's argument for taking seriously the natural intimacy between cultures and physical place is similar to the work of critical geographer Ellen Semple, a twentieth-century geographer who wrote about a concept she calls the "land-bond."[61] For Semple, the land-bond refers to relations between peoples and soil, which she argued deepens and intensifies with social advancement.[62] Yi-Fu Tuan likewise argues that even research in physical geography that might look at scientific aspects of a place through empirical research are guided by and connected to people.[63]

The goal is not to bifurcate research along the lines of human versus physical, but instead to fully consider the ways in which physical geography constitutes the underlying or overarching reality in which human geography occurs. This approach is typified through the "regional

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[60] Arthur Austin Miller, *The Skin of the Earth* (London: Methuen, 1953) at 196, online: <archive.org> [https://perma.cc/HEU8-NW72].

[61] Ellen Semple, "The Influences of Geographic Environment on Law, State and Society" in Albert Kocourek & John Henry Wigmore, eds, *Formative Influences of Legal Development*, Evolution of Law: Select Readings on the Origin and Development of Legal Institutions, vol 3 (Boston: Little, Brown, 1918) 215 at 223, online: <archive.org> [perma.cc/8DXX-MLWQ] [Semple, "The Influences of Geographic Environment"].

[62] *Ibid* at 222; Blomley, *Law, Space, and the Geographies of Power, supra* note 27 at 32.

[63] See Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Minneapolis: University of Minnesota Press, 1977) generally and at 67–78 [Tuan, *Space and Place*].

geography" approach that treated the physical environment as a foundation for human activity.[64] The regional geography tradition of the twentieth century approached the physical place as both the condition and the consequence of human processes, an insight that was central to the development of research in the fields of cultural geography, political geography, and others.[65] For these geography subfields, the spatial activities of institutions are not merely coincidental in how they interact over locations, but are instead tied to the intricacies of that place. The physical geography is simultaneously the starting point for how humans and human-created spatial processes can possibly occur, as well as the ongoing foundation for different iterations of change and movement. Spatial processes can even alter the physical place. Changes can occur over time as spatial processes respond to the material geography and create possibilities for how a location is to be used. Doreen Massey provides an evocative example of this when she writes about the effects of glaciers from 10,000 years ago on the landscape of the Lake District, England that a "graciously sweeping road … takes its shape not just from some designer's preference for curvaceous avenues, but from following the foot of a drumlin."[66] The built environment may develop to reflect the long histories of the natural environment, more recent choices in the built environment, or otherwise informalized community practice. Thus, locations adopted as places for a shipping port can become more robust and be built into a port for commercial usage. Winter parks may be groomed for cross-country skiing by informal community groups, which later become formalized through official city support or an annual ski event.

Taking the physical and natural geographies of propertied places as the central factor in a given property issue requires that we interrogate the ways in which people, the law, and social and

[64] Derek Gregory, "Human Geography" in Derek Gregory et al, eds, *The Dictionary of Human Geography* (Oxford: Wiley-Blackwell Publishers Ltd., 2009) at 350.
[65] *Ibid.*
[66] Massey, *For Space, supra* note 39 at 133. A drumlin is a small hill formed by glaciers.

political interests are led and shaped by physical places. As identified by legal geographers there can be a tendency to approach "law" as a spatial monolith, without interrogating the context-driven, place-making aspects of it. The spatial practices that legal geographers have identified are not simply "projected" onto place but are instead intimately a part of those places and a part of an ongoing process. In relation to land and real property law, laws so often regulate physical sites, for example through the use of surveys and land databases to manage property, or by using the body of common law relating to water rights when a property is near water. These processes, however, don't necessarily provide insight into how physical geographies are continually created through the use and development of these same laws. The water rights may be limited by the legal reclassification of a marshland to a legally protected or regulated wetland, or they may arise because of a manufactured pond created as part of a property development. The property parcel and how it interacts with property rights in water in these places may be regulated through land and real property laws, but they will have been created by a mixture of common law and statute, property and other areas of law, through policy-guided discussions about how the place can be created, and maybe in ignorance of past interactions with that place. Insights based on physical geography would lead to a more nuanced assessment of the interaction between different places, to highlight the way that geography forms the boundaries for attachment to place and then the ongoing manifestations of place through spatial interactions. Using insights from law and geography about the importance of space and spatialized institutions to interrogate the role of physical place creates an opportunity to assess how different place-based understandings can be incorporated into property law processes.

2.3. SPATIAL THEORY: A THEORETICAL FRAMEWORK FOR PROPERTY

This thesis uses place and space theory to engage with geography, place, and land and real property law. Using spatial theory continues the work of the spatial turn, an intellectual movement of the twentieth century that sought to establish the importance of spatiality and geographical thought as central to social life.[67] The spatial turn was brought into consideration in work carried out across the humanities and social sciences and, comparatively recently, to law as well.[68] The basic premise of spatial thought[69] is that places are the sum of people, their experiences, and the historical and current engagement with a location. Institutions including political, legal, and social such as personal relationships, all entail spatial arrangements. Within this theoretical engagement there are a variety of perspectives on the definitional content of space and its relation with time, movement, location, and place. Within the work of legal geographers, the spatial theory related to political space, primarily from spatial theorist Henri Lefebvre, has been particularly influential.[70] For this thesis I focus on the theory of place and space, as considered by Lefebvre and the works of other key thinkers such as Yi-Fu Tuan[71] and Doreen Massey.[72] The relationship between place and space identifies the tension between assumptions about geographic locations, of how they are used within social systems (including in law), and of the ongoing place-making activities afforded through space.

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[67] Barney Warf & Santa Arias, eds, *The Spatial Turn: Interdisciplinary Perspectives* (London: Routledge, 2008) [Warf & Arias, *The Spatial Turn*].

[68] Braverman et al, *Expanding Spaces of Law, supra* note 21 at 2–12. The authors identify three main waves in law's turn to spatiality: a cross-disciplinary wave, then an interdisciplinary wave, and finally a post-disciplinary wave.

[69] See e.g. Tuan, *Space and Place, supra* note 63; Massey, *For Space, supra* note 39; Nigel Thrift & Michael Crang, eds, *Thinking Space* (London: Routledge, 2000); Kanishka Goonewardena et al, eds, *Space, Difference, Everyday Life: Reading Henri Lefebvre* (New York: Routledge, 2008) [Goonewardena et al, *Space, Difference, Everyday Life*]; Henri Lefebvre, *The Production of Space*, translated by Donald Nicholson-Smith (Oxford: Blackwell, 1991) [Lefebvre, *The Production of Space*].

[70] Goonewardena et al, *ibid*; Lefebvre, *ibid*.

[71] Tuan, *Space and Place, supra* note 63.

[72] Massey, *For Space*, *supra* note 39.

2.3.1. Place and Space Thought

Spatial theory is integral to understanding that places cannot be understood solely through the materiality of what can be observed. Instead, a place, a geography, or a location- are deeply connected with the institutions, interpretations, and processes that exist in and through the material place. These different terminologies—between a location or a place or a spatialized institution—also have different meanings within geographical thought and indicate to some extent how spatiality is thought about. To reiterate, when I refer to "space," I adopt a definition that identifies space as relational and occurring across political, social, and economic processes, and that these phenomena can be geographically located.[73] When I refer to "place," I adopt a definition that emphasizes its tangible nature and highlights the role of personal connection, longevity, and known quality of place as a particular location.[74]

Understanding the ways in which space can be theorized is an important aspect of identifying how space – and what spatial institutions – affect place. In one of the most influential works on a theory of space, *The Production of Space*, Henri Lefebvre develops a philosophical alternative to absolute space, arguing that space is continually produced through action.[75] He describes the three dimensions of space as (1) the practice of space, (2) the representation of space, and (3) the space of representations. Lefebvre emphasizes, first, spatial practice, which is perceived space, and highlights space is not an inert entity but is a result of continued action. Second, the representation of space, which is conceived space, gives space an image, and thus helps define space.[76] For Lefebvre, representations of space include maps and plans, information in pictures

[73] See Chapter One, *above*, s 1.2.
[74] See Chapter One, *above*, s 1.2.
[75] Lefebvre, *supra* note 69 at 38–39; See also, Massey, *For Space, supra* note 39 at 100, who argues that space is forever incomplete and in production.
[76] Christian Schmid explains, "Representations of space emerge at the level of discourse, of speech as such and therefore comprise verbalized forms such as descriptions, definitions, and especially (scientific) theories of space" (see Christian Schmid, "Henri Lefebvre's Theory of the Production of Space: Towards a Three-

and signs as found particularly in specialized disciplines such as architecture and planning but also in social sciences.[77] Third, is symbolic representations of space, which is lived space, such as "a divine power, the logos, the state, masculine or feminine principles."[78] Lefebvre's theory of the production of space has been influential for the work of legal geographers for revealing that the production of space is ongoing, iterative and created through the deployment of space.[79]

Analysis from Yi-Fu Tuan identifies the non-tangible aspects of space in terms of ideas that geographers often ignore (humanistic), as he is concerned with a person's experiences as integral to the creation of space. He argues that the definition of geography is as an environment that is used by humans. Tuan does not separate people from the environment; for Tuan, the environment and people come together to create interests in the geography of a place. This process occurs through extensive engagements with many elements that exist in social life and physical place, such as histories, interests, and political frameworks.[80] I would add legal frameworks to this list.

Tuan's 1977 text *Space and Place: The Perspective of Experience*, he addresses the connection between space and place, arguing it is difficult to speak to one without also speaking to the other:

> The ideas "space" and "place" require each other for definition. From the security and stability of place we are aware of the openness, freedom, and threat of space, and vice versa. Furthermore, if we think of space as that which allows movement,

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Dimensional Dialectic" in Goonewardena et al, *supra* note 69 at 36 [Schmid, "Henri Lefebvre's Theory of the Production of Space"].

[77] Lefebvre, *supra* note 69 at 38–39; Schmid, "Henri Lefebvre's Theory of the Production of Space," *ibid* at 37.

[78] Schmid, *supra* note 76 at 37. This triad of the production of space inspired legal geographer David Delaney in David Delaney, *The Spatial, The Legal and the Pragmatics of World-Making: Nomospheric Investigations* (New York: Routledge, 2010) [Delaney, *Spatial, Legal and Pragmatics*].

[79] Many writers build their law and geography research on the insights offered by Lefebvre. For the authors mentioned, see respectively: Chris Butler, *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (New York: Routledge, 2012); Delaney, *Spatial, Legal and Pragmatics, ibid*; Blomley, *Law, Space, and the Geographies of Power, supra* note 26; Andreas Philippopoulos-Mihalopoulos, *Law and the City* (London: Routledge, 2007).

[80] Tuan, *Space and Place, supra* note 63 at 67–84.

> then place is pause; each pause in movement makes it possible for location to be transformed into place.[81]

For Tuan, the key point about space is that it is understood in a dialectical relation with the concept of place. In this relationship, space is uncontrolled and open. In opposition to this, place is considered definite and closed. Place and space are co-constituted and understood in relation to each other. A key theme emerging from this dialect is the permanence ascribed to place. Tuan critiques the treatment of space which because it is not as recognizable compared to place, is capitalised on by professional planners "with their urgent need to act, move too quickly to models and inventories," and is in turn too readily accepted by the layperson.[82]

The types of professionals who capitalize on the creation of place are similarly commented on by Massey.[83] Although neither Massey nor Tuan refer to lawyers specifically, legal geographers such as Nicholas Blomley, David Delaney, and Sarah Keenan have all shown that legal professionals are part of the group of professionals engaged with place and space-making work. For example, on the role of law in the creation of spatiality, Delaney builds directly on Lefebrve:

> As Henri Lefebvre has written, "That space signifies is incontestable. But *what* it signifies is *dos* and *don'ts*, and that brings us back to power." And *that* brings us back to law.[84]

Delaney's analysis of law is developed through his monograph references to all aspects of law, including legal structures, legal actors, and legal projects. Reorienting an understanding of law toward the spatial nature of law and of legal actors removes the barriers between legalities and non-legalities. While an integral aspect of these experiences that a law and geography approach highlights is law, there is in addition numerous varieties of geographically oriented interactions

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[81] *Ibid* at 6.
[82] Tuan, *Space and Place, supra* note 63 at 7.
[83] Massey, *For Space, supra* note 39 at 10.
[84] Delaney, *Spatial, Legal and Pragmatics, supra* note 78 at 4. Reference to Lefebvre, *supra* note 69 at 142. Italics are from Delaney's original work.

that together create place and space. Turning fleeting spatial experiences into tangible places is carried out by human experiences, which draw on experiences of "place, space, home and the world which people use in their lives to integrate forces, perspectives and selves."[85] Thus, whatever the exact configuration between place and space may be, its construction, even as it relates to the physical location, is people oriented and dependent on the totality of spatial experience.

In her influential monograph *For Space*, Doreen Massey considers the space–time bifurcation. Often space is considered to have conquered time, meaning that when spatiality is considered, it is done through the representation of space as a closed system. For the consideration of space, the multiple potential temporalities are paused, and a single concept of that space emerges. Massey argues that the space must be understood as both multi-versive and discursive. A key component of this is that space is relational, to other spaces and to other times.[86] While places are captures of space and time frozen; together these are our histories.[87]

Massey focuses on space in relation to the daily experience of moving from place to place, which requires individuals to bring part of their experience in one place into creating a new experience of reality in a new place. Like Lefebvre, Massey breaks down her theory of space into three points:

(1) Space as the product of interrelations;
(2) That space raises the possibility of contemporaneous plurality;
(3) That we recognize space as always under construction.[88]

Massey writes that place is often considered subordinate to the political arena represented in

[85] Robert D Sack, *Homo Geographicus: A Framework for Action, Awareness, and Moral Concern* (Baltimore: John Hopkins University Press, 1997) at 58.
[86] Massey, *For Space, supra* note 39 at 61, 76–80.
[87] See, generally, *ibid*, at 20–30, 130–31.
[88] *Ibid* at 8, 100.

space.[89] There is a gendered component to this. Her analysis mirrors feminist concerns with division between public and private spheres, and public and home life. Identifying and privileging the role of place—the geographical landscape—as the site in which spatial representations of political and social life are brought into relief is thus a political action, challenging the privileging of space over place.[90] Massey does not seek to explain the dynamic between place and space, rather in her analysis she animates space as something "lively and challenging"[91] and best engaged with through examination of "ordinary space"[92] of everyday.

The complexity of spatial theory illustrates the multiple directions a work in this area could take. The work of Yi-Fu Tuan and other thinkers in the humanist tradition is particularly helpful for this thesis, for insights on the place and space duality as a relationship that codifys traces of spatiality into physical place. In particular, Tuan's work highlights the challenge of creating meaning and understanding in the value of space when it encounters the more tangible structures of place. The definitional content of how space is produced is thus interpretive and dependent on the motivating normative content. A given interpretation will privilege certain spatialized activities, which themselves are possible through the introduction of tools and regulations to create a given location. This malleability has led to the observation that there exists "geographical alienation of people from the world around them."[93] In this statement, the concept of "world" is the physical place, and the "geographical alienation" is achieved pursuant to a manipulation of space. Law is not immune from the place and space duality, and it too participates in processes of geographical alienation. In this account, law is the tool that enables geographical alienation as it is

[89] *Ibid*.
[90] *Ibid* at 9, 65.
[91] Massey, *For Space, supra* note 39 at 14.
[92] Massey, *For Space, supra* note 39 at 13.
[93] John A Agnew, "Space and Place" in John A Agnew & David N Livingstone, eds, *The SAGE Handbook of Geographical Knowledge* (London: SAGE Publications, 2011) 316 at 323 [Agnew, "Space and Place"].

used to change areas, codify ways of viewing the world, and privilege locations. Law is the interface between the place it inhabits and the vision for how the place could be constructed. Legal rules, statutory and court interpretations, and policy documents together create property law as a spatialized entity.

2.3.2. Property Theory versus Theory of Space

In many ways the intersections between property, geography, and spatial theory are patent. As a legal construct, land and real property law is primarily concerned with how a physical place can be regulated for purposes of ownership, use, access, transmission, management, and so on. Even when research in the area of property law considers intangible property rights such as temporal limitations that exist pursuant to the existence of an estate, the concern remains centred on the piece of land and real property. Despite the evidently situated nature of land and real property, spatial theory is not overtly present in works that consider property. Often when place and space is introduced, it is highlighted as a facet of property and used to examine already existing concerns within property scholarship. As a newly identified element, spatial thought can provide new perspectives on issues concerning justifications for property regimes and demand close examination of the manifestation of barriers to accessing property. The results of this process of spatialization and the impacts it has on people and institutions is then brought into the consideration of property theory.

A key aspect to the thesis's approach to property is that instead of centring a study of place on the legalized property title therein, this thesis takes these insights and brings them into a place-based consideration of that location. That is to say, the focus is not on property theory, and in particular it does not seek to address definitions of property or justifications for property; instead, it reflects on spatial theory and how that illuminates property. The work of Christopher Essert's

work is helpful for how such an approach might work.[94] In his monograph, *Property Law in the Society of Equals,* Essert argues that the institution of the law of property is required to afford people the control needed to do anything in space, and that without property "we would be unable to engage, as equals, in *any* activity or relation that requires control over spaces or objects."[95] As he explains it, the "commitment" undertaken is one of creating and arranging social and political institutions so as to protect persons interacting as equals. Property law, in his view, is one of such systems that is committed to ensuring equality between persons.[96] Essert does not define property, adopting instead the "idea of yours and mine" as the moniker for the thing that property regulates; nor does he seek to justify property, instead focusing on the practical importance of property as something that allows people to relate to each other as equals. According to this approach, there is a pragmatism to accepting property institutions, as "the idea would be to embrace a kind of Peircean pragmatism, and say that the depth and breadth of the embeddedness of the idea of yours and mine is too great to allow us to abandon it without remaking our social world to a degree which is in some sense beyond us."[97] Similarly to Essert, for this thesis, intersections between property theory and law and geography research are pragmatically recognized. Here, they are used to consider the ways in which a spatial lens can contribute to an understanding of property, where property is conceptualized as something that exists and cannot be removed from place to an *a priori* state of being.

The language of property theory lends itself also to expression of place and space theory about property. For example, Gregory S Alexander, who writes in the areas of property theory,

[94] Christopher Essert, *Property Law in the Society of Equals* (New York: Oxford University Press, 2024).
[95] *Ibid* at 35 [italics in original].
[96] *Ibid* at 20.
[97] *Ibid* at 227.

introduce the term "governance property" in a 2012 article of the same name.[98] The foundation of Alexander's piece is an examination of the prevalent models of property that exist today between the two options of exclusionary property—that is, property that adopts the Blackstonian model of exclusion as the key trope of private property—and governance property, which is constituted through multiple concurrent ownerships.[99] Alexander argues that the central mode of property is governance property, which is defined as property that affords the property title-holder a host of rights, but notably not the right to exclude. In terms of the thing captured by the term "governance property," Alexander includes a wide variety of types of property, from private property of a house and antecedent property of the home, of marriage and domestic partnership, and neighbourhoods and communities, which include closed-interest communities[100] and leaseholds. According to Alexander's argument, property boundaries have become less Blackstonian in exclusion and more porous. For Alexander this is a good thing, because it promotes human flourishing through the virtues of community, cooperation, trust, and honesty. A key component of the impetus for "governance property" is a concern with the realities of property use, which involve multiple spatial (and temporal) interactions with a parcel. Conflict in any concurrent spatialities of property use is managed through the rules of property law; for example, conflicts that could arise in public-facing private properties.

Likewise, the important ideas developed by Jennifer Nedelsky in her monograph *Law's Relations* on "property-as-relations" could be reconceived as a concerted effort to relocate property into a contextualized spatial model.[101] A central concern of legal geographers is to turn from the

[98] Gregory S Alexander, "Governance Property" (2012) 160:7 U Pa L Rev 1853.
[99] *Ibid* at 1855–57.
[100] Also known as a gated community.
[101] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) [Nedelsky, *Law's Relations*].

notion of property as exclusionary, as it is created through boundaries (tangible and intangible), to the notion of spatially embedded property where property is part of intricate spatial models. Reflecting on the shift this model would represent, Blomley describes the individuated property model found within classical accounts of property as follows:

> [L]iberal property entails the spatial circumscription of the subject-owner. The possessive individual is individuated, imagined as a presocial, autonomous and distinctive subject, protected from others by the shield of rights.[102]

Re-embedding property would correctly reflect the context of relations and account for the importance of ideas about property in the political and cultural imagination, and as essentially a site for the embodiment of construction between place and space. Nedelsky's examination of relations between persons as they serve to construct and hold access to property is related to theory about space and property. It mirrors the arguments made by Doreen Massey on the construction of place through continual construction and reconstruction of movement in space, which are themselves constituted through the social life of institutions.[103] Property is one of those institutions. Considering the foundations of a relational theory of property as something akin to spatiality is not done to reclassify the efforts of property theory, but to re-examine the underlying motivations of property analysis that would centre person-to-person relationships as property.[104] Person-to-person relationships are not separated from the underlying property system, or a non-legalized component of property, but instead these relationships exist in places through the boundaries of public property, private property, and all the configurations in between.

The work of re-grounding property as an institution constituted by and reflective of connections between people is important and makes sense as a response to the liberal individualism

[102] Blomley, "Cuts, Flows, and the Geographies of Property," *supra* note 28 at 206.
[103] Massey, *For Space, supra* note 39.
[104] Nedelsky, *Law's Relations, supra* note 101 at 95.

notion of property.[105] There is a ready connection between this property theory work and law and geography work that is founded on the human geography tradition (as a majority of it is). Like Blomley's piece (excerpted above) demonstrates,[106] to take a spatialized approach to property is to highlight property as an institution held in space by (spatial) relations between people, types of property (e.g., public and private), and political organizations. Keenan likewise speaks to how property can be part of forms of belonging through relationships.[107] Taking a spatialized relational approach to understanding how property titling systems function requires that erstwhile individualized property be reconfigured as dependent on a variety of personal and institutionalized relationships. This approach is an effort to name otherwise hidden spatial power structures of property.[108]

Using these insights to think about the impact of spatiality on the physical geography requires a shift, as the questions raised move beyond establishing the existence of spatial processes as a central component of property. Instead, we can build on this insight to look at how the inherent existence of spatiality features in and creates the physical place that property occupies and is constructed through. Considering still the intersections between property theory and theory of space, I draw on insights from Margaret Jane Radin to think about personhood and land.[109] Radin's central thesis on the importance of self-development and the requirements of personal property for this are similar to the insights of humanistic spatial theorists who highlight the role of the personal in place-making. If spatiality is a component of property, as are relationships among people,

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[105] Margaret Davies, "Persons, Property, Community" (2012) 2:2 feminists@law 1 at 13, online: <journals.kent.ac.uk/index.php/feministsatlaw/issue/view/6> [perma.cc/SH7F-GAES].
[106] Blomley, "Cuts, Flows, and the Geographies of Property," *supra* note 28.
[107] Keenan, *Subversive Property, supra* note 38.
[108] Blomley, *Law, Space, and the Geographies of Power, supra* note 27 at 27; Massey, *For Space, supra* note 39 at 9.
[109] Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan L Rev 957.

between types of properties, and between institutions, then we must begin examining how spatial theory highlights the creation of importance in places of land and real property.

In her 1982 article "Property and Personhood," Radin made the claim that self-development, or personhood, requires individuals to have control over things in their external environment. The personhood theory of property contends that:

> Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.[110]

This theory essentially considers the role of the personal as it establishes importance in property. The importance of property to the realization of self Radin articulates concerns both chattels[111] and rights in real property.[112] This examination of the role of the personal in property can be similarly extended to think about the realization of self through the places that property structures inhabit. Humanistic spatial theory, which highlights that places gain importance through experience, time, and familiarity, provides the bridge to extend Radin's insights to land and real property. The manifestations of the self through places that are propertied are often overlooked in legal structures of property, which have not been equipped to incorporate divergent interests into property titles.

There is divergence between humanistic spatial theorists and Radin's personhood theory; notably, Radin's work is situated in law and property theory and so continues in the legal tradition of searching for justifications for property, while humanistic spatial theories are focused on human experiences, emotions, and meaning.[113] This approach is logical—maybe even required—given

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[110] *Ibid* at 959.
[111] Such as a wedding ring, a portrait, or an heirloom (see *ibid* at 959).
[112] Such as a home, which could include both a property held in fee simple or a property used by way of a leasehold (see *ibid* at 991–92 and 992–96 respectively).
[113] Radin explores how the perspective of personhood in property can help guide and decide disputes between claimants to that property (see *ibid* at 978–79).

the adjudicative and penal aspect of law. As this thesis is a law and geography examination of property, there is less focus here on justifying systems of property and more on how to identify and name interests in place that can then be supported by or realized through property law. The theory of place guides how importance is created in a given location; it may also be able to guide our understanding of how law assigns importance to types of places.

2.3.3. Space in Property Law

Place and space theory reveals that manifestations of place are multifaceted and constituted by an array of legal interests, historical uses, and cultural significance. Understanding property law as more than the currently used property title in turn raises questions about how the different interests (legal and informal) can be actioned, or indeed whether interests that are not based on the property title should be protected. Looking at property law through the lens of place and space theory is an opportunity to begin interrogating legalized understandings of property and to consider the implications of broadening interests in properties to include places as being simultaneously the built and the unbuilt environments, and would include how it affects and is affected by people.

This work can be distinguished from property theory in that my primary concern is not with assessing the relative merits and justness of a property system. A concern for legal and political equality in access to property has motivated much of property theory and has resulted in arguments for the development of contemporary property relations. As a legal endeavour, property theory works are often focused on the ways in which property is justified, how it is supported through legal structures, and the impact it has on people often outside of the property law structures. Using property theory to interrogate property as a system of justification for and distribution of property is important. My work builds on this by using place and space theory in connection with the manifestation of (legal) interests in places. These places may be the subject of

built properties, places of unbuilt land that is nonetheless the subject of private property, or places of unbuilt land that is public land. I am interested in using theories of place and space to interrogate property law, which is built on these physical places.

Place and space theory provides insight into the force of law as a spatial structure, but also as the force of law as a creator of place. Considering this relationship between place and spatial-legal activities is a central aspect of a law and geography thesis. Adopting the insights from spatial theorists, some observations about the spatial nature of land and real property law can be made. First, it is a truism of law and geography that law is spatially contingent. Law mediates and creates through its interactions, relationships, and performances. Of all subject areas of law, property law is arguably easily interpreted as spatial because physical property, the subject of real property and land law, is observable. However, this observation has the tendency to obfuscate the close interaction between place and space, as the materiality of legal structures (of property titles) become hidden in the physical landscape as the legal structures are essential for creating property titles and so take precedent.

Second, law relies on place as something that is directly engaged with and then mediated over. The impact of this engagement is that law as a spatially contingent entity does not automatically or even always divorce people or processes from location: Instead, it is quite the opposite, as law relies on the specificity of place to create locations. Conversely, a fundamental aspect of engaging with place can mean there is over reliance of despatialized legal documents which do not seem to accord with the histories or ideas of that place. At times, property law (as one of the spatially contingent legal structures) can seek to hide the specificities of a given place or its impact on the people involved.

Third, building on the second point, as all iterations of law mediate and create, it would be a fallacy to argue that this is done without law including some consideration of the geography of a location. The interaction between the physical geography with law has been part of a "regionalized"—or comparative law—account of how legal systems grow in different parts of the world.[114] Or it can be identified through an "impact" account of how law is immediately affected by the landscapes it takes up.[115] What is missing is information about the extent to which law operates with geographical awareness. Attention to the ways in which law acts spatially requires examination of institutional understanding of place in a given context, and in turn examination of the spatial tools and ideas that are used to effect in that place. Attachments to places encapsulate personal histories, future histories, collective interests, and individual interests in private property that are not currently protected.

Keeping the focus on the places property law inhabits provides the parameters for looking at how space as an active and evolving entity is used, as well as requires continued reference to the materiality of that location, which includes both the physical geography and property titling systems. While spatiality is an integral component of property, it should be examined not just through the lens of its impact on and reliance on relationships, but with attention to the ways in which space is used to create propertied places.

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[114] This point is made with reference to the work of John Wigmore, who authored *A Panorama of the World's Legal Systems*, which Blomley describes as detailing "the formative influences of legal development" (Blomley, *Law, Space, and the Geographies of Power, supra* note 27 at 29). See John Wigmore, *A Panorama of the World's Legal Systems* (Washington DC: Washington Law Book Co, 1928).

[115] Blomley, *Law, Space, and the Geographies of Power, supra* note 27 at 32. This point is made with reference to the work of Ellen Semple, an early critical geographer who wrote about a thing she called the "land-bond," whereby relations between people and the soil deepen and intensify with social advancement. See Semple, "The Influences of Geographic Environment," *supra* note 61 at 223.

2.4. WHAT IS WHERE, WHY THERE, AND WHY CARE?

Gritzner offers a definition of geography designed to be broad enough to encompass the many different types of geographic inquiry. As Gritzner explains the definition, in the form of questions "what is where, why there, and why care?," centres the "where" question as the fundamental aspect common to all types of geographic inquiry.[116] This centrality of "where" is also present in law and geography inquiries, as work has shown the importance of context for understanding how law is spatialized.[117] As a methodology, these questions provides guidance for a law and geography study about how land and real property laws operate in and through space.

2.4.1. "What?" A Spatial Reading

The first part of the methodology asks "what" the inquiry examines. Gritzner explains here that "what" is used to identify the branch of geographic inquiry.[118] As Gritzner explains, part of the difficulty of creating a singular, universally applicable definition of geography is the difference between the categories of physical and human geography in terms of research focus, methods, and goals.[119] The definition offered by Gritzner—what is where, why there, and why care—is broad enough to allow for types of geography to be explained as the "what" that is being examined. In the discipline of geography, this would be either physical geography or human geography. Physical geography starts its analysis with the topography of a place, and from there will typically be carried out through quantitative research methods. Human geography looks at processes created, led, or experienced by humans, and from there research will typically highlight spatial relations between people and institutions. The choice of adopting a human geography or a physical geography

[116] Gritzner, "What Is Where?" *supra* note 2 at 40.
[117] See section 2.1.1., *above*, and particularly, Blomley, *Law, Space, and the Geographies of Power*, *supra* note 27; Braverman et al, "Introduction," *supra* note 5; Forest, *supra* note 1.
[118] Gritzner, "What Is Where?" *supra* note 2 at 39.
[119] Gritzner, "What Is Where?" *supra* note 2 at 39.

perspective will depend on multiple factors, such as professional and academic training, personal interest, developing a body of research in response to a concern or issue, and so on. At the same time, this initial step also identifies that there is a connection between these seemingly disparate areas of geography.

Gritzner's methodological questions capture the point that the physical geography and the human geography, are not necessarily separate inquiries. Nor is it even correct to consider these distinct inquiries. The physical and human interaction in relation to a place creates the parameters of spatial interaction because it creates the possibilities afforded by that location, and very often encodes these possibilities in place through the built environment. Spatial activities occur in and through the same location. Therefore, locations should not be considered in isolation, but instead locations include space that is encoded in place, a place impacts and guides spatial relations, and interaction between physical geography with human geography.

A re-reading of "what" a geographic inquiry examines through the lens of place and space theory similarly identifies this connection between concepts of physical place and spatial relationships, and how they operate together in a location.

Reviving geographic inquiry as deserving of attention has been the motivating goal of the spatial turn. Born in the 1990s, the spatial turn sought to recognize the fundamental role of space across social, political and cultural life. According to Warf & Arias there had existed a sense of the historical as linearized and representative of progressive development, a narrative in which the discipline of geography did not feature[120] Edward Soja described this an "an over developed historical contextualization of social life and social theory that actively submerges and peripheralises the geographical or spatial imagination."[121] It was by focusing on temporal

[120] Warf & Arias, *The Spatial Turn, supra* note 67 at 22.
[121] Edward Soja, "Postmodern Geographies and the Critique of Historicisms" in John Paul Jones, Wolfgang Natter &

interactions and constructions that space is allowed to become empty, flat, and co-optable for the purposes of time.[122] Likewise, Michel Foucault describes this interaction between uses of time and space: "Space was treated as the dead, the fixed, the undialectical, the immobile. Time, on the contrary, was richness, fecundity, life, dialectic."[123] Massey notes that there has been a long history of understanding space as the opposite of time, and time as the "vital dimension of life, of existence itself."[124] The central goal of Massey's work "For Space" was to show that "space is equally lively and equally challenging…and far from [] being dead and fixed."[125] These writers identified a prioritization of time prevalent across many disciplines, from theories of evolution to the work of colonization to the assumptions of inevitability in the Industrial Revolution.[126] A central concern identified is that when time is prioritized over space, then space is treated as existing only in serve of temporal organization and without regard to a spatial present.[127] In this order of prioritization between time and space, it was assumed that space exists only in service of the temporal organization and occurs without any regard to a spatial present.

Legal geographers have adopted insights from the spatial turn on the interplay between time and space, observing that law and legal research also can prioritize a time analysis of issues over a spatial analysis. According to Blomley attention to history within the legal studies project has the impact of overlooking the spatial. Blomley explains further:

Theodore R Schatzki, eds, *Postmodern Contentions: Epochs, Politics, Space* (New York: Guildford Press, 1993) at 140 [Soja, "Postmodern Geographies"].

[122] Warf & Arias, *The Spatial Turn*, *supra* note 68.

[123] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed and trans by Colin Gordon (New York: Pantheon Books, 1980) ch 4 at 70. Soja refers to this excerpt from Foucault as a foundational moment in which space was argued to be on parity with time, and as the precursor to the spatial turn; see Edward W. Soja, "Taking Space Personally" in Warf & Arias, *supra* note 67 at 18–19 [Soja, "Taking Space Personally"].

[124] Massey, *For Space, supra* note 39, at 13–14.

[125] Massey, *For Space, supra* note 39, at 14.

[126] See, Warf & Arias, *The Spatial Turn, supra* note 67 at 20–21.

[127] Massey, *For Space, supra* note 39 at 13.

> In deploying history to argue against the closure of the legal system, legal scholars fail to recognize the profound importance of space in the regulation of social life and the subversive potential of what might be called a geographic critique. If social and political life occurs in time *and* space, it seems curiously restrictive to focus on the former.[128]

Historicity is engaged with and managed through law in multiple ways: the rules of evidence, prioritizing of ownership claims dependent on a prior history, chain of events used for evidence or story-making, and the importance of precedent and recorded content as representation of moments in time.[129] For a discipline that heavily prioritizes a temporal understanding of events and moments it is logical that legal research also would organize the spatial into a time-based understanding, and reproduce the tendency to minimize the importance of space[130] However, legal geographers research began addressing this oversight and gave explicit attention to the need to consider space as early as the 1980s. For example, Gerald Frug highlighted the interplay between urban settings and legal constructs of the urban setting in his 1989 article "The City as a Legal Concept."[131] Gordon Clark considered the role of courts in structuring geographical outcomes in his book *Judges and the Cities.*[132] Review articles surveying the field were published in 1986.[133] From a theoretical perspective, in 1987 Boaventura de Sousa Santos used the image of the map, as both a metaphor and as substantive engagement, with questions about the authority, truth, and power of

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[128] *Ibid* at 25 [italics in the original].
[129] Robert W Gordon, "Critical Legal Histories" (1984) 36:1/2 Stan L Rev 57.
[130] *Ibid* at 57: "Critical legal writers pay a lot of attention to history. In fact, they have probably devoted more pages to historical description—particularly the intellectual history of legal doctrine—than to anything else, even law and economics."
[131] Gerald E Frug, "The City as a Legal Concept" (1980) 93:6 Harv L Rev 1057.
[132] Gordon L Clark, *Judges and the Cities: Interpreting Local Autonomy* (Chicago: University of Chicago Press, 1985).
[133] Published as a paired set of review articles in a geography journal and a law journal, these articles demonstrate an early awareness of the two academic lineages contained within law and geography, and of the differences as the works conform to the requirements of their respective disciplines. See Mark Blacksell, Charled Watkins & Kim Economides, "Human Geography and Law: A Case of Separate Development in Social Science" (1986) 10:3 Prog Hum Geog 371; Kim Economides, Mark Blacksell & Charles Watkins, "The Spatial Analysis of Legal Systems: Towards a Geography of Law?" (1986) 13:2 JL & Soc'y 161.

law.[134] These and other works that self-consciously took up and established the legal geography tradition had as their goal to consider the spatial impacts and consequences of law.

This work of thinking through geography as it intersects with law has continued steadily up until the time of writing this thesis, and there is now a substantial body of work arguing that space and time create legality.[135] The current topic of debate among these scholars is more focused on the details of how spatiality, law, and geography exist together in the research area now commonly called "legal geography." Whether this is a cross-disciplinary, interdisciplinary, or potentially post-disciplinary project, this scholarship is part of the effort to effect ever more insightful and impactful results from the work. Regardless of what direction law and geography research takes in the future, the work of bringing the spatial turn to law and identifying the importance of space to legal process is of ongoing importance. Early critical legal geographers and legal geographers did the difficult work of bringing insights from the spatial turn into how law is conceived of and critically engaged with. Now this thesis takes up a close examination of the constitution of that space through attention to place and space.[136]

Within the theoretical framework of spatial theory there is a relational aspect between ideas of space and ideas of place.[137] Spaces are the abstract processes of interactions, while places are the fixed locations. Spaces are filled with movement and possibility as relationships between people and between institutions create the circumstances in which people are able to conduct themselves; places are the backdrop in which these occur. This dichotomy, however, produces a limited understanding of the iterative relationship between the two, resulting in a mutual limitation

[134] Boaventura de Sousa Santos, "Law: A Map of Misreading: Towards a Postmodern Conception of Law" (1987) 14:3 JL & Soc'y 279.
[135] Following Soja's work, which has tried to have the importance of geography to history and history to geography recognized. See Soja, "Postmodern Geographies," *supra* note 121.
[136] Chris Butler, "Critical Legal Studies and the Politics of Space" (2009) 18:3 Soc & Leg Stud 313
[137] Tim Cresswell, *Place: An Introduction*, 2nd ed (Oxford: Wiley-Blackwell, 2015) at 56 [Cresswell, *Place*].

in how place and space are understood. First, it reinforces space as either a multifaceted and unwieldy concept in which aspects of space are so intangible that they are not documentable or are entirely subjective. Or, on the other hand, space is understood as a dead or fixed non-entity.[138] By both accounts, space becomes managed or usable when it is represented into spatialization, so that representation alone is the constitution of space.[139] Second, it similarly reinforces place as a singular entity. Agnew explains the danger of this view as enforcing a consideration of places as a "a surface where things 'just happen' rather than the more holistic view of places as the geographical context for the mediation of physical, social and economic processes."[140] Without consideration of place as itself a performative thing, place becomes flattened into an internally coherent, pre-existing, and bounded thing.[141]

Insights on the content of the spatial and how to understand a more complex and iterative type of place can be gained from the works of Massey and Tuan, both are key thinkers in place and space theory, and whose insights are central to this thesis.

Doreen Massey includes the natural landscape in her work, which is focused on "space," and she reflects on the space-time dichotomy. She argues that space must be understood somewhere between a notion of dead fixed space, which is the positivist account of space, and the deconstructive "extravaganza of non-Euclidean black-holey space."[142]

For Massey, space as a political and relationship driven process applies to shape the geographical landscape, which she argues inevitably forms modern-day boundaries and spaces. It is the physical geography which ultimately guides human actions because the physical location

[138] Michael Crang & Nigel Thrift, eds, *Thinking Space*, (London: Routledge, 2000).
[139] See Massey, *For Space, supra* note 39.
[140] See Agnew, "Space and Place," *supra* note 93 at 318.
[141] Doreen Massey, "The Political Place of Locality Studies" (1991) 23:2 Environ & Plan A: Econ & Space 267; Cresswell, *Place, supra* note 133.
[142] Massey, *For Space, supra* note 39 at 13.

limits or creates opportunities, even as human activities try to shape places (through language, signs, and histories), shifting geographies (of waterways or landmasses) can limit or remove entirely human agency in those locations. As Massey observes, "[i]t is evident, of course, that much of the landscape here has been etched and molded into its present-day basic shape by the glaciers of ice ages, the last of which retreated 10,000 years ago."[143] Massey refers to the work of Nigel Clark, a geographer, who similarly questions the collective appreciation of the geographic landscape in our understanding of space:

> Why … are [we] still so much more comfortable tracking the impact of globalization on the biophysical world than we are with any consideration of a biological or geological contribution to the global contours we now confront?[144]

Clark and Massey's observations highlight the ongoing importance of physical place to the development of spatial action and processes. These spatial processes of political, cultural, and relational actions are both distinct from the biological and geological (as spatial theorists have identified) but also immediately impacted, limited, and potentially controlled by it. Restating the importance of place as an impactful factor is a reaction to the processes of globalization in which there is a sense of an increasingly placeless flow of communication, relations, and people that undermine the rootedness of place.[145] The concern as articulated by Massey is that without recognition of physical parameters of place, spatial relations, with all of their complexity, are conceptualized as separate from the locations in which they develop. This, in turn, reduces the possibility of political action around the information about and articulations of a place.[146] A powerful summary of this point is made in a piece by Gupta and Ferguson on perceived cultural

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[143] *Ibid* at 131.
[144] Nigel Clark, "The Demon-Seed: Bioinvasion as the Unsettling of Environmental Cosmopolitanism" (2002) 19:1/2 Theory, Culture & Soc'y 101 at 103.
[145] See Agnew "Space and Place," *supra* note 93 at 318. See generally Thomas Friedman, *The World Is Flat: A Brief History of the Twenty-First Century* (New York: Farrar, Straus, and Giroux, 2005).
[146] Massey, *For Space, supra* note 39, ch 1.

differences and placeness.[147] As they write: "The presumption that spaces are autonomous has enabled the power of topography to conceal successfully the topography of power."[148]

Massey is concerned with political space and particularly brings out feminist concerns about the durability of places that embody male-dominated politics. Tuan has the same concerns about how limited the collective understanding of place is, but he turns his attention explicitly to the content of places. Tuan highlights the role of place as a unique and personal experience. He writes that places have a "spirit," which make them unique.[149] The spirit about a place is developed through the personal connection people have with that place:

> People demonstrate their sense of place when they apply their moral and aesthetic discernment to sites and locations … However, other than the all-important eye the world is known through the senses of hearing, smell, taste, and touch. These senses, unlike the visual, require close contact and long association with the environment.[150]

Places can be developed through specific impressions of a location, the importance of that place, and the ways in which it inspires awe or affection. Place as something cultural, personal, and emotive grew as a reaction to what were increasingly positivist interpretations of space.[151] Identifying a "place" as a set of longitudinal and latitudinal spatial coordinates produces the flattened space that Foucault, Massey, and others warned about. Tuan identified that place indicates a social position and moral order, as well as a being the location where space can be made tangible.[152]

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[147] Akhil Gupta & James Ferguson, "Beyond 'Culture': Space, Identity, and the Politics of Difference" (1992) 7:1 Cultural Anthro 6.

[148] *Ibid* at 8, referenced in Massey, *For Space, supra* note 39 at 67.

[149] Yi-Fu Tuan, "Space and Place: Humanistic Perspective" in Stephen Gale & Gunnar Olsson, eds, *Philosophy in Geography*, Theory and Decision Library, vol 20 (Dordecht, Netherlands: D Reidel Publishing, 1979) 387. Note that in Tuan's work the "humanistic" perspective refers to the activities and then products that occur that are distinctive to the human species. Humanism does not refer to a set of ethical principles, but is a scientific proposal for the comprehension of geography.

[150] *Ibid* at 410.

[151] Agnew "Space and Place," *supra* note 93 at 318.

[152] Yi-Fu Tuan, *Topophilia: A Study of Environmental Perception, Attitudes, and Values* (Englewood Cliffs, NJ:

2.4.2. "What?" Requires the Physical and the Human, the Place and the Space

Using Gritzner's methodology and answering the first step of the inquiry—the "what" that is being examined—requires identification of the area of geography considered (human or physical) but only insofar as that helps identify the starting point for the research. This thesis prioritizes physical geography in an effort to refocus attention on the importance of the physical to law and geography. At the same time to avoid a simplified or singular account of how geography is being used in law and geography, spatial theory can be applied to better understand that both the spatial and the physical geography create place. There is a tension in naming research as either human or physical geography when both will always be present. This is particularly true for law and geography research with law necessarily requiring interrogation of legal processes and structures, which are spatial structures and part of human geography. Spatial theory provides the lens through which these elements are brought together so that what is examined reflects the potential ways in which a place is constituted.

Recognizing the interplay between places of law and spaces of law is important to a work that prioritizes the physical geography in its analysis. Examining the ways in which the physical impacts and guides law is particularly needed for land and real property law, which already has a material presence. The observability of structures of real property lends itself to assumptions about those properties based on what is observable. Taking spatial theory seriously opens up complexity, because it means that places are understood as important precisely for the ways in which spatial processes operate in place. Places simultaneously become sites of the personal, of the present and the past, and of multiple interests, all of which cannot possibly exist on one property paper title. At the same time, without attention to the physical geography and only looking at the spatial

Prentice-Hall, 1974).

threatens to remove localism from how a particular place of land and real property is understood. The subject of land and real property law can only be understood as a complex interaction between processes of real property law as are contained in property titles, of attention to the meaning of properties as systems as replicated throughout society, and as a tension that results from the unique role physical locations serve to either justify exceptionalism in how property laws apply in a location or, conversely, are overlooked in search of a cohesive system.

2.4.3. "Where?"

Where these processes around space and place occur is as important as what they are identified as. "Where" is the second element of Gritzner's definition, and it is the spatial-analytical element that is essential to all geographic inquiry, and certainly central to place and space thinking. Spatial inquiry is primarily concerned with where something is located; in turn, how the geography is defined impacts how the location is interpreted. "Given that both space and place are about the 'where' of things," Agnew explains, "their relative invocation has usually signaled different understandings of what 'where' means."[153] "Where" could be a particular, single location, or it could be locations of a particular type that are repeated in multiple locations on Earth's surface. Gritzner refers to these as either a location that is site specific or a location that is situation specific.[154] Whether "where" refers to a single location or a set of similar locations, both of these accounts are indicative of place-based accounts of whereness. They reference specificity of a bounded place and suggest the possibility of location determined by both its individual geolocation and possibly across many not specifically geolocated locations recognizable through similarities.

[153] Agnew, "Space and Place," *supra* note 93 at 316.
[154] Anthony C. Gatrell, *Distance and Space: a geographical perspective* (Oxford: Clarendon Press, 1983).

Identification of a location might be looked at with reference to the area of a region, communities, states, and continents.

Interrogating "where" through the perspectives of relationships and institutional processes—that is, through the space lens—would highlight different aspects of a location. Thus, a location could be identified through the ways in which it is accessed or accessible to individuals or communities of users. Compared to a bounded notion of a location that is singularly defined, attention to space introduces more interpretive accounts of a place.

"Where" might be the location of features of importance in a city, such as parks, schools, or homes. How locations such as these are defined and understood is dependent on how one is situated in space comparatively. For example, a building becomes a home through a series of processes. These include that the building is identified as a possible residential building (as opposed to a commercial building). The building exists in an area in which residential buildings are permissible according to relevant zoning by-laws. The individual has the ability to access processes relating to a home purchase, and the individual has access to information about processes that impact homemaking; this may include information about mortgages or other finances, about rights vis-à-vis a landlord, and building requirements. All of these processes depend on an individual's ability to navigate complexity in spatial relationships and arrangements, which depends on factors including personal literacy, a network of support processes, and structural support at the community, city, and regional levels that will recognize and continue to support that building as a home.

Both the more bounded place-based accounts of a location and space-based accounts of a location can be described through the more detailed spatial descriptors that are identified by

Gritzner as components for assessing the "where" of a geography study.[155] These are location, distribution, pattern, area, region, accessibility, and remoteness.[156] For a law and geography research study, "jurisdiction" should also be added here as an important legal descriptor of "where."

Gritzner's questions, "what is where?," when taken together, make up the descriptive part of defining a geography. The descriptive aspect also identifies the types of spatial analysis that may be used to interrogate the place and the location. Geographies are best understood through the theoretical aspects of space and place. Work on the theory of place and space has articulated the interplay between perceived notions of dead space, which in turn have flattened perceptions of geography into singular entities or detached spatial complexities. Attention to the physical geography as an important factor in how place and space is created and exists, opens opportunities to look at the manifestation of spatiality. In this account, the spatial is something that is performed in relation to a specific location, and likewise the place is something that can be interrogated as multifaceted. This foundation has particular implications for processes of land and real property law.

2.5. WHAT IS WHERE? LAW AND PLACE-MAKING

Insights made by spatial theorists have introduced a complexity to how places of land and real property law may be understood: A given geography is not a singular, pre-existing, bounded thing; instead, all places are subject to aspects of interpretation, creation, and assumptions. This last element is particularly true in relation to physical geographies, in which observable phenomena are often assumed to be fully constituted and pre-existing. "Places," Massey explains, "[are] seen

[155] Gritzner, "What Is Where?" *supra* note 2 at 39; see also Figure 1.2. in Chapter 1.
[156] Gritzner, "What Is Where?" *supra* note 2 at 40.

as bounded, with their own internally generated authenticities, and defined by their differences from other places which lay outside, beyond their borders."[157] Although the physical geography, as an observable phenomenon, seems to be readily definable, even these are subject to selective processes in which images of place are prioritized. Relying on a predetermined image of a location has particular significance for law, because law can seem to be required to exist in a particular location in a particular way due to the necessities of that (pre-existing) geography.

Considering "what is where" within a law and geography study means introducing law or legal insights to how places and geographies are understood. Four insights about land and real property law in place are drawn out in this section. These insights are that (1) There is an important interaction between space and place; (2) physical geography is the subject of definitional interpretation, and this is enacted through law; (3) the geographic imagination around empty space is an integral aspect of land and real property law; and (4) particular importance is afforded to permanence as an indicator of place and property.

2.5.1. Spaces of Land and Real Property Law Are Created from Place

Laws and regulations are limited by the physical area or location they relate to. If land and real property laws are derived from the same geography, one cannot consider the creation of real property without identifying that land is its source.[158] One is derived from the other. This point—that law is dependent on the physical places it engages with—is important because in though law is spatially motivated and dependent on relationships and processes, in addition the descriptive

[157] Massey, *For Space, supra* note 39 at 64.
[158] Canadian Institute of Surveying and Mapping, *Survey Law in Canada: A Collection of Essays on the Laws Governing the Surveying of Land in Canada* (Toronto: Carswell, 1989), s 4.07; see also Elaine L Hughes, Arlene J Kwasniak & Alastair R Lucas, *Public Lands and Resources Law in Canada* (Toronto: Irwin Law, 2016).

account of the physical location, and how that in turn is entangled in the spatial developments, can be overlooked.

In the case of land and real property law, the rules directly exist in relation to the physical or natural geography. This can be seen across the many different iterations of land and real property laws—whether they pertain to built property, lands used for cultivation purposes, non-habitable structures, fences, or measurement of lands and buildings for taxation purposes. That real property is derived from physical land is true for all types of ownership rights, from the strongest claim of fee simple title through to rights of access on the basis of an easement claim or rights to profit from land.[159] The single connecting point across all of these iterations of claims to land and real property is that the land (topology, physical place) is a physical and conceptual limit to the property. To put it another way: Claims to any form of ownership in land and real property are necessarily limited by the practical realities of the physical nature of the real property.[160]

This observation was first made by comparative lawyers who documented the growth of legal traditions in different areas of the world. The work of John Wigmore, for example, charted the development of different legal traditions in his opus *A Panorama of the World's Legal System*.[161] In his work he shows that the growth of legal traditions were deeply connected to both ancient legal systems of Egypt and Mesopotamia and colonial patterns of expansion. The limitations and growth of systems of law are connected to the geography of a place. Wigmore explains that the earliest records of sea law come from ancient commercial coast towns, including Venice, Pisa, and Genoa;[162] to medieval-era trade centres of Southampton and Barcelona;[163]

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[159] "*Profit-a-prendre*."
[160] Rutherford H Platt, *Land Use Control: Interface of Law and Geography*, Resource Paper no 75-1 (Washington DC: Association of American Geographers, 1976) at 3.
[161] John Wigmore, *A Panorama of the World's Legal System* (Washington, DC: Washington Law Book Co, 1928).
[162] *Ibid* at 882.
[163] *Ibid* at 885–93.

through to the beginnings of present-day international law of the seas founded in Antwerp (a coastal city).[164] Nicholas Blomley describes the work of Wigmore and other similar scholars as the forerunners of law and geography.[165] At the smaller local scale, the nature of a property parcel is similarly limited by the reality of the physical context.

Property in undeveloped land is less discussed in real property law compared to matters of estates, which are built property. However, the importance of land remains, particularly in relation to land that is undeveloped or that comprises natural land areas.[166] Emphasizing the continued importance of "land" to highly valued parcels of real property insists that real property be understood as intimately connected to the physical places from which it is derived. In their edited volume titled *Feminist Perspectives on Land Law,* Anne Bottomley and Hilary Lim highlight the importance of maintaining awareness of the broader lands from which properties are derived. They argue that we must maintain connections between property and lands, observing:

> [S]uch a spotlight on "land" is not merely a turning away from a broader investigation of "property," but rather provides an alternative form of engagement with "property" by insisting on a strategy of embodiment and embedding. "Property," in this account, needs to be examined through micro-strategies focused on specific sites and the constellation of practices within those sites. "Land" is such a site, through which we can encounter the many ways in which the figure of property is given shape and form.[167]

Bottomley and Lim argue for a contextual account of land and property as a method for framing encounters with land and property. Too often, they argue, real property legal debates occur through the processes of technical legal language. This overlooks "micro-strategies" that can be used to

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[164] The development of the "York Antwerp Rules of 1890" were codified at a series of conferences held here, and these in turn were ultimately the foundation of the Hague Rules of 1921, which contained mercantile laws pertaining to goods and insurance (see Wigmore, *ibid* at 920).

[165] Blomley, *Law, Space, and the Geographies of Power*, *supra* note 27 at 29.

[166] For example, rural land, agricultural land, Indigenous land ownership (see Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (Toronto: Ontario Law Reform Commission, 1996) at 5–9, online: <archive.org> [perma.cc/9L5W-6A9K]).

[167] Anne Bottomley & Hilary Lim, "Feminist Perambulations: Taking the Law for a Walk in Land" in Hilary Lim & Anne Bottomley, eds, *Feminist Perspectives on Land Law* (New York: Routledge-Cavendish, 2007) at 9.

shape areas of land. Micro-strategies that the authors consider include gendered property holdings, the inability of Western legal systems to protect non-Western land and property interests (such as communal property ownership), real property rules that enable largescale land grabs by ignoring the community aspect of property that is particularly required to support women's ownership of land in some parts of the world (as is highlighted in the work of Bottomley and Lim), and the lack of a strong administrative system to support a fully functioning property system. Ignoring these details about how property functions effectively equates to an inattentiveness to how property in land are created and maintained.

Broadening the accounts of real property to include non-built land (as Blackstone intended[168]) one must attend to the physical places of the property. Even in instances in which a claim to property rights is examined through the lens of highly legalized and detailed rules of property law, the foundation of that claim is always the physical materiality of the place concerned. Whether the property right can be actioned depends on the topography, geographic features, or physical requirements of that piece of land.

Reaffirming the physical and natural geography as fundamental to how property laws exist in and through a location is an important aspect of identifying the geography, as Gritzner's methodology requires. It is also a practical approach to interrogating real property. In a given action, the court is required to consider the plain and ordinary meaning of "property," not the many philosophical interpretations of property.[169] As Gray and Gray explain, "[w]hat actually happens on the ground—whether rightly or wrongly—has constituted a powerful determinant of

[168] See in Chapter One, *above,* s 1.2.3.

[169] *Alberta (Treasury Branches) v MNR; Toronto-Dominion Bank v MNR*, 1996 CanLII 244 (SCC) at para 56: "The plain and ordinary meaning of property is legal title and not a contingent future equitable right to reacquire property which one does not presently hold."

entitlement in English land law."[170] The authors recommend that "[t]he normative tug of sheer physical fact should never be underestimated."[171] The common lawyer's primary concern is with this observable phenomenon. Actions in real property do not exist as isolated and free-floating actions, but instead are derived from the physical place and tied to a complex framework of interests held by way of that place.

2.5.2. Places Are Subject to Interpretation

As the land and real property system is a derivative of the physical place, attention to the constitution of the physical geography is important. Applying the insights from spatial theory, places are not pre-existing locations waiting for recognition and use. Instead, places are subject to the forces of interpretation, of movement, and how they have historically been and are currently used. This interpretability also extends to the accounts of a physical/natural location, which are constructed through emphasizing the different aspects that exist in that location or could potentially exist.

The work of Pauline Couper is illustrative of this point and worth considering extensively. In her book *A Student's Introduction to Geographical Thought: Theories, Philosophies, Methodologies*, Couper provides a detailed overview of the ways in which theories and research design impact every aspect of how a location or place is interpreted.[172] She provides an overview of five ways in which a single geographic location can be defined. Couper emphasizes that the chosen definition demonstrates one's research focus, assumptions about the location, one's interests, and ultimately has an impact on every aspect of one's engagement with that location.

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[170] Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed (Oxford: Oxford University Press, 2009) at 6 [Gray & Gray, *Elements of Land Law*].
[171] *Ibid*.
[172] Pauline Couper, *A Student's Introduction to Geographical Thought: Theories, Philosophies, Methodologies* (London, UK: SAGE Publications, 2015) [Couper, *A Student's Introduction to Geographical Thinking*].

From a law and geography perspective, this selective geography impacts how law is applied in these locations. Law is sometimes situated as a passive user of that location and other times as an active creator of how the location can be used. Couper provides a case study example in which a group of geography students attend a beach to carry out field research. She asks: "You arrive at the beach, but what, exactly are you looking at? What is a beach?"[173] Couper offers five examples of different interpretations of the beachfront area and its related activities, and each highlights a different possible perspective and definition. Contained within each of the five definitions is an implicit or explicit judgment about the most important aspects of that area.

The first image of the beach focuses on material and physical aspects of the beachfront area. With this approach the focus is on what we can see, where it is, and descriptive accounts of those elements. The beachfront is described in terms of its physical or material features:

> The beach is a coastal deposition of sand and gravel particles lying between mean tide and the inland extent of the highest storm waves.[174]

This definition looks at the beach in terms of what can be seen. Details about the physical landscape include aspects such as wave size, measurement of high and low tides, size of grains of sand or stone particles, prevalence of sea life, which would all be included in a materialist view of the beachfront. Methods used to study the beach through this materialist lens would be largely empirical in nature, as measurements are used to capture the attributes of the beachfront. Methods of observation include "surveying and measuring the material objects forming the beach."[175] In law, a materialist view of the beach would be used when the observable-materiality of the beach is not necessarily considered relevant to the proceedings. For example, the beachfront may be the backdrop in which a crime took place. Or it could be incorporated more directly into a statute or

[173] *Ibid* at 5.
[174] *Ibid* at 5.
[175] *Ibid* at 5.

regulation to describe where an activity may or may not take place, with the intent of simply describing where a rule applies.

A material and descriptive account of a geographic area is also used to establish jurisdictional boundaries. For legal purposes, a geographic area is described linguistically (as opposed to being represented on a map or visually). The resulting description of an area can be complex, as navigational directions, roads, natural land formations, and other markers are used to describe the geographic area of a jurisdiction. An example of this is the description of the National Capital Region [NCR], contained in a schedule to the *National Capital Act*, which is a unique jurisdiction within the municipalities of Ottawa and Gatineau, and a federal regulatory jurisdiction. The NCR area covers 4,715 kilometres, and just one small part of the description of the area contained in the *National Capital Act* reads:

> A territory composed of part of the provinces of Ontario and Quebec, … the lots or part of lots, blocks or part of blocks, their present or future subdivisions, as well as highways, railway right-of-ways, islands, watercourses or parts thereof; the whole confined within the boundaries described as follows: Commencing at a point on the south shore of the Ottawa River where it is intersected by the boundary between the geographic Township of McNab and the geographic Township of Fitzroy; thence southwesterly along the said boundary to the line between the northeast and southwest halves of the Lots in Concession II, geographic Township of Fitzroy.[176]

Though more complex than the description of the beach, and most likely understandable to fewer people, the purpose is the same. It serves to describe the material location of an area and its features. Including a legal description here raises important points about the materiality of law, which in some ways is not observable in the same way as a beach may be. But to only explain land and real property law with reference to the spatial is to ignore the materiality of it. The beachfront could as easily be described by incorporating jurisdictional boundaries in the description and the effect would be the same; the area of the beach is described as a material fact.

[176] *National Capital Act*, RSC 1985, c N-4, s 2, Schedule, "Description of National Capital Region."

The second description of the beachfront area continues to look at material aspects but does so by studying the relationship between various scientific phenomenon. The beach could be described in the following way:

> A beach is an active part of the morphodynamic[177] coastal system of energy transfers and sediment movement. As the boundary between water and land, a beach is the transitional area between aquatic and terrestrial ecosystems, where continual change creates hostile environments for life.[178]

In this description the beach is described, first, through its material components: the water, ecosystems, sediment, and lands. Second, the definition is concerned with the interaction between these components, specifically the transfer of sediment along the coastal line. This definition indicates the research interests about the beach, asking, what, how, and why questions about the movements of matter in the beach area. Couper suggests methods of scientific inquiry that could be used to measure how sediments move along the water on the beachfront, for example by painting some rock sediment to enable measuring their movement (time and distance) along the beach.

Attention to the combination of matter and how processes act on the beach requires a mixture of observation and scientific rationalism about the impact of these processes. This type of definition would be used to highlight processes or patterns that occur in this location and suggests interests that may measure environmental impacts or raise environmental concerns. This description of the beachfront could be used to guide legal frameworks focused on environmental assessments or management of land areas. For example, the federal *Canadian Environmental Protection Act*[179] requires the environment minister to "conduct research and studies relating to environmental contamination, changes in naturally occurring toxic substances, and detection of

[177] Morphodynamics is the study of landscape changes due to erosion and sedimentation.
[178] Couper, *A Student's Introduction to Geographical Thinking*, *supra* note 172 at 6.
[179] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33.

damage to ecosystems."[180] These points of information are to be identified, monitored, and researched, and the results published.[181] Published research on the health of the Great Lakes pursuant to these requirements indicates that relevant aspects to describing, identifying, and monitoring areas of concern in the Great Lakes region are the presence of native and invasive species and loss of habitat.[182] For the purposes of a scientific study, which could be for purposes of an independent study or pursuant to a statute, this second definition highlights the physical geography as a place to be measured through scientific processes.

The third possible definition of the beachfront switches from physical geography to human geography and focuses on human interaction in the beachfront area. The third description reads as follows:

> The beach is a place that people visit primarily for recreational purposes (e.g., sunbathing, swimming), often in social groups. Beaches are busiest in the summer months, when people may travel considerable distances to visit.[183]

While definitions one and two are focused on empirical phenomena about material matter that is observable, the third definition is focused on empirical phenomena that are observable and measurable in the location of the beach. Couper suggests that work related to this definition might interrogate issues such as the local economy supported by the use of the beach, the creation of an informal economy, or the assessment of distances travelled by people to make use of the beach.[184] A more complex study in human geography may look at the relationships and uses of the space as

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[180] *Ibid*, s 44(1)(c).

[181] See Environment and Climate Change Canada, *A Guide to Understanding the Canadian Environmental Protection Act, 1999*, Catalogue No En84-11/2004E-PDF (Ottawa: Environment and Climate Change Canada, 2004), ch 15 at 30, online: <https://publications.gc.ca/collections/Collection/En84-11-2004E.pdf> [publications.gc.ca/pub?id=9.687511&sl=0].

[182] The Great Lakes have been identified as an area of importance and of environmental concern pursuant to the *Canadian Environmental Protection Act*. See reports online: Government of Canada, "How the Great Lakes Are Doing" (last modified 12 August 2024), online: <https://www.canada.ca/en/environment-climate-change/services/great-lakes-protection/how-great-lakes-are-doing.html>.

[183] Couper, *A Student's Introduction to Geographical Thinking*, *supra* note 172 at 7.

[184] *Ibid* at 7.

between people, for example, looking at how the actions of one group that uses the beach, such as food cart vendors without permits, may impact another group, such as food cart vendors with permits.

Although the material focus has shifted from physical to human geography in this third definition, this does not necessarily signal a shift in perspective or theoretical motivation concerning how we think about the beach. Instead, the beach is understood as an area that is observable through a variety of methods and techniques.[185] Describing a location in this way through a law and geography lens reveals opportunities for how that location is currently or could potentially be used by people. This type of approach is relevant to the creation of a law and policy framework focused on the area or issue. The *Safe Streets Act*[186] is an example of a statute that identifies places that are open to the public and then prioritizes free movement in these places.[187] The *Safe Streets Act* defines "outdoor public spaces" as including "a sidewalk, street, parking lot, swimming pool, beach, conservation area, park and playground, and school grounds."[188] Activities that would have the effect of limiting access to these places for the general public (for e.g. soliciting) are prohibited by the legislation.[189] These provisions in the *Safe Streets Act* could be both the result of observation of behaviours in public areas or of policy that contains normative accounts of how the location should be used. This definition in the *Safe Streets Act* is descriptive of the popular understanding of use of the beach for recreation purposes.

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[185] *Ibid* at 8

[186] *Safe Streets Act, 1999*, SO 1999, c 8.

[187] Sidewalks are places of movement; see Nicholas K Blomley, *Rights of Passage: Sidewalks and the Regulation of Public Flow* (New York: Routledge, 2011) [Blomley, *Rights of Passage*].

[188] S 4(1).

[189] The effect of this legislation has been strongly criticized for its disproportionate impact on the lives and freedoms of street-involved individuals. On the discriminatory impacts of the legislation, see Joe Hermer & Janet E Mosher, eds, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax, NS: Fernwood Publishing, 2002). For a legal geographer's critique of the regulation of public spaces by legislation like the *Safe Streets Act*, such as the sidewalk, see Blomley, *Rights of Passage, supra* note 187.

Couper's fourth possible definition represents a significant shift in which the beach is described through terms focused on experiences and impressions of the beach. The description of the beachfront could look as follows:

> A beach is sand between your toes, the sound of the surf surging towards you, the smell and taste of sea salt, momentary weightlessness as each wave lifts your body and rolls past, hot sunshine on your skin, cold water. It is a place for relaxation, or for adrenaline-fueled, surf-induced excitement; splashing out through the shallows, watching the incoming surf, launching yourself ahead of the wave. A beach is escape, banishing everyday pressures from your mind. For some, though, a beach is a place of fear (eremophobia is a fear of sand).[190]

This fourth account is not about an observable, independent empirical reality, but instead defines the beach in relation to the senses and experiences of the individual. From this perspective the impressions one has of the beach are entirely subjective and impacted by personal choice, experience, and perspective. Couper explains that this perspective about a place by asking, "what does the beach mean for us, and why?"[191] To answer this question, research collects and analyzes quantitative data. Aspects of emotion and the personal and how they define a place are difficult to capture in law, but examples do exist. Within land and real property law, for example, the principle of nuisance recognizes that the personal ways property is used can impact neighbouring properties. The principle is not used to prevent the personal ways in which property is used, but to manage these when they conflict with other personal uses of a place.

The fifth possible definition of the beachfront continues in the tradition of looking at human interaction on the beach and does so by highlighting the regulatory aspects of the beachfront:

> A beach is a "liminal" place, where normal rules—such as rules about dress—do not apply. But a beach can also be a regulated space. Behaviour may be formally controlled by "safe swimming" flags and sun-lounger hire rules, constantly under the surveillance of lifeguards and vendors, but also informally controlled as we conform to social expectations of what is normal. A beach is a site in which

[190] Couper, *A Student's Introduction to Geographical Thinking*, *supra* note 172 at 10.
[191] *Ibid* at 11.

> identities of gender, health, wealth and fitness are performed, exhibited or inhibited.[192]

This suspension and imposition of rules in public places and areas accessible to many can result in freeing behaviour or controlling behaviour, which Couper observes makes the beach a "site in which identities of gender, health, wealth and fitness are performed, exhibited or inhibited."[193] This focuses on social rules and expectations, and can be most easily identified as a typical legal-geography type of analysis. To return to the example of the *Safe Streets Act*, the underlying policy goals of the statute have been questioned and severely criticized as demonstrating an intent to regulate so-called undesirable peoples out of public spaces. Activities carried out by street-involved people (including youth), such as panhandling and unsolicited cleaning of cars (performed by so-called "squeegee kids"), are criminalized by the *Safe Streets Act*. That the *Safe Streets Act* includes the beach as a type of public property in which these behaviours are prohibited would mean that some persons are regulated by the government in their activities on beaches in Ontario, while others are not.

One of the most important take-aways from Couper's examples of how a beach may be defined is that these definitions contain presumptions and ideas about the nature of that place. This has implications for how law may regulate in relation to that place. Focusing on the observable environment may result in a descriptive approach where the beach is the backdrop to a regulation. A description may be used to identify environmental processes and to develop (legal) mechanisms for monitoring those processes. These approaches indicate a positivistic approach to the geography of a location, in which the place is treated as a definitive, singular place that is determinable through the collection of information. GPS coordinates that point to a particular place is a good

[192] *Ibid* at 11.
[193] *Ibid*.

example of this. A definition of a beach may also highlight how people use the location as Couper described in her description three of the beach and could be used to develop mechanisms to influence or control how people use that location. Couper's fourth definition highlights the personal and may result in law grappling with how to respond to subjective accounts of the importance of a location. This process of adopting a definition of locations for different purposes is not an incidental aspect of property; it is instead a structural facet integral to land and real property law. However, the manifestation of these definitions in legal measures is not a linear process and it may also be that the beach is simply noted as the backdrop to a regulatory measure without any significant engagement with the context of the place itself. From a law and geography perspective, and as Couper so aptly demonstrates, the definition of a location, long with assumptions about that location will occur regardless of whether it is named or engaged with on a policy level.

2.5.3. The Place and Space Dichotomy Is Essential to Interpretations of Place

An underlying point that animates how places are defined, and how they can be created using spatial tools, is the relationship between place and space. As Massey, Tuan, Sack, Foucault, and others identify, space has been (incorrectly) understood in relief to place as the empty and unstructured possibilities of relations, interactions, and processes,[194] while place is understood as the fixed, bounded location. These understandings rely on each other for oppositional meaning; the spatial is intangible while place is ascertained through its tangible nature. Missing the importance of the spatialized manifestation of social, political, and cultural life indicates a gap in knowledge about the complex and iterative ways in which place and space exists. Systems that ignore space results in a perceived vacuum in which power-driven systems are free to move and

[194] See Chapter One, *above,* ss 1.2.5-1.2.6.

space becomes co-optable.[195] Ignoring place (the physical manifestation) reduces engagement with that place by rendering it a backdrop in which things occur.

2.6. WHY THERE, AND WHY CARE? ANALYTICAL FRAMEWORKS

Gritzner describes the second part of his definitions as the conceptual aspect to geography. How geographical elements are constituted will very much depend on the research design, and these conceptual accounts of why a geographical phenomenon occurs in the described location are considered with specificity in the three case studies. Below are some points and ideas relating to Gritzner's aspects of analysis and related implications to a law and geography methodology.

2.6.1. Why There?

The aspect of considering "why" a phenomenon occurs in place, space, or a geographic location is, as Gritzner describes, the scientific aspect of the geography definition. Three analytical approaches highlighted by Gritzner that are used for investigating why a phenomenon occurs: agents, processes, and interrelationships. All three are relevant to this thesis.

An agent refers to "a person or thing which acts upon someone or something."[196] The nature of the agent focused on will depend on the nature of the study, and particularly on whether a study focuses on physical or human geography aspects. To refer back to Couper's examples of how a beach may be described,[197] in description three, the beach is approached through a material-scientific lens as a "system of energy transfers and sediment movement." Here the agent may be identified as the movement of the water that is eroding the beach, or it may consider the transfer

[195] This is the insight from Massey in her analysis of political power that exists in space. See, *above*, s 2.3.1 and accompanying text; Warf & Arias, *supra* note 67 at 4–5.
[196] John A Simpson & Edmund Weiner, eds, *Oxford English Dictionary,* 2nd ed (Oxford: Oxford University Press, 1989) *sub verbo* "agent (n.1 & adj)," online: <https://www.oed.com/dictionary/agent_n1?tab=factsheet#8694696>.
[197] Couper, *A Student's Introduction to Geographical Thinking, supra* note 172.

of energy broadly in the beach area. This is in contrast to definitions four and five of Couper's analysis, which are human focused, and so the agents may be people who impact the physical environment or those people and institutions that monitor and affect beach behaviour. This is to say that the way in which the descriptive account of an area of interest is described will impact who the relevant agents are.

An important point of consideration for law and geography scholarship is how the relationship between geography and law is conceptualized vis-à-vis agency. Legal geographers have critiqued an aspatial understanding of law missing the importance of law as a spatialized system. By focusing on a contextual approach to examining law as a political, social, and interactive process, legal geographers have shown that law is co-constituted with and through spatial actions.[198] This approach serves to deconstruct the barriers between ideas of law and of the spatial. Indeed, one of the ultimate goals of law and geography research is to "transcend the bidisciplinary focus that has characterized … much of its scholarship."[199] To put this goal into the framework of considering the role of agency, within law and geography scholarship the goal has been to show that neither space nor place are the predominant agents, but instead they both work in myriad ways on each other.

An important outcome of bringing insights from the spatial into legal research is that law and legal orders as an institution with its own ideas, procedures, and perspectives. Instead, Braverman et al highlight that often law is approached as a social artifact and understood as a manifestation of social and political procedures.[200] This approach, while revealing the interrelations between law and geography by problematizing how disciplines have an impact on

[198] Braverman et al, "Introduction," *supra* note 5 at 1: "The *where* of law are not simply the inert sites of law but are inextricably implicated in *how* law happens." [italics in original].
[199] *Ibid* at 2.
[200] *Ibid* at 15.

one another, has simultaneously resulted in little attention to law as an institution. Braverman et al express concern that the "danger of thinking about law as a manifestation of the broader social context is that one loses sight of the particular ways in which legal actors (however defined) think and act."[201]

Taking up this call for attention to law as something more than the social or political within a law and geography study requires that we also consider the geographical as more than the social or political. Principles of property law, their use, and the underlying normative aims of property systems are all relevant to the ways in which legal actors think and act.[202] The physical features of a location, its use, and the limitations or possibilities afforded by the specifics of that geography are the ways in which the geographic elements enact agency. Both "law" and "geography" are agents and recipients of actions in the place-making process. Attention to the agency of both as actors that adopt processes and require engagement reveals a collective place-making enterprise. In a context-driven approach, the agents, processes, and relationships between law and geography in the place-making enterprise of property law are examined in the thesis through the case studies.

2.6.2. Why Care?

Why care about a location? A series of like places? How people interact with different locations? Gritzner describes this aspect of the definition as "[h]umans need to know begs the question, why care?"[203] The implicational aspect of why a study that uses a law and geography methodology matters will of course depend on the nature of the study itself. Elements of the study such as the chosen definition of a place, the spatial tools used, and the analytical framework

[201] *Ibid* at 15.
[202] Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (Chicago: University of Chicago Press, 2011); and Valverde, "Jurisdiction and Scale," *supra* note 54.
[203] Gritzner, "What Is Where?" *supra* note 2 at 39.

adopted to establish policy or undertake a scientific research study, will highlight the normative considerations of what is being examined.

For this thesis, property is foregrounded as the central area of law that creates, regulates, and generally operates in relation to a place. The importance of property law to how people are permitted to interact with a location and how law uses place to create systems of permissible property use can only been seen in the close examination of an individual location. Complex interests arise in multiple ways and can arise unrelated to the property title. Interests exist in law by way of the property title, they may exist in places adjacent to the property parcel, they can be held by the broader public because of the public nature of the property, or they may be intangible but historically important and on this basis receive protection in the present day. Close examination of a place of land and real property shows there may be interests that exist in a property that are not legally protected but are, from the perspective of place, which is equally as important. Propertied places are constituted through a complex network of interests, experiences, histories, and uses, both past and present. Connecting land and real property law to law and geography requires undertaking a close examination of property as dependent on and informed by the places it inhabits.

At the large scale, the case study chapters look at a location through the lens of different perspectives. The legal actions concern many aspects of the property, including disputes over expropriation, the interaction between property laws and the public law and Indigenous land rights. At their core, the three case studies highlight that there is great diversity in property disputes. Following the law and geography approach, attention to a context is an important insight to draw out. Doing so forces examination of the complex interaction between local sites and applicable property laws. It may highlight the challenges of applying vast property rules designed to fit a

multitude of circumstances to a single, local site. Or conversely, it may underscore property-related law as a way to promote a place or type of place as an exception to private property rights.

At the small scale, looking at the specifics of the property, the geography, and the disputes in the three case studies is an opportunity to consider how the elements of rights, the law, and the geography feature within the land and real property system more broadly. These elements together create places of land and real property, and any insight on the local can in turn be considered across like situations. Attention to the big picture reveals that the structures of property are connected to geography, and they have been selectively chosen and created. Systems of law in place rely on interpretations, assumptions, and presumptions related to the specifics of the location. Just as there is a performance of property, there is also a performance of geography. Interrogating the foundation of land and real property looks at how the system functions, what interests are prioritized, and how places can be overlooked or put to use to meet the law's normative aims. These aims reveal themselves through application of legal rules and considerations made to resolve disputes.

Conflict in the use of property are prevalent and ongoing. These conflicts may be understood as conflict between property owners, or property owners and the broader public, or between competing principles of property laws. This conflict can also be understood as a conflict about how places are interpreted, which may be demonstrative of different ideologies about how a place should be created used. Place matters for individuals as they operate within localized and regional frameworks. Places impact every aspect of experience in home, workplace, and movement. The parameters of what is legally allowable in a given place is connected to ideas related to land and real property, and more often than not are dependent on it. The personal in property exists no matter if it is a privately held place of residence or a privately held commercial

property or a long-time public property such as a park. Looking at property on the small scale brings attention to conflicts that exist in multiple forms, while looking on the large scale at individual sites brings attention to the ways in which the conflict occurs through the relevant area of law. The importance of place is not going away and is likely to increase in a context of scarce resources, insecure property rights, and uncertainty about reconciling competing interests.

2.7. CONCLUSION

This chapter has introduced the geographies of land and real property law as connected to the functioning of land and real property law. Land and real property law engages with the physical location it seeks to regulate and, because of this, the possibility that normative interpretations may exist in the physical place have been overlooked. In fact, attention to the geography of a physical place is particularly important because of the assumptions and presumptions that can prevail within the immediacy of material observation. The questions offered by Gritzner—what is where, why there, and why care?—is an important tool for critically engaging with how complex places really are. This chapter adopted these questions as a methodological framework and through it examined theories of place and space and how they connect with land and real property law. The possibility of interpreting place, of the iterative relationship between place and space, and of the role of permanency both within property law and spatial theory point toward a central role for geography in the property system.

Adopting a methodology that foregrounds the importance of place and the possibilities of geography requires examination of different interests and how they are represented in the legal system. The possible interests that exist in a location and the ways in which they are selected, protected, and promoted through property law is examined in the case studies in this thesis.

Whether these interests ought to be recognized by the legal system (or indeed even could be) is the necessary follow-up question that will be examined in the context of the three case studies explored in Chapters Four, Five, and Six.

CHAPTER 3: EXPROPRIATION LAW AND PLACE: A RECONFIGURATION

> Neither discovery nor exploration can be examined outside the context of the cultural and intellectual milieu of the discoverers and explorers. Major discoveries—whether they be geographical or not—are made by people who recognize data that do not conform to their preexisting world view.[1]

3.1. INTRODUCTION

Property as a construct is complex and multifaceted. A basic definition of property as found in a generalized dictionary would describe it in the following way:

> A (usually material) thing belonging to a person, group of persons, etc.; a possession; (as a mass noun) that which one owns; possessions collectively; a person's goods, wealth, etc.[2]

Though this description of property as a thing captures one of the core indicia of property—ownership—it does not speak to the complexity of meaning attached to property. Nor does it identify the interaction between systems and ideas as they impact that ownership model. Concepts such as access, possession, exclusion, relationship, and indeed ownership are central to property and to property law, but there is no singular definition that captures these elements, or perhaps more correctly, no single definition that captures the balance between these concepts that is agreed upon. As Margaret Davies has argued, "property is a multi-faceted, sometimes self-contradictory and internally irreconcilable notion which is variously manifested in plural (though inseparable) cultural discourses—economic, ethical, legal, popular, religious, and so forth."[3]

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[1] John L Allen, "New World Encounters: Exploring the Great Plains of North America" (1993) 13 Great Plains Q 69 at 69.
[2] *Oxford English Dictionary* (Oxford: Oxford University Press, December 2021), *sub verbo* "property, n."
[3] Margaret Davies, *Property: Meanings, Histories, Theories* (New York: Routledge-Cavendish, 2007) at 3 [Davies, *Property*].

The lack of a uniform approach to defining property is not a shortcoming of property law and property theory, but instead is a marker of it. The concept of property is required to meet the needs, concerns, and demands of individuals and society, in such a way that reflects the diversity therein. As Bradley Bryan has observed, property is "an expression of social relationships because it organizes people with respect to each other."[4] The allocation of property within a complex system requires that property rules adapt as much as they regulate.

Geographic thought, and specifically place and space theory, lends insight into the complexity of property (laws, concepts, ideals) and how it serves to support the creation and recognition of place. On its face, adopting a theory of place to examine property brings in complexity as spatial theory too highlights a complex and multifaceted approach to examining the ways in which place is defined. It highlights that there are many ways in which places are assigned significance for individuals and institutions alike, and furthermore that the significance of places and locations is part of spatial ordering. This spatial ordering is done through structural institutions (political, social, cultural, physical), and legal institutions are one example of spatial structure. Rather than considering spatial thought as a way to introduce additional complexity to examining law, this thesis posits that "property" is something that already carries legal, cultural, social, and political meanings.

With a reality that leans toward complexity, spatial thought provides a tool for examining property as a spatialized institution that is embedded in locations and places.[5] Insights from spatial thought complement the reality of property and particularly legalized property as something that has meaning in multiple ways. It provides a structure for examining the importance of place and a

[4] Bradley Bryan, "Property as Ontology: On Aboriginal and English Understandings of Property," (2000) 13 Can JL & Jur 3 at 4.

[5] Edward W Soja, "Taking Space Personally" in Barney Warf & Santa Arias, eds, *The Spatial Turn: Interdisciplinary Perspectives* (New York: Routledge, 2009) 11 at 18–19.

method to examine the ways in which legal constructs relating to property are created and recognized. Property that is recognized through a titling system represents aspects of place that are sanctioned through the legal system. This is but one example of the ways in which property is recognized and engaged with, and in fact it offers a cursory approach to understanding the meaning assigned to property. A theory of place/space would examine additional claims to property, and these may or may not be recognized within legal systems. Adopting the place-based questions of examining what is important about a location as a method for analysis of place interests affords a principled method for examining property as a place-based interest.

From this perspective of acknowledging and embracing the complexity of property constructs, spatial theory highlights conflict that exists in the way in which place or places are defined. Looking specifically at the property law of expropriation is of particular utility because expropriation operates in a way that affords interests in a place of property that are not held by the property title holder to be judicially considered. Or, to put that another way, the law of expropriation operates to manage competing claims to place.

Expropriation looks beyond the property title to entail a broader examination of how places are used, may be used, and how public policy intersects with interests in that location. As the variety of property-related laws relevant to expropriation indicate, this confrontation of interests when *de facto* expropriation is analyzed looks beyond the limits of the property title. Instead, the conflict in cases of *de facto* expropriation is between differing interpretations of a location that is immediately personal to the title holder, and at the same time is relevant to a sector of society surrounding that property title lot. The extent place gains meaning as captured in *de facto* expropriation jurisprudence is examined in this thesis. Expropriation is statute based in Canada,

not a general power at the common law,[6] so claims to expropriation analyze the applicable statutory and regulatory frameworks. This require close adherence to rules, largely procedural, that are contained in the statutory framework.[7] The extent to which the principle of *de facto* expropriation captures or relies upon place-based interests that may be indicated through property titles, statute and regulatory frameworks, and other government action can be examined through a place-based analysis.

In Section 3.2, this chapter first offers a reimagination of property understood through the lens of spatial theory. It is argued that a claim to property is in fact a claim to place, as is demonstrated through the importance attached to property ordering within the Canadian context. Assigning meaning to place is not a single step but is instead part of an ongoing reflexive process. Place-based theory highlights the ways in which claims to place are recognized, and property law is one of the important spatial structures that allow for spatial arrangement in place. Importantly, this examination requires consideration of the ongoing claims that exist in property law (and property-law-adjacent areas, such as municipal law) and the ways in which property is protected through law.

In Section 3.3, the place-based articulation of property is considered in the specific context of the law of expropriation. It is argued that expropriation correctly considered is a public law tool

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[6] Gerard La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 149: "[Federal government] power appears to be limited to expropriation for purposes within the scope of its legislative authority." Ontario, *Royal Commission Inquiry into Civil Rights Report No 1,* vol 3 (Toronto: Queen's Printer 1968) (Commissioner James Chalmers McRuer) at 962: "The power to expropriate, as commonly understood in Canada, is a statutory power to take land without the consent of the owner … In Ontario, as in other Canadian provinces, it is clear that the power of the Province or any body deriving its power from the Legislature to expropriate must be conferred in a statute enacted by the Legislature."

[7] One important area of expropriation focused on in the McRuer Report was procedural aspects of expropriation, leading the commission to recommend that procedure be strengthened by introducing a system of approving expropriations and creating opportunities for property holders to be heard. "The McRuer Report," *ibid*, at 1083–1092. In Ontario, the recommendations of the McRuer Report led to a modernization of the law of expropriation and adoption of the modern expropriation regime in the 1968 *Expropriations Act* (RSO 1970, c 154).

that is used over private property. Thus, it is an area of property law that straddles spatial structures, such as exclusions ordinarily afforded private property holdings, and the public and private law divide. Instead, the law of expropriation highlights a relational, discursive, and uncertain approach to property holdings.

Section 3.4, the final section, reviews expropriation law, cases, and academic scholarship in consideration of the ways in which place arises in the application of the law of expropriation. Understood through the lens of place and space theory, application of the law of expropriation can tend to obfuscate the practice of expropriation as a tool of place by foregrounding matters of legal technicalities. Areas such as statutory interpretation, judicial review, and reference to important—seemingly unassailable—public policy goals together have the impact of limiting, and sometimes removing altogether, recognition of the ways in which expropriation principles serve to reorganize spatial arrangements. The importance of place to the people or communities of people so involved in and impacted by instances of expropriation is overlooked. This is out of step with recognition of the importance of property within law more broadly.

This final section first considers the administrative law aspect of expropriation law and highlights a concern with the common law test for *de facto* expropriation, which I argue explicitly prohibits consideration of place. As part of a reflection on the ways in which geographic context is already part of expropriation matters, I conclude with reflection on two cases on expropriation law. Though there is currently inconsistency in the adoption of place-based thought within expropriation law, and perhaps a misunderstanding of the role of place within property law more broadly, the geographic story shared in these cases highlight the potential of considering place in the context of expropriation law.

3.2. PROPERTY, SPACE, AND PLACE

3.2.1. Place

A simple definition of place is useful to guide this chapter. Consider the following definition: "A meaningful segment of space combining location, locale and a sense of place."[8] Geographical definitions of place tend to focus on the combination of location, as an objective account of a point in space, and meaning, which is the subjective engagement with and understanding of a point in space.[9] The physical location, and the underlying physical geography, is a central component for geographers. Recall the discussion surrounding the key geographic question(s) of "what is where, why there, and why care?" where Gritzner highlights "where" as the central factor common to all geographic inquiry.[10]

As the definition indicates (and discussed earlier in Chapter 2), the geographical fact of the location of a place is to be considered commensurate with the "sense of that place." The intangible components of place are the impressions, ideas, senses, histories, and personal components of that location. Though an essential part of why place matters, recognition of the intangible components of place will depend on the spatial structures in place that prioritize spatial arrangements. Particular spatial arrangements—places, territories, regions—at different scales are constantly enacted, reproduced, and transformed in contexts of already existing spatial arrangements. Spatiality is thus before, after, and within specific practices and experiences. At the broad level, property structures are part of spatial arrangement.

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[8] Tim Cresswell, *Geographical Thought: A Critical Introduction* (Chichester, UK: Wiley-Blackwell, 2013) at 280 [Cresswell, *Geographical Thought*].

[9] Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Minneapolis: University of Minnesota Press, 1977); John A Agnew, *Place and Politics: The Geographical Mediation of State and Society* (Boston: Allen & Unwin, 1987); Tim Cresswell, *Place: A Short Introduction* (Oxford: Blackwell, 2004) [Cressell, *Place*].

[10] Charles F Gritzner, "What Is Where, Why There, and Why Care?" (2002) 101:1 J Geog 38 [Gritzner, "What Is Where?"].

Reframing place (and relatedly space) as central facets of property is not to create a utopian vision of any of the thesis components under interrogation—place, property, nor geography. Place can also be negative. It can be the central way in which people are excluded even as others are included. "Place is part of the process by which insiders are differentiated from outsiders—'us' from 'them.'"[11] That places gain meaning from their similarities to other like places adds weight to what can often be exclusionary accounts of locations,[12] because locations are recognized in so far as they reflect already acceptable accounts of place. In this way, place and space thought can be reified as much as property structures themselves can be. Thus, as much as intangible components of place coalesce into the physical location, senses of place are dependent on institutional recognition, and hopefully from there protection.

3.2.2. Property as Place

A re-reading of "property as place" is a task that requires attention to both legal and non-legal approaches to property. This is because property as a concept is both a legal and non-legal subject. Though property law is but one aspect of property, it is a significant one that highlights the importance of property, and particularly private property, within Western liberal thought.[13] In his commentaries on the common law, William Blackstone provided a strong account of the importance of property rights: "The absolute right, inherent in every Englishman, is that of property."[14] This right to private property is "probably founded in nature … but certainly the modifications [of the property law system], the method of conserving it in the present owner, and

[11] Cresswell, *Geographical Thought, supra* note 8.
[12] See Doreen Massey, *For Space* (London, UK: SAGE Publications, 2005); Doreen Massey, "The Political Place of Locality Studies" (1991) 23 Env & Plan A 267.
[13] See Davies, *Property, supra* note 3.
[14] William Blackstone, *Commentaries on the Laws of England in Four Books*, 5th ed (Oxford: Clarendon Press, 1773), vol 1 at 134–135, 140–141, online: <https://babel.hathitrust.org/cgi/pt?id=njp.32101075718237&seq=157> [Blackstone, *Commentaries*].

of translating it from man to man, are entirely derived from society."[15] Blackstone writes that protecting these rights is a "point of honor and justice"[16] of the laws of England. Thus, "no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgement of his peers, or by the law of the land."[17]

As a legal structure, the concept of property is engaged with through many different areas of law. These laws can be common or civil law based, statute based, and though in Canada not directly contained within the Constitution, these pieces of law will often have constitutional dimensions.[18] Property is constituted through property law, real estate law, estates law, municipal law, and myriad other areas of law. The norm for legal property structures in Canada is for there to be extensive regulation of property, so much so that some consider regulation as one of the elements that constitute property.[19] That is to say, "regulation" is one of the property rights that exists in the metaphor of a bundle of sticks that is used to explain property. The importance of property is recognized in law where land and real property hold particular importance.[20] Land is afforded special protection in law. One guiding principle for this protection is recognition of the

[15] *Ibid*.
[16] *Ibid*.
[17] *Ibid*.
[18] This is true even in Canada where property is not protected through the Constitution but nonetheless will be engaged through related areas. See Bruce Ziff, "Taking Liberties: Protections for Private Property in Canada" in Elizabeth Cooke, ed, *Modern Studies in Property Law*, vol III (London: Hart Publishing, 2005) at 341 [Ziff, "Taking Liberties"]. Ziff explains that there are property implications of non-property focused areas of law, for example section 8 of the *Canadian Charter of Rights and Freedoms* protects against unreasonable search and seizure, which in turn protects property interests in the home or against seizure of personal property.
[19] See e.g. *Mariner Real Estate Ltd v Nova Scotia (Attorney General),* 1999 NSCA 98, per Justice Cromwell at para 39: "In short, the bundle of rights associated with ownership carries with it the possibility of stringent land use regulation." [*Mariner Real Estate* (NSCA)].
[20] See Eduardo M Peñalver, "Land Virtues" (2009) 94 Cornell L Rev 821 [Peñalver, "Land Virtues"]; Eduardo M Peñalver, "Property's Memories" (2011) 80 Fordham L Rev 1071; Carol M Rose, "The Story of Lucas: Environmental Land Use Regulation Between Developers and the Deep Blue Sea" in Richard J Lazarus & Oliver A Houck, eds, *Environmental Law Stories* (New York: Foundation Press, 2005) 237 [Rose, "The Story of Lucas,"]; Robert C Ellickson, "Property in Land" (1993) 102 Yale LJ 1315.

unique importance that land provides for the title holder: "[C]ommon law of property in its wisdom has regarded each piece of land as unique."[21]

At the same time, property as a construct holds significance on a far larger scale, of which legal property is only one aspect.[22] The work of Margaret Davies is an example of work in property theory that highlights the possibility for engaging with property ideas at multiple levels and in such a way that does not rely solely on an examination of property laws.[23] She writes: "[T]he concept and the manifestations of property in the Western liberal context go far beyond legal doctrine, extending to ideologies of the self, social interactions with others, concepts of law, and social concepts of gender roles and race relations."[24] For Davies, the meaning of property lies not just in the application of property rules, but in the cultural, social, and political meanings attached to it. She goes on to explain:

> More generally … cultural narratives about ourselves and our environment play an important role in influencing or persuading the community about different notions of property.[25]

The cultural importance of property highlights a plurality that exists within property itself. Pluralistic approaches to property would highlight that there are "multi-faceted, sometimes self-contradictory and internally irreconcilable notion[s] [of property] that are variously manifested in plural (though inseparable) cultural discourses."[26]

Property as something that includes both the property as defined and recognized within law and the meaning of property as referred to and understood with cultural, social, and political

[21] Rose, "The Story of Lucas," *ibid* at 279.
[22] See e.g. Davies, *Property, supra* note 3; Brenda Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham, NC: Duke University Press, 2018) [Bhandar, *Colonial Lives of Property*].
[23] See Davies, *Property, supra* note 3.
[24] *Ibid* at 2.
[25] *Ibid*.
[26] *Ibid* at 3.

connotations is to some degree recognized within law. Gray and Gray reflect on the uniquely theoretical and practical understanding of property that a common law approach requires:

> The world of the common lawyer has always been a curious blend of the physical and the abstract, a commixture of the earthily pragmatic and the deeply conceptual. In consequence the common lawyer's understanding of land still oscillates between a purely material conception of the physical stuff of land and a more cerebral image of land as comprising a coordinated set of abstract rights.[27]

Abstract rights that Gray and Gray reflect upon include equity, temporal components of land and property as is captured within the law of estates, "ideology of property law [which] interacts with key issues of freedom, fairness, and efficiency," and above all a "reluctance to embrace any grand or overarching model of the phenomenon of ownership."[28] With the confluence of property ideas, law, and norms, the very application of property law requires a recognition and balancing of issues of attributing meaning to land as much as recognition of the physical land itself. Gray and Gray go on to observe that:

> The outcome of this creative tension between the physical and the abstract has been the elaboration of a pragmatic, but highly operational, law of land. A vigorous preoccupation with earthly reality, coupled with the constant subjection of the inner workings of property to logical ordering, has for centuries rendered it unnecessary for the common law to construct any large or systematic theory of ownership.[29]

Determining ownership, one of the core indicia of legal property, requires attention to the physical location of property and spatialized institutions that operate in that location, including law. Any supposed separation between a Blackstonian articulation of clear, bounded property interests (as may be found within law) and recognition of the importance of property from a cultural perspective does not allow for an understanding of property that is impacted by interpretive factors. Property is both the physical and theoretical, and to develop an understanding of its importance requires

[27] Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford: Oxford University Press, 2008) at 6 [Gray & Gray, *Elements of Land Law*].
[28] *Ibid* at 6.
[29] *Ibid* at 7.

attention to meaning afforded through property law and through cultural, social, and political meaning. Though property is ultimately subject to regulation and potentially adjudication provided by the legal framework, this action does not necessarily preclude cultural, social, and political spatialities as being relevant to this process.

3.2.3. Land and Property Title in Place-Making

A particularly important aspect of property are the links between law, property, and the acquisition of property. Land and real property hold meaning precisely because they are so important to people, and property law as a spatialized institution endeavours to provide security for people in this system. That everything has to happen somewhere is a truism recognized in law, in geography, and in property thought, and it is a truism that provides the guiding question in the framework questions guiding this thesis. The where-ness of geography is both part of "banal everydayness" and deeply "profound" as it is all around us all the time.[30] Eduardo Peñalver highlights this foundational role of land:

> Land's status as an essential component in any human activity that requires physical space leads to a second dimension of land's complexity: its relationship to human beings.[31]

Peñalver reflects on the inevitability of land as the central component for human activity in the hope that, in addition to the economic value attributed to property, ethical engagements with land will be recognized as central to land use and ought to be part of developing an intergenerational justice in in developing land-use frameworks.[32] Karl Polanyi similarly wrote "[l]and invests man's life with stability; it is the site of his habitation; it is a condition of his physical safety; it is the

[30] Cresswell, *Geographical Thought, supra* note 8 at 2–3.
[31] Peñalver, "Land Virtues," *supra* note 20 at 829.
[32] *Ibid* at 822.

landscape and the seasons."[33] Notably, this reflection by Polanyi was made in his work *The Great Transformation* and was part of an argument stating that economic value in land is but one component of land that is important. For Polyani, the value created in the commodification of land through property systems is something that needs to be interrogated because it threatens to dissociate land as property from its important role as central to human experience. The importance of land from an economic perspective is enhanced by the fact that it is a limited resource—there is not going to be an increase of any more land.

Property in land is an intimate part of how people order their lives, and the ability to own property was important for people who moved to the New World. Property in land cannot be separated from histories of land capture, sovereignty, colonization, and immigration.[34] Settlement in Canada occurred against the backdrop of intense discussions about land enclosures that were occurring in the United Kingdom, particularly Scotland, and of widespread land dispossession then occurring in Ireland.[35] The settlement of land that occurred through colonialism was achieved through the promises of land ownership, which would otherwise be unattainable for many British and European individuals. Cole Harris explains:

> For many, this was North America's attraction: the opportunity to bypass both the confining grid of custom and power that dominated European property and the vagaries of chance that, at the personal level, usually turned on relatives' life spans.

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[33] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1944) at 178.

[34] See e.g. Richard P Boast, "Land, Custom, and Ideology 1870–1940: The New Zealand Case in a Global Context" (2016) 37 Adelaide L Rev 325 [Boast, "Land, Custom, and Ideology"]; Jessica A Shoemaker, "Fee Simple Failures: Rural Landscapes an Race" (2021) 119 Michigan L Rev 1695; Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005) [Robertson, *Conquest by Law*]; Keith Aoki, "No Right to Own? The Early Twentieth-Century 'Alien Land Laws' as a Prelude to Internment" (1998) 40 BC L Rev 37; Brenda Bhandar, *Colonial Lives of Property, supra* note 22; John Weaver, *The Great Land Rush and the Making of the Modern World, 1650–1900* (Montreal: McGill-Queen's University Press, 2003) [Weaver, *The Great Land Rush*]; Cole Harris, *A Bounded Land: Reflections on Settler Colonialism in Canada* (Vancouver: UBC Press, 2020) [Harris, *A Bounded Land*].

[35] Boast, "Land, Custom, and Ideology," *ibid;* Edward J Hedican, *After the Famine: The Irish Family Farm in Eastern Ontario, 1851–1881* (Toronto: University of Toronto Press, 2020) (a case study of mid-nineteenth-century Irish settlers in Adamston, a township in Renfrew County, Ontario).

> The opportunity could be seized individually (to improve one's lot in the world) or collectively (to impose, untrammelled, a European social vision on a new setting).[36]

The benefits of settling in Upper Canada were notable:

> In Upper Canada, the colonial government granted free farm lots, then opened Crown land to private land companies and the land market. In the 1830s, an uncleared farm lot of eighty to a hundred acres in an area of new settlement in Upper Canada cost some thirty to forty pounds, which is what an agricultural labourer (who also received room and board) obtained for a year's work. The same work that earned the right to rent one acre of arable land in Ireland earned a forested lot of eighty to a hundred acres in Upper Canada. Add to this the start-up costs of farming (about a hundred pounds) and it is apparent that after some … four years of wage labour an immigrant who arrived in Upper Canada with little or no capital could reasonably expect to be working his own farm—the opportunity that underlay the momentum to immigrate to and settle in Upper Canada, as, within various terms of access to land, in all the pockets of developing agricultural settlement in the Maritimes.[37]

Letters sent from emigrants to Canada to their birthplaces of Wiltshire and Somerset, England, capture the opportunities afforded to newcomers in North America. Terry McDonald discusses the important role of first-hand accounts written by emigrants in letters to their family as records of life in colonial North America.[38] In one letter, William Clements of Corsley, England, proudly writes to his father after emigrating to Port Talbot, Ontario, about his achievements:

> Now I am goun to Work on My One frme of 50 Eakers wich I bot at 55L and have 5 years to pay it in. I have bot Me a Cow and 5 pigs ... If I had staid at Corsley [Wiltshire, England] I never shuld had nothing. I like the Contry very Much—I am at librty to shout terky, Quill, Pigeons, Pheasants, Dear, and all kind of Geam wch I have on My Back Wood.[39]

William Clements' letter was first published in the *Bath Chronicle* on August 4, 1931. This letter was re-published in multiple venues, and other collections of letters were published in journals and

[36] Harris, *A Bounded Land, supra* note 34 at 120.
[37] *Ibid* at 154.
[38] Terry McDonald, "A Door of Escape: Letters Home from Wiltshire and Somerset Emigrants to Upper Canada, 1830–1832," in Barbara J Messamore, ed, *Canadian Migration Patterns from Britain and North America*, (Ottawa: University of Ottawa Press, 2004) at 101 [McDonald, "A Door of Escape"].
[39] *Ibid* at 103.

pamphlets at the same time. There was interest in this letter by the readership of the *Bath Chronicle* because it showed the benefits of emigrating to North America: "Think of a mere labourer talking of working his own farm of 50 acres, buying cows and pigs—sowing wheat, building a house, etc. When shall we see a labourer in England in one year at such prosperity?"[40]

The same sentiment was articulated by J Hector St John, an American farmer of English heritage who was living and working in Massachusetts.[41] St John published his text, *Letters from an American Farmer*, in the late eighteenth century. One letter in the volume, titled "On the Situation, Feelings, and Pleasures of an American Farmer," reflects the sentiment of Clements' letter but invites deeper reflection on the important role of property within this process. In the letter written to X, St John reflects on the joy and privilege of farming land he owns:

> The instant I enter my own land, the bright idea of property, of exclusive right, of independence exalt my mind. Precious son, I say to myself, by what singular custom of law is it that thou was made to constitute the riches of the freeholder? No wonder that so many Europeans who have never been able to say that such portion of land was theirs, cross the Atlantic to realize that happiness.[42]

Importantly for St John, as part of this reflection he notes that the privilege he enjoys is built on the hard work of his father who cleared 371 acres of land to build the house and barn and grow an orchard. "It is my duty," he writes, "to think how happy I am that he lived to build and to pay for all these improvements; what are the labours which I have to undergo; what are my fatigues when compared to his."[43] In his closing is the strongest affirmation of the great importance attached to land ownership: "This formerly rude soil has been converted by my father into a pleasant farm,

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[40] *Ibid* at 103.

[41] J Hector St John, *Letters from an American Farmer*: *Describing Certain Provincial Situations, Manners, and Customs, Not Generally Known; and Conveying Some Idea of the Late and Present Interior Circumstances of the British Colonies in North America: Written for the Information of a Friend in England* (London: Printed for Thomas Davies and Lockyer Davis, 1782), online: <canadiana.ca/view/oocihm.06141> [perma.cc/E5SF-TUTN] [St John, *Letters from an American Farmer*].

[42] *Ibid* at 25–26; Harris, *A Bounded Land, supra* note 34 at 311.

[43] St John, *Letters from an American Farmer, supra* note 41 at 23 (letter II "On the situation, feelings, and pleasures of an American Farmer").

and in return it has established all our rights; on it is founded our rank, our freedom, our power as citizens."[44]

Detractors of emigration argued that letters such as the Clements' letter, St John letter, and more besides[45] were "written in the style of … advertisements."[46] James Inches, an anti-emigration advocate writing in 1836, critiqued these letters as promoting an ideal at the expense of the truth of the difficulties of settler life:

> The substance of the whole [of these letters] is exactly similar—condolence with their friends in Europe for the starvation and other miseries to which they are doomed to submit in England, as well as Ireland, from want of food and want of money—fullness of everything in Canada.[47]

The authenticity of letters home was questioned by anti-emigrant advocates, but the *Bath Chronicle* editors' choice to retain the grammar and spelling errors of the letter author is an important aspect that points to the authenticity of the letter.

Posters from the 1800s onward were reflective of this advertisement approach to "selling" a life in the New World. For example, between 1886 and the early 1930s the Department of the Interior developed a publicity campaign to attract immigrants to Western Canada.[48] The marketing phrase "Last Best West" was coined as a descriptor of the organized approach to settling the Canadian West (in contrast to settlement at the American frontier), which was the last are in North

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[44] *Ibid* at 26 (letter II "On the situation, feelings, and pleasures of an American Farmer").

[45] See e.g. Edward Gibbon Wakefield, *A View of the Art of Colonization, with Present Reference to the British Empire; in Letters between a Statesman and a Colonist* (London: JW Parker, 1849) Letter XII, at 65 (highlighting that Great Britain, France, Ireland, and others have "circumstance that may be termed a want of room for people of all classes" and suggesting that obtaining land, trade, and opportunity for the poor was a goal of colonization); Herman Merivale, *Lectures on Colonization and the Colonies* (London: Longman, Green, Longman, and Roberts, 1861).

[46] James Inches, *Letters on Emigration to Canada, Addressed to the Very Rev. Principal Baird* (Perth, printed for the author, 1836) at 166–72 (Toronto Metropolitan Reference Library) in McDonald, "A Door of Escape" *supra* note 38 at 102.

[47] *Ibid* at 166–72.

[48] Vasanthi Pendakur, "'The New El Dorado'—Attracting Settlers to the West" (2 May 2017), online (blog): <https://thediscoverblog.com/tag/immigrations-posters/> [Pendakur, "The New El Dorado"]. The Department of the Interior was responsible for land, immigration, Indian affairs, and natural resources and would later be superseded by the Department for Indian Affairs and Department for Mines and Resources.

America to remain unpopulated by Europeans.[49] A poster advertised the availability of "160-Acre Farms in Western Canada—Free!" at a series of talks offered in Scotland extolling the opportunity of "Canada and Its Resources."[50] Another poster advertising free land was made for Norway: "160 Acres Frit Land."[51] The images contained in these advertising documents were full of landscapes, harvests, and bright skies. The challenges of living in Canada and in the Prairies in particular—of cold and isolation—were downplayed.[52] The advertisements came from government departments, such as one poster dated 1925 that indicates it was "issued by direction of the Hon. James Alexander Robb, Minister of Immigration and Colonization."[53] Advertisements were also made by private corporations who needed a labour force for colonial expansion and sought to encourage immigration from the United States to Canada.[54] The messages conveyed through poster advertisements were of opportunity ("Westward the star of empire takes its way. This is your opportunity, why not embrace it?"[55]), home, and security ("Homes for Everybody. Easy to Reach. Nothing to Fear. Protected by Government"[56]).

From these pieces of information—letters home, advocates for and against emigration, poster advertisements extolling the benefit of creating a new life in North America—it is clear that

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[49] Jean Bruce, "The Last Best West: Advertising for Immigrants to Western Canada, 1870–1930," online: <publications.gc.ca/site/eng/470434/publication.html> [perma.cc/N6NG-SXHD]..

[50] "Poster Advertising a Lantern Slide Lecture," Ottawa, National Archives of Canada (RG 76-I-A-1, vol 1625, file no 239620, item ID number 1437596), online: <https://central.bac-lac.gc.ca/.redirect?app=fonandcol&id=1437596&lang=en>

[51] "North Atlantic Trading Company—Posters & Pamphlets," National Archives of Canada (GARDD, RG 76 Immigration Branch Records, Vol 225, file no 113228, part 9, item ID number 2945660), online: <central.bac-lac.gc.ca/> [perma.cc/4AAH-87FB]. The North Atlantic Trading Company distributed this advertising card as part of its effort to recruit immigrants to Canada. Thousands of these cards in many European languages were circulated by mail between 1900 and 1905.

[52] Pendakur, "The New El Dorado," *supra* note 48.

[53] "Canada: The New Homeland." *Canada West* (1925) National Archives of Canada (item ID number 2958967), online: <central.bac-lac.gc.ca> [perma.cc/BNK4-TVUL]..

[54] "40,000 Men Needed in Western Canada. Poster to Encourage American Immigration" (1911) National Archives of Canada (item ID number: 2837964), online: <central.bac-lac.gc.ca> [perma.cc/6QLQ-QLYQ].

[55] "Western Canada: The New Eldorado" (c 1890–1920). National Archives of Canada (vol 1622, item ID number 2945432), online: <central.bac-lac.gc.ca> [perma.cc/75BE-E4UJ].

[56] *Ibid*.

a singular account of motivation for emigration was contested, even at the time of colonization. However, it is also clear that there was an emphasis placed on the opportunities afforded by living in North America, free of the constraints of class division and insecurity in property ownership. Regardless of whether detractors critiquing the advertisements coming out of North America as setting up a false narrative were correct in their critique or not, this observation still stands. The point that comes out of reflections of emigrants to Canada is on the importance in the ability to own land as a piece of property—as something that provides certainly the potential for financial security, but also the personal freedom of finding a new place free from the constraints of Europe. McDonald finishes his article "A Door of Escape" with a poignant reflection on the importance of emigration for the individual authors of letters home to England:

> This article is entitled "A Door of Escape" not just as a literary conceit but because it conveys an emotive message. A door is often the only way out of an enclosed space, and usually means achieving freedom from captivity.[57]

Life in North America provided "a new field of opportunity, a gate of escape from the bondage of the past; and freshness, and confidence and scorn of older society, impatience of its restraints and its ideas, and indifference in its lessons."[58] The process of settling in the New World required that settlers find new ways of conducting themselves without the guidance of cultural norms that existed within their home country or even existed from town to town. The immediate family became important as a source of labour, support, and security for settlers, particularly within the farming and ranching community. At the same time, the details of cultural norms unique to

[57] McDonald, *supra* note 38 at 116.
[58] Frederick J Turner, *The Significance of the Frontier in American History* (British Library, 1894) at 227 [Turner, *The Significance of the Frontier*].

different European cultures were paired back as English, Dutch, French, Scottish, Ukrainian, Irish (and more!) settlers learned how to interact with unknown cultures.[59]

Settlers were required to navigate and create new political and cultural organizations while working in difficult conditions. The realities of emigrating to Canada, though affording the possibility of a life free from the inequalities in Europe, was not a free or even low-cost process of settlement. Years of work went into creating properties that were hospitable, then livable, and finally would be capable of yielding a harvest. As Cole Harris explains:

> It is known that lives went into clearing, grubbing, and building; that the margin between success and failure was thin; and that failure due to accidents, mental breakdown, or the overwhelming enormity of the task was common. Slowly, however, the forest yielded and farms appeared.[60]

Though pioneer work afforded poor people the opportunity to own land, this came at the cost of relentless work carried out by the entire family for years and even generations.[61] Furthermore, it occurred in the context of the emerging administration of Upper and Lower Canada and the United States, which were themselves rife with fraudulent activities in land surveying, land squatting by untitled settlers, the illegal sale of land, and incorrect or no record keeping around land transactions.[62]

3.2.4. Land as the Subject for Colonial Expansion

Colonial expansion was predicated on the acquisition of land. Land was the subject of dispossession of Indigenous Peoples, and land was the subject of claiming to the benefit of settlers.[63] The connection between dispossession and acquisition was not an accidental aspect of

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[59] Harris, *A Bounded Land, supra* note 34 at 145–64; Harold Troper, "Immigration to Canada," *Canadian Encyclopedia* (12 January 2021), online: <thecanadianencyclopedia.ca> [perma.cc/5VV6-XAZB].
[60] Harris, *A Bounded Land, supra* note 34 at 153.
[61] Referred to in Harris, *ibid* at 153.
[62] See Weaver, *supra* note 34 at 133–77, 264–310.
[63] Many works have highlighted this link, describing the devastating impact of widespread abuse of Indigenous Peoples and illegal sales of land from Indigenous Peoples to speculators and settlers. See e.g. John Borrows,

colonial expansion, but a central component for control over lands newly under the control of British or French empire, or prior to 1812, lands sought by a European nation toward their expansionist goals.[64] The deliberate and illegal taking of land meant control over Indigenous Peoples on the basis of racist ideas of European superiority and a belief in the providence of European law, governance, and educational structures.[65]

In 1858, a special report commissioned by the Commissioner of Indian Affairs articulated the policy goal of taking land from the control of Indigenous Peoples as a tool for quieting unrest in the colonial project.[66] The report recommended that "Native groups should at once cede at a fair valuation to the Province, such lands as shall be previously decided not to be necessary for their own use."[67] It was argued that this recommendation of land sales, which audaciously required Indigenous Peoples to action it, not settlors, was beneficial to "the core mission of the colonial project in British North America over the course of the previous two centuries."[68] The benefits were described in the following way:

> "The Indians would gain a settled income," the commissioners argued, "not so large perhaps, as they might if their lands were sold by auction, but it is one involving no trouble or uncertainty and accrues immediately." They also felt that "the jealousy now entertained against the native race by their white neighbors will disappear when the land, the cause of strife, is put within the power of the latter." Furthermore, the purchases would provide the government with a "large accession of valuable land" to accommodate the "stream of immigration flowing into the land" that would be cheaper than the conventional means of surrender and sale at

*Recovering Canada: The Resurgence of Indigenous La*w (Toronto: University of Toronto Press, 2002) 283; Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass: Belknap Press of Harvard University, 2005); Cole Harris, "How Did Colonialism Dispossess? Comments from an Edge of Empire" (2004) 94:1 Annals Assoc Am Geog 165 [Harris, "How Did Colonialism Dispossess?"]; Weaver, *The Great Land Rush, supra* note 34; Robertson, *Conquest by Law, supra* note 34; Bhandar, *Colonial Lives of Property, supra* note 22.

[64] Weaver, *The Great Land Rush, supra* note 34.

[65] Harris, *A Bounded Land, supra* note 34, see generally 145–64.

[66] Canada, *Report of the Special Commissioners Appointed on the 8th of September, 1856, to Investigate Indian Affairs in Canada* (Toronto: Stewart Derbishire and George Desbarats, 1858).

[67] *Ibid* at 21.

[68] *Ibid* at 25–26.

> auction, and it would raise the "the value of the surrounding districts, now separated from each other by the Reserves."[69]

The self-interested approach articulated in this passage indicates the importance of land as a tool for quieting social unrest, addressing concerns settlers had about working on land with insecure title. That it shows utter disregard for the interests of Indigenous Peoples, or even a recognition of Indigenous Peoples as persons who already owned land, is not surprising in the colonial context.

Self-interest, Cole Harris notes, was a motivating aspect to how settlement in the New World took place, or to put it another way, "how colonialism dispossessed."[70] "Missionaries excepted, immigrants had not come to British Columbia to civilize Indigenous peoples. They had been attracted by the prospect of unused land."[71] Indeed, the benefits of emigration were not solely for the immigrant, but instead was to the benefit of the emerging colonies of Upper and Lower Canada, because through immigration "Upper Canada began receiving the sort of people that it urgently needed—independent, well-travelled, and possessing the practical skills so necessary in their new homes."[72]

Examination of colonial expansion, land interests, and the actions taken to acquire lands, whether it be the actions of individuals or policy recommendations from government departments, is to examine the ways in which people interact with place. Colonialism was and is a place-making exercise.[73] The power of colonial activities was in the expansion of state frontiers to acquire space for development.[74] Edward Said's writings on imperialism, culture, and the Western world identify the spatial components that were front and centre in colonial activities:

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[69] *Ibid* at 25–26.
[70] Harris, "How Did Colonialism Dispossess?" *supra* note 63 at 165–82.
[71] *Ibid* at 171.
[72] McDonald, "A Door of Escape," *supra* note 38 at 116.
[73] Weaver, *The Great Land Rush, supra* note 34 at 11–12.
[74] Turner, *The Significance of the Frontier*, *supra* note 58 at 204:

> It appears then that the universal disposition of Americans to emigrate to the western wilderness, in order to enlarge their dominion over inanimate nature, is the actual result of an expansive power which is inherent

> Underlying social space are territories, land, geographical domains, the actual geographical underpinnings of the imperial, and also the cultural contest. To think about distant places, to colonize them, to populate or depopulate them: all of this occurs on, about, or because of land. The actual geographical possession of land is what empire in the final analysis is all about.[75]

In this equation of land, property, and people, no single factor was more important than the others in colonial expansion. Land without capital and labour was worthless.[76] At the individual level, the work of emigrating and then clearing and settling land was motivated by social and political factors that existed in a person's country of origin. The New World afforded opportunities for poor people who had none in their home country. At the state level, settlement offered opportunities for sovereign expansion for the purposes of resource extraction, development, and wealth. To realize the benefits of this, Indigenous Peoples were dispossessed and Europeans were enticed to emigrate and take up those same lands. The centrality of land acquisition to this process was supported by property law structures that afford selected beneficiaries.

3.2.5. Conclusion

In many ways, property as place is already a feature of the common law approach to property. Components of place are reflected in ideas of location, personal histories, the present, and more. All these together give a sense of place. Common law is not immune to the importance of place—of a single location and of the personal importance that is ascribed in those locations. Law recognizes this in multiple ways, including, importantly, principles of property law that would protect legal action relating to land and real property. In family law, contract law, and property law contexts, among others, the law has developed in such a way as to recognize the importance

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> in them, and which by continually agitating all classes of society is constantly throwing a large portion of the whole population on the extreme confines of the State, in order to gain space for its development.

[75] Edward Said, *Culture and Imperialism* (New York: Vintage Books, 1994) at 78.

[76] Herman Merivale, "Scarcity of Labour in New Colonies; Its Effects on the Progress of Wealth," lecture IX in Herman Merivale, *Lectures on Colonization and the Colonies* (London: Longman, Green, Longman, and Roberts, 1861) at 256.

of a particular parcel of property for those impacted by it. Thus, the law will step in to enforce contracts relating to real property, it will protect real property as a particularly important type of property within the family context, and there have been myriad individual rules created to recognize and protect real property in the estates context to benefit dependants and other impacted family members. The institution of property is required to recognize property holdings, protect the importance of property for those invested, and ameliorate the impact of different legal protections on property title holders and non-holders alike. The relational reading of property is relevant to understanding the importance of place, as both approaches highlight the importance of understanding property as beyond the confines of the paper title. A spatial approach provides the added point that it recognizes the place as integral to both the development of property and of relationships. Places gain importance because of relationships not just with people around them, but with the location and place itself. This is the guiding point about why place matters.

3.3. EXPROPRIATION AND PLACE

3.3.1. Introduction

Expropriation is defined as "the action of depriving (a person) of property; deprivation; an instance of this."[77] Expropriation law serves to remove or limit property rights held by the private property holder. While property law and expropriation do not explicitly adopt "place" or "place-making" into the analytical framework, the operation of expropriation is by definition an act of place-making.

A reading of expropriation law through the lens of place-based interests highlights the principle of expropriation as a tool used to manipulate place: It can manage, create, and change

[77] *Oxford English Dictionary* (Oxford University Press, 2021), *sub verbo* "expropriation," n."

place by altering the ways in which property rights can be used. This manipulation is something that already happens every time an act of expropriation occurs. Importantly, the principle of expropriation engages with place by limiting or even removing property rights that would otherwise exist in that location. Expropriation acts as an exception to principles that would highlight the importance of property as an "absolute right, inherent in every Englishman."[78] This feature is not a hidden aspect of the law of expropriation, but a central aspect to it.

The application of expropriation law already captures the idea of a sense of place, and even directly engages with it, since as part of the analysis of an expropriation matter parties will share information about how a government regulation interferes with their use of their property. However, the idea of "place" encompasses many different components: physical locations, numerical identifiers of that location (geographic coordinates), personal and collective identities in that location, experience of insiders and outsiders, histories, and the relationship between those who hold property title and the location. If "place" is defined as "a meaningful segment of space combining location, locale and a sense of place," then the addition of place to the analysis of expropriation requires attention to multiple aspects of why a location matters. Importantly, this will include aspects of a given property lot that are important to the individual.

Explicit recognition of place-based interests as part of both property title and expropriation analysis develops the way in which location is captured within expropriation law. The importance of a location for a property interest holder will attach in different ways: It could be relational as between peoples in that location, it could be emotive, or it could be on the basis of historical use and development (which may be recognized through law in certain circumstances[79]). The lens of

[78] Blackstone, *Commentaries*, *supra* note 14 at 134–35.

[79] See e.g. the legal rules relating to adverse possession, the principle which affords recognition of property rights for occupiers of property in limited circumstances. See Eran Kaplinksy, Malcolm Lavoie, & Jane Thomson, *Ziff's Principles of Property Law*, 8th ed (Toronto: Thomson Reuters Canada, 2023) at 163–70.

spatiality, particularly focusing on the land of that location, brings these perspectives into the analysis of expropriation, requiring consideration of use, experience, histories of that place, as well as attention to the spatialized impact of applying laws of expropriation in that location.

Importantly, as the history of real property and land shows, "place" is not entirely overlooked in the law. In fact, property interests in place, and that they may be impacted by statute and government regulation, is a central facet of our property system. Eric Todd explains that "traditionally the property concept is thought of as a bundle of rights of which one of the most important is that of user. At common law this right was virtually unlimited and subject only to the restraints imposed by the law of public and private nuisance,"[80] however now regulatory frameworks that impact private property is the norm:

> Today the principal restrictions on land use arise from the planning and zoning provisions of public authorities. By the imposition, removal or alteration of land use controls a public authority may dramatically increase, or decrease, the value of land by changing the permitted uses which may be made of it.[81]

There are vast types of regulatory frameworks that impact property, including regulation of development and change in conservation areas, sites of scientific interest, protections for areas of natural beauty and the creation of national parks, urban development areas, preservation of trees and other natural features, and more.[82] Regulations that impact real property are often the cause of expropriation actions. Though regulatory frameworks can impact property, and though the number and variety of regulations seem to be increasing, it is the principle of expropriation that operates to manage instances of infringement on property rights and to ameliorate any harm caused by government action.

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[80] Eric CE Todd, *The Law of Expropriation and Compensation in Canada,* 2nd ed (Scarborough, Ont.: Carswell, 1992) at 22 [Todd, *The Law of Expropriation and Compensation in Canada*].
[81] *Ibid* at 23.
[82] Gray & Gray, *Elements of Land Law*, *supra* note 27 at 1382–83.

The complexity of property laws and detailed analysis undertaken by the courts in instances of expropriation, though often showing a deeply considered approach to the legalities of expropriation law, do not always or fully account for the places that are the subject of the expropriation. Though the law of expropriation is ostensibly about the legal structures of property law and of statutory interpretation, application of it shows it to be a tool for the regulation of place. For the remainder of this chapter, I consider the implications if explicitly including mention of the importance of the geographic locale, place, and location were included in expropriation analysis.

3.3.2. Law of Expropriation

Expropriation is defined as "the compulsory acquisition of property by the Crown or by one of its authorized agencies."[83] The law of expropriation provides the rules and regulations for managing the circumstances in which property can be taken—or to put it another way, the ways in which a property holder may be deprived of their property. Expropriation can occur as an official government action, whereby a property parcel (or part thereof) is taken from the property title holder and turned over to the government. This is called *de jure* expropriation, and it can only occur through adherence to strict requirements as are contained in expropriation statutes.[84] There are statutes in every province, territory, and federally in Canada that contain the procedural requirements for carrying out an expropriation. Process requirements entail considerations such as providing notice of intention to expropriate, hosting public hearings or inquiry proceedings and considering standing for submission at these forums, rules around entering property for surveying and appraisal purposes, and determining compensation.[85] *De jure* expropriation is a creature of

[83] Todd, *The Law of Expropriation and Compensation in Canada*, *supra* note 80 at 1.
[84] *Expropriation Act*, RSC 1985, c E-21 (federal); *Expropriation Act*, RSNWT 1988, c E-11 (Northwest Territories); *Expropriation Act*, RSNS 1989, c 156 (Nova Scotia); *Expropriations Act*, RSO 1990, c E-26 (Ontario); *Expropriation Act,* RSPEI 1988, c E-13 (PEI); *Expropriation Act,* RSQ 1983, c E-24 (Quebec); *The Expropriation Act*, RSS 1978, c E-15 (Saskatchewan); *Expropriation Act,* RSY 2002, c 81 (Yukon).
[85] Todd, *The Law of Expropriation and Compensation in Canada*, *supra* note 80 at 39–87.

statute, so it is a derived and limited power. *De jure* expropriation is managed through strict application of statute, which contain the rules and requirements for the Crown and its agencies when carrying out an expropriation, including guidelines for compensation.[86]

De jure expropriation is to be contrasted with *de facto* expropriation, which occurs when there is no explicit Crown action in expropriation, but a government action nonetheless has the impact of limiting the use and enjoyment of rights afforded to property holders, even though the government does not officially take title to property.[87] *De facto* expropriation can be alternatively referred to in scholarship as "constructive expropriation," "compulsory takings," or "regulatory takings." More recently, the Supreme Court of Canada adopted the term "constructive takings" in place of the term *de facto* expropriation.[88]

De facto expropriation occurs when the regulation goes so far as to eventually confiscate all the estate owners' bundle of sticks.[89] Express mention of *de facto* expropriation was first made by the Supreme Court in the 1985 decision *The Queen v Tener.*[90] In this case, the Tener's were registered owners of mineral rights issued by the Crown in lands that in 1939 were incorporated into the Wells Gray Provincial Park in British Columbia. Regulations under the applicable provincial statute over time became more onerous, requiring the Teners to apply for permits to exercise their rights. These applications were repeatedly denied until they were notified in 1978

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[86] *Ibid* at 59.

[87] See Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40 UBCL Rev 315 at 315 [Brown, "Constructive Taking"]; Ziff, "Taking Liberties," *supra* note 18 at 103.

[88] *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36 at para 17 [*Annapolis v Halifax*].

[89] *Belfast Corporation v OD Cars Ltd,* [1960] AC 490 at 519–520 per Viscount Simonds, at 525 per Lord Radcliffe [*Belfast Corporation*]; *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 144 per Justice Mason; *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 639 per Justice Kirby; *Pennsylvania Coal Co v Mahon*, 260 US 393 at 415, 67 L Ed 322 (1922) at 326 per Justice Oliver Wendell Holmes ("if regulation goes too far it will be recognised as a taking.") [*Pennsylvania Coal*]. The line between regulation and a taking/confiscation is difficult to ascertain. See *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City*, 473 US 172 at 199, 87 L Ed 2d 126 (1985) at 147 where Justice Blackmun writes the "lawyer's equivalent of the physicist's hunt for the quark").

[90] 1985 CanLII 76 (SCC) [*Tener*].

that no new exploration or development would be allowed in the park. The Tener's filed suit, claiming an expropriation had occurred and seeking compensation for the acquisition of the mineral claims, expenditures, and present value of future loss of opportunity.

The Tener's were successful in their claim.[91] Writing for the majority,[92] Justice Estey provided a definition of *de facto* expropriation as follows:

> Expropriation or compulsory taking occurs if the Crown or a public authority acquires from the owner an interest in property. Difficulty in computing the value of the interest taken is not relevant to either the right to compensation or indeed the determination of the interest taken.[93]

To analyze whether an expropriation had occurred, the court adopted two questions to be answered:

> (a) What right did the respondents lose, and what interest did the government acquire?
> (b) If such compulsory taking has occurred, when did it take place?

The first question essentially establishes the common law test for *de facto* expropriation, and so guides analysis by the court in later cases. The second question as to the timing of the compulsory taking was important on the facts of this case because the court was asked to assess the impact of a variety of provincial park regulations that had been implemented over an extended period of time.[94] This test for *de facto* expropriation has been applied in multiple decisions since *Tener*,[95]

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[91] *Ibid* at 565, per Justice Estey, writing for the court.

[92] The court was in agreement that a *de facto* expropriation had occurred but was split 5–2 on the valuation of compensation.

[93] *Tener, supra* note 90 at 556, per Justice Estey, writing for the court.

[94] *Ibid* at 556, per Justice Estey. Followed in *Casamiro Resource Corp v British Columbia (Attorney General),* 1991 CanLII 211 (BCCA).

[95] See e.g. *Canadian Pacific Railway Company v City of Vancouver,* 2006 SCC 5 at paras 8, 30, 34 [*Canadian Pacific Railway*]; *Annapolis v Halifax, supra* note 88 at paras 4, 52; *Genesis Land Development Corp v Alberta*, 2009 ABQB 221 at para 127; *Northern Cross (Yukon) Ltd v Yukon (Energy, Mines and Resources),* 2021 YKSC 3 at para 285; *Altius Royalty Corporation v Alberta*, 2024 ABCA 105 at para 15; *Gosse v Conception Bay South (Town*), 2021 NLCA 23 at para 30; *St John's (City) v Lynch*, 2024 SCC 17 at para 33; *A Maze in Corn Inc v Manitoba Emergency Measures Organization et al*, 2023 MBCA 92 at para 45; *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283 at para 48 [*Nilsson*].

and it was crystallized firstly in *Mariner Real Estate*[96] (the focus of this thesis) and later in *Canadian Pacific Railway Company v City of Vancouver*.[97] The test for *de facto* expropriation only changed in 2022 when the Supreme Court handed down the *Annapolis v Halifax* decision, broadening the two arms of the test.[98]

The statutory link between a *de jure* and *de facto* expropriation is made when the interference with property is so severe as to constitute an expropriation within the meaning of the applicable statute. For *de facto* expropriation, the goal for applicants is to have their property interests recognized to give rise to compensation for the taking of their property. Without the application of a strict statutory scheme, the test for *de facto* expropriation turns to consider the extent to which a regulation impacts the property holder's interests. A close examination of aspects of that property is required to assess this. From the property owner's perspective, *de facto* and *de jure* expropriation are functionally equivalent because the property title holder loses rights to do certain things with their property.

An essential component of the calculus for both *de jure* and *de facto* expropriation is an examination of interests in place. For *de jure* expropriation, a close examination of property interests does not need to happen. Instead, *de jure* expropriation occurs through the application of the applicable statutory framework. The overt steps required for an explicit compensation are contained in the applicable expropriation statute. On the other hand, for *de facto* expropriation the process is multi-layered; the claimant must first seek recognition that there has been an expropriation and second seek compensation for that taking.

[96] *Mariner Real Estate* (NSCA), *supra* note 19.
[97] *Canadian Pacific Railway, supra* note 95. Discussed below at notes 179–82 and accompanying text.
[98] *Annapolis v Halifax supra* note 88. Discussed below at notes 183–98 and accompanying text.

3.3.3. A Tool for Place

Expropriation manages place. For instances of *de jure* expropriation, an act of expropriation is clear and transparent as the property owner will receive a letter notifying them of the expropriation. For instances of *de facto* expropriation, there is not a specific legal process that will be triggered; instead, complainants will bring the matter to the courts through litigation.

Assessing circumstances of *de facto* expropriation is essentially a question of balance between state regulation and the rights commonly associated with private property holdings. The classic statement about the nature of *de facto* expropriation is found in the words of Justice Holmes, who, speaking in the US context, refers to "regulatory takings." Holmes wrote: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[99] This classic understanding of regulatory takings, or *de facto* expropriation, was introduced into Canadian law in the 1960 decision *Belfast Corporation v OD Cars Ltd*.[100]

The details of how and when an expropriation may be deemed to have occurred is not immediately apparent. Instead, the question is: At what point does an interference with the freedom of a property owner and a reduction in the incidents of property ownership equate with a taking of property warranting compensation?[101] As Bruce Ziff writes in a more recent piece and with reflection specifically on the Canadian law of *de facto* expropriation:

> At some point, admittedly hard to locate, excessive regulation must be seen as equivalent to confiscation. If property is a bundle of rights, then state action that

[99] *Pennsylvania Coal, supra* note 89 at 415.
[100] *Belfast Corporation*, *supra* note 89 at 519.
[101] *Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 1999 ABQB 440 at para 52; aff'd 2002 ABCA 283, leave to appeal to SCC refused, [2003] 2 SCR at xi.

> removes the ability to exercise those rights leaves merely the twine of the bundle (bare title), but little else.[102]

Instead of providing a definitive line between the aspects of government action and private property rights, there is a point whereby regulation results in severe enough impact on the property that the law of expropriation manages. How to assess precisely when government actions become expropriation is informed by development of the principle at common law, public policy, and by norms about what regulation is considered acceptable.

Expropriation serves an important public policy goal. In his *Commentaries*, Blackstone affirms the absolute right of property and then highlights the ability of the government to interfere with property rights. Despite the importance of private property, Blackstone concedes that governments need to have the ability to interfere with private property.[103] Expropriation (or eminent domain) "is an essential tool in a modern democratic society" in that it "facilitates planned and orderly development."[104] Likewise, in the US context, Justice Frankfurter writes that regulation is "part of the burden of common citizenship."[105] That burden is sometimes placed on property holders, sometimes without the benefit of having that burden ameliorated by compensation or other government support. For example, the Supreme Court of Ireland flatly rejected the suggestion that public compensation was required in respect of the compulsory preservation of a Neolithic fort situated on privately owned farmland,[106] even though the preservation order limited the ability of the farmer to make a gainful living off the land. Chief Justice Higgins indicated that "the common good requires that national monuments which are the

[102] Ziff, "Taking Liberties," *supra* note 18 at 341.
[103] Blackstone, *Commentaries*, *supra* note 14 at 139. See also RA Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass: Harvard University Press, 1985) at 7–18.
[104] *Waters v Welsh Development Agency*, [2004] 1 WLR 1304 at 1, per Lord Nicholls of Birkenhead [*Waters*].
[105] *Kimball Laundry Co v United States* (1949) 338 US 1 at 5, 93 L Ed 1765 at 1771.
[106] *O'Callaghan v Commissioners of Public Works in Ireland and the Attorney General*, [1985] ILRM 364.

prized relics of the past should be preserved as part of the history of our people." Therefore, the court wrote that the preservation of the fort was a "requirement of what should be regarded as the common duty of all citizens."[107]

The goal for actions in both *de jure* and *de facto* expropriation is not to prevent expropriation, but rather to manage the impact of government expropriation on the private property title holder. The importance of property is typically affirmed through providing monetary compensation. As Blackstone said, it was inconceivable that "sacred and inviolable rights of private property" should be postponed to "public necessity" without "a full indemnification and equivalent for the injury thereby sustained."[108] The importance of protection of proprietary interests is recognized even in absentia, as interests are removed. But it is axiomatic that "[h]and in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation."[109] Such compensation is required so that the economic cost of communally beneficial policies should not be disproportionately concentrated on a few citizens."[110] To this point, Blackstone underscores the importance of procedure and compensation:

> [T]he legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.[111]

At the core, the existence of monetary compensation is the way in which the importance of a specific property to the title holder is recognized. Compensation is an important tool for recognizing property interests and thus managing governmental goals while protecting private

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[107] *Ibid* at 367–68.
[108] Blackstone, *Commentaries, supra* note 14 at 135.
[109] *Waters, supra* note 104, per Lord Nicholls of Birkenhead.
[110] *Penn Central Transp. Co. v New York City,* 438 U.S. 104 (1978) at 124.
[111] Blackstone, *Commentaries, supra* note 14 at 139; Michael Taggart, "Expropriation, Public Purpose and the Constitution" in Christopher Forsyth & Ivan Hare, *The Golden Metwand and the Crooked Cord* (Oxford: Oxford University Press, 1998) 91 at 97 [Taggart, "Expropriation, Public Purpose, and the Constitution"].

property interests. Within this system, the existence of place-based interests by way of property title are recognized and thereafter given effect through monetary compensation.

There has long been a high degree of acceptance of the idea that property can be regulated. In the Canadian context, the norms relating to the acceptable amount and type of regulation that impact private property indicate a general acceptance of a governmental role in facilitating and managing all kinds of property. An early example of debate on, and ultimately acceptance of, regulation of property for the public is found in the "rivers and streams dispute," a nineteenth century dispute that centered on the legal saga of *McLaren v Caldwell* (1880-1884).[112] McLaren owned extensive lands on both sides of a river and built dams and slides along the river to allow for the transportation of logs. The river would not have been useable for log transportation but for McLaren's improvements. Caldwell, part of the lumbering company Boyd, Caldwell and Son's, attempted to drive logs down the now accessible river. McLaren sought an injunction and was successful at first instance on the basis that the river was found not to be navigable or floatable and so was part of the private property he held. The decision was eventually appealed all the way to the Judicial Committee of the Privy Council, with each court reversing the previous court's decision. The Privy Council ruled in favour of Caldwell's claim to use the improved waterway on the basis that it was not a requirement of the applicable legislation that the entire water way be navigable for it to be publicly accessed, only that there must be a sufficient body of water above and below the property area in question.

[112] The *McLaren v Caldwell* legal saga was heard at four levels of court: the court of first instance, Court of Chancery of Ontario, *McLaren v Caldwell* (16 December 1880) [unreported] cited in (1882) 8 S.C.R. 435 at 450; the Ontario Court of Appeal, *McLaren v Caldwell* (1881), 6 OAR 456 [*McLaren v Caldwell,* ONCA]; the Supreme Court of Canada, *McLaren v Caldwell* (1882) 8 S.C.R. 435 [*McLaren v Caldwell,* SCC], and the Judicial Committee of the Privy Council, *McLaren v Caldwell* (1884), 9 *Appeal Cases* 392.

The *McLaren v Caldwell* case is notable because the question of the extent to which private property can be regulated for the public was directly at issue throughout. On the one hand, the Court of Chancery of Ontario (the court of first instance) and the Supreme Court of Canada articulated a clear vision of private property and sought to protect property rights by ensuring that the benefits of the improvement to the waterway (made at the property title holder's own expense) inured to McLaren, the property holder. Interestingly at the Supreme Court, Ritchie CJ expressed the opinion that if McLaren were to have his property rights taken for public use in this way, expropriation would be the correct mechanism for the government to employ.[113] On the other hand, the Ontario Court of Appeal and the Privy Council sought to protect waterways as being for the public regardless of improvements made by a property holder. A practical public policy concern that animated this perspective was whether there would have been gridlock in the waterways used by the lumber industry, a very important industry in Canada in the nineteenth century, if an injunction were issued in favour of the riparian property holder.[114]

The second circumstance that constitutes part of the "rivers and stream dispute" is that contemporaneously with the legal appeals, and in response to McLaren's win at the first instance, the Ontario legislature passed the 1881 *Act for Protecting the Public Interest in Rivers, Streams and Creeks*.[115] This Act protected rights of users to waterways, even if such waterways were only accessible due to improvements made by riparian property holders. Or to put it another way, this Act rejected a monopoly over waterways.[116] The Act also provided for the payment of tolls to property holders who did improve such waterways.[117] In response to a petition from McLaren, the

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[113] *McLaren v Caldwell,* SCC*, ibid* at 444.
[114] Jamie Benidickson, "Private Rights and Public Purposes in the Lakes, Rivers, and Streams of Ontario 1870-1930" in David H. Flaherty, ed, *Essays in the History of Canadian Law*, vol 2 (Toronto: University of Toronto Press, 1983) 365 at 375.
[115] (1881), c. 11 [*Rivers and Streams Act*].
[116] Benidickson, *supra* note 114 at 373.
[117] *Rivers and Streams Act*, *supra* note 115, s 1; Benidickson, *ibid* at 375; Carl Stychin, "The Rivers and Streams

Federal government disallowed the Act in 1881, in 1882, and in 1883, but the Act was finally allowed in 1884.[118] In the provincial legislature the arguments in support of public access to improved riparian properties was rigorous. In 1882, Edward Blake, the treasurer of the Law Society of Upper Canada and leader of the Liberal Party, said:

> I am a friend to the preservation of the rights of property ... but I believe in the subordination of those rights to the public good. ... I deny that the people of my Province are insensible to or careless about the true principles of legislation. I believe they are thoroughly alive to them, and I am content that my rights of property, humble though they are, and those of my children, shall belong to the Legislature of my country to be disposed of subject to the good sense and right feeling of the people of that Province.[119]

This excerpt and the surrounding debate support promoting public access to and use of property as an appropriate goal for government. Mr Blake emphasized that the government's role is limited to managing property for the benefit of the public, and not for that property to be transferred to private ownership. Ultimately it is this perspective promoting a type of public use of waterways, regardless of existing riparian property titleship and regardless of improvements made by private property holders, that was successful in the final legal decision issued by the Judicial Committee of the Privy Council and was codified in the 1884 *Rivers and Streams Act.*

The Alberta Court of Appeal affirmed the sentiment that property is subject to regulation more recently in a leading expropriation law case, *Alberta (Minister of Infrastructure) v Nilsson*:

> [F]rom the earliest of times the owner of property, and in particular of land, has been restricted in his free enjoyment of it not only by the common law maxim *sic utere tuo ut alienum non laedas* [use your own property so as not to injure that of

Dispute: a Challenge to the Public/Private Distinction in Nineteenth-Century Canada" (1988) 46:2 University of Toronto Faculty of Law Review 341 at 344.

[118] Stychin, *ibid*.

[119] Canada, *House of Commons Debates*, "Disallowance of Streams' Bill," 4-4 (14 April 1882) at 915.

> another], but by positive enactments limiting his use or even imposing burdens upon him.[120]

As a general proposition, there is acceptance of a higher degree of regulation in Canada. Expropriation is a tool to facilitate this. In the leading treatise on expropriation law in Canada, E Todd describes it in the following way:

> By the imposition, removal or alteration of land use controls a public authority may dramatically increase, or decrease, the value of land by changing the permitted uses which may be made of it. In such a case, in the absence of express statutory provision to the contrary an owner is not entitled to compensation or other remedy notwithstanding that subdivision approval or rezoning is refused or development is blocked or frozen pursuant to statutory planning powers in order, for example, to facilitate the future acquisition of the land for public purposes.[121]

Historically in Ontario, the sovereign power to expropriate did not even come with the basic requirement that compensation be paid. That is how absolute governmental power was understood. Justice Riddell descriptively wrote: "The prohibition 'thou shall not steal' has no legal force upon the sovereign body. And there would be no necessity for compensation to be given. We have no such restriction upon the power of the legislature as is found in some States."[122]

There are upper limits to the acceptable regulation of property through expropriative actions. For example, though it is settled law that zoning activities carried out by a municipal government do not constitute *de facto* expropriation,[123] where zoning activities are used to lower the value of a property prior to a *de jure* expropriation this may be considered part of the "expropriation machinery" and is prohibited.[124] Tony Honoré felt that the ability of the state to

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[120] *Nilsson*, *supra* note 95 at para 55.
[121] Todd, *The Law of Expropriation and Compensation in Canada*, *supra* note 80 at 22–23.
[122] *Florence Mining Co v Cobalt Lake Mining Co* (1908), 18 OLR 275, 279, aff'd by the Privy Council in 1910, 43 OLR 474.
[123] The classic common law case on this is the US case *Euclid v Amber Realty Co* (1926), 47 St C 114, in which the majority, including Justice Holmes, defended land-use zoning as constitutional. In Canada, see *Vancouver v Simpson* 1976 CanLII 148 (SCC), although a municipality cannot use rezoning to depreciate the value of a property as a prelude to an expropriation. See *Tener, supra* note 90 at 557.
[124] *Tener, supra* note 90 at 558.

expropriate property is not an inherent incident of property. Though expropriation exists, it tends to be restricted to certain kinds of property.[125] Though Honoré did not indicate the types of property that would tend to be captured within expropriative action, Canadian jurisprudence highlights that property interests captured in or related to natural spaces—such as parks, unused land, beaches, or lands planned for development purposes—are often the subject of claims of *de facto* expropriation.

The principle of expropriation sits at the centre of both private and public property law. It is the tool through which property is engaged and through which it is managed. As a management tool it serves an important public good of providing a framework for regulating any interference with a property holders' rights, thus maintaining respect for property rights while affording public authorities the tool through which they can access and ultimately take land that in their opinion serves the public purpose.

3.3.4. Harnessing Place within Property and Expropriation

Reorienting the law of expropriation around the importance of place considers and builds on some central aspects of expropriation and property within the Canadian legal system. Reflection on the law of expropriation within the academic literature has revealed two central aspects to how it is framed.[126]

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[125] Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987) at 175 (on ownership).

[126] Brown, "Constructive Taking," *supra* note 87; Ziff, "Taking Liberties," *supra* note 18; Raymond E Young, "Canadian Law of Constructive Expropriation" (2005) 68 Sask L Rev 345 [Young, "Canadian Law of Constructive Expropriation"]; Douglas C Harris, "A Railway, a City, and the Public Regulation of Private Property: CPR v City of Vancouver" in Eric Tucker, Bruce Ziff & James Muir, eds, *Property on Trial: Canadian Law in Context* (Toronto: Irwin Law, 2012) [Harris, "A Railway, a City, and the Public Regulation of Private Property"]; Donna R Christie, "A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada" 32:2 Brooklyn J Int'l L 343 [Christie, "A Tale of Three Takings"]; Bryan P Schwartz & Melanie R Bueckert, "Regulatory Takings in Canada" (2006) 5 Wash U Global Stud L Rev 477 [Schwartz & Bueckert, "Regulatory Takings in Canada"].

First is the importance of the constitutional framework as it relates to expropriation and, second is the utility of the "bundle of sticks" approach to assess property interests. These components as they are articulated in Canadian law and legal analyses promote a flexible approach to defining property interests. Flexibility to assessing and protecting property interests are promoted precisely because property is not constitutionally protected. Instead of codifying property interests in the Constitution, there was an intention to keep open possible future rights in property. Flexibility is also promoted through an approach to defining property interests that relies on the concept of a bundle of property interests, some of which may be impeded or even removed entirely. The analytical framework for assessing *de facto* expropriation is deeply reliant on this metaphor as a way of assessing the presence of various property interests that exist in a property. These two aspects of property, and specifically its relationship with expropriation, indicate an approach of interpretive flexibility as property interests are recognized, defined, and potentially given effect to. In turn, this openness to property is what could support the incorporation of "place" as a property interest. Both property aspects—constitutionalism and the bundle of sticks—are looked at in turn below.

3.3.4.1. Constitutional Protection for Property

The most significant aspect of the Canadian legal framework pertaining to property generally is its exclusion from the *Canadian Charter of Rights and Freedoms* [the Charter].[127] This approach is distinctly different to many other jurisdictions,[128] and this is particularly notable

[127] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell Legal Publications, 2015) (loose-leaf updated 2024) at 36-12 [Hogg, *Constitutional Law*].
[128] See Christie, "A Tale of Three Takings" *supra* note 126.

given the constitutional protection granted to property in the United States, Canada's neighbour.[129] The lack of constitutional protection has had a direct impact on how the principle of *de facto* expropriation has developed, notably by reducing certainty as to protection for property rights. Protection for property in Canada is contained in the 1960 *Canadian Bill of Rights*,[130] which recognizes and confirms "security of the person and enjoyment of property."[131] As a federal statute, its force and effect is not the same as constitutional recognition of property. There have been no successful claims to property rights based on this provision. In 2003, the Supreme Court heard and denied a claim of expropriation of property rights made under section 1(a) of the *Bill of Rights* in *Authorson (Litigation Guardian of) v Canada (Attorney General).*[132] In *Authorson* the plaintiff was a disabled World War II veteran who argued that the government had mishandled the plaintiff's benefits by not crediting interest to the benefits of veterans who were under guardianship. As Bruce Ziff describes:

> A more sympathetic plaintiff can hardly be imagined. Joseph Authorson, who championed the cause for all similarly situated veterans, was a war hero. The federal government which had sent these men off to war fifty years ago, was seeking to escape liability by cloaking itself in a purpose-built statutory immunity. The legislation was passed just three days before Remembrance Day, a national holiday always held on the anniversary of the Armistice of WWI.[133]

Yet, the claim of expropriation of property based on this quasi-constitutional statute was not successful. Writing for the court, Justice Major found that the *Bill of Rights* applies only to guarantee the fundamental justice of proceedings, not to impose on Parliament a duty to provide a

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[129] Notably, of course, property is protected by the US Constitution in the Fifth Amendment, which provides: "private property [shall not] be taken for public use, without just Compensation." Much of the significant jurisprudence concerning *de facto* expropriation has come out of the US context.
[130] *Canadian Bill of Rights*, SC 1960, c 44.
[131] *Ibid* at article 1(a).
[132] *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2003) 227 DLR (4th) 385 (SCC), 2003 SCC 39, [2003] 2 SCR 40 [*Authorson*].
[133] Ziff, "Taking Liberties: Protections for Private Property in Canada" *supra* note 18 at 345.

hearing before the enactment of legislation, which here had the impact of limiting Crown liability for non-payment of veteran benefits.[134] Justice Major was guided by judicial restraint in how expropriation is considered, demonstrating a reluctance to mandate compensation.

Whether to include property in the Charter or not was hotly debated.[135] Political and government actors who were lobbying to keep property out of the Constitution in 1982 raised a variety of different concerns.[136] Vocal actors included the National Democratic Party of Canada who are a left-leaning democratic political party;[137] the government of Alberta, which has a strong free market ideology;[138] and the government of Prince Edward Island, which wanted to keep control of its provincial power to manage foreign ownership of land.[139] Though these are different bodies with distinct ideological differences, they came together in their perspective that the inclusion of property rights would mean an entrenchment of the then existing allocation of rights.[140] The many aspects of constitutionalized property rights that were thought to have negative impacts are summarized by Jean McBean writing shortly after the adoption of the Charter.[141] The fears included a perception that it would

> take away the hard won rights of Canadian workers to occupational health and safety laws, of Canadian wives to the benefit of matrimonial property laws, and of Canadian citizens in general to the benefits of environmental laws, rent control legislation and numerous other acts of government which benefit Canadians while encroaching on the property rights of those affected by the law.[142]

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[134] *Authorson, supra* note 124 at para 41 and 62, in which the Court considered application of the *Department of Veterans Affairs Act*, RSC 1985, c. V-1, ss. 5(*d*), 5.1(4) [ad. 1990, c. 43, s. 2].
[135] Hogg, *Constitutional Law of Canada*, *supra* note 127 at 36-12.
[136] See R W Bauman, "Property Rights in the Canadian Constitutional Context" (1992) 8 South African Journal Human Rights 344.
[137] Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26:3 Alta L Rev 548 at 550 [McBean, "Implications of Entrenching Property Rights"].
[138] Ziff, "Taking Liberties," *supra* note 18 at 342.
[139] *Ibid* at 342.
[140] See Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 Can J Pol Sci 309; Ziff, "Taking Liberties," *supra* note 18 at 342.
[141] McBean, "Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" *supra* note 137.
[142] *Ibid* at 549.

McBean goes on to argue that these fears were unfounded and that entrenching property in the Constitution would serve to protect people from deprivation of property, both traditional forms of real and tangible property and less traditional types of property, which would include properties such as economic interests.

The decision not to entrench property rights in the Canadian Constitution has not been revisited.[143] Instead, aspects of property rights can be and are adjudicated through jurisprudence. The ongoing importance of common law to regulation and protection of property rights is important because by some estimates "[d]espite not enjoying constitutional protection, rights associated with ownership of property, especially real property, have generally been well protected by common law courts."[144] Ziff argues that in fact there are many aspects of property that are protected by the Constitution, citing aspects such as prohibitions on search and seizure and Sunday shopping rights on the basis of freedom of religion.[145]

The perspective that property interests can be well served through non-constitutional law processes and in some circumstances *better* served is captured by Jennifer Nedelsky.[146] Nedelsky

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[143] See e.g. Ziff, "Taking Liberties," *supra* note 18; Christie, "A Tale of Three Takings," *supra* note 126; Young, "Canadian Law of Constructive Expropriation," *supra* note 126; Schwartz & Bueckert, "Regulatory Takings in Canada," *supra* note 126. A notable exception to this is the work of Russell Brown, who would later be appointed to the Supreme Court of Canada, serving from 2015–2023. See Brown, "Constructive Taking," *supra* note 87. Note that internationally the differences borne of the different constitutional statuses are well noted. A comparative law piece considering compensation rights in the United States compared to other jurisdictions noted Canada as having "narrow compensation rights." See Rachelle Alterman, "The U.S. Regulatory Takings Debate Through an International Lens" (2010) 42 Urban L Rev 331 at 339.

[144] Young, "Canadian Law of Constructive Expropriation," *supra* note 126 at 345.

[145] Ziff, "Taking Liberties," *supra* note 18 at 342. To be contrasted with this is Russell Brown and Graham Purse, who argue that there are numerous limitations on property rights caused by a great diversity of areas of law. These include searches without warrants, taxes, limitations on causes of action and seizures, and so on. See Russell Brown & Graham Purse, "Regulation of Property Use and Regulatory Takings in Alberta" (2012) Can Const Foundation.

[146] Jennifer Nedelsky, "Should Property Be Constitutionalized? A Relational and Comparative Approach" in GE van Maanen & AJ van der Walt, eds, *Property Law on the Threshold of the 21st Century* (Antwerp: Maklu, 1996) 417 [Nedelsky, "Should Property Be Constitutionalized?"].

is not a strong proponent of private property rights.[147] Rather than protecting a fixed set of privately held property interests, Nedelsky suggests that the constitutional status of property represents who is the arbiter of expropriation. Nedelsky writes that the constitutionalizing of property

> *i*s *an extremely powerful symbol* of the public/private divide which designates governmental measures affecting property as public "interferences" with a sacred private realm—which then bear the burden of justification.[148]

Inclusion of property in a constitution would reinforce private property as something that ought to be protected from regulation. However, at the same time, by keeping property out of the Constitution, the Canadian framework reserves interpretation of central aspects of expropriation law for the courts, such as the meanings of "taking," "acquisition," "due process," or "fundamental justice" as they relate to property.[149] These aspects are central to identifying and assessing claims to expropriation. Nedelsky argues that by constitutionalizing property rights, an unsolvable conflict is created in how property is to be managed, whereby the components of property are considered as between the public and the private. Therefore, by retaining control of property within the common law system, flexibility is maintained as property interests are assessed, and the obligations that exist as between private and public interests in that property can be interrogated anew as they relate to a particular property parcel. It is through the common law approach to assessing expropriation that publicly held interests in property can even be recognized and the allocation of rights and burdens as between private individuals and the broader public interrogated.

The lack of constitutional protection for property may be considered a shortcoming to the Canadian regime as compared to the constitutional protection afforded property holders in other jurisdictions. An illustrative example of the disproportionate impact the Canadian approach can

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[147] See e.g. Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2012) [Nedelsky, *Law's Relations*].
[148] Nedelsky, "Should Property Be Constitutionalized?" *supra* note 146 at 422.
[149] Christie, "A Tale of Three Takings," *supra* note 126 at 373–74.

have is found in the North American Free Trade Agreement (NAFTA),[150] which was replaced with the Canada–United States–Mexico Agreement (CUSMA). Canada became a party to the original NAFTA in 1994,[151] and then a signatory to CUSMA (or NAFTA 2) in 2018.[152]

In the original NAFTA, article 1110 provided protection for foreign-owned companies against *de facto* expropriation by providing that signatory states can be held liable for significant monetary penalties in relevant circumstances. In a 2000 arbitration, *Metalclad Corporation v United Mexican States*,[153] consideration and application of article 1110 of NAFTA resulted in an award against the Mexican government who were ordered to pay a US company damages on the basis of expropriation for preventing them from establishing a hazardous waste facility when all but the final permit had been obtained.[154] From the Canadian perspective, the *Metalclad* decision highlighted the incongruity between protections available to Canadian companies operating in Canada versus US or Mexican companies operating in Canada.[155] The provision in the original NAFTA had the impact of protecting property rights for foreign companies, even though Canadian companies did not receive the same level of protection for private property. This discrepancy was resolved with the advent of CUSMA, because in the new agreement Canada has withdrawn from the arbitration component that was contained in article 1110.[156] Thus with the adoption of this

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[150] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No *NAFTA*2.

[151] See Raymond E Young, "A Canadian Commentary on Constructive Expropriation under NAFTA 1110" (2006) 43 Alta L Rev 1001 [Young, "Canadian Commentary"]; Ziff, "Taking Liberties," *supra* note 18; Russell Brown, "Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience" (2009) 1 Int'l J L in Built Env't 179.

[152] Government of Canada, "A New Canada-United States-Mexico Agreement," online: <international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng>.

[153] *Metalclad Corp v United Mexican States,* International Centre for Settlement of Investment Disputes Case No ARB(AF)/97/1; (2000), 119 ILR 615, online: <italaw.com/sites/default/files/case-documents/ita0510.pdf> [perma.cc/C4RA-MRU9].

[154] *Ibid* at paras 103–05 and 131.

[155] Young, "Canadian Commentary," *supra* note 151.

[156] Which allows for expropriation claims to be brought and was used in the *Metalclad* decision. See Daniel Garcia-Barragan, Alexandra Mitretodis & Andrew Tuck, "The New NAFTA: Scaled-Back Arbitration in the USMCA" (2019) 36:6 J Int'l Arb 739.

second regional trade agreement, Canada has not retained the obligations for compensation imposed by the arbitration components of NAFTA.

The approach that Canada took to CUSMA is in accordance with the way in which property is protected in Canada domestically. The lack of constitutional protection means that courts maintain the jurisdiction to assess property rights, as was seen in the *Authorson* decision. While Parliament and regulatory bodies retain jurisdiction to adopt a manner of measures without being limited to the ways in which property holders are impacted and would possibly—within a system that protects property rights such as the United States—be compensated. The result of this approach is that hard lines around property titles are not directly created within the Canadian system. In turn, this means that a hard line between what is considered private law and public law as it relates to property is not created, and with that flexibility to how property rights are recognized and protected within Canada is retained.

3.3.4.2. Flexibility in the Content of Property Law

The theory of a "bundle of rights" as a way of understanding the content of property inherently lends itself to the possibility of the inclusion of more perspectives on the definitional content of property. The bundle of rights approach holds that a reference to a "property right" is not an indication of the "thing" that is the subject of property, but instead is a reference to the bundle of rights that are associated with that "thing." The bundle of rights commonly associated with property will include rights such as possession, ability to exclude others, access, quiet enjoyment, disposition, and others. Not all rights need be present for a property right to be recognized, nor do specific rights attach to specific types of properties. By some accounts it is said that the right to exclude is the most important right that exists within the bundle.[157] Other accounts

[157] See e.g. Thomas W Merrill, "Property and the Right to Exclude" (1998) 77 Neb L Rev 730.

highlight that the concept of "property" is simply nomenclature for recognition of rights that exist in a given context and as such the definitional content of a property right can only be identified with reference to the specific "thing," which is understood in relation to other rights, obligations, and relationships. The notion of there existing a bundle of rights that can arise in different ways with different formulations indicates a deep flexibility in how property law is understood and with that the potential for including recognition of different geographic contexts.

Margaret Davies' insights about the importance of interrogating property as a construct that is important within law highlights that the meaning of property is a contested subject.[158] The focus is not on producing a singular definition of the content of property, but instead to reflect on the circumstances in which property as a construct is recognized. There are a number of writers who have reflected on property as constituted through relationships: Carol Rose on the importance of environment and community to developing meaning in property;[159] Gregory S Alexander, who argues that property is as much a result of collective governance as it is traditional notions of exclusion within property law;[160] Eduardo M Peñalver's work on memory as a facet of property, even though this is not always captured or even appreciated within property law;[161] Nicholas Blomley's work on spatiality and property, arguing that property holds particular significance within Western liberal thought as an ideal toward which society reaches and which law protects;[162]

[158] See Davies, *Property*, *supra* note 3.

[159] See e.g. Carol Rose, "Canons of Property Talk, or Blackstone's Anxiety" (1998–1999) 198 Yale LJ 601; Carol M Rose, "Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory" (1990) 2 Yale JL & Human 37.

[160] See Gregory S Alexander, "Governance Property" (2012) 160:7 U Pa L Rev 1853.

[161] Eduardo M Peñalver, "Property's Memories" (2011–2012) 80:3 Fordham L Rev 1071 [Peñalver, "Property's Memories"]; Gregory S Alexander & Eduardo M Peñalver, "Properties of Community" (2009) 10 Theor Inq L 127.

[162] Nicholas Blomley, "The Territory of Property" (2016) 40:5 Prog Hum Geog 593; Nicholas Blomley, "Making Private Property: Enclosure, Common Right and the Work of Hedges" (2007) 18:1 Rural Hist 1; Nicholas Blomley, "The Right to Pass Freely: Circulation, Begging, and the Bounded Self" (2010) 19:3 Soc & Leg Stud 331.

and Sarah Keenan's work on the importance of property outsiders to re-create spaces of belonging.[163] Common across these perspectives is an acceptance of the cultural importance of property, which exists concomitant with and through property law principles. Cultural aspects of property are an essential part of regulation of property use.

Of particular relevance to the interrogation of "property as place" is an interpretation of property as constituted through relationships. Jennifer Nedelsky foregrounds the importance of relationships to the constitution of property when she argues that a relational analysis provides a framework for identifying what is really at stake in cases and for making judgements about the relationships involved. [164] Understanding property through the lens of interrelations in property structures is not to construct a "utopian" idea of how property can operate, but instead recognizes that property structures already operate in a manner that has a level of contingency. This insight has been particularly influential to feminist legal thought, which highlights that relationships of contingency and belonging are not always positive and thus can create contexts of dependency. Nedelsky writes:

> On a relational view, the persons whose rights and well-being are at stake are constituted by their relationships such that it is only in the context of those relationships that one can understand how to foster their capacities, define and protect their rights, or promote their well-being. This is a very different starting point from simple plurality of independent beings whose inherent rights and obligations mediate their encounters with each other.[165]

In contrast to an individualized account of entitlements, rights, and obligations, including exclusion, as central to identifying property, this is a rethinking of property from a relational perspective. A relational view of property recognizes property rights, entitlements, and obligations

[163] Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Abingdon, UK: Routledge, 2015).
[164] Nedelsky, *Law's Relations*, *supra* note 147 at 78.
[165] *Ibid* at 121.

as constituted through people who are constitutively interrelated, while simultaneously property relationships are obscured by legal structures that rely on the notion of autonomous and bounded individuals. Reconsidering property as constituted through relationships affords the potential for interrogation of access to property and requires consideration of the connection between individual rights and the collective.

Negative aspects of relational property remain. Throughout her monograph, Davies highlights two examples of historical aspects of property that have an ongoing impact both socially and legally: (1) a historically gendered approach to property that requires marriage property be held by men even if the property was held by the wife before the marriage,[166] and (2) a racialized approach to property that prioritizes security of white ownership, often disallowing persons of African descendancy (and other minorities) from owning property, [167] and even creating propertization through the system of slavery.[168] Though property laws containing racialized or gendered discrimination have begun to be addressed, [169] particularly to remove overt discrimination, Davies writes that the impacts within political and social aspects of property too often remain.

The relational reading of how place matters highlights that places are constituted as much through those who are outside as those who are inside.[170] For example, Doreen Massey's spatial reading of geographic enterprise requires particular attention to notions of power and vulnerability, which she argues are revealed through a relational approach according to which that which is

[166] Davies, *Property, supra* note 3.
[167] Peñalver, "Property's Memories," *supra* note 161.
[168] See Cheryl I Harris, "Whiteness as Property" (1993) 106:8 Harv L Rev 1707.
[169] While it has begun to be addressed, there is a lack of clarity or uniformity. Work is ongoing to unearth either overt discrimination in property rules or discriminatory impacts.
[170] Cresswell, *Geographical Thought, supra* note 8 at 220–21.

outside of a particular geography are as important as that which is inside it. Massey speaks about this relational quality to place as part of identify formation:

> No longer is identity (on the broader canvas, "entities") to be theorized as an internally coherent bounded discreteness. Rather it is conceptualized relationally—with implications both internal (in terms of fragmentation, hybridity, decentring) and external (in terms of the extension of connectivity).[171]

This comment is written as a reflection on spatial arrangements as they relate to geopolitical sentiment, and Massey argues that geographic approaches of regionalism are reactionary toward existing structures such as clear boundaries, deep roots, and singular identities—for example, national identities being attached to bounded territories. Thus, relations of property require there to be outsiders and insiders who hold different interests and together formulate property structures. These relationships will arise situationally depending on their connections to specific locations.

3.4. A RECONFIGURATION: PLACE WITHIN EXPROPRIATION LAW

The structures that guide property law in Canada—the constitutional framework and the common law approach to defining property, which is guided by the principle of a bundle of rights—afford a flexibility to the institution of property that can adapt to changing priorities and circumstances. Thus, it is possible to broaden the nature and variety of considerations that make their way into the expropriation analysis. However, the question remains: What can explicit mention of place and space offer to the analysis of expropriation? Here I will briefly answer this question by exploring what is missing from the law of expropriation currently and provide some examples of how place has at times been addressed in different expropriation actions. It is important to remember the interpretative aspects to both geography and law as they create spatialized processes in place.

[171] Doreen Massey, "Landscape as a Provocation—Reflections on Moving Mountains" (2006) 11 J Material Culture 33 at 37.

Processes of cartography, geographic interpretation, legal adjudication, and the creation of property systems are all spatial institutions that serve to create place. The insights from spatial theory would highlight that place is more than the singularity of any of these institutions, and instead includes political, social, and cultural aspects, which together operate to create meaning in a location. Attention to the importance of place would highlight that the institution of property is an aspect of spatiality and one that incorporates the physical geography, legal property, as well as cultural meaning that is attached to property in location.

3.4.1. Administrative Law Distractions

Though place and its location is a central component of the importance attached to property, it is not central to an analysis of expropriation. Expropriation was long a creature of common law that is now codified in statute, and as such it is framed as an administrative action. Or to state this another way, expropriation sits in the areas of property law and administrative law.[172] As a creature of statute, expropriation is subject to the limits and principles of construction as to interpreting the statute. Typically expropriation statutes will not provide a detailed definition of "expropriation," nor indeed of "takings" or "*de facto* expropriation," which remain creatures of the common law. For example, the federal *Expropriation Act* simply provides the following information about the meaning of expropriation:

> *s 2(1) expropriated interest or right* means any estate, interest or right that has been lost, in whole or in part, by the registration of a notice of confirmation.

This definition does not provide a detailed explanation as to the meaning of expropriation from a definitional perspective nor any guiding information as to the content of and goals for expropriation. An attempt to provide definitional content to the interpretation of expropriation by

[172] Taggart, "Expropriation, Public Purpose, and the Constitution," *supra* note 111 at 94–95.

way of consideration of its foundational components was expressly rejected by the British Columbia Supreme Court. In *Cream Silver Mines v British Columbia*, the court examined and rejected claims as to expropriation of a mineral claim caused by newly introduced park regulations that prohibited mining. The court wrote:

> To my mind, the respondent is attempting to turn a rule of statutory construction into a positive rule of law by giving to such words as "taking" and "property", as those words appear in the authorities … the status to which they would be entitled were they contained in legislation. If [this] were accepted, the Crown would be, in law, obliged to pay compensation for all "takings", for all types of "property", no matter what the legal nature is of that "property" and no matter how the "taking" occurs, unless the enabling legislation expressly denies compensation.[173]

This excerpt indicates two concerns from the court. First, it shows that the principle of expropriation is of limited application: It does not allow for all takings and all properties to be recognized in analysis. Instead, the principle serves an ameliorating role as it considers thresholds for which compensation may be given or adjusted. Second, the excerpt highlights the important role of statutory interpretation within the application of the principle of expropriation. The claimants in the *Cream Silver Mines* decision were unsuccessful in their claim to expropriation because the court found the property right at issue was not within the contemplation of the expropriation statute. The property status of a mineral claim was the central aspect of analysis and was discussed through close inspection of legislative development.[174]

Instead of providing details as to the definition and content of expropriation, statutes will typically contain a detailed framework through which compensation is considered, as well as the administrative process for giving notice to property holders that they are subject to the government power of expropriation. For assessing compensation rights, one needs to turn to the applicable expropriation that contains the procedural requirements for carrying out an expropriation. The

[173] *Cream Silver Mines v British Columbia*, 1993 CanLII 2878 (BCCA) at para 19.
[174] *Ibid* at para 6.

exact approach will vary depending on the province or territory. In Ontario, for example, compensation is to be calculated based on four factors: (1) the market value of the land; (2) damages attributable to disturbance; (3) damages for injurious affection; and (4) any special difficulties in relocation.[175] This can relate to the entirety of a property parcel, or it may related to the acquisition of part of the parcel lot.[176]

The administrative law component of expropriation is typified by analysis that focuses on the extent to which compensation is owed and how precisely it appears in statute. A series of key cases have guided the approach taken by courts as to the payment of compensation. In *Sisters of Charity of Rockingham v The King*, Lord Parmoor noted:

> Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected," unless he can establish a statutory right.[177]

Coming to the opposite conclusion in *AG v DeKeyser's Royal Hotel*, Lord Atkinson held:

> The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.[178]

These two decisions from the House of Lords in the United Kingdom have been influential in Canada[179] and are the basis for the current presumption that holds compensation will be owed for an expropriation unless legislation explicitly prohibits it.[180] The Manitoba Court of Appeal summarized the rule as follows:

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[175] See *Expropriations Act*, RSO 1990, c E.26, s 13(2).
[176] Kenneth J Boyd, *Expropriation in Canada* (Aurora, Ont: Canada Law Book, 1988) at 25–28.
[177] *Sisters of Charity of Rockingham v The King*, [1922] 2 AC 315 at 322 (PC).
[178] *AG v DeKeyser's Royal Hotel*, [1920] AC 508 (HL) at 542.
[179] For example, these two passages were relied on in *Nilsson*, *supra* note 95 at para 46.
[180] See *Progressive Developments (1978) Ltd v Winnipeg (City of), Progressive developments (1978) Ltd v Winnipeg (city)* (1982), 1982 CanLII 2978 (MBCA), leave to appeal to SCC refused, (1983) 27 SCR 142. See also Todd, *The Law of Expropriation and Compensation in Canada*, *supra* note 80 at 34–35, where the author also notes that, the lack of constitutional requirement for compensation notwithstanding, rules of statutory construction raise the presumption in favour of full compensation unless clearly indicated otherwise.

> Unless the Legislature uses explicit language to deny compensation, I think it should be held that they are entitled to receive compensation. It is not necessary in this case to import special machinery for assessing the compensation; it is here a question of the meaning to be given to the term "interest in land" as used ... in the Act.[181]

Hogg's *Constitutional Law of Canada* confirms this where the rule is summarized as being "as a rule of statutory interpretation in Anglo-Canadian law that a statute which takes private property is to be read as implicitly requiring that compensation be paid to the private owner."[182] The lack of constitutional requirement for compensation notwithstanding, rules of statutory construction raise the presumption in favour of full compensation unless clearly indicated otherwise.[183]

While statutory interpretation is an important aspect of legal analysis and central for areas of law that are codified by statute, this can have the impact of limiting the scope of the legal inquiry. For the law of expropriation, this can serve to limit consideration of common law principles that underpin expropriation. This point is particularly salient in relation to *de facto* expropriation, which is part of the common law and remains undefined in statute.

3.4.2. *De Facto* Expropriation and Place

Administrative law raises different concerns to those that may be considered within the principle of expropriation, and broadly in property law. While administrative law will raise issues of statutory interpretation and procedure under the applicable legislation, the principle of expropriation will raise issues of managing government regulation with private property title. Taking a view of property that recognizes the importance placed in property title, the cultural and historical meaning attached to propertized locations, and the broader societal context in which a singular property lot is found, highlights that instances of expropriation, both *de jure* and *de facto*,

[181] *Progressive Developments (1978) Ltd, ibid* at 412 (Justice Sullivan).
[182] Hogg, *Constitutional Law of Canada*, *supra* note 127 at 29-11.
[183] Todd, *The Law of Expropriation and Compensation in Canada*, *supra* note 80 at 34–35.

are critical moments when place is altered or changed in some way. This approach recognizes place as an integral part that is animated through the law of expropriation.

With respect to *de facto* expropriation there has been an explicit limitation on how "place" is captured in the test. The test for *de facto* expropriation requires that the government body acquire the property interest. As a reminder, the rule for *de facto* expropriation in Canada is a two-part test. For a finding in *de facto* expropriation, it is required that there be (1) an acquisition of a beneficial interest in the property or flowing from it and (2) removal of all reasonable uses of the property.[184] This rule articulates a requirement that the property interest has transferred from one prior owner to a second owner, the government. The "taking" component of *de facto* expropriation is the point that is most central to analysis of government action and its impact on privately held property. Lord MacDermott in *Ulster Transport Authority v James Brown & Sons Ltd* reflected on the role of "taking" within *de facto* expropriation analysis:

> The next question is whether the effect of the relevant prohibition is "to take" the property thus lost. This verb was the subject of much argument, most of it referable to two submissions advanced on behalf of the appellants as follows: (1) "to take" means to acquire or take over and thus signifies a transfer or passing of property from one to another, in contra-distinction to a take away without acquisition, as by dissipation or destruction; and (2) a mere prohibition is not a taking whatever else "to take" may connote.[185]

This comment indicates the centrality of the idea of "taking" to consideration of expropriation as an indication of something changing hands from one person to another. Or to state this another way, mere dissipation of a property interest through regulation that limits it will not allow for a finding of *de facto* expropriation. This requirement that there be an acquisition of the same kind of property by the government body undertaking the expropriative act also applies in Canada.

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[184] See *Mariner Real Estate* (NSCA), *supra* note 19 at para 67; *Canada Pacific Railway, supra* note 95 at para 30; *Manitoba Fisheries Ltd v The Queen*, 1978 CanLII 22 (SCC); *Tener*, *supra* note 90.

[185] *Ulster Transport Authority v James Brown & Sons Ltd*, [1953] NI 79 at 111 (Lord MacDermott, LCJ).

The centrality of government acquisition has been upheld by the Supreme Court in *Canadian Pacific Railway v Canada*.[186] In that case, the respondents owned a corridor of land running partly through downtown Vancouver that was used for a railway. CPR had ceased operation of the railway along this track in 1999 and had put forward proposals to develop the corridor for commercial and residential purposes. However, in 2000 the City of Vancouver adopted the *Arbutus Corridor Official Development Plan By-Law*,[187] which designated the corridor as a public thoroughfare for transportation and greenways. The impact of the development plan was to freeze the development potential of the strip of land, thus limiting the potential use of the property for the title holders.

Like the preceding jurisprudence, the court's analysis in the case was largely taken up with statutory interpretation and administrative law, as the court assessed the city's enabling statute and related regulatory framework through which the city adopted the development plan. After finding that the city was within its statutory rights to adopt the development plan, the court adopted the two-part common law test for *de facto* expropriation in Canada. In a unanimous decision and with analysis that only spans 12 paragraphs of the decision, the court found that (1) the Crown had not acquired beneficial interest in the property and (2) nor were all reasonable uses of the property removed.[188] Thus, neither part of the test had been met and there had been no *de facto* expropriation. As to the first part of the test, CPR had argued that the beneficial interest acquired by the Crown was the creation of a *de facto* park by way of the development plan. In the court's analysis there had not been the acquisition of a beneficial interest of this nature because the

[186] *Canada Pacific Railway*, *supra* note 95. See Harris, "A Railway, a City, and the Public Regulation of Private Property," *supra* note 126 at 455.
[187] City of Vancouver, By-Law No 8249, *Arbutus Corridor Official Development Plan*, 25 July 2000 [*Arbutus Corridor Official Development Plan*].
[188] *Canada Pacific Railway*, *supra* note 95 at para 31.

development plan only represented a requirement that the land be developed according to its terms. Chief Justice McLachlin wrote:

> The City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land.[189]

In the development plan by-law, there was no articulation of a specific property right gained by the city, and accordingly the court said there was no beneficial acquisition of the property.

3.4.3. *De Facto* Expropriation in *Annapolis v Halifax*

The most recent decision on *de facto* expropriation is the 2022 decision *Annapolis Group Inc v Halifax Regional Municipality*.[190] The facts are as follows: Annapolis Group Inc [Annapolis] acquired 965 acres of land over time starting in the 1950s.[191] Annapolis had the intention of developing the lands. In 2006 Halifax adopted the "Regional Municipal Planning Strategy" to guide land development, which zoned the lands as urban settlement and urban reserve. In turn, for Annapolis to develop their lands, Halifax had to begin a secondary planning process to amend the applicable by-law. Halifax refused to engage the secondary planning process, and Annapolis sued alleging expropriation, tort of misfeasance, and unjust enrichment.[192] At issue before the Supreme Court was the matter of expropriation. Concerning *de facto* expropriation ("constructive taking"), Annapolis argued that Halifax had deprived them of all reasonable and economic uses of their lands, constituting an expropriation.[193] In particular, Annapolis alleged that Halifax created a public park over part of their lands, encouraging members of the public to hike, cycle, canoe, camp, and swim on the lands.[194] In response, Halifax sought partial summary judgment to throw out

[189] *Ibid* at para 33.
[190] *Annapolis v Halifax*, *supra* note 88.
[191] *Ibid* at para 5.
[192] *Ibid* at para 8.
[193] *Ibid* at para 9.
[194] *Ibid* at para 9.

Annapolis' claim concerning expropriation, arguing that as a matter of law an expropriation cannot result because of a change in zoning and related land-use laws.[195]

In *Annapolis v Halifax*, Annapolis was successful. The Supreme Court overturned the finding of the Nova Scotia Court of Appeal[196] and sent the matter back for trial. The slim majority[197] sought to make three significant changes to the law. First, the majority adopted the term "constructive takings" when it wrote of *de facto* expropriation because in their opinion it more accurately captures the nature of the government action at issue.[198] Second, the majority found that the intention of public authority was relevant because "the intention to take constructively, if proven by the claimant, may support a finding that the landowner has lost all reasonable uses of their land."[199] Third, the majority kept the general framework of the common law test for *de facto* expropriation but broadened it. They restated the test as follows:

1) A beneficial interest—understood as an advantage—in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource.
2) The impugned regulatory measure removes all reasonable uses of the private property at issue.[200]

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[195] *Ibid* at para 10.
[196] *Halifax Regional Municipality v Annapolis,* 2021 NSCA 3 [*HRA v Annapolis*].
[197] This was a 5–4 decision. Justices Côté and Brown wrote for the majority (with Chief Justice Wagner and Justices Moldaver and Rowe concurring). Justices Kasirer and Jamal wrote for the minority (with Justices Karakatsanis and Martin concurring).
[198] *Annapolis v Halifax*, *supra* note 88 at para 17. The majority cited a work by Malcolm Lavoie in support of their choice to alter the language used in this area of law. Lavoie's work is an outlier in the area of expropriation in its adoption of the term "constructive takings." See Malcolm Lavoie, "Canadian Common Law and Civil Law Approaches to Constructive Takings: A Comparative Economic Perspective" (2010) 42 Ottawa L Rev 229.
[199] *Annapolis v Halifax*, *supra* note 88 at para 53.
[200] *Ibid* at para 4.

The minority did not agree with any of these findings.[201]

Annapolis v Halifax may have broadened the test for *de facto* expropriation to include some measure of place in legal analysis, though this was not articulated by the majority in those words. The first part of the test for *de facto* expropriation as articulated by the majority provides that a "constructive taking" may be found to have occurred if a public authority attains some "advantage from the property … which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource."[202] This articulation of the first part of the test for *de facto* expropriation broadens the early approach to allow for circumstances where the property has not been taken by the government. This change is doctrinally sound because it maintains the distinction between *de facto* and *de jure* expropriation by allowing for expropriation by acquisition of an "advantage" flowing from the property (instead of requiring a proprietary interest be acquired).[203] The broadening of the first part of the test, though strongly rejected by the minority, is a welcome correction of the record produced by the lower court, where the Nova Scotia Court of Appeal wrote the first requirement in the following way:

> The acquisition must be one that confers a beneficial interest on the authority alleged to have expropriated the land. Land must actually be taken from an owner and acquired by the authority.[204]

This statement of law from the lower court creates the image of a property interest being transferred from one property owner to a second owner, which is a description of a *de jure* expropriation, not a *de facto* expropriation. It relies on a notion of property interest that is singular, in that the property

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[201] *Ibid* at paras 82–83 (where the initial adoption of the language of "*de facto*" occurred, which was then used throughout); paras 85, 100–03 (firm rejection of the first part of the test); para 119 (rejection of the view that the intention of the public authority is relevant to *de facto* expropriation).
[202] *Ibid* at para 4.
[203] *Ibid* at paras 39–40; Brown, "Constructive Taking," *supra* note 87; Hogg, *Constitutional Law*, *supra* note 127 at 29-13.
[204] *HRA v Annapolis*, *supra* note 196 at para 71.

interest is the same even though there are different holders of the right. This approach sees property as self-contained, bounded, and identifiable as a singular type of property interest. But it does not account for differences in how property is experienced depending on subjective experience. That is to say, it does not capture the relational nature of property.

One implication of a subjective right to property is that when a property (or right) is used by one person in a particular way, that right may no longer exist when that thing is in the hands of another person. For example, there may be property interests that are dependent on receiving permission through regulatory processes; a removal of those regulatory processes does not mean they will be transferred to the state. A regulatory process that serves to create or limit a property interest relates to the rights of the property holder, and by its very nature they do not exist when held by others, particularly the government. It is the government here that is in the position of control, whereby they are confirming a property interest or not. The property interest is not a static, independent thing, but instead is created through relational government processes.

The nature of regulatory frameworks related to property is that they rely on the creation (and removal) of place-based interests in that property. The ways in which places are used can be allowed or removed through government assessment. Given this, it seems illogical or even legally impossible to require that the government acquire the same property interest that has been removed or limited when that property interest is specific to that property and for that holder of the property.

This brings me to the final point of interest I have in the finding in *Annapolis v Halifax,* which is the possibility that this broadening raises for incorporating a sense of place into assessments of the interests that exist in parcels of property. An advantage that flows from property would seem to capture more than the property interest itself, and this language recognizes that property interests are more than the title. The slim majority in *Annapolis v Halifax* did not provide

a definition of an "advantage," rather they explained that the beneficial interest and the advantage flowing from it is rooted in the "domain of equity."[205] Though not providing as much direction as might be needed to better understand how advantages might exist in relation to property, grounding it in principles of equity better reflects the realities of property as place by including aspects of location, the personal, histories, and the present.

3.4.4. The Potential for Place: Two Vignettes

"Place" as a concept is not explicitly incorporated into the law of expropriation, nor indeed into definitions of or laws relating to property. The concepts contained within geographic thought as they relate to place entail ideas of location, scale, relationship to like and dissimilar places, memories, histories of use, creation of and reliance on property systems, and others. Geographic thought highlights components of property that hold meaning for property holders in a way that considers ideas that exist beyond the paper title. Though place is an inherent part of property, expropriation does not explicitly refer to place, nor to the role of expropriation as a tool that operates to make changes to the configuration of place. This does not, however, mean that place is not implicitly recognized as important within cases that have considered *de facto* expropriation. Below I present two vignettes on place as they have appeared in case law. The first case presents an account of place from the Supreme Court, and the second considers an account of place from the US Supreme Court. The representations of place contained in these case reports invite consideration of the importance of the specific location in issue and how it is relevant to an analysis of the claims made in *de facto* expropriation and takings, respectively.

3.4.3.1. *Canada Pacific Railway v Vancouver*

[205] *Annapolis v Halifax*, *supra* note 88 at paras 25, 38.

Canadian Pacific Railway Co v Vancouver (City) is an example of the way in which place can appear in a case report as part of the context for the matter while not being used to guide application of *de facto* expropriation. In this case, British Columbia granted the plaintiff a corridor of land on which to build a railway line. This railway line was in operation until 1999, and in the years leading up to the legal action the corridor of land had become unused by the railway company. Meanwhile, the City of Vancouver adopted by by-law an "Official Development Plan"[206] that designated the corridor as a public thoroughfare for transportation. This by-law had the impact of freezing development along the corridor of land, thus removing development opportunities for the property title holders and limiting the use of their property to non-economic ones. The action in *de facto* expropriation failed on the basis that the city did not acquire a beneficial interest in the land, nor were all reasonable uses removed, as is required under the respective arms of the two-part test. Regardless of the application of the *de facto* expropriation test, the court found that the enabling statute for the by-law, the Vancouver Charter,[207] effectively ousted operation of the remedy of *de facto* expropriation because it provided that the effects of a by-law could not amount to an expropriation.[208]

The case report for *Canadian Pacific Railway* starts with some observations about the places around the railway line, which goes through Arbutus Corridor, which was impacted by the by-law. The case report begins with the following paragraph, written by Chief Justice Beverly McLachlin:

> Over a century ago, in 1886, the provincial Crown granted the Canadian Pacific Railway Company ("CPR") a corridor of land for the construction of a railway line from False Creek, in the City of Vancouver ("City"), south to Steveston, on Lulu Island (named after Miss Lulu Sweet, a young actress in the first theatrical company

[206] *Arbutus Corridor Official Development Plan, supra* note 180.
[207] *Vancouver Charter*, SBC 1953, c 55, s 569.
[208] *Canadian Pacific Railway, supra* note 95 at para 19.

> to visit British Columbia). It is this corridor of land, now known as the "Arbutus Corridor", that lies at the heart of this appeal.

With these opening sentences there is a clear effort to convey information about the Arbutus Corridor and to do so by capturing the location at the "heart" of the decision, which is portrayed through a descriptive lens. The context of the Arbutus Corridor traverses back to 1886, as the court explains that the foundation for the property title held by the Canadian Pacific Railway was a Crown grant of a land patent. The Chief Justice then explains that the name of Lulu Island comes from a nineteenth-century actress named Lulu Sweet who visited British Columbia.

These considerations of the ways in which the Arbutus Corridor were created as a place is interesting and provides some context of the corridor of land most immediately impacted by the by-law. However, the descriptive approach raises questions about the meaning of these facts and the intent of the court in starting with them. First, it confirms that CPR has legal title to the location, but it is done by reference to the legal genesis of that title, which was a colonial land grant. It is not clear why this piece of historicism is relevant to explaining that CPR indeed holds valid legal title. Reference to colonial land grants and railway lines provides clarity relating to where a legal property title comes from, but it also provides the foundations for a distinctly critical approach to interrogating the ways in which title holders receive title, particularly when the title is held by a corporate entity.[209] Second, this paragraph brings into the historical context an island at the end of the Arbutus Corridor and provides information about an actress after whom it is named. The intent behind sharing this piece of information is puzzling, and insofar as the *de facto* expropriation

[209] The centrality of railway lines to colonial expansion have been discussed elsewhere. See e.g. Ned Blackhawk, "The Tracks of Settler Colonialism" (2019) 47:4 Rev in Am Hist 564; Randy W Widdis, "Railways and Borderland Spaces: The Canada-US Case" (2019) 63:1 Can Geog 11; Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002); David Vogt & David Alexander Gamble, "'You Don't Suppose the Dominion Government Wants to Cheat the Indians?': The Grand Trunk Pacific Railway and the Fort George Reserve, 1908–12," (2010) 166 BC Stud 55; Kurt Korneski, "Race, Gender, Class and Colonial Nationalism: Railway Development in Newfoundland, 1881–1898" (2008) 62 Labour 79–107.

matter is concerned it adds nothing to the legal analysis of the test strictly construed. Instead, this piece of information raises (for me) questions about the interest in this historical figure for the communities now occupying Lulu Island, or more directly the interest in the work of Lulu Sweet by the Chief Justice herself.[210] It might be indicating the ways in which the Arbutus Corridor is linked to moments in history of importance to Vancouver and its residents, or it might be a claim to the place of Lulu Island[211] as something that is important beyond the land grant to the benefit of the CPR.

For both of these points—the initial land grant and the theatre tour by a nineteenth-century actress—the interpretive implications are many. The points highlighted by the Chief Justice indicate an interest in engaging with the places of the Arbutus Corridor and, remarkably, indicate a willingness to bring in historical tidbits that or may not be part of local knowledge for Vancouver residents. This first step is indicative of a place-based analysis, though not specifically named as such. In particular, it acknowledges the link between memory and place, as "one of the primary ways in which memories are constituted is through the production of place."[212] A site such as a corridor of land, and particularly a corridor used for a railway, can most certainly be a location that holds particular importance, which may or may not be recognized in the materiality of that location.[213] However, the facts contained in the case writeup are piecemeal, and the extent to which they are reflective of the many different aspects of the places related to or impacted by the *de facto* expropriation claim is unclear. I carried out an extensive document search on the topic of Lulu Island, the train service, and histories of colonial Vancouver trying to understand what was

[210] For a summary of the naming of Lulu Island, see Christine Hagemoen, "How Lulu Island Got Its Sweet Name," *Scout Magazine* (5 December 2017), online: <scoutmagazine.ca> [perma.cc/UV23-H5XK].
[211] Richmond, BC, is located on Lulu Island.
[212] Cresswell, *Place, supra* note 9 at 85.
[213] *Ibid* at 85.

important about the information provided in the first paragraph of the *Canadian Pacific Railway* decision. I then read the Chief Justice's memoir, in which she writes about the early stages of her career in Vancouver and British Columbia to understand whether there was something personally important about this location for the chief justice. I could not find anything indicating a personal interest held by the Chief Justice other than the fact that she lived near the University of British Columbia (which is somewhat close to the Arbutus corridor) during her first teaching job, which was at the University. [214] Most definitely, they are not directly brought into the analysis of *de facto* expropriation, which is done later with very little detailed analysis.

Beyond this first paragraph there is no explanation of, or even engagement with, the ways in which the corridor as a place is used by the parties to the matter. Perspectives on place that may be relevant include the use or planned use of the corridor by CPR as the property title holder, any claims to the corridor, the current usage made of it and by whom, an account of the properties that exist along the corridor, and more. The only indication of the many people who may have an interest in how the Arbutus Corridor is used comes up in the analysis of whether the adoption of the by-law accorded with principles of procedural fairness.[215] In the process of dismissing the complaint from CPR that the hearing process failed to acknowledge that the proposed by-law had the effect of "designat[ing] private land public,"[216] it was acknowledged that notice of the proposed by-law was sent to "11,000 people in the immediate neighbourhood of the corridor."[217] For the court, this letter and the detailed content contained therein about the designation of the Arbutus Corridor for "the purposes only of transportation, including rail, transit and cycle and pedestrian

[214] See Beverly McLachlin, *Truth Be Told: My Journey through Life and Law* (Toronto: Simon & Schuster, 2019).
[215] Applying the duty of procedural fairness as outlined in *Baker v Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC).
[216] *Canadian Pacific Railway, supra* note 95 at para 41.
[217] *Ibid* at para. 41.

paths but excluding the movement of motor vehicles"[218] was enough to discharge the duty of fairness.

The analysis of whether standards of procedural fairness had been met is unrelated to the analysis of whether an expropriation had occurred. However, a principled place-based analysis would find that the perspectives of CPR as title holder complaining of the new "public" nature of their property title and of the many people impacted by the by-law designation because they live in the immediate neighbourhood of the corridor are directly relevant. The interesting first paragraph by Chief Justice McLachlin is at best a misnomer insofar as it suggests an engagement with the ways in which these interests may arise. At worst, it may indicate a personal inclination of the chief justice as to what she sees as important about places related to the Arbutus Corridor and done at the expense of those who are immediately impacted by this tract of land.

3.4.3.2. *Palazzolo v Rhode Island*

In *Palazzolo v Rhode Island*,[219] the property lot at issue was a waterfront parcel of land that was mainly constituted by salt marsh and was subject to flooding. The wet ground would have required extensive development work and infilling to build on. The waterfront area was subject to regulations for protecting coastal wetlands[220] administered by the Rhode Island Coastal Resources Management Council. The petitioner acquired the property in 1978 from their business associates, who had together purchased the property lots under the company name Shore Gardens Inc in 1959. When the petitioner acquired the property in 1978 the regulations prohibiting development of the lots had been enacted, and the petitioner's application to build a private beach club in 1985 was rejected by city council. They brought an application arguing that their Fifth Amendment

[218] *Ibid* at para. 41.
[219] 533 US 606 (2001), 150 L Ed 2d 592. Online: <law.cornell.edu> [perma.cc/Y3DW-PBT7] [*Palazzolo*].
[220] 1971 RI Pub Laws, c 279, §1 et seq regulations.

constitutional rights, which prohibit the taking of property without just compensation, had been violated.[221] They argued that the Fifth Amendment had been violated because the council's action deprived them of "all economically beneficial use" of the property, and thus required compensation.[222]

The case turned on whether a subsequent successor in title can make a "takings" claim even though the property was already subject to regulation at the time of purchase.[223] It was found that the property title holder did have standing to make the claim. To decide otherwise would have meant that "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme of unreasonable … A State would be allowed, in effect, to put an expiration date on the Takings Clause."[224]

Justice Kennedy delivered the opinion of the court. As in the *Canadian Pacific Railway* case discussed above, Justice Kennedy began his judgment with a detailed description of the locale of the petitioner's property lot. Located in the town of Westerly, Rhode Island, the town shares a border with Connecticut in the Pawcatuck River. The original inhabitants of the lands of Westerly were the Narragansett Indian Tribe, from whom the land was purchased and incorporated in 1669. The histories of settlement of Westerly were discussed by the court, highlighting its importance in the war of 1812.[225] Later, after the Civil War, the beachfront locations of Rhode Island became an increasingly important vacation destination. The court excerpted the following passage in full:

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[221] Applicable to state action through the Fourteenth Amendment. Chicago, *B&QR Co v Chicago*, 166 US 226 (1897).

[222] Application of *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992).

[223] Note here that the petitioner in the matter was also involved in the original purchase. In 1959 the petitioner formed Shore Gardens Inc along with associates to make the initial purchase of the property. Due to insolvency of the company, the petitioner then took title as the corporation's sole shareholder.

[224] *Palazzolo, supra* note 219 at 4 (Syllabus).

[225] *Ibid* at 2 (Opinion of the Court, per Justice Kennedy). The court relied on multiple historical accounts here: Mary Best, *The Town That Saved a State—Westerly* (Rhode Island: The Utter Company, 1943) at 60–83 [Best, *The Town That Saved a State*]; William McLaughlin, *Rhode Island: A Bicentennial History* (New York: WW Norton & Company, 1978) at 39–57; Frederic Denison, *Westerly and Its Witnesses* (Rhode Island: JA & RA Reid, 1878)

> After the Civil War the rapid growth of manufacture and expansion of trade had created a spending class on pleasure bent, and Westerly had superior attractions to offer, surf bathing on ocean beaches, quieter bathing in salt and fresh water ponds, fishing, annual sail and later motor boat races. The broad beaches of clean white sand dip gently toward the sea; there are no odorous marshes at low tide, no railroad belches smoke, and the climate is unrivalled on the coast, that of Newport only excepted. In the phenomenal heat wave of 1881 ocean resorts from northern New England to southern New Jersey sweltered as the thermometer climbed to 95 and 104 degrees, while Watch Hill enjoyed a comfortable 80. When Providence to the north runs a temperature of 90, the mercury in this favored spot remains at 77.[226]

Justice Kennedy goes on to note that Westerly maintains its reputation as a summer resort town up to the present day. There are approximately 20,000 year-round residents, with an influx of thousands more in the summer. The town is oriented around access to the beach, particularly Misquamicut State Beach, with access obtained primarily via a three-mile stretch of road called Atlantic Avenue.[227] Along Atlantic Avenue, there is a commercial strip along the west, tapering down to more residential to the east, where the road is bordered by the beach on the south and by Winnapaug Pond on the north.[228]

The petitioner to the action was a lifelong resident of Westerly. They purchased three undeveloped parcel lots along the eastern, less developed stretch of Atlantic Avenue bordering Winnapaug Pond. These parcel lots were about 20 acres in total, and were it subdivided as originally planned would have amounted to 74 property lots.[229] For Justice Kennedy these facts about the histories, the locale, and the situation of the specific property lot were significant because they highlighted the utility of the plot of land at issue, which entailed building on the lot for purposes of enjoying the residential and business potential.

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at 118–19.

[226] Best, *The Town That Saved a State, ibid* at 192; *Palazzolo, supra* note 219 at 2 (Opinion of the Court, per Justice Kennedy).

[227] *Palazzolo, supra* note 219 at 3 (Opinion of the Court, per Justice Kennedy).

[228] *Ibid*.

[229] *Ibid*.

In addition to the historical-geographic analysis carried out in the *Palazzolo* decision, of note is the opinion Justice Stevens who, concurring in part and dissenting in part, critiqued the majority for what in his view was a lack of discussion of "the particular facts or legal claims at issue in this case,"[230] instead focusing "its inquiries in broadly significant terms." These "significant terms" are perhaps a reference to the sweeping historical account undertaken by the majority. In Justice Steven's opinion, another reading of the significance of the historical geography is the possibility of removing the value of building on a privately held property lot—an important right in the bundle of property rights—from all but the very first holder of that property lot. Justice Kennedy wrote:

> Perhaps my concern is unwarranted, but today's decision does raise the spectre of a tremendous—and tremendously capricious—one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land at the moment this legal question is permanently resolved.[231]

Another way to state this concern is that the impact of taking a time-limited approach to assessing whether a claim in takings can lie would negatively impact all but the select few who hold property prior to the enactment of a regulation. In some ways this observation highlights the way in which property and land have become closed through the institution of private property, and then pragmatically preserves the possibility of an action in takings as a way to ameliorate potential unfairness for subsequent property holders.

3.4.5. Conclusion

These two cases—*Canada Pacific Railway* and *Palazzolo*—are interesting for their extensive reflection on the places that are the subject of expropriation. The points above are on the historical, cultural, and personal geographies that are discussed in the case reports. The distinction

[230] *Ibid* at 1 (Opinion of Justice Stevens).
[231] *Ibid* at 9.

between Canada and the United States as to the constitutional protection afforded property does not directly impact the geographic reflections made by the courts that I highlight. The practice of the court in these decisions highlight some points about the utility of place, space, and factual record as it relates to the law of expropriation.

First, the cases highlight the extent to which place is an unavoidable aspect of property and land law. While the decisions analyze different laws concerning *de facto* expropriation and takings, the importance of the place is foregrounded in the decisions. A property lot is not just a piece of property title, but instead relates to and relies on history, past and future use, property holders claims, and community interests. The sense that property is important from a cultural, social, and political perspective is evident in the approach taken by the courts.

Second, there is a sense of discursivity in how ideas that come from geographic reflection can be used as part of the legal analysis. They might be used to serve as an evocative backdrop, and as such are a description of the location. We can speculate that this might be done for the purposes of creating interest in the area discussed in the case or through a sense of personal interest as writers reflect on what is important about that place from their perspective. On the other hand, geographic reflection might serve as the foundation for addressing a legal question as to the use of expropriation and limits to it. This might be done to address a gap in the law or to highlight a negative implication of not addressing limits.

A discussion of place can add to an understanding of how the law of expropriation operates over a location. More than a simple description of the context of the facts considered in a decision, an account of place can explain the ways in which a location gains importance, which may help assess what kind of location to create in the future and guide the management of current interests held both in the property lot and in the surrounding environment. The vignettes provide a snapshot

of the potential use of place as part of the legal analysis for expropriation matters, but examination of the geography contained therein also highlights the potential concerns with taking an unfocused or unprincipled examination of geography in place. The utility of geographic insight is not as a backdrop to legal action, but instead is an integral part of legal action, and as such adoption of principled approaches to managing it must be considered.

3.5. CONCLUSION

This chapter has considered how spatial thought can serve as a tool for examining property as a spatialized institution that is embedded in locations and places. Spatial thought would highlight that the importance of a location entails far more than the physical place, and instead that location gains importance through a variety of norms and institutions, all of which have spatialized manifestations.

A concern that arises when using spatial thought to interrogate property is the potential complexity that it brings to property, an already complex subject. This concern overlooks the fact that property—as a spatialized institution—is already engaging in spatial activities. An assessment of place is an integral, though unnamed, part of property law. This is demonstrated through the relational, flexible, and nuanced regulations contained within property law, which are attentive to the unique differences between property parcels and the central role of relationships to realize property interests. A re-examination of the role of expropriation law through the lens of place reveals it as a tool that reshapes property relations through a normative lens of achieving what is desired for that location. Expropriation is the property law rule that can be used to serve policy goals.

Though spatial theory may be incorrectly interpreted as adding an unnecessary complexity to property law, it is correct to question how to develop a principled approach to manage place.

This is particularly important in relation to expropriation law, which serves to disrupt ideas of place that have developed in a location. In the coming chapters I consider this. How can introduction of geographic questions help interrogate both the law and the places that are subject to the law? What is the impact of strict application of legal rules for expropriation on the places that are impacted? And how do we sufficiently capture the meaning of place—is it through the people that are located there? Is it through the legal title that operates over that location? Is it by placing the location in the context of the community? Or rather, do we consider the importance of that place with regard to similar locations?

The next chapter of this thesis considers and answers these questions with reference to the Nova Scotia Supreme Court decision *Mariner Real Estate v Nova Scotia*. This 1999 decision offers a substantive analysis of the application of the law of *de facto* expropriation. I use Gritzner's frame of analysis to ask "what is where, why there, and why care?" about Kingsburg Beach, the area that is subject to the application of *de facto* expropriation. The approach that is taken in the next chapter considers the single location through four different perspectives: private, public, environmental, and Indigenous. These individual perspectives consider the ways in which a place may be considered important and highlights the points of information, ideas, and normative goals that guide that construction.

CHAPTER 4: PERSPECTIVES ON KINGSBURG BEACH: PROPERTY VERSUS THE ENVIRONMENT

When it was decided to people the province of Nova Scotia with foreign immigrants, advertising literature, in the shape of large posters, was distributed throughout Hanover and parts of Switzerland calling attention to the advantages to be derived from emigration. French Hugenots [sic], obliged through religious persecution to leave their native France, were also advised of the opportunities in this new country. Quite alluring were these advantages, as advanced by the wide- awake agents of the British Government. Fifty acres of land for each settler, with ten acres additional for each member of the family, free of taxes for ten years and a nominal taxation thereafter, together with other privileges in proportion to the number of acres cleared and brought under cultivation. Maintenance for all immigrants for one year after arrival in Nova Scotia. The provision of arms, ammunition, housekeeping utensils, farming implements, building material and fishing accessories. All the above inducements were offered. To these advantages were added a salubrious climate, pure and plentiful water, fertile soil, an abundance of fish of the most valuable kins, secure and commodious harbors for trade and commerce. Truly Nova Scotia must be the Promised Land.[1]

Beaches are an integral part of coastal ecosystems, often defined as the area extending from the shoreline inland to a marked change in physiographic form, or line of permanent vegetation. It is here that the energetic and fertile exchange of sand, biological matter and other materials happens between dunes, shores and surf zones. Actually, the sandy apron of sediment is only one facet of the larger beach system, which may include features such as dunes, marshes, lagoons and offshore bars. In turn, this system is connected to a much larger coastal watershed, beginning far away at the headwaters of a stream or river, and finishing in the ocean deep. ... Sandy beaches are experiencing a worldwide conservation crisis. As in many parts of the world, Nova Scotia's beaches are trapped in an unfortunate "coastal squeeze." From the terrestrial side, mounting pressures from development, recreation and other human activities are impacting our beach systems at exceptional rates. Meanwhile, the effects of climate change and sea level rise threaten from the ocean side.[2]

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[1] Harry W Hewitt, *History of Lunenburg County* (Nova Scotia: publisher unknown, 1959), Halifax, Nova Scotia Archives (PANS Microfilm Cabinet, Places: Lunenburg, History) at 11–12.

[2] Sadie Beaton, *True Grit: A New Vision for Healthy Beaches in Nova Scotia,* discussion paper on beach management in Nova Scotia prepared for the Ecology Action Centre workshop in Halifax on 27 November 2008 (Halifax: Ecology Action Center, 2008) at 4, 5 [citations omitted; Beaton, *True Grit*].

4.1. INTRODUCTION

Kingsburg Beach is the location where the *de facto* expropriation *Mariner Real Estate* decisions[3] occurred. Kingsburg Beach is on the south shore of Nova Scotia in Lunenburg County. Lunenburg County is a historically significant part of Nova Scotia. The Town of Lunenburg, located in Lunenburg County, is approximately 20 kilometres from Kingsburg Beach. Lunenburg was settled in 1753 as a protestant community largely consisting of German immigrants. Lunenburg town was established around the fishery, an industry that remains in the town and area today. Lunenburg received world heritage status from UNESCO in 1995 because of its historic architectural tradition, which is recognizable by its colourful wooden structures. The government administrative town in Lunenburg County is Bridgewater, which is 30 kilometres from Kingsburg Beach. Bridgewater has always been a town where government administration is located, such as the courthouse and municipal buildings, and where industry grew, such as the lumber industry.

The area along Kingsburg Beach and surrounding locations was settled by the first recorded settlers in Lunenburg and their descendants. Today those families remain in Kingsburg Beach, whether it be through family lines interred in a graveyard on one of the private lots along the beach, in place names through the naming of main roads and a local island, or even as a named litigant in the *Mariner Real Estate* decision. Before German immigrants, Lunenburg County was settled by Acadians in the 1620s, and before then, since time immemorial, Mi'kmaq Indigenous communities would historically use the area from Lunenburg to Mahone Bay.

[3] The *Mariner Real Estate v Nova Scotia (Attorney General)* decisions of the Nova Scotia Supreme Court (NSSC) and the Nova Scotia Court of Appeal (NSCA) are referred to in the text as the *Mariner Real Estate* decisions (see *Mariner Real Estate Ltd v Nova Scotia (Attorney General),* 1998 CanLII 1757 (NSSC) [*Mariner Real Estate*, NSSC], & *Mariner Real Estate Ltd v Nova Scotia (Attorney General),* 1999 NSCA 98) [*Mariner Real Estate*, NSCA].

Technically, of course, the *Mariner Real Estate* decisions took place in a court—first in the Nova Scotia Supreme Court (NSSC), sitting in the courthouse at Bridgewater, and later in the Nova Scotia Court of Appeal (NSCA), sitting in Halifax. From the perspective of the discipline of law, the examination of the law of expropriation at trial recorded in the two case reports might be considered the most important. From the legal perspective, points of law that would be most important include the doctrine of *de facto* expropriation, the *Expropriation Act*,[4] the *Beaches Act*,[5] the trial record, and ultimately the recorded court decision. The records of the *Mariner Real Estate* decisions in the resulting case reports have continued to impact the law of expropriation. The test of *de facto* expropriation articulated in *Mariner Real Estate*[6] by the court of appeal has been applied by multiple courts since and was only re-examined—and largely retained—by the Supreme Court of Canada in 2022.[7] But at the centre of the *Mariner Real Estate* decisions is the location of Kingsburg Beach, which is the subject matter of government action, and it is in response to this government action that the legal action arguing that a *de facto* expropriation had happened. The location of Kingsburg Beach holds histories, legalities, environment, properties, and people. These details constitute the place of Kingsburg Beach, and it is this place that it was argued suffered an expropriation.

Two aspects of place are highlighted and examined in the *Mariner Real Estate* decisions. These are, first, private property lots used for residential purposes, and second, environmental protection. These are framed as part of the facts that guide the *de facto* expropriation analysis. These two aspects of Kingsburg Beach were present in both the case at first instance—heard at the

[4] RSNS 1989, c 156.
[5] *An Act to Preserve and Protect the Beaches of Nova Scotia,* RSNS 1989, c 32, as amended by RSNS 1993, c 9 [*Beaches Act*].
[6] *Mariner Real Estate,* NSCA, *supra* note 3.
[7] *Annapolis Group Inc v Halifax Regional Municipality,* 2022 SCC 36 [*Annapolis v Halifax*].

NSSC—and on appeal in the NSCA. However, these two aspects of place were emphasized in different ways in the two court decisions: The NSSC focused on private property and the NSCA focused on environmental aspects of place. The different emphases are interesting because they demonstrate the courts willingness to engage with location, even though this is not strictly part of the test for *de facto* expropriation. The test for *de facto* expropriation only requires an answer to two questions concerning (1) the acquisition of property and (2) the reasonable use of the property.[8] This means that the location of Kingsburg Beach is not directly part of a legal test for expropriation, but instead is part of the backdrop for consideration in application of the legal test.

In this first case study, I reframe these two aspects of private property and environmental concern as components of place and examine them as opportunities for decision making about the nature of the geography that is being created through an instance of expropriation. What initially had a material effect on the location was the designation of the beach under a statutory framework, which had the effect of limiting the ability for private property holders to build on their property lots.

In a broad summary, the two perspectives on place can be summarized as follows. On the one hand, Kingsburg Beach is divided into private property lots that are residential. They are owned either by individual private property holders or by corporate entities (but also for residential purposes). The importance of the value of the private property lots for the property holders was emphasized at first instance, where the NSSC focused on the impact the regulatory framework had on the market value of the property lots, finding that the *Beaches Act* had "prohibited all economically beneficial or productive uses of the land … render[ing] the land to be economically

[8] *Mariner Real Estate,* NSCA, *supra* note 3 at para 5.

idle, effectively valueless."[9] In the NSSC's opinion, this removal of economic opportunity meant there was no reasonable use to be made of the property lots. The property lots themselves are economically significant and also historically significant, though this was touched upon only slightly in the court's decisions.

On the other hand, the legislation that caused the alleged *de facto* expropriation, the *Beaches Act*, was used to designate Kingsburg Beach because it was identified as a location in need of environmental protection. The full title of the *Beaches Act* is "*An Act to Preserve and Protect the Beaches of Nova Scotia,*" and the goals of the legislation are just as the title conveys: It seeks to protect beaches and dunes, regulate land-use activities, and control recreational activities on the beach.[10] Once a beach is designated under the *Beaches Act* there are a host of regulations that apply, including that the holder of a property lot might have to apply for a permit to build on their land. During its decision, the NSCA considered in detail the environmental aspects of Kingsburg Beach and particular concerns about environmental degradation as justification for applying the legislative framework via designation. There was specific attention to the fragility of the dune system bolstered by an expert opinion report that identified erosion as a concern.

These two perspectives on place are considered in more detail throughout this chapter. In Section 4.2 of this chapter, I review the *Mariner Real Estate* decisions to examine the law of *de facto* expropriation. I use information I collected during two field research visits to Kingsburg Beach and surrounding areas. These informational points allow for the case study site to be considered in detail with attention to the persons, properties, and environment that are part of Kingsburg Beach and so an essential aspect of the geographies of that location. I then move into

[9] See the expert evidence given by Charles JL Hardy, BSc, FRICS, AACI, the plaintiff expert witness, adopted by the court and reproduced in the case report in *Mariner Real Estate,* NSSC, *supra* note 3.
[10] *Beaches Act, supra* note 5, s 2(2).

the Section 4.3, which uses the framework suggested in the work of Charles Gritzner and which I have adopted as a methodology. I will examine the geographies of Kingsburg Beach guided by the research questions of (1) what is where? (2) why there? and (3) why care? Through this guided geographic analysis, which includes both spatial and physical geography and their interaction with the institution of property law (highlighting expropriation law), the geography of Kingsburg Beach is foregrounded as an active site for interpretation. The issue at hand in this case study approach is not just with spatial interactions between people that are legalized or encountering legalized institutions, but also with the constraints, opportunities, and movements that can occur in the interpretation of the physical geographies so impacted.

4.2. KINGSBURG BEACH, PROPERTY, AND EXPROPRIATION

4.2.1. A Case Study on the Law of *De Facto* Expropriation

In March 1993 the Nova Scotia government designated Kingsburg Beach as a "beach" under the *Beaches Act*. Kingsburg Beach, Lunenburg, is located on the south shore of Nova Scotia, a popular location for beachfront properties. The *Beaches Act*, as the full title indicates (*An Act to Preserve and Protect the Beaches of Nova Scotia*), seeks to give protection for beaches in Nova Scotia. It provides that "[t]he beaches of Nova Scotia are dedicated in perpetuity for the benefit, education and enjoyment of present and future generations of Nova Scotians."[11] A beach designated under the *Beaches Act* is subject to heightened rules that are contained in regulations enacted pursuant to the legislation.[12] The *Beaches Regulations* adopted pursuant to the *Beaches*

[11] *Beaches Act, supra* note 5, s 2(1).
[12] *Ibid,* s 5(1).

Act provide that "[n]o person shall develop a beach without the prior written authorization and approval of the Minister."[13] Furthermore, to develop means:

> the construction of a path, trail or road on a beach or the erection of placement on a beach of a building, structure or other man made feature not indigenous to the site.[14]

Kingsburg Beach was designated as a protected area through the statutory framework of the *Beaches Act* and related regulations. This statutory framework first identifies the protection of beaches as a legislative goal and then identifies select beaches subject to its regulation. Pursuant to the *Beaches Act*, Kingsburg Beach was designated a protected beach in 1993.[15] As a designated beach, there are a host of regulations imposed on the use of and access to the beach. They are guided by the threefold goals of the *Beaches Act,* which are:

> (a) Provide for the protection of beaches and associated dune systems as significant and sensitive environmental recreational resources;
> (b) Provide for the regulation and enforcement of the full range of land-use activities on beaches, including aggregate removal, so as to leave them unimpaired for the benefit and enjoyment of future generations;
> (c) Control recreational and other uses of beaches that may cause undesirable impacts on beach and associated dune systems.[16]

Many of the regulations in the statute directly relate to environmental concerns. In keeping with the scheme of the statute, some of these regulations prohibit activities outright, while other activities are permissible should a permit be obtained. Prohibited activities that are banned outright that directly relate to environmental concern include a ban on any activities that "willfully destroy property and other natural resources found on or adjacent to a beach" or "dump or deposit garbage or other material on a beach."[17] Activities that are prohibited unless a permit has been obtained

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[13] *Beaches Regulations,* NS Reg 70/1989 as amended by NS Reg 75/2015, s 6 [*Beaches Regulations*] adopted pursuant to *Beaches Act*, supra note 5, s 13.
[14] *Ibid,* s 2(c).
[15] *Kingsburg Beach Designation*, NS Reg 52/1993, adopted pursuant to *Beaches Act*, supra note 5, s 5(1).
[16] *Beaches Act, supra* note 5, s 2(2).
[17] *Ibid*, s 8(1).

include development of beach land and removal of sand, gravel, stone, or other material by either property owners or those in the trades.[18] The governor in council may make regulations "for the preservation, control and management of beaches"[19] and exempt any beach from the operation of the Act and related regulations[20] and any other matters deemed necessary for the carrying out of the intent and purposes of the Act.[21] Relying on this last provision, further powers of the minister are contained in the *Beaches Regulations,*[22] which expressly prohibit developing a beach without the prior written authorization of the minister.[23]

Along Kingsburg Beach are a series of property lots, some empty and some with built property on them. The impact of the *Beaches Act* and *Beaches Regulations* was that holders of empty property lots along the beach had to apply to the Minister of Natural Resources for permission to build single family homes. In February 1995, the Minister of Natural Resources denied building permits for five property lot title holders. The minister relied on an environmental impact study that indicated the fragile dune system along Kingsburg Beach required that there be no additional development.[24]

Out of the 25 property lots along Kingsburg Beach, the three title holders involved in the litigation were uniquely impacted by the beach designation because they were all in the process of constructing either single family dwellings with concrete foundations or fences on their property lots. Or, as they testified in court, they had the intention of constructing in the future.[25] Property title holders Lamont and Carole Anne Mosher were ultimately successful on application to the

[18] *Ibid*, s 13(c).
[19] *Ibid,* s 13(a).
[20] *Ibid,* s 13(d).
[21] *Ibid,* s 13(l).
[22] *Beaches Regulations, supra* note 13, s 13.
[23] *Ibid,* s 6.
[24] *Mariner Real Estate,* NSSC, *supra* note 3 at para 7. This is the Whitford report, which is discussed below at notes 225–31, 239–41, and accompanying text.
[25] *Mariner Real Estate,* NSSC, *supra* note 3 at para 6.

minister to create a management plan pursuant to section 4(4) of the *Beaches Act* two years after their initial application had been rejected. The "Management Agreement" dated 27 January 1995 is now registered on title for the property lot plan #93006063, field plot P-007/93, property numbers 9A and 9B on the property survey map. The management agreement provides for an exemption to the operation of the *Beaches Act* by allowing the property title holders to build a foundation of a dwelling on their property, to landscape the property, and to repair and maintain the construction.[26] The management agreement also contains prohibitions on the use that may be made of the property by, for example, not allowing the dune areas to be disturbed, limiting vehicular access along paths that already exist, prohibiting the use of herbicides and insecticides, and using plantings appropriate to the area and only with the permission of the minister.[27]

4.2.1.1. Nova Scotia Supreme Court: *Mariner Real Estate v Nova Scotia*

Subsequent to the beach designation and minister's decision not to allow further built property, the property lot holders Mariner Real Estate Ltd, Gordon HH Read and Catherine Read, 2102660 Nova Scotia Limited, and Carole Anne Mosher and Lamont Mosher brought an action against the government. They made their claim on the basis of expropriation, arguing that the impact of the denial of a building permit constituted an "expropriation" of their property within the meaning of the provincial *Expropriation Act*. The *Expropriation Act* provides that "where land is expropriated or injurious affection is caused by a statutory authority"[28] then an expropriation will have occurred and compensation is owed to the property owner.[29] They sought compensation

[26] *Beaches Act, supra* note 5, ss 1, 4, 8, and 9, respectively.
[27] *Ibid*, ss 5, 7, 10, and 11, respectively.
[28] *Expropriation Act, supra* note 4, s 4(1).
[29] *Ibid,* s 24.

for the monetary value they had lost on their property lots, which had now greatly depreciated in value without the benefit of property development.

The arguments made were threefold. First, that the designation of Kingsburg Beach as a "beach" pursuant to the *Beaches Act* constituted an expropriation; second, as an expropriation the property owners were entitled to compensation; and third, the entitlement to compensation was not precluded by section 12 of the *Beaches Act,* which states that there is no entitlement to compensation for properties impacted by the *Beaches Act*.[30] Meanwhile, the Crown in defence argued that the issue was not ripe for judicial intervention because new formal applications for building permits, which were to contain information about how the environmental harm could be mitigated by landscape architects, had not been submitted by the plaintiffs. This threshold argument was dismissed by the court because there were letter applications submitted, and there was no indication from the minister or other government departments that a formalized application containing plans would have to be submitted. [31] Concerning the substantive matter of expropriation, the Crown argued that they had not acquired any property by way of the designation under the *Beaches Act* and therefore no expropriation had occurred.[32]

The plaintiffs were successful in these arguments at the NSSC. First, it was found that the plaintiffs had lost an interest in their properties by losing virtually all of the economic value designated in the lands. These restrictions had the effect of severely impacting the plaintiffs' use of their property. In particular, expert witnesses for the respondents from the Canadian Institute of Appraisers gave evidence about the impact the restriction that removed the possibility of

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[30] See *Beaches Act, supra* note 3, s 12:

> No person affected by this Act shall be entitled to compensation for any restriction, encumbrance or use or lack of use, of any nature or kind whatsoever, of a beach that may result or results from the enacting of this Act.

Mariner Real Estate, NSSC, *supra* note 3 at para 1.

[31] *Mariner Real Estate,* NSSC, *supra* note 3 at paras 10–12.

[32] *Ibid* at para 29.

developing the land had had on the value of the lot properties.[33] For valuation purposes, appraisers take the "highest and best use that can be made of land," which prior to Kingsburg Beach's designation would have been to build a single-family dwelling. In the expert's opinion the loss in value of the respondents' lots was significant, ranging from $34,000 to $61,000.[34] The impact of the beach's designation under the Act meant that the permissible use of the land had been changed to recreational only, where previously it had been both residential and recreational in nature.

For the second aspect of the *de facto* expropriation test—assessing what the government acquired—the government argued that though an interest to the plaintiffs had been lost, there was no corresponding gain by the government, which would mean that no *de facto* expropriation had occurred. This argument was not accepted by the court. Instead, the court found that "enhancing the beach for the use and enjoyment of the public"[35] was the interest acquired. The benefit to the beach area that the government acquired when they designated the beach was a general benefit given to the broader public. The benefits of removing development on the beach and ostensibly protecting the fragile dune area is one that flows to the general public. In sum, the court agreed with the plaintiff by finding the lands "have been pressed into public service."[36]

4.2.1.2. Nova Scotia Court of Appeal: *Mariner Real Estate v Nova Scotia*

The Crown appealed the decision to the Nova Scotia Court of Appeal. Justice Cromwell, who would later be appointed to the Supreme Court of Canada, wrote the decision for the three sitting judges. Justice Cromwell begins the judgment by observing:

> In the background of this case is the policy issue of how minutely government may control land without buying it. But in the foreground is the narrower issue of

[33] *Ibid* at para 18.
[34] *Ibid* at para 19.
[35] *Ibid* at para 31.
[36] *Ibid* at para 31, as stated by Mr. Dexter, counsel for the plaintiff, quoting Justice Scalia, who made this statement in a factually similar US decision, *Lucas v South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886 (USSC 1992).

> whether the stringent land use regulations applied by the Province to the respondents' lands is an expropriation of them within the meaning of the *Expropriation Act*.[37]

Thus, the assessment of the impact of the *Beaches Act* on Kingsburg Beach starts by a framing of the issue of expropriation as a narrow issue and one that is tied to the limitations of property in Canada. *De facto* expropriation, he goes on to explain, is "constrained by two governing principles."[38] These are, first, that in Canada valid legislation may greatly restrict an owner's enjoyment of private land, and second, that compensation is only available where legislation provides for it.[39] The impact of these two limitations, Justice Cromwell opines, is that *de facto* expropriation is only available in very narrow circumstances.[40] Thereafter, the two-part test for determining whether government action constitutes *de facto* expropriation, which requires that there be a loss of interest in lands and a corresponding gain by the government, was applied by the court of appeal.[41]

These characterizations about the properties along Kingsburg Beach and the role of land-use regulation in Canada guided the analysis of the *de facto* expropriation test at the court of appeal. For a *de facto* expropriation to have occurred there must be both acquisition of a property right by the government and all reasonable uses of the property must be removed.[42] Writing for the court, Justice Cromwell held, first, that there had not been the loss of "virtually all economic value of the land" for the property title holders.[43] The court emphasized that economic benefits are only one form of land use, and the possibility of other land uses remained.[44] Justice Cromwell observed that

[37] *Mariner Real Estate,* NSCA, *supra* note 3 at para 1.
[38] *Ibid* at para 38.
[39] *Ibid.*
[40] *Ibid* at para 39.
[41] *Ibid*.
[42] *Ibid* at paras 5, 37.
[43] *Ibid* at paras 56–57, 79.
[44] *Ibid* at para 70.

the trial court's finding that the plaintiffs had lost virtually all economic value of their lands was a finding of fact. As a finding of fact, based on the evidence before the court provided by the appraisers, it was a reasonable conclusion.[45] In a review of Canadian authorities on the requirement that all value in a property be removed, the court found "no Canadian case in which the decline of economic value of land, on its own, has been held to be the loss of an interest in land."[46] Instead there is a distinction between government action that takes ownership versus interference with ownership rights that result in a decrease in value.[47]

Second, in response to the requirement that the government acquire an interest in the property impacted, it was found that the government did *not* gain a beneficial interest in the property through the designation of Kingsburg Beach.[48] It was found that mere enhancement of the value of public property was not an acquisition of land within the meaning of the *Expropriation Act,*[49] so the government did not gain a beneficial interest in the property.[50] Justice Cromwell wrote that the "freezing of development and strict regulation of the designated lands did not, of itself, confer any interest in land on the Province."[51] The decision at the NSCA was not appealed to the Supreme Court of Canada.

The holding of the court of appeal in *Mariner Real Estate* was applied by the Supreme Court of Canada in a subsequent case, *Canadian Pacific Railway Co v Vancouver (City)*,[52] which was heard in 2006. In *Canadian Pacific Railway*, the court considered a claim of *de facto* expropriation made by the railway company over a tract of land formerly used for railway lines,

[45] *Ibid* at para 56.
[46] *Ibid* at para 71.
[47] *Ibid* paras 71–72.
[48] *Ibid* at para 92.
[49] *Ibid* at para 107.
[50] *Ibid* at para 92.
[51] *Ibid* at para 105.
[52] *Canadian Pacific Railway Co v Vancouver (City),* 2006 SCC 5 [*Canadian Pacific Railway*].

but which had subsequently lain unused and later was subject to limitations on development by way of a city by-law.[53] The Supreme Court spends a scant eight paragraphs considering whether a *de facto* expropriation had occurred.[54] The Supreme Court applied the *Mariner Real Estate*, NSCA, holding with little to no consideration of the jurisprudence in the area, nor a detailed analysis of applying the principle of *de facto* expropriation to the facts of the case. Thus, the holding by Justice Cromwell provides a clear articulation of the common law principle of *de facto* expropriation as it has been formulated in Canada. More recently, the law of *de facto* expropriation was considered and applied in the Supreme Court decision *Annapolis v Halifax Regional Municipality*.[55] In *Annapolis v Halifax,* the Supreme Court took up the principle of *de facto* expropriation articulated in *Mariner Real Estate*, NSCA, which was later affirmed in *Canada Pacific Railway,*[56] and developed the test for *de facto* expropriation so as to broaden it. The view that there are limited circumstances in which a *de facto* expropriation will be found to have occurred remains the case in the latest consideration of expropriation by the Supreme Court in *Annapolis v Halifax*.[57] The *Mariner Real Estate* decisions remain central to the law of *de facto* expropriation in Canada.

The importance of the *Mariner Real Estate* decisions for their contribution to jurisprudence on expropriation might leave one to overlook the centrality of the *place* of Kingsburg Beach to the decisions (indeed the importance of places that are under expropriation generally). Interpretation of Kingsburg Beach was actioned through the analysis in the court decisions. That is to say, that in the process of deciding the *Mariner Real Estate* decisions the Nova Scotian courts articulated

[53] See Chapter 3, *above*, for a discussion of *Canadian Pacific Railway.*
[54] *Canadian Pacific Railway, supra* note 52 at paras 29–37.
[55] *Annapolis v Halifax*, *supra* note 7. See Chapter Three, *above,* for a fuller discussion of *Annapolis v Halifax*.
[56] *Ibid* at para 25.
[57] *Ibid* at para 20.

perspectives on the nature of property interests in Kingsburg Beach. These perspectives oscillated in their focus between the two courts. At first instance, economic benefits associated with real property were highlighted, so the loss in valuation of the property lots by way of regulation was decisive for the court and resulted in a finding of expropriation. On appeal, cultural components of property interests held by way of the title lots coupled with an interest in the natural space were highlighted as remaining interests and valid policy goals, and thus it was found that no expropriation took place. These perspectives—the value of private property, cultural aspects of property, and environmental concerns—are all present and they are accounts of place. They highlight the distinct choices in place that can be made.

4.3. GEOGRAPHICAL INQUIRY

4.3.1. What Is Where?

Unpacking the two written *Mariner Real Estate* decisions as two accounts of place is a complicated step that requires closer attention to the location than the case reports allow. The details of the location of Kingsburg Beach are fascinating. Who are the people that live along Kingsburg Beach? How prominent are private properties along Kingsburg Beach? What is the physical geography of the existing property lots? What is the physical geography of the beach front? What are the legalities that are present along the beach? Are environmental concerns visible at the beach? What does the surrounding area reveal or add to our understanding of Kingsburg Beach? To answer these questions, I turn to legal and extra-legal information collected through field research trips I conducted at the site of Kingsburg Beach, in the Town of Lunenburg, and in the archives in Halifax and Ottawa. In my research visits and through my reading on law related

to Kingsburg Beach, such as legal decisions and management plans, I found information about people, the physical properties and physical geography, and activities carried out in that location.

4.3.1.1. Property and People

There are many activities, emotions, and moments around real property such that the properties along Kingsburg Beach hold much more than simply being property lots (here, ones that are impacted by legislative regulations). Most directly, the beach area is organized as real property and the property lots are captured in the paper titles. The property survey of Kingsburg Beach, "Property Survey P-007/93," indicates that there are 25 property lots along Kingsburg Beach. Property information, including deeds, documents, and plans, can only be obtained in person from a Land Registration Office in Nova Scotia, and at a cost. I obtained the property survey from a Land Registration Office at Bridgewater, Lunenburg County, which is the closest Land Registration Office to Kingsburg Beach. There are 25 property lots immediately adjacent to Kingsburg Beach. The property lots along Kingsburg Beach have beach frontage and are deep, slim property lots. All of these properties are impacted by the Kingsburg Beach designation.

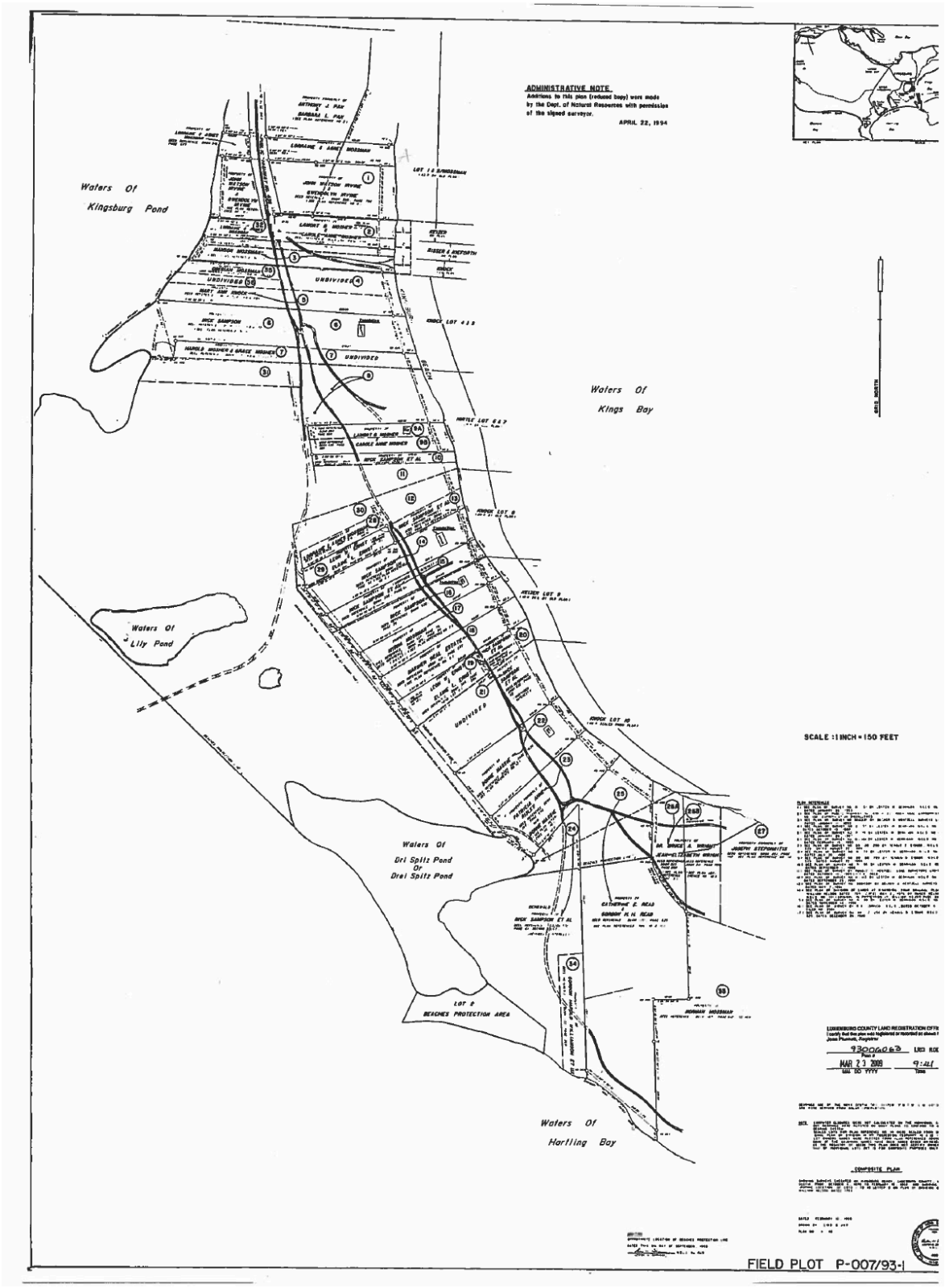


Figure 4.1: Property survey: Field plot P-007/93

However, in the *Mariner Real Estate* decisions only four property title holders brought the action. These were Mariner Real Estate Limited, 2102660 Nova Scotia Limited, and Carole Anne and Lamont Mosher. A fourth claimant, Nick Sampson, sought to join the action at a late stage but was denied by the court.[58]

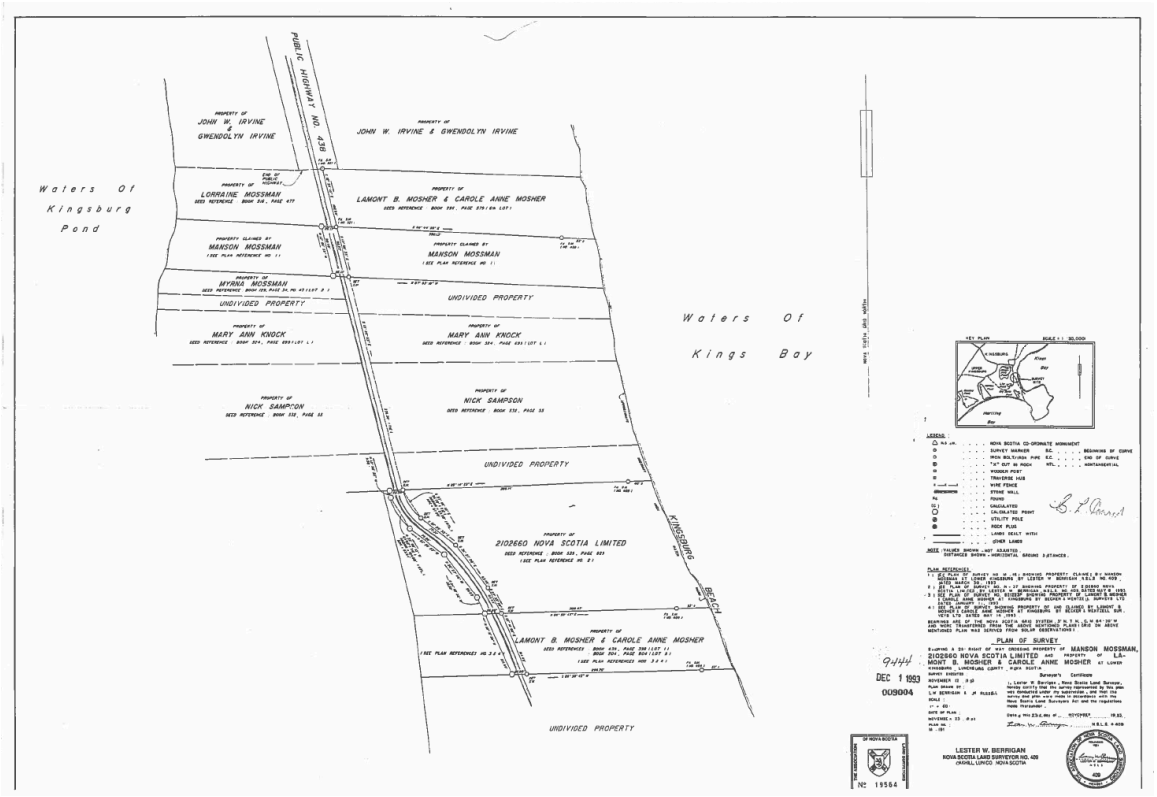


Figure 4.2: Property survey: Close-up showing the properties involved in the *Mariner Real Estate* litigation

Mariner Real Estate Limited purchased a block of land, and the company's principal, Mr. Rose, built a single-family lot on the land.[59] At the time of the decision, Mr. Rose used the land to walk around, and he had applied for and received a permit for building a fence. The decision does

[58] *Mariner Real Estate,* NSSC, *supra* note 3 at para 7.
[59] *Mariner Real Estate,* NSCA, *supra* note 3 at para 21.

not tell us how large the tract of land owned by Mariner Real Estate was, nor what the topography of the property lot was.

The second respondent in the case was another company, 2102660 Nova Scotia Limited ("2102660 Ltd"). 2102660 Ltd acquired property through the principal, Mr. Hamilton, who is an American real estate broker.[60] Mr. Hamilton had a permit for a septic system on the property, but this could not be renewed when the beach area of his property was redesignated under the *Beaches Act*.[61]

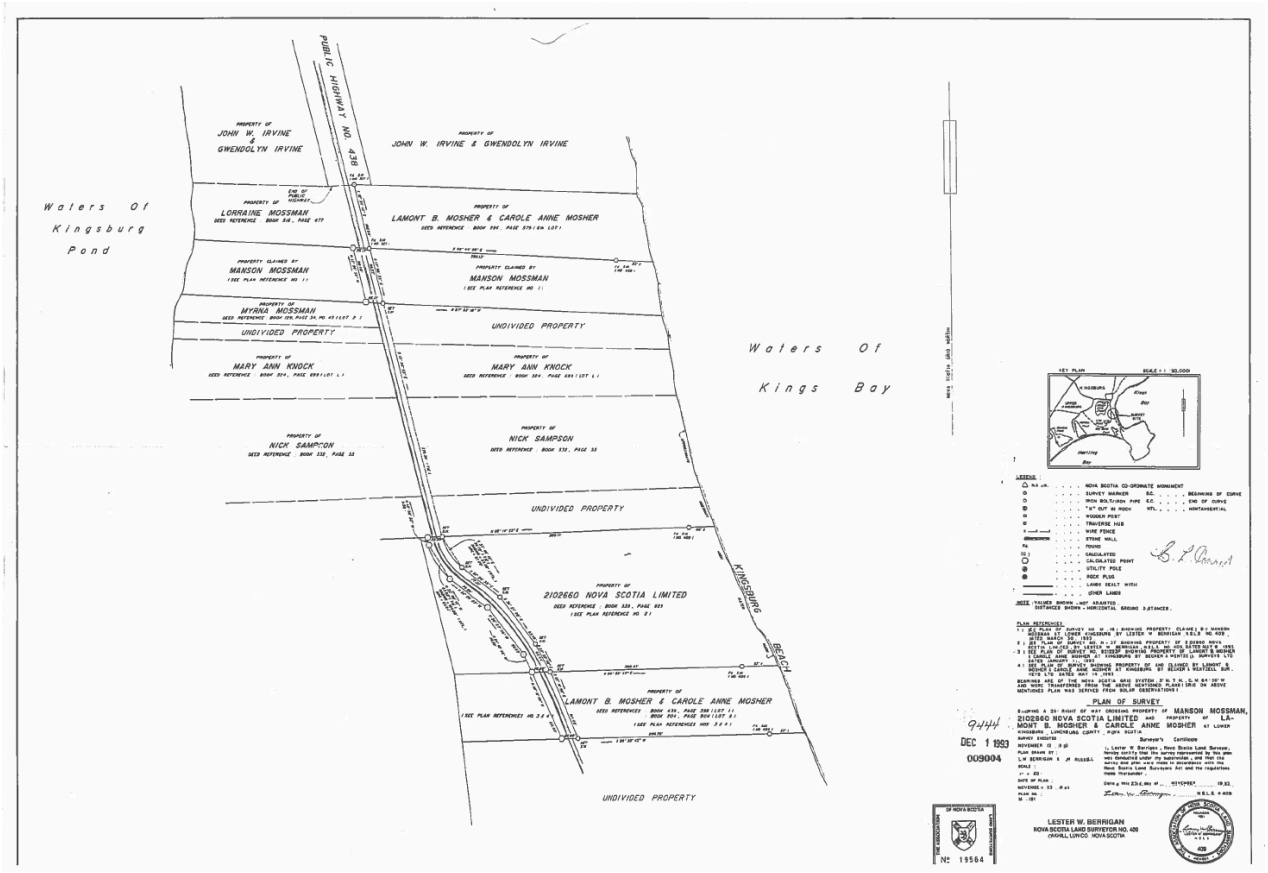


Figure 4.3: Close-up of property lot held by plaintiffs 2102660 Nova Scotia Limited

[60] *Ibid* at para 24.
[61] *Ibid* at para 25.

The third respondents in the case were Lamont and Carole Anne Mosher. At the time of the action, the Mosher's owned several pieces of land in the Kingsburg area, but only four of these property lots—a house lot, a gutter lot, a garden lot, and a cemetery lot—were at issue in the *Mariner Real Estate* decisions.[62]



Figure 4.4: Photograph of cemetery on Mosher property lot. (Photograph by Tenille E Brown, 2016)



Figure 4.5: Photograph of cemetery showing how close it is to built property on the Mosher lot. (Photograph by Tenille E Brown, 2016).

[62] *Ibid* at para 26.

These four parcels of land were acquired from extended family members in the 33 years before the court proceedings. The only development on these lands was the applications made by the Mosher's to build a fence, a single-family dwelling, and a septic system on the housing lot. The permits for the septic system and the building permits were obtained in 1993, but an application to develop the housing lot was denied on a number of occasions after the land was redesignated under the *Beaches Act,*[63] and an application to build a fence was left unresponded to.[64] By the Mosher's own observation, the cemetery lot was too small to build on in light of municipal building requirements.[65]

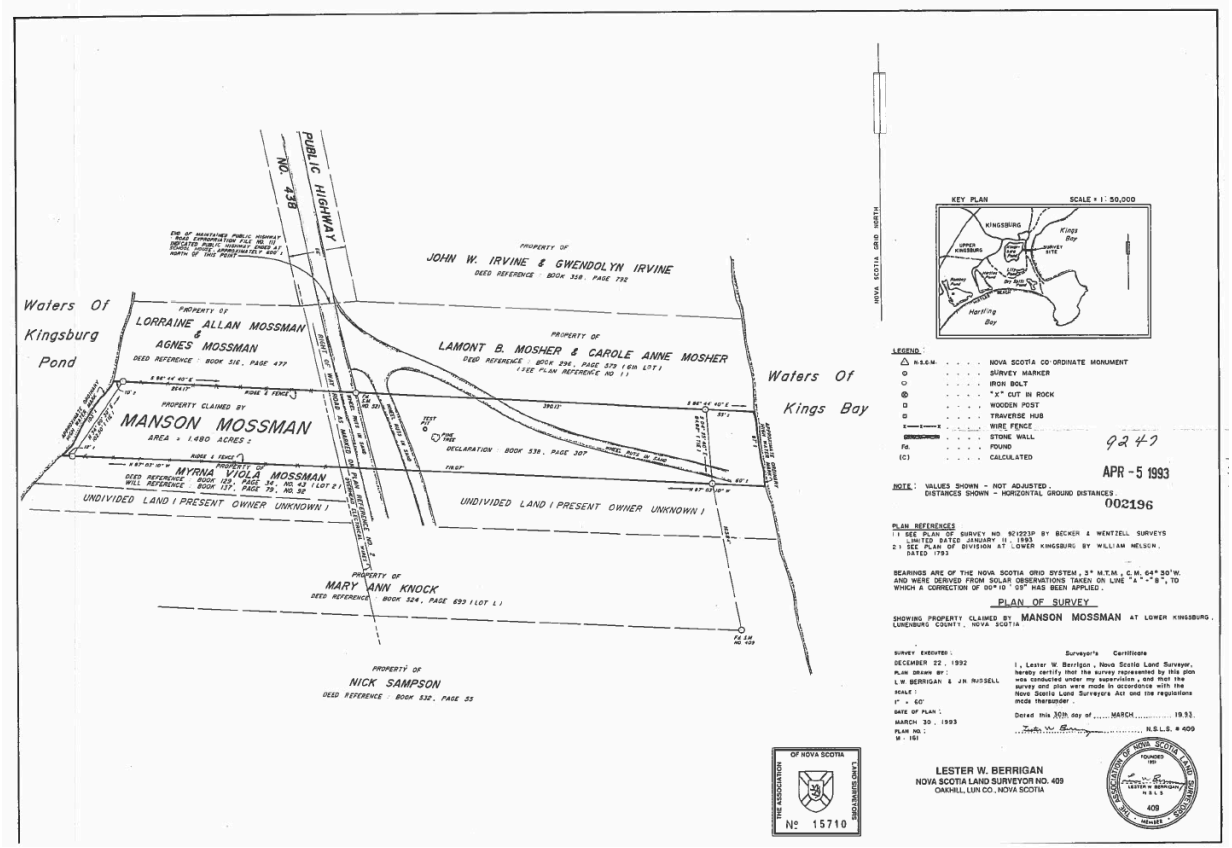


Figure 4.6: Close-up of property lot held by plaintiffs Mosher

[63] *Ibid* at para 30.
[64] *Ibid*.
[65] *Ibid* at para 29.

4.3.1.2. Culture and Property Use

According to the NSCA, even though the regulatory restrictions greatly decreased the market value of the property lots, other reasonable property uses remained for the respondents, and furthermore, this was true even for those properties for which permission to build single family dwellings had already been refused.[66] In the court's opinion although residential development was not allowed, traditional recreational uses were still possible for all of the property lots.[67] An example of the types of activities highlighted by the court included the ability to "walk around [a property], sometimes with friends, and take pictures" as was done by Mr. Rose.[68] Other property lot holders had a history of using their land for "tenting," camping on the beach, and boating.[69]



Figure 4.7: Photograph of a fire pit found on Kingsburg Beach.
(Photograph by Tenille E Brown, 2016).

[66] *Ibid* at para 87.
[67] *Ibid* at para 85.
[68] *Ibid* at para 23.
[69] *Ibid* at para 28. Testimony from Mrs. Mosher, one of the plaintiffs in the action.

The court highlighted the social aspects of the property lots as important for the plaintiff/respondents. Mrs. Mosher, one of the respondents in the matter and whose family had been a long-time resident of Kingsburg Beach, shared the following about traditional activities:

> We had a number of occasions to have lots of parties and campfires and sing-songs, a traditional way of life for the people of Kingsburg, which is certainly not happening today, because of the designation.[70]

Though Mrs. Mosher testified that the beach designation removed the right to these activities, Justice Cromwell observed there was "no evidence that a permit ha[d] been sought for any of these kinds of activities, much less refused."[71] In concluding that the regulatory impact on the use of private property lots along Kingsburg Beach was reasonable, the court found that the respondents had not shown that the many possible "reasonable or traditional uses of the lands"[72] had been or would be denied a permit as is required under the *Beaches Act Regulations*. As such "the respondents have failed to establish that virtually all incidents of ownership have, by the effect of the Act and Regulations, been taken away."[73]

4.3.1.3. Physical Geography

Kingsburg Beach is in the County of Lunenburg, which is on the south shore of Nova Scotia. The district of the south shore of Nova Scotia contains 1,252 hectares of "coastal beach,"

[70] *Ibid* at para 28.
[71] *Ibid* at para 88.
[72] *Ibid* at para 89.
[73] *Ibid* at para 89.

which is 1.0 percent of the total land area of that region.[74] Kingsburg Beach is a sandy tombolo beach, with an extensive dune system.[75]

Tombolos

Derived from the Latin for 'burial mound', tombolos are stretches of sediment extending from a mainland shore out to an island. These beaches formed in the lee of islands, where wave action is reduced. Tombolos are very temporary, geologically speaking, as the sea wears the islands away in a few thousand years.

Nova Scotian examples:

Crescent (near Bridgewater), Port Hood and Point Michaud.

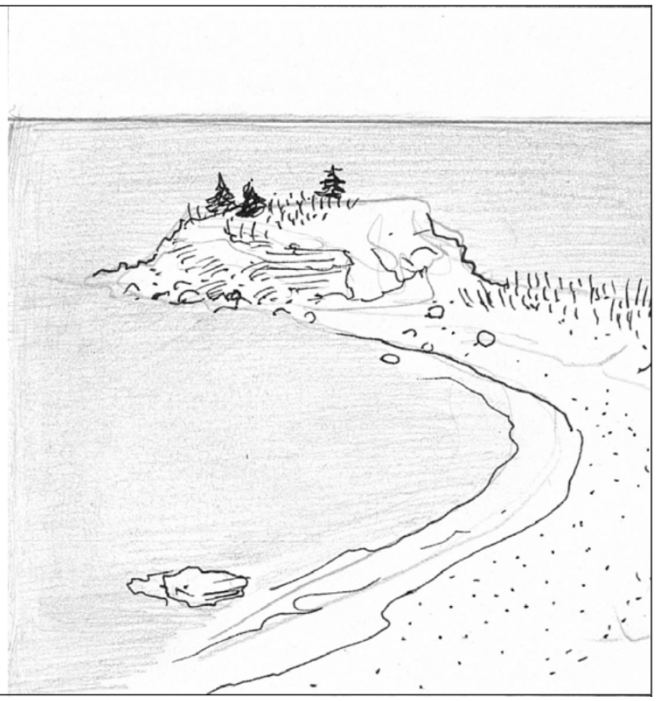


Figure 4.8: Diagram of a tombolo beach[76]

Kingsburg Beach is a habitat for the piping glover, an endangered bird species.[77] Sandy beaches are important for settlement purposes as they support a variety of ecological, social, cultural, and economic goods and services.[78]

Immediately behind the sand dunes of Kingsburg Beach is Kingsburg Pond, a freshwater pond that is part of the Kingsburg Beach complex but separated by the sand dunes.[79] Kingsburg

[74] Nova Scotia Department of Lands and Forestry, *Ecological Landscape Analysis South Shore Ecodistrict 830*: *2019 Update for Part 1 and 2* (Nova Scotia: DLF, 2019) at 28, online: < novascotia.ca/natr/ELA/pdf/ELA_2019part1_2/830SouthShoreParts1&2_2019.pdf > [DLF, *Ecological Landscape Analysis*].
[75] *Ibid* at 25.
[76] Beaton, *True Grit, supra* note 2 at 7, Figure 2.
[77] DLF, *Ecological Landscape Analysis, supra* note 74 at 28.
[78] Thomas A Schlacher et al, "Sandy Beaches at the Brink" (2007) 13:5 Diversity and Distributions 556.
[79] Christopher A Miller, "Assessment of the Environmental Sensitivity of Kingsburg Beach," report prepared for the

Pond is a unique geographical feature as it is one of the few ponds in Nova Scotia that changed from saltwater to freshwater,[80] and it has become an important habitat for migrating aquatic bird species.[81]



Figure 4.9: Google Earth image showing Kingsburg Pond[82]

Kingsburg Coastal Conservancy (January 2005) at 6, online: </citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=d78dc243b6eac2f7e3a1bc31e2306bece73b8841> [perma.cc/6RYH-SPBP] [Miller, "Assessment"].

[80] RB Taylor et al, *Recent Geological Evolution of Kingsburg Beach, Lunenburg County, Nova Scotia*, Geological Survey of Canada, Atlantic Geoscience Centre, open file report 3069 (1995) at 21, online: < publications.gc.ca/site/eng/9.820267/publication.html> [perma.cc/N323-7L7J]: "Kingsburg Pond represents one of the few documented cases in Nova Scotia where a water body has switched from marine to fresh water." [Taylor, *Recent Geological Evolution of Kingsburg Beach*].

[81] Miller, "Assessment," *supra* note 80 at 6; Jacques Whitford Environment Ltd & Canadian Seabed Research, *Report to Nova Scotia Department of Natural Resources on Ecological Study of Kingsburg Beach, Kingsburg, Lunenburg County* (1994) at 43 [Whitford, *Report on Ecological Study of Kingsburg Beach*].

[82] Google Earth, "Kingsburg Pond: 44°16'30"N 64°15'34"W" (October 2023), online: <earth.google.com> [perma.cc/W29F-PHB5].

There are 90 designated beaches under the *Beaches Act*.[83] The south shore contains sandy beaches, of which Kingsburg Beach is one. It contains a significant dune system, which is fragile.[84] The Whitford report was prepared for the purposes of assessing the property lot holders' applications to build on their land, and it indicated a strong need for ecological protection. The report found that the shoreline of Kingsburg Beach had migrated landward between 5 to 13 metres from 1955 to 1992.[85] As well, the dunes had decreased in size and had drifted landward. The consultants estimated that the dune structure has a maximum lifespan of 45 to 150 years, and that this would be impacted negatively by global warming.[86] Out of 36 beaches in Nova Scotia evaluated for ecological significance, Kingsburg Beach was rated as fifth in terms of need of protection based on its geomorphology, ecology, and use and development of the beach.[87]

[83] See the designations of beaches enacted as regulations under s 5(1) of the *Beaches Act*, *supra* note 5.
[84] Whitford, *Report on Ecological Study of Kingsburg Beach, supra* note 81 at 17; Canada, Department of Fisheries and Oceans, Habitat Management Division, *By the Sea—A Guide to the Coastal Zone of Atlantic Canada: Module 6, Sandy Beaches and Dunes* (Moncton, NB: DFO, 1996), online: < publications.gc.ca/pub?id=9.868505&sl=0> [perma.cc/XCM8-VGMZ].
[85] Whitford, *Report on Ecological Study of Kingsburg Beach, supra* note 81 at 17.
[86] *Ibid*.
[87] *Ibid*.

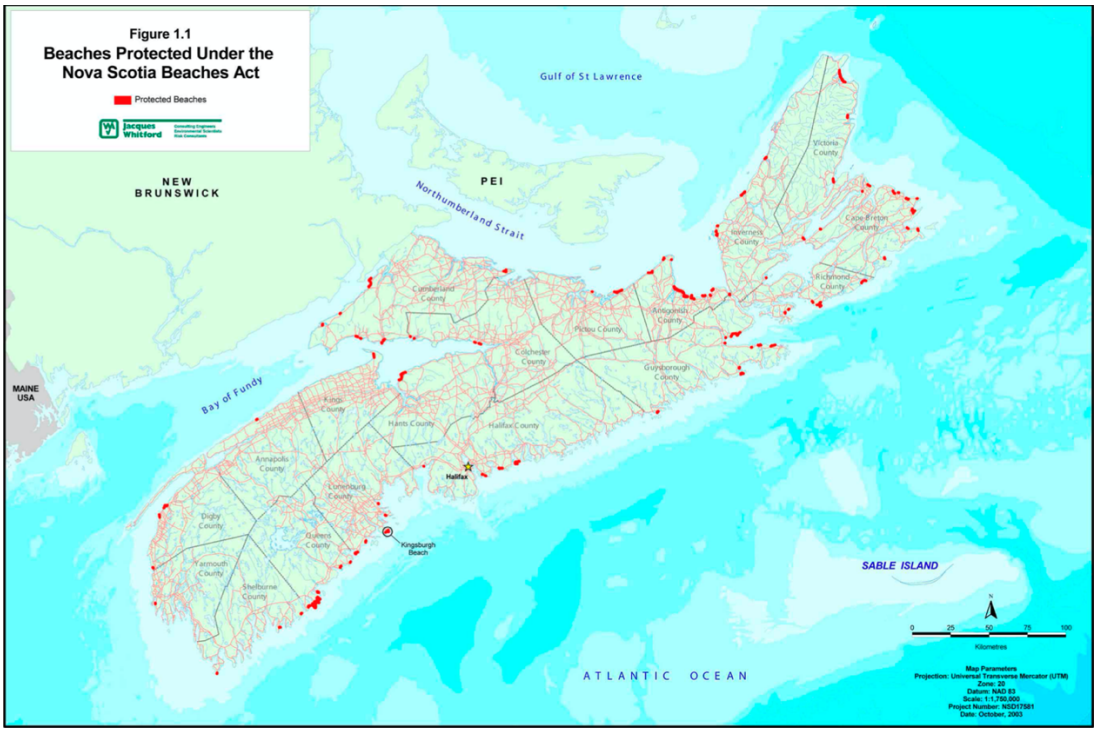


Figure 4.10: Map of beaches protected under the *Beaches Act*[88]

4.3.2. Why There?

The question "why there?" is an analytical question that examines why a geographical phenomenon is found in a specific location. Why as a matter of historical accuracy are properties in that location? Why has the *Beaches Act* been used in this location? The analysis in this chapter centres properties on Kingsburg Beach as the object that was created through spatialized forces of law, expropriation, histories, and people. The centring of properties for analysis takes property as an organizing social construct,[89] wherein the rights of people with respect to the property is what expropriation law regulates (rather than the thing itself). As was discussed above when defining "what is where," the properties of Kingsburg Beach are a conglomerate of people and culture

[88] Jacques Whitford Environment Ltd, *Managing Development on Protected Beaches in Nova Scotia: With Kingsburg Beach as a Case Study,* report to the Nova Scotia Department of Natural Resources, Project NSD 17581 (2003) at 2. [Whitford, *Report on Managing Protected Beaches*].
[89] Thomas W Merrill, "The Property Strategy" (2012) 160:7 U Pa L Rev 2061.

(since social meanings of property are present in the location of Kingsburg Beach) and also property is a matter of physical place and physical natural geography. These properties are the physical geography that ultimately give rise to the application of the law of expropriation.

As the properties along Kingsburg Beach are centred in the law and geographical analysis to ask "why properties are there?" expropriation is decentred. An analysis that is solely legal would take the question as "why did an alleged expropriation take place there?" Taken in this way, the question has been answered above: The alleged expropriation of properties on Kingsburg Beach occurred because the beach was designated by the *Beaches Act*. This answer centres the law of expropriation as the object of legal inquiry and the beach as the contextual backdrop in which the law occurred. Such an approach misses the crucial point that the beach is not merely the context of law but instead an active agent and can be as much the subject of analysis as expropriation. Furthermore, the geography of Kingsburg Beach does not exist as a solely natural space but is instead a physical geography constituted by natural features of the beach and also human-made built features. "Why there?" thus becomes a tool for examining why geographic features of the natural environment and also human-made properties exist in that location. The remainder of this section considers, first, why properties are along Kingsburg Beach and, second, why the beach has become a geography of environmental concern.

4.3.2.1. Histories of Property and People in Place

Geographic knowledge, constituted through both spatial and place-based knowledge, are acquired through observation and interpretation. There is always a critical component to processes of interpretation and knowledge building. Edward Said's work reflects on knowledge building, filtering, and sharing as it serves to create knowledge. Simultaneously this process serves to hide interpretive perspectives:

> All knowledge that is about human society, and not about the natural world, is historical knowledge, and therefore rests upon judgment and interpretation. This is not to say that facts or data are nonexistent, but that facts get their importance from what is made of them in interpretation … for interpretations depend very much on who the interpreter is, who he or she is addressing, what his or her purpose is, at what historical moment the interpretation takes place.[90]

This reflection from Said, though made in relation to a specific geopolitical context, highlights the importance of various facts and data as foundational aspects of knowledge building. Looking specifically at geographic knowledge, Harris too highlights that to know a geographic location when conducting field research one has to access diverse sets of knowledge by going into the archives.[91] The historical information contained in records of a given place are as important as records of observation gained from visiting a field research location. It is through both observational facts found in a location and the archival information that interpretation of place occurs. The physical geography and the archives of Kingsburg Beach are filled with a lot of property-related information: property titles, histories of property ownership, and community ties that exist through these histories. The histories of Kingsburg Beach are the histories of settlement of Lunenburg County and the histories of families historical to the area through settlement. The property lots represent people. The archives can also reveal through their absence. Silence in the archives of property law broadly, and the place of Kingsburg Beach specifically, is found in the absence of the histories of Mi'kmaq people,[92] efforts made to create property lots, and the cultural

[90] Edward W Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (New York: Pantheon Books, 1981) at 154.

[91] Cole Harris, "Archival Fieldwork" (2001) 91:1/2 Geog Rev 328 at 330.

[92] The archive is problematic for, on the one hand, it's silencing of Indigenous Peoples' histories and experiences, and on the other hand creating narratives about Indigenous Peoples. On the silencing impact of archives and its role in the colonial context, see Declan Cullen & Heather Castleden, "Two-Eyed-Seeing/Etuaptmumk in the Colonial Archive: Reflections on Participatory Archival Research" (2023) 55:3 Area 340. On the importance of the archive to the colonial project, Cullen & Castleden write that "Due to their role in colonial processes that seek to control, silence, and erase Indigenous peoples, places, and ways of knowing, archives present limits for decolonising projects" (*ibid* at 340). Cole Harris was very aware of the need for critical attention to the archive when carrying out his research, as can be seen in his other works, e.g. Cole Harris, *A Bounded Land: Reflections on Settler Colonialism in Canada* (Vancouver: UBC Press, 2020).

importance of property. *Why* properties are *there*, along Kingsburg Beach, is thus an intimate story of colonial expansion and personal engagement with properties. This chapter reviews property as an essential aspect of the law of expropriation, but like the archives, Indigenous Peoples are absent from consideration of expropriation law as applied to private property parcels. I consider the implications of this in Chapter 6 on Indigenous Peoples and expropriation law.

What is now known as the Town of Lunenburg was first called Merliguesche, and by many Malegash.[93] Lunenburg County was settled in 1753.[94] The original settlors of Lunenburg County were largely of German origin, hailing from the town of Lüneburg, Germany, a name ultimately recognized in the naming of the Town and County of Lunenburg. Immigrants also came from France and Switzerland. The first settlors were enticed to Nova Scotia by public notices that spoke of the benefits of emigrating to Nova Scotia. These advertisements, distributed throughout Hanover, Germany, and parts of Switzerland,[95] emphasized the benefits of settlement in the "new world," which included access to resources and land. Though I have not been able to locate a copy of the original posters, they would have been very similar to the posters discussed in Chapter 3 that were disseminated throughout Europe to entice immigrants to North America. In the *History of the County of Lunenburg*, author Mather DesBrisay describes the advertisements offering the following to immigrants:

> [F]ifty acres of land each free from all rent and taxes for ten years, with ten additional acres for each member of a family, and further privileges in proportion to the number of acres of land cultivated and improved, and were to be maintained for twelve months after their arrival in the Province. They were to be provided with arms and ammunition, and a sufficient quantity of materials and implements for housekeeping, clearing and cultivating their lands, erecting habitations, and

[93] There have been various spellings: Merleguish, Merligash; see Mather B DesBrisay, *History of the County of Lunenburg*, 2nd ed (Toronto: William Briggs, 1895) at 18, 21, online: <ia600202.us.archive.org/3/items/cu31924028897952/cu31924028897952.pdf> [perma.cc/F8A3-9LKX]. [DesBrisay, *History of the County of Lunenburg*].
[94] *Ibid* at 27.
[95] Hewitt, *History of Lunenburg County, supra* note 1 at 13.

> promoting the fisheries. They were informed that the climate of the Province was healthy, the soil productive and fertile, yielding an abundance of everything necessary to support life, with a sea coast abounding in fish, well situated for shipping and trade, and furnished with secure and convenient harbors.[96]

Immigrants were to apply to Mr. John (Johann) Dick, an agent for the colony of Nova Scotia, and they had to pay for their passage.[97] The document signed by passengers on a ship, *Sally*, indicated that they were obliged "jointly and severally" to pay the cost of their passage at a "rate of one shilling sterling [Dutch currency] per day, until the whole we owe is paid."[98] Immigrants were to make this money through work for the governor of Nova Scotia, as they "think properly to employ" them at.[99] Of the passage made on the ship, immigrants subsequently complained that Mr. Dick persuaded the passengers to sell all their goods, including bedding, prior to the voyage to be able to have room for more people on the passage.[100] This had the impact of many people dying both enroute and once they had landed on shore in Nova Scotia from a lack of provisions.[101] One hundred and thirty people were on the first passage in 1750 from Rotterdam to Halifax, and by 1753, 1,615 people in total had emigrated to Halifax on multiple ships.[102]

The settlement at Lunenburg did not begin until 1753, when 450 emigrants set out from Halifax to Lunenburg via boat, although immigrants had been in Halifax since 1750.[103] The first property lots were created in 1753 when officials divided land into 500 lots and allocated property lots by a drawing of names. Settlors received "garden lots, closest to town and farms, more

[96] DesBrisay, *History of the County of Lunenburg, supra* note 93 at 22; Hewitt, *History of Lunenburg County, supra* note 1 at 13.
[97] DesBrisay, *History of the County of Lunenburg, supra* note 93 at 22, 24.
[98] *Ibid* at 24.
[99] *Ibid*.
[100] *Ibid*.
[101] *Ibid*.
[102] *Ibid* at 23.
[103] *Ibid* at 21, 27.

remotely situated."[104] Records show there was informal exchange of property between settlors prior to that time, and the first deed actually executed at Lunenburg is dated 3 December 1753.[105]

Settlement was not an easy process. On their arrival at Lunenburg harbour, the settlors found "farmlands covered by virgin forests; lack of roads; the dearth of home comforts during the first years of pioneering; absence of accustomed religious privileges."[106] Leonard Christopher Rudolf, an officer in the Regiment of Margrave of Baden-Durlach (in Germany) who sailed the ship *Pearl* to Nova Scotia and was prominent in settlement of Lunenberg, published his journal on these experiences. Rudolf wrote the settlors "went to work to clear the wilderness on the 7th June" of 1753.[107] For this work, the original settlors did receive all the supports required to clear land, cultivate the soil, and grow provisions. Each property lot included the provision of building supplies such that "[e]ach family building a house was to receive … materials not exceeding seven hundred feet of boards, five hundred bricks, and a proportionate quantity of nails."[108] Support from the government was stopped on 14 June 1754 except for those who were aged and infirm, and without government support many people were poor, and commodities such as tea, coffee, and sweets were a luxury for many.[109]

At early settlement, it was the government in Halifax and the military posted in Lunenburg who supported the work of setting up properties and farmlands, laying out plots, and cultivating land. Eventually this resulted in a grant of land for the township of Lunenburg from the Nova Scotian government on 18 August 1761.[110] This grant included lands in both the Town of Lunenburg and the County of Lunenburg, which includes the area of Kingsburg Beach.

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[104] Hewitt, *History of Lunenburg County, supra* note 1 at 37.
[105] *Ibid*.
[106] *Ibid* at 12.
[107] DesBrisay, *History of the County of Lunenburg, supra* note 93 at 28.
[108] *Ibid*.
[109] *Ibid* at 38–39.
[110] *Ibid* at 69.

Essentially, this land grant was given once the settlors had shown they were successful in the process of settlement and property titles were confirmed, with the expectation that the settlement would be complete in 1765.[111] The grant, which was awarded by petition, provided:

> WHEREAS, many of the said inhabitants do now pray that the lands so laid out and assigned to them heretofore may be granted to them in due form and possession thereof confirmed to them.[112]

The original settlors granted property lots in the Town of Lunenburg included[113] the Moshers,[114] the Hirtles, the Knocks,[115] the Creightons, and the Zwickers, among others. Land grants for property lots along Kingsburg Beach were granted on 5 July 1787 to Leonard Hirtle, John Mossman, Peter Knack, Christian Hartman, John Kayser, and Jacob Moser.[116]

These original inhabitants have remained in the community and become prominent families in the County of Lunenburg. A road immediately behind the beach is called Mosher Road. Lamont B Mosher and Carole Anne Mosher were plaintiffs in the *Mariner Real Estate* litigation. Their properties are along Kingsburg Beach.[117] Not mentioned in the case report from either court is that the graveyard on the property lot owned by the Mossman family, though public, contains the graves of Mossman family members, effectively operating as a family graveyard.

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[111] *Ibid* at 69, 72.
[112] *Ibid* at 69–72.
[113] All of these property deedees (deeds) are listed by name in DesBrisay's text (see DesBrisay, *ibid* at 69–72).
[114] Sometimes recorded as Mosser or Moser in the historical treatises.
[115] Various spelling in the records include Knock or Knockell.
[116] Nova Scotia Registry of Deeds, Lunenburg District Registry of Deeds (1759–1968), Halifax, Nova Scotia Archives (Book 5, no 53, p 45; for index to land grants, see microfilm 18426), online: <ns-archives.accesstomemory.net/lunenburg-district-registry-of-deeds> [perma.cc/Q5KF-AX6L]; Nova Scotia Department of Lands and Forests, Land grant registration books (1730–1958), Halifax, Nova Scotia Archives (for index of grantee, see microfilm 12927), originals held by the Crown Lands Records Office, Nova Scotia Department of Natural Resources, online: <ns-archives.accesstomemory.net/land-grant-registration-books> [perma.cc/6U2N-3MJ6] ("Mosher" is the surname of one of the parties in *Mariner Real Estate decisions,* In historical documents both "Mosher" and "Moser" are used. Jacob Moser is the ancestor of many present-Moshers. It is unclear if references to the "Knocks" and "Knack" are the same. See, Kingsburg Community Association, "Our Early History" (undated) online: <kingsburg.info> [perma.cc/4ZM2-ZSUG]).
[117] Nova Scotia Registry of Deeds, Lunenburg District Registry of Deeds (1759–1968), Halifax, Nova Scotia Archives (Book 204, p 804 and Book 439, p 338; for index to land grants see microfilm 18426). See Figure 4.2: Property Survey. Close-up showing the properties involved in *Mariner Real Estate* litigation.



Figure 4.11: Close-up of Mossman gravestone. (Photograph by Tenille E Brown, 2016).

Further north down the coast is Moshers Island. Hirtle's Beach is the next beach over from Kingsburg Beach and can be accessed only via private property. Descendants of these original inhabitants—Mary Ann Knock, Manson Mossman, Lorraine Allan Mossman, and Agnes Mossman—are all listed as owning property lots.[118] Across from these properties facing Kingsburg Pond, Harold Mosher and Grace Mosher own property lots.[119]

[118] See Figure 4.1: Property survey: Field plot P-007/93.
[119] See Figure 4.3: Close-up of property lot held by plaintiffs 2102660 Nova Scotia Limited.

4.3.2.2. Public Law Frameworks for Managing People, Property, and Place

Historically, government regulations have shown concern about the protection of beaches in Nova Scotia, with the earliest Nova Scotia statutes addressing the management of beach matter, which was being used as beach-sourced resources. The first set of consolidated statutes, published in 1851, included Chapter 108, titled "Of the Gathering of Sea Manure."[120] "Sea manure" is a mixture of sea matter, including seashells, seaweed, and sea mud, which together was used for fertilizer on farms.[121] Sea manure is located in the water along a beach or rocky shoreline. The Act regulated the gathering of sea manure by limiting the amount that could be taken (or harvested) from beach areas. In 1884 the amended statute, Chapter 70 "Of Sea Manure," extended these regulations to include other sea matter in addition to sea manure, such as kelp and rockweed.[122] The concerns about management of beach matter included Kingsburg Beach, where a plaque prohibiting the removal of beach matter is still mounted at the south end of the beach.

The issue of regulating beach areas by preventing matter from being taken to the extent that natural resources are depleted is still an issue in the coastal regions of the Maritimes and the

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[120] William Young et al, eds, *The Revised Statutes of Nova Scotia,* 1st series (Halifax: Richard Nugent, 1851) at Chapter 108, "Of the Gathering of Sea Manure," online: <0-nsleg--edeposit-gov-ns-ca.legcat.gov.ns.ca/deposit/Statutes/RSNS/R-1851.pdf>.

[121] A correspondent of the Yankee Farmer, in speaking of "sea manure" says, "When sea mud is thickly blended with sea-shells, they tend to give it much additional value; as the shells, when exposed to atmospheric influence, will have their cohesion and organization gradually destroyed—chemical composition ensues, carbonic gas is disengaged, and this gas comes in contact with the vegetable fibre, where it is distributed through all its ramifications. To improve the soil is to give it the principles which it requires, and does not contain. Marine dressing not only imparts to its principles, but animates inert matter into action; or, to define it more chemically, the elements of inert matter are resolved into new combination"; see JM Ives, "Shelly-Marl, or Muscle Bed" in Samuel W Cole, ed, *The New England Farmer,* vol 2 (Boston, Mass: J Nourse, 1850) at 13, online: <ia801308.us.archive.org/24/items/newenglandfarmer50bost/newenglandfarmer50bost.pdf> [perma.cc/RXC4-5GME].

[122] Otto S Weeks et al, eds, *The Revised Statutes of Nova Scotia,* 5th series (Halifax: Queen's Printer, 1884) at Chapter 70, "Of Sea Manure," online: <0-nsleg--edeposit-gov-ns-ca.legcat.gov.ns.ca/deposit/Statutes/RSNS/R-1884.pdf> [perma.cc/NS2S-DWEG].

northeastern United States. In 2017 the Superior Court of Maine had to decide whether the management of "rockweed," a type of sea manure[123] found in hightide areas along the coast, was a type of marine product owned by the state in trust for the public.[124] The issue for private property holders of intertidal property was the growing commerce in small-scale farming of seaweed that was damaging, and in places destroying, the ecosystem in these locations. The Maine court held in favour of the private property holders, reluctant to interfere with previous decisions that recognized property rights extending out into the water flats adjacent to a property lot.[125] Access to rockweed, and presumably a variety of other sea matter, was historically encouraged as part of commerce and in the settlement and opening up of Maine.[126]

From this initial statutory approach, which saw the beach and beach matter as resources that could be extracted, the statutory framework was later developed to regulate the taking of beach matter and to afford protection based on a concern about environmental protection. The current *Beaches Act* has its origins in the *Beaches Protection Act*, 1960.[127] The *Beaches Protection Act* signalled a shift in approach to managing beach areas. Where the earliest statutes sought to control the extent to which material was taken from the beach, the 1960 Act brought about the still existing

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[123] Rockweed is the common name for a species of brown intertidal seaweed known as *Ascophyllum nodosum,* and it is commonly referred to as "sea manure"; see *Ross v Acadian Seaplants Ltd,* 2017 US Lexis 47 at 2 (Me Super Ct 2017).

[124] *Ibid.*

[125] *Ibid,* affirmed 206 A (3d) 283 (Me Super Ct 2019).

[126] Ben Goldfarb, "A Fish Called Rockweed" (29 May 2018), online: <hakaimagazine.com> [perma.cc/HSD8-CQLR]. Similarly see Heather L MacLeod, *Past Nature: Public Accounts of Nova Scotia's Landscape, 1600–1900* (Masters' thesis, Atlantic Canada Studies, Saint Mary's University, 1995) [unpublished], online: <library2.smu.ca> [perma.cc/2PBK-LV6G]. MacLeod describes: "When Joseph Howe spoke of settlers transforming the still unfilled forests of Nova Scotia into an 'unbroken prospect of smiling and peaceful cultivation,' the symbol of a virtuous mission was strongly encoded in the message of triumphant settlement" (at 10).

[127] *An Act Respecting the Protection of Beaches,* SNS 1960, c 2, online: <0-nsleg--edeposit-gov-ns-ca.legcat.gov.ns.ca/deposit/Statutes/1960/1960_ch2.pdf> [perma.cc/GN7T-3VV6] [*Beaches Protection Act,* 1960]. The *Beaches Protection Act* was later consolidated and revised under the Revised Statutes of Nova Scotia, 1967 (see *Beaches Protection Act,* RSNS 1967, c 20, online: <0-nsleg--edeposit-gov-ns-ca.legcat.gov.ns.ca/deposit/Statutes/RSNS/R-1967-1.pdf> [perma.cc/4XDU-2HHA] [*Beaches Protection Act,* 1967]).

framework for managing beaches in Nova Scotia, which is to designate select beaches for protection. Section 2(1) states: "the Governor in Council, on the recommendation of the Minister of Lands and Forests, may designate areas of land lying under tidal water or adjacent to such land as protected beaches."[128]

The 1960 Act stipulated a variety of prohibitions on beach activity. It prohibited defacing or otherwise altering an area designated as a beach.[129] It also introduced a permit system for lawful removal of "sand, gravel, stone or other material from a designated area."[130] Like the earliest statutes, the 1960 Act continued the concern about removal of beach matter on a large scale. At the second reading of the *Beaches Protection Act*, Member of the Legislative Assembly (MLA) Mr. Cowan raised a particular concern about the removal of sand from beaches:

> I think most members of the public, and most members of this House, will support the bill as being necessary to protect our beaches, particularly since many tons of sand have been removed from beaches, enabling the sea to remove the remaining bank.[131]

Mr. Cowan went on to identify "contractors and other people" as those who have been removing sand, gravel, and other beach matter.[132] As far as the contractors were concerned, the beach material would largely be used for building purposes,[133] and even used by government contractors for the Department of Highways for purposes of building roads and highways.[134]

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[128] *Beaches Protection Act,* 1960*, ibid*, s 2; *Beaches Protection Act,* 1967, *ibid*, s 1(1) (this quote is at s 1(1) in the 1967 act, but at s 2(1) of the 1960 act).
[129] *Beaches Protection Act,* 1960*, ibid*, s 4.
[130] *Ibid*, s 6(1).
[131] "Bill 36, Beach Protection," 2nd reading, *Nova Scotia House of Assembly Debates,* 46-4, vol 2 (7 March 1960) at 611 (Mr. Cowan).
[132] *Ibid.*
[133] *Ibid* at 623 (Mr. Hicks).
[134] *Ibid* at 627–28 (Hon Mr. Smith).

The 1960 Act and the revised 1967 Act were repealed in 1975 and replaced by the *Beaches Preservation and Protection Act*.[135] The 1975 Act incorporated a clear articulation of parliamentary objectives of environmental protection of the beach as a goal in and of itself:

> The beaches of Nova Scotia are hereby declared to be for the benefit, education and enjoyment of the people of Nova Scotia and subject to this Act and the regulations the beaches shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.[136]

Like the 1960 Act, the 1975 Act vested authority in the Cabinet to regulate beaches for the preservation, control, and management of beaches, and in addition it allowed the governor in council to select beaches for designation under the Act.[137] At the bill's second reading, the Honourable Maurice E Delory explained the change in purpose from the 1960 to the 1975 Act in the following way: "In this bill we are not expropriating, we are not buying. We are protecting and preserving."[138]

The assembly debates at the second reading indicate support for the concern about the environmental components of the bill, but with some reluctance concerning its interaction with the existing property rights since the 1975 *Beaches Preservation and Protection Act* abolished the right to compensation. In addition, public interest in access to beach resources and propertization of the same continued. The member for Lunenburg Centre, the MLA local to the Kingsburg Beach area, expressed concern that the new protection would interfere with the private title in beaches "that has been passed on from father to son to grandson for the purpose of protecting the sea manure on the beaches which the families living there find very useful."[139] Others expressed

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[135] *An Act to Preserve and Protect the Beaches of Nova Scotia,* SNS 1975, c 6, online: <0-nsleg--edeposit-gov-ns-ca.legcat.gov.ns.ca/deposit/Statutes/1975/1975_ch6.pdf> [perma.cc/DE7G-QPRR].
[136] *Ibid* at s 2.
[137] *Ibid* at s 5(1).
[138] "Bill 63, Act re Beaches of Nova Scotia," 2nd reading, *Nova Scotia House of Assembly Debates and Proceedings,* 51-2 (5 March 1975) at 996 (Hon Maurice E Delory, Minister of Lands and Forests).
[139] *Ibid* at 999 (Hon Bruce Cochran, Member for Lunenburg Centre).

concern about the general prohibition on the removal of sand and the impact that may have on private property holders who would otherwise use it for personal use. One member asked, perhaps facetiously, "what happens to [an individual property holder] if his grandchildren come to play at his home and he wishes to get a bucket of sand for them to play with? Does he get fined for it?"[140] In strong support of the bill, the premier framed these concerns as not unlike the types of regulations that would ordinarily be placed on a variety of types of property through the application of zoning laws,[141] and cited the destruction of Silver Sands, a major beach close to Halifax and Dartmouth, by contractors as justification for the environmental protection.[142]

The last substantive amendment to the *Beaches Act* regime is the 1989 version, amended in 1993, which is also the version that was applicable in the *Mariner Real Estate* decisions and the version in force today.[143] The amendments in 1989 expanded the purpose of the Act so as to:

> (i) provide for the protection of beaches and associated dune systems as significant and sensitive environmental and recreational resources;
> (ii) provide for the regulation and enforcement of the full range of land-use activities on beaches, including aggregate removal, so as to leave them unimpaired for the benefit and enjoyment of future generations;
> (iii) control recreational and other uses of beaches that may cause undesirable impacts on beach and associated dune systems.[144]

At the introduction of the 1988 bill to Parliament, the Honourable Jack MacIsaac, then Minister of Lands and Forests, explained that the reasoning for the expanded purpose of the Act was "to

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[140] *Ibid* at 998 (Hon Thomas J McKeough, Member for Cape Breton North).
[141] *Ibid* at 1001 (Hon Gerald Regan, Premier of Nova Scotia).
[142] *Ibid*. Silver Sands Beach was approximately 15 kilometres from Dartmouth and a popular destination for day trips for people residing in Halifax and Nova Scotia. Beginning in the 1940s, construction companies used it for commercial resource extraction. The beach was designated under the 1967 *Beaches Protection Act,* though it still saw material extraction by permit until 1975. See Magen Lilli Hudak, *Cow Bay's Ocean Playground: The Shifting Landscape of Silver Sands Beach, 1860s-Present* (Masters' thesis, Atlantic Canada Studies, Saint Mary's University, 2014) [unpublished] at 137, online: <library2.smu.ca/xmlui/bitstream/handle/01/25865/hudak_magen_l_masters_2014.pdf?sequence=1&isAllowed=y>.
[143] *Beaches Act, supra* note 5.
[144] *Beaches Act, supra* note 5 at s 2(2).

provide outdoor recreational resources for future generations."[145] The changes envisioned a widespread shift in the approach to using public space from a resource that had to be regulated to a place that required environmental protection:

> There is a need for a strong outdoor commitment from government to protect and improve our provincial Crown land estate, expand outdoor recreational opportunities, better identify and manage our outdoor resources and to safeguard its environment.[146]

Because of this largescale approach, the amendments to the *Beaches Act* were introduced as part of a trilogy of bills, which together were designed to provide greater access to parks and outdoor recreation resources.[147]

In his remarks, MacIsaac noted that the department had received more than "125 briefs and submissions … from groups and individuals … including campground owners, environmentalists, campers and hikers and members of the outdoor recreational clubs."[148] Together these submissions had indicated a desire to protect outdoor resources, motivated by the negative impact of environmental degradation. Speaking in the legislature, the minister explained that the goals of the *Beaches Act* were the result of the public consultations that indicated protection of public space is a priority:

> Accordingly, Mr. Speaker, the new policy calls for better identification, acquisition and development of parklands, beaches, heritage sites, trails and waterways for recreational use. It also recognizes the need to acquire unique or special lands for environmental protection. In order to provide more opportunities for Nova Scotia to wisely use and enjoy certain Crown lands, an administrative framework for

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[145] "Bill 65, Act to Amend Chapter 6 of the Acts of 1975. Beaches Preservation and Protection Act," 1st reading, *Nova Scotia House of Assembly Debates and Proceedings*, 54-4 (8 April 1988) at 1584 (Hon Jack MacIsaac, Minister of Lands and Forests) [Bill 65, 1st reading]—statement of minister regarding new parks policy.

[146] *Ibid*.

[147] The trilogy of bills included "Bill 65, Act to Amend Chapter 6 of the Acts of 1975. Beaches Preservation and Protection Act," 4th Sess, 54th Leg, Nova Scotia, 1988 (assented to 25 May 1988), SNS 1988, c 44; "Bill 63, An Act Respecting Provincial Parks," 4th Sess, 54th Leg, Nova Scotia, 1988 (assented to 25 May 1988), SNS 1988, c 18; and "Bill 64, An Act to Provide for Trails over Land and Water in the Province," 4th Sess, 54th Leg, Nova Scotia, 1988 (assented to 25 May 1988), SNS 1988, c 20. All three bills were adopted.

[148] Bill 65, 1st reading, *supra* note 145 at 1584 (Hon Jack MacIsaac, Minister of Lands and Forests)—statement of minister regarding new parks policy.

> campsite and recreational leases on Crown lands will be developed and implemented.[149]

This statement was met with applause from the House.[150] At the second reading of the bill, there was a universal acknowledgement of the importance of the preservation of beaches in Nova Scotia by the MLAs who spoke. One member stated, "no doubt this would be for the benefit of people to use these beaches for recreation and preserve the wildlife,"[151] another brought attention to a specific beach in their jurisdiction that would benefit from preservation,[152] while yet another shared support for the development in the legislation since 1975 as "we need stiffer and better laws" to protect beaches,[153] sharing an anecdote about people littering on beaches to illustrate their point.[154]

Though the environmental aims and ethos were supported, there was ongoing concern about whether the legislative changes were sufficiently targeted to prevent erosion. A general concern that beaches were not being preserved was articulated by MLAs and went so far as to identify entire beaches that had eroded, causing land loss, or had even been washed away entirely.[155] As a result, the Act included protection of beaches as one of its goals, but it did not include any active efforts to mitigate environmental harm or prevent erosion.[156] This outcome would suggest that there was an intent to preserve beaches in their natural state, but perhaps as a

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[149] *Ibid* at 1585.
[150] *Ibid*.
[151] "Bill 65, Beaches Preservation and Protection Act," 2nd reading, *Nova Scotia House of Assembly Debates and Proceedings*, 54-4 (16 May 1988) at 3475 (Hon Bob Levy, Member for Kings South).
[152] *Ibid* at 3466 (Hon Paul Macewan, Member for Cape Breton Nova).
[153] *Ibid* at 3469 (Hon Guy Brown, Member for Cumberland Centre).
[154] *Ibid* at 3472 (Hon Guy Brown, Member for Cumberland Centre).
[155] *Ibid* at 3470 (Mr. Guy Brown, Member for Cumberland Centre, who identified beaches in Pictou County), at 3481 (Mr. Harold Huskilson, Member for Sherburne, who identified Johnstons Pond Beach as having washed away entirely), at 3482 (Mr. James Barkhouse, Member for Lunenburg East, who identified that entire beaches had washed away but did not name them).
[156] *Ibid* at 3482 (see e.g. the comments made by Mr. James Barkhouse, Member for Lunenburg East, and Mr. Guy Brown, Member for Cumberland Centre, who states there would need to be beach rehabilitation of beaches that have been subject to erosion).

compromise to other interests in that location not to intervene if any erosion was based on natural causes.

4.3.3. Why Care?

4.3.3.1. Judicial Interpretation of Place

The two courts in the *Mariner Real Estate* decisions came to different conclusions as to whether a *de facto* expropriation had occurred. While this difference in legal outcome is reflective of the respective courts' application of the test for *de facto* expropriation, these different interpretations of the law belie another interpretative choice made. This is an interpretation of the place of Kingsburg Beach. The NSSC emphasized, first, the economic value of real property, while the NSCA emphasized the cultural use of property and the surrounding environmental concern. These contextual framings of the place of Kingsburg Beach and the properties along it are choices made to describe the locale; thus, the two courts' interpretation of different aspects of place coloured how the law of *de facto* expropriation was applied.

The interpretation of place at the NSSC foregrounds property, emphasizing the financial impact of denying property title holders the ability to build on their property lots. The impact the *Beaches Act* had on the economic value of the property lots is relevant to part one of the test for *de facto* expropriation, which asks "what right did the respondents lose?"[157] The trial judge placed high significance on the impact of the property lots' beach designation, which allowed only recreational uses, where previously both residential and recreational uses had been allowed. The removal of the economic value of the property was total, according to the trial court, and as such the court found that the first arm of the test for *de facto* expropriation was met.[158] Justice Tidman's

[157] *R v Tener,* 1985 CanLII 76 at para 48 (SCC) [*Tener*].
[158] *Ibid*. A reminder that the two-part test from *Tener* was "What right did the respondents lose? What interest did the government acquire?"

conclusion "that the plaintiffs have lost virtually all economic value in the designated lands and thus have lost an interest in their property"[159] was made with very little comment or analysis, beyond the opinions offered by both expert witnesses. For Justice Tidman, as for the beach lot title holders who brought the litigation, the removal of the total market value of a property due to regulatory actions, as supported through the evidence of the appraisers, resulted in a *de facto* expropriation.

One reason to care about this decision was set out by the homeowners in the case: The homeowners' valuation of property dropped dramatically. Expert witnesses from the Canadian Institute of Appraisers gave evidence about the economic impact of the regulatory restriction, which removed the possibility of developing the land.[160] For valuation purposes, appraisers take the "highest and best use that can be made of land" to assess the market value. Prior to the Kingsburg Beach designation, the highest and best use of the land would have been to build a single family dwelling. After the designation, this use was dependant on successfully applying for a permit. In the expert's opinion, the loss in value of the respondents' lots was significant. The Read property lot (plaintiffs in the action) dropped from $139,000 to $94,000; the Mariner property dropped from $52,000 to $18,000; and the numbered property (2102660 NS Ltd) dropped from $95,000 to $34,000.[161] The Mosher property did not receive an appraisal because of a mistake made by the minister when carrying out investigations for compensation purposes; however, in the appraisers' opinion, comparative figures would apply to the Mosher property. As the single expert witness for the plaintiffs stated—and this is reproduced in full in the trial court case report:

> The designation pursuant to the Beaches Act has effectively prohibited all economically beneficial or productive uses of the land and as such, has rendered the land to be economically idle, effectively valueless. That is, the capability of

[159] *Mariner Real Estate,* NSSC, *supra* note 3 at para 27.
[160] *Ibid* at paras 18–24.
[161] *Mariner Real Estate,* NSSC, *supra* note 3 at para 19.

> economic existence and development, supported by our consideration of the legal basis of value and the economic factors of value has been nullified by the restrictions imposed by the Beaches Act.[162]

The expert witnesses painted a stark picture of the utility of the property lots, which, after the beach designation and refusal to grant a building permit, was greatly reduced. This expert witness was one of only two expert witnesses quoted in the case report, and the court accepted this testimony in full. Market value is inextricably connected to the usage (or possible usage) of property lots. As the expert witness explained, "[l]and has value because it has specific utility and demand. However, as the ownership rights that differentiate real property from real estate are eroded or removed, so too is the utility and demand, hence the value of the property"[163] will also decrease. The market value of property is dependent on its permissible use, and building on one's property lot to create real estate is a valuable use of a property lot.

In the NSCA decision, economic interests in property were not a serious issue in the opinion of the court. In fact, the entirety of the direct comments on the economic value of the property lots is contained in one paragraph. Justice Cromwell wrote:

> The judge found as a fact that the plaintiffs had lost virtually all economic value of their lands. That is a question of fact. The trial judge decided to accept the evidence of the respondents' expert, Mr. Hardy, on this point. While there was some attempt to attack it in this Court, I conclude that the finding is reasonable and supported by the evidence at trial and should not, therefore, be disturbed on appeal.[164]

Instead of considering the economic aspect of private property, Justice Cromwell found that as a matter of expropriation law, compensation attaches to the loss of interests in property, not for loss of market value of property.[165] As just one type of property interest, and not all of the possible property interests, removal of economic value of a property parcel does not meet the test for *de*

[162] *Ibid* at para 24, evidence provided by Mr. Charles JL Hardy, BSc, FRICS, AACI, plaintiff's expert witness.
[163] *Ibid*.
[164] *Mariner Real Estate,* NSCA, *supra* note 3 at para 56.
[165] *Ibid* at para 47. See also Chapter 3.

facto expropriation, which requires the removal of all property rights, not just the removal of economic rights.[166] Robert Bauman[167] summarizes the Cromwell judgment on this point: "One must … demonstrate that the legislation effectively, if not *prima facie,* confiscates all reasonable private uses of the lands in question."[168] Accordingly, despite the regulatory restrictions, recreational uses of the beach lot properties remained, including campfires, family get-togethers, and other activities, which are all reasonable uses of properties even though the lot might indeed be impacted economically.

Rather than highlighting economic aspects of private property parcels, the initial description of the beach highlights environmental protection as central to the location. Justice Cromwell is direct in his summation of the perspective of the beach as one requiring environmental protection, but he does so by contrasting it with private property rights. At paragraph one of the NSCA decision, Justice Cromwell writes:

> This case involves a collision of important interests. On one side, there are the interests of the respondents in the enjoyment of their privately owned land at Kingsburg Beach. On the other is the public interest in the protection and preservation of environmentally fragile and ecologically significant beach, dune and beach ridge resources.[169]

Though the court of appeal judgment begins with a reference to the ecological significance of the beach coupled with the existence of property rights, this dichotomy is quickly minimized as information about the environmental aspects of the beach are foregrounded in the account of the context of Kingsburg Beach.

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[166] *Ibid* at para 47.
[167] Robert Bauman would later be appointed chief justice of the British Columbia Supreme Court, serving from 2009 to 2013.
[168] Robert J Bauman, "Exotic Expropriation: Government Action and Compensation" (1994) 52:4 Advocate 561 at 574. See *Mariner Real Estate*, NSCA, *supra* note 3 at para 48.
[169] *Ibid* at para 1.

The details of the decrease in property valuation thus was a central feature of the lower court's analysis, but were not central in the court of appeal's analysis.[170] While the lower court's finding of fact was accepted, the court of appeal disagreed with its assessment of the removal of economic rights within *de facto* expropriation analysis.[171] As the court of appeal interpreted the statute, the *Expropriation Act* provides compensation for loss of interest in land and not for loss or decline in market value of a property.[172] Accordingly, it was incorrect to equate the loss of virtually all economic value with the loss of land within the meaning of the *Expropriation Act*, and therefore the plaintiffs did not satisfy the legal test for compensation for expropriation.[173]

An interesting difference between the NSSC and NSCA decisions is the approaches to considering and defining what is a reasonable use of property. At first instance, the NSSC focused on the impact the regulatory framework had on the market value of the property lots, finding that the *Beaches Regulations* had "prohibited all economically beneficial or productive uses of the land … render[ing] the land to be economically idle, effectively valueless."[174] In the NSSC's opinion, this removal of economic opportunity meant there was no reasonable use to be made of the property lots. On appeal, the court took a different approach to defining and assessing place. The court of appeal acknowledged and accepted the evidence that showed economic interests had been removed but highlighted instead the traditional use of beach properties that occurred along Kingsburg Beach. Ultimately the potential for use of property lots for traditional activities meant

[170] In fact, the entirety of the direct comments on the economic value of the property lots is contained in one paragraph (*ibid* at para 56): "The judge found as a fact that the plaintiffs had lost virtually all economic value of their lands. That is a question of fact. The trial judge decided to accept the evidence of the respondents' expert, Mr. Hardy, on this point. While there was some attempt to attack it in this Court, I conclude that the finding is reasonable and supported by the evidence at trial and should not, therefore, be disturbed on appeal."

[171] *Mariner Real Estate,* NSCA, *supra* note 3 at para 55.

[172] *Ibid* at paras 58–62, 71–75, where the judgment discusses the *Expropriation Act, supra* note 4, ss 3(1), 26, and 30(1).

[173] *Mariner Real Estate,* NSCA, *supra* note 3 at para 57.

[174] *Mariner Real Estate,* NSSC, *supra* note 3 at para 24, evidence provided by Mr. Charles JL Hardy, plaintiff's expert witness, adopted by the xourt and reproduced in the case report.

that not *all* use had been removed by way of the regulatory framework, and thus reasonable use could be made of it.

This distinctly different approach to considering what "reasonable use" may be made of a property indicates different approaches both to defining a place and defining a property. The supreme court's point is that the economic value of a property is the most important use of a property, and when that economic value is greatly reduced or removed altogether that constitutes a *de facto* expropriation. The court of appeal's point is that the economic value of a property is but one interest that a real property holder has in their property and that other interests, such as recreational activities, remain. The appellate court did not capture the monetary realities of property ownership, while the lower court did not explicitly reflect upon the existence of recreational activities in that area. These distinct judicial approaches to defining place are important because they were decisive in the legal matter of expropriation.

A spatialized expropriation law would require instead that legal analysis highlight the ways in which place can gain meaning, ways in which places are created and managed, and the ongoing importance of locations. Beaches so designated under the *Beaches Act* in Nova Scotia are thus subject to heightened regulations that, most centrally, place restrictions on properties and property lots. A critical point about the existence of liminal spaces, as Couper explains, is that they require that social expectations and norms be exhibited in conformity with informal or official regulations. The creation of rules raises "[q]uestions of inclusion, exclusion and power"[175] and furthermore, "these are associated with issues of identity, difference, and representation."[176] The regulatory rules established through Kingsburg Beach can likewise be interrogated from the perspective of

[175] Pauline Couper, *A Student's Introduction to Geographical Thought: Theories, Philosophies, Methodologies* (London, UK: SAGE Publications, 2015) at 12.
[176] *Ibid.*

inclusion and exclusion, responsibility, and power. The legislation puts obligations on property holders that would be considered liminal to the ordinary parameters of real property ownership, though perhaps not liminal to places such as beaches.[177] There is interaction between the beach area, regulatory framework, properties, and people involved in the beach area through paper title ownership that extends beyond considerations within doctrinal expropriation law principles.

Application of a geographic lens to the legal analysis would suggest that when expropriative principles are used, then they must be done in such a way as to capture ongoing interests and complexity. The court of appeal did not capture all the personal aspects of property even though they purported to do so. They also did not capture the dollar value placed on property lots by property assessors and through the market. The valuation component of property is adopted as a mechanism in expropriation law to recognize interests in a location. Viewed from the perspective of place-based analysis, adopting a valuation mechanism to manage interests is incomplete; however, at the same time, removal of this component of property is a removal of one of the ways in which place has meaning for property title holders. An approach that foregrounds one set of aspects of place, such as recreational use, at the expense of another, such as market value, is possible within the confines of expropriation principles that are applied through a narrow lens. However, this narrow assessment of property interests is not desirable because it fails to capture and respond to the ways in which property is important for place, people, and property holders.

[177] Though the place of the beach will then have to be interrogated further to consider whether it is a place for environmental protection or a place for the public.

4.3.3.2. Expropriation and Environmental Regulation

Regulatory frameworks that have goals of environmental protection are just one of the ways in which expropriation may occur. Expropriation cases that explicitly concern environmental regulation are few. The leading cases on *de facto* and constructive expropriation concern land-use regulation, not environmental regulation. *Canadian Pacific Railway Co v Vancouver (City)*[178] concerned land-use regulation that limited the development of the railway line corridor through downtown Vancouver. *Alberta (Minister of Infrastructure) v Nilsson*[179] concerned restrictions on development in areas designated as a "restricted development area" for purposes of the future development of a ring road. In *R v Tener*,[180] the expropriation claim concerned the adoption of a government policy that refused to grant permits for surface rights in the newly formed Wells Gray Park, thus impacting a mineral claim rights holder. All of these cases concern regulation for land-use purposes, not for environmental purposes.

In a recent case heard by the Alberta Court of Queen's Bench, *Altius Royalty Corporation v Alberta*,[181] the court considered the extent to which a "constructive expropriation" (*de facto* expropriation) claim could lie after the government adopted regulations to reduce carbon dioxide emissions.[182] This regulation impacted the plaintiff by requiring they purchase updated technology to reduce CO_2 emissions.[183] Judge Farrington dismissed the constructive expropriation claim on the ground that regulation was the norm in the industry in which the plaintiff had invested (power plant operation). In the course of coming to this conclusion, Judge Farrington directly considered the extent to which the takings case law concerning regulation of land use could apply to matters

[178] *Canadian Pacific Railway, supra* note 52.
[179] *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283.
[180] *Tener, supra* note 157.
[181] *Altius Royalty Corporation v Alberta*, 2021 ABQB 3 [*Altius Royalty Corporation*].
[182] *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations,* SOR/2012-167, enacted pursuant to the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, s 332(1).
[183] *Altius Royalty Corporation, supra* note 181 at paras 3, 9.

concerning environmental regulation. "While no case law on environmental regulation and taking" was provided by the plaintiffs in the matter, Judge Farrington speculated that:

> the protections to environmental regulation that may eventually develop in the area from a common law perspective will likely be at least equal to those provided to land development regulation.[184]

The key reason cited by Judge Farrington for coming to this conclusion is the oft-cited passage from (then) Justice Cromwell in the *Mariner Real Estate* NSCA decision: "[I]n modern Canada, extensive land use regulation is the norm and it should not be assumed that ownership carries with it any exemption from such regulation." [185] Notably, in Judge Farrington's summary, environmental regulation does not yet have the same deference as land development regulation.

A court's consideration of how land-use regulation could be used to guide the assessment of takings when it is done via environmental regulation highlights a core point: There are different types of government regulation that may be considered by way of a *de facto* expropriation claim. As yet, the judiciary has not explicitly addressed the impact of environmental regulation on private property through the lens of expropriation law. Implicit in the passage from Judge Farrington's decision is the point that *Mariner Real Estate* is *not* a case that directly concerns environmental regulation; instead, it is a case that directly concerns land-use regulation. There is a tension here between a legal regulation that addresses the environment (regulations pursuant to the *Beaches Act*) and a legal analysis that engages with the law of expropriation. The *Mariner Real Estate* decisions don't explicitly address environmental regulations; but at the same time, the outcome of the decision is that the environment is protected.

The inattention to the nature of the regulation and its analysis within expropriation law may have been the result of the specifics of the legislative framework engaged with in the *Mariner Real*

[184] *Ibid* at para 44, Farrington MC.
[185] *Ibid* at para 44; *Mariner Real Estate,* NSCA, *supra* note 3 at para 49.

Estate decisions. Environmental concern is contained in the *Beaches Act*, which at section 2(a) does include a desire to protect beaches in its goals. When looking more broadly at how regulatory goals (of environmental care) are met through an expropriatory action, the threefold goals of the *Beaches Act* heightens, rather than lessens, the importance of deciding how the environment is interpreted and defined. These three goals are (1) "Provide for the protection of beaches and associated dune systems as significant and sensitive environmental recreational resources"; (2) "Provide for the regulation and enforcement of the full range of land-use activities on beaches, including aggregate removal, so as to leave them unimpaired for the benefit and enjoyment of future generations"; and 3) "Control recreational and other uses of beaches that may cause undesirable impacts on beach and associated dune systems."[186] The information considered at trial and on appeal highlights environmental degradation as a concern, yet the goals of the *Beaches Act* are multiple and overlapping. The way in which these goals are actioned—and the resulting expropriation of impacted properties—is precisely what an expropriatory action ought to be responding to. What is the purpose for which the environment could be considered? Is the purpose conservation of a location, or is it a process of anthropomorphizing that location? If it is the former, then information about the ways in which significant parts of the beach (such as dunes in Kingsburg Beach) are protected through the expropriatory action ought to be before the court. If it is the latter, then using the legislation in such a way as to have the result of anthropomorphizing the beach location to give it personality in and of itself would go far beyond the goals of the legislation.[187] And are these protections done in such a way that the dune systems are protected

[186] *Beaches Act, supra* note 5, s 2.

[187] In recent years there has been a growing interest in assigning legal personhood to natural entities. For example, in 2021 the Mutuhekau Shipu, or Magpie River, in Quebec was granted legal personhood status, the first such designation in Canada. See Susan Nerberg, "I Am Mutehekaur Shipu: A River's Journey to Personhood in Eastern Quebec," (8 April 2022), online: <canadiangeographic.ca> [perma.cc/BY5A-FDVZ]; Douglas C Harris et al, eds, *A Property Law Reader: Cases, Questions, and Commentary,* 5th ed (Toronto: Thomson Reuters, 2022) at 15.

alongside the "environmental recreational resources"?[188] Indeed, what does this phrase even mean?

Likewise, inattention to the specific type of regulation may have been because of the flexibility that is contained within the two-part common law test that examines claims of *de facto* expropriation. That is to say, that the rules consider not the type of regulation, but the impact of that regulation on property holdings. However, this raises an important point about how the impact of regulation is measured, what information is available, whose perspectives are captured within those informational pieces, and how these informational pieces meet the goals of the legislation.

4.3.3.3. Conflicts in Place Continue

Kingsburg Beach continues to be a place of conflict. Two recent situations are demonstrative of an ongoing concern about how to manage place as between the binaries of environmental place and properties in place.

First, development along Kingsburg Beach continues. In June of 2024, Nova Scotia Minister of Natural Resources Tory Rushton issued a development permit to holders of a private property lot along Kingsburg Beach pursuant to his powers under the *Beaches Act* and *Beaches Regulations* to holders of a private property lot.[189] The property lot already had a built family home on it. The permit was for building a boardwalk that would connect the family home on one side of the property lot to a storage building closer to Kingsburg Pond (which was also being built under the permit), behind Kingsburg Beach. This development was carried out by the property title holders fulfilling the requirements of the *Beaches Act* by getting all of the required permits. The community is in conflict about the development decision to the extent that the mayor of Lunenburg,

[188] *Beaches Act, supra* note 5, s 2(a).
[189] Micheal Gorman, "Municipality Calls on Province to Reconsider Development Approvals in Protected Areas," (June 2024), online: <cbc.ca> [perma.cc/3CMR-95FJ].

Carolyn Bolivar-Getson, wrote to Minister Ruston concerning the decision to allow the permit.[190] As the photo in Figure 4.12 shows, the building permit has already been acted upon and the building is complete.



Figure 4.12: Photograph of the 2024 development of a boardwalk and small building by permit. (Photography by CBC, 2024).[191]

The second situation also occurred in 2024 and it concerns the provincial government's failure to implement the *Coastal Protection Act*[192] and the subsequent response from the Municipality of the District of Lunenburg to adopt their own coastal development regulations. The *Coastal Protection Act* outlined where and how people can build along the coast to protect them from the effects of climate change. The purpose of the Act "is to protect the Province's coast for future generations by preventing development and activity in locations adjacent to the coast that

[190] *Ibid.*
[191] *Ibid.*
[192] *An Act Respecting Coastal Protection in Nova Scotia,* SNS 2019, c 3.

(a) damage the environment … [and] (b) put residences and buildings at risk of damage or destruction from sea-level rise, coastal flooding, storm surges and coastal erosion."[193] The *Coastal Protection Act* was passed in 2019, but it did not become law, and instead a series of steps were taken to develop regulations that would enact it.[194] After consultations with municipalities, experts, the public, and those living on the coasts, the government abandoned implementation of the *Coastal Protection Act* and replaced that regime with a coastal action plan.[195] In a March 2024 news report, the Nova Scotia Minister of Environment and Climate Change, Tim Halman, "revealed that only 1,070 coastal property owners responded to a survey mailed to 40,000 people"[196] and he took that as an indication that the public was not supportive of the *Coastal Protection Act*. Not willing to give up on adopting a legal framework that protects the coastline,[197] the Lunenburg municipal government adopted their own land regulations. In a special council meeting in June 2024, the municipal council passed the second reading to amend the Municipal Planning Strategy and introduce a new Municipal-Wide Land Use By-law that includes coastal protection regulations.[198] By-law 049 effectively prevents development on a 2.5 metre setback from the coast, which impacts all properties on Kingsburg Beach.[199]

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[193] *Ibid*, s 2.

[194] Mike Kofahl, "Five-Year Anniversary of the Coastal Protection Act: Comparing the Coastal Protection Act to the Future of Nova Scotia's Coastline: A Plan to Protect People, Homes and Nature from Climate Change," (11 April 2024), online (blog): <ecelaw.ca> [perma.cc/Y98T-2DKK].

[195] Department of Environment and Climate Change, *The Future of Nova Scotia's Coastline: A Plan to Protect People, Homes and Nature from Climate Change* (2024), online: <novascotia.ca> [perma.cc/DHN9-XP6A].

[196] Michael Gorman, "N.S. Environmental Minister Says Silence on Coastal Protection Act Survey Speaks Volumes," (7 March 2024), online: <cbc.ca> [perma.cc/SFN6-Q6QD].

[197] See the extensive amount of information on the District of Lunenburg website, "Coastal Protection" (last modified 13 August 2024), online: <engage.modl.ca/coastal-protection> [perma.cc/E5SR-5G4X].

[198] District of Lunenburg, "Council Passes New Coastal Protection Regulations" (19 June 2024), online: <engage.modl.ca/coastal-protection/news_feed/council-passes-new-coastal-protection-regulations-2> [https://perma.cc/LB8U-VY5U].

[199] District of Lunenburg, By-law 049, *Municipal-Wide Land Use By-law Pertaining to Coastal Protection Regulations* (18 June 2024), s 4.12–4.13, online: <modl.ca/index.php?option=com_docman&view=download&alias=9108-municipal-wide-lub-maps&category_slug=planning-documents&Itemid=102>.

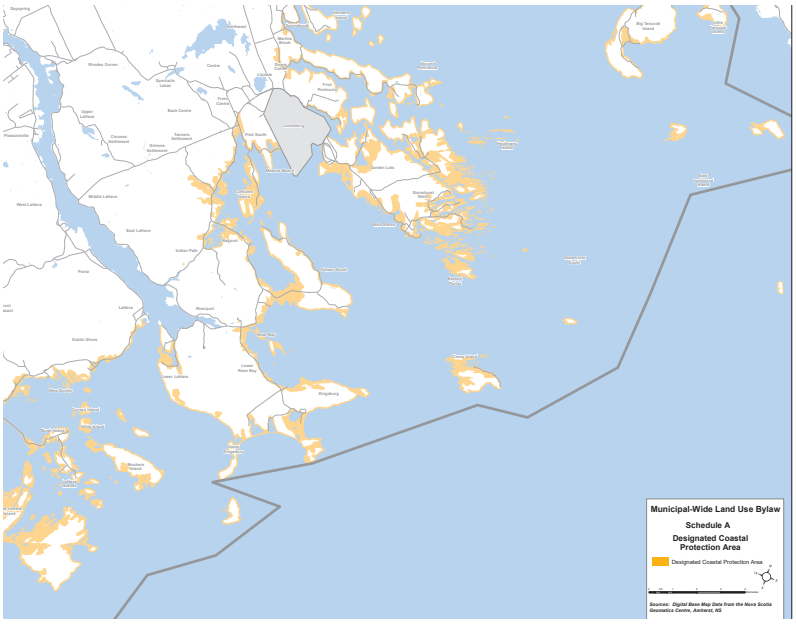


Figure 4.13: Map of coastal properties impacted by municipal regulations[200]

These two situations are demonstrative of conflicts remarkably similar to the conflict in the *Mariner Real Estate* decisions. On the one hand, there is a concern for environmental aspects of Kingsburg Beach and other beaches in Nova Scotia, and on the other hand, there are rights held by private property owners that are at risk, or there is the perception that they are at risk. These two perspectives are considered below.

4.3.3.3.1. Environmental Concerns

Conserving Nova Scotia's beaches remains an important goal for the provincial government, and reports indicate that environmental degradation is still an issue on Kingsburg Beach. In 2003 Jacques Whitford Environment Ltd, the same consulting company that prepared the initial environmental assessment in the *Mariner Real Estate* decisions, was asked by the Nova

[200] District of Lunenburg, Planning & Development Services Department, *Municipal-Wide Land Use By-Law: Schedule A: Designated Coastal Protection Area* (2024).

Scotia Department of Natural Resources to conduct a second study at Kingsburg Beach.[201] The 2003 report looked at changes in the area from 1976 to 2001. The report indicates ongoing concern about the environmental stability of Kingsburg Beach. Overall, the 2003 report predicts that the estimated rate of recession of 0.2–0.4metres a year was correct, though in places the shoreline continued to be relatively stable.[202] The natural vegetation is disrupted in places where human-made lawns have increased in size.[203] Kingsburg Beach remains ecologically fragile. The 2003 report recommends the following ongoing mitigation techniques be adopted:

> Potential guidelines for protecting Kingsburg Beach were developed using the following objectives: mitigate wind funnelling and blowouts; stabilise vegetation; reduce trampling and overall disturbance; and generally to minimise property loss by maximising the buffering capacity of the dune system.[204]

Community groups have taken up the work of bringing attention to the importance of beaches and their need for ongoing protection. The Kingsburg Coastal Conservancy (KCC) is a not-for-profit group formed in 1995 and active in Lunenburg County. The KCC works to "preserve headlands, beaches, and wetlands of the Kingsburg Peninsula and neighbouring areas, and to safeguard traditional access to [Nova Scotia's] shoreline."[205] As part of their advocacy work, the KCC continues to monitor the beaches along Kingsburg Peninsula, including Kingsburg Beach, raising awareness about environmental sensitivity along the beach area[206] and highlighting the importance of Kingsburg Pond. The KCC has established a land acquisition initiative[207] and is also

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[201] Whitford, *Report on Managing Protected Beaches*, *supra* note 88 at iii.
[202] *Ibid* at 26.
[203] *Ibid* at 29.
[204] *Ibid* at 30.
[205] Kingsburg Coastal Conservancy, "Who We Are" (last visited August 2024), online: <kccns.org> [perma.cc/CW5S-AB8R].
[206] Miller, "Assessment," *supra* note 79.
[207] See Nova Scotia, Department of Fisheries and Aquaculture, *Our Coast: Live. Work. Play. Protect. The 2009 State of Nova Scotia's Coast: Technical Report* (2009) at 153, online: <coilink.org/20.500.12592/3jhl22x> [perma.cc/C8L8-HPNR] [DFA, *2009 State of Nova Scotia's Coast*].

a designated body able to hold conservation easements according to the *Conservation Easements Act*.[208] The KCC acquired land holdings along the peninsula and including some on Kingsburg Beach, which it has acquired by donation and by purchase. For example, the KCC has had the benefit of receiving donations of formerly privately owned land on Kingsburg Beach.[209] In 2012, it received a donation of land from James and Christine Knock, which included the public access point to the beach.[210]

Still, there is a gap in the development of systematic government policy on the matter of environmental protection of the beaches of Nova Scotia broadly. The Ecology Action Centre suggests that there is an information gap in the health and ecology of the beach area and recommends a "beach system inventory"[211] be established to catalogue the flora and fauna, water quality, sediment movement, and impact of storm events. A report from the Institute for Environmental Studies at Dalhousie University expressed concern about the lack of clarity and cohesiveness in government policy for management of beaches.[212] Noting in particular that though "nearly all provincial departments and several federal departments have some interest in beaches … [t]his separation also reduces the opportunity for innovative programs or adequate programs."[213]

Though an older report, this fragmented approach to beach management through the development of cohesive programming across government departments is an ongoing issue. In 2007 the Provincial Oceans Network, established by the Nova Scotia Department of Fisheries and

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[208] *Conservation Easements Act*, SNS 2001, c 28; See DFA, *2009 State of Nova Scotia's Coast, ibid* at Appendix 3.
[209] See Kingsburg Coastal Conservancy, "The Kingsburg View" (last visited August 2024), online: <kccns.org> [perma.cc/96NZ-LVRD].
[210] *Ibid.*
[211] Beaton, *True Grit, supra* note 2 at 18.
[212] AJ Bowen et al, *The Maintenance of Beaches: Technical Report,* report prepared for the Nova Scotia Environmental Control Council (Halifax, NS: Dalhousie University Institute of Environmental Studies, 1975).
[213] *Ibid*.

Aquaculture, highlighted that this approach has resulted in conflicting service delivery, inefficient use of government resources, and, particularly problematic, it does not include community stakeholders in planning initiatives.[214] The Coastal Management Framework was created in 2008, and the *2009 State of Nova Scotia's Coast: Technical Report* recognized informational gaps required to manage the coasts more effectively.[215] It identified several factors, such as environmental, social, and ecological aspects, which must be developed together to create a more unified approach to coastal management.[216]

4.3.3.3.2. Property as a Part of the Environment

There exists real property lots along Kingsburg Beach. Private property and the people who own those holdings are considered in the next chapter. In addition to looking at real property as a distinct account of place, the existence of real property lots is also relevant to environmental concerns. The private property owners of land holdings along the coast of Nova Scotia have an active role in environmental management. Estimates of private land ownership along the coastline of Nova Scotia range from 87 percent[217] to 77 percent[218] to as high as 95 percent.[219] Kingsburg Beach is part of "South Shore Ecodistrict 830,"[220] an area identified by the Nova Scotia Department of Natural Resources for purposes of promoting ecosystem-based land

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[214] Nova Scotia, Department of Fisheries and Aquaculture, Provincial Oceans Network, "Nova Scotia's Proposed Coastal Management Framework," presentation delivered at ACZISC (now COINAtlantic) meeting #52 to the Integrated Coastal and Ocean Management Working Group, Halifax, Nova Scotia, September 2007) [unpublished], found in Magan Hudek, "'Cow Bay's Ocean Playground:' The Shifting Landscape of Silver Sands Beach, 1860s–Present" (Masters' thesis, 2014), online: <library2.smu.ca> [perma.cc/6QZQ-JULC].

[215] DFA, *2009 State of Nova Scotia's Coast, supra* note 207.

[216] *Ibid* at 2-12.

[217] Christopher Burbidge & Lucia Fanning, "Addressing Coastal Access as a Priority Coastal Issue in Nova Scotia" (2009) 1:2 Marine Affairs Policy Forum.

[218] DFA, *2009 State of Nova Scotia's Coast, supra* note 207 at 2.

[219] Beaton, *True Grit, supra* note 2 at 4.

[220] See a map of the ecosystems along the south shore: Nova Scotia, Department of Lands and Forestry, *Ecological Landscape Analysis South Shore Ecodistrict 830*: *Maps* (2019), online: <novascotia.ca> [perma.cc/MEJ4-2A4Y] [DLF, *Ecodistrict 830 Report 2019*].

management.[221] In this management plan, the government reports that 77.7 percent of land in the South Shore Ecodistrict is privately held, 16.3 percent is provincial Crown land, 1.6 percent is held by the federal government, and 4.4 percent is other types of land, including waters and transportation corridors.[222]

Given the sizable portion of private ownership throughout Nova Scotia, the management of the ecosystem requires that private landowners be engaged to support activities for environmental protection. The Department of Lands and Forestry relies on the work of private property holders as part of its policy:

> With much of the ecodistrict privately owned, effective wildlife management will to a great extent rely on active, informed stewardship by the many landowners. The Department of Lands and Forestry can assist private land stewardship by providing knowledge and information on various management strategies.[223]

Jacques Whitford Environment wrote of the need to stabilize the Kingsburg Beach sand dunes in 2003,[224] and it acknowledged there have been positive impacts from the development on the beach. For example, there are significantly less roads over the dunes since the 1992 designation of the beach, which the 2003 report attributes to the maintenance of a public road that has reduced the use of vehicles off road and over sand dunes.[225] The 2003 report writes with particular concern about the proliferation of roadways constructed by property owners between 1976 and 1992 to access the beach area.[226] The homeowners were using the dune areas as multiple roadways, and it

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[221] Nova Scotia, Department of Natural Resources, "Ecological Landscape Analysis Reports" (last modified 2021), online: <novascotia.ca> [perma.cc/K78W-SZTH]. An ecodistrict is a subdivision of ecoregions and identified by the department. An ecodistrict is characterized by distinctive assemblages of relief, geology, landform, and vegetation that is used to define an area for purposes of completing ecological landscape analysis and developing management plans; see DLF, *Ecodistrict 830 Report 2019, ibid* at 41.

[222] DLF, *Ecodistrict 830 Report 2019, supra* note 220 at 9. Importantly, it also states that 0 percent of the lands are owned by Indigenous Peoples.

[223] *Ibid* at 21.

[224] Whitford, *Report on Managing Protected Beaches*, *supra* note 88.

[225] *Ibid* at 28.

[226] *Ibid*.

was only with the creation of a single road that the dunes were stabilized.[227] Aerial photographs of Kingsburg Beach show that eventually, by 1994 (which was the time of the initial designation of the beach), many were closed as property owners restricted access to the beach and a public roadway into the area was improved.[228]

At the same time as the dunes stabilized, the report notes that as the number of buildings along the beach had decreased since 1992, there has been an increase in the size of the land area occupied by buildings along Kingsburg Beach:

> Although the area occupied by buildings tripled between 1992 and 2001, the total area disturbed fell to the level present in 1976 as a result of landowners restricting access to their properties and improvements to the quality of the access road.[229]

The increase in land areas for each individual property lot also created stability on the dunes (just as the single road did). However, it also brought new concerns about erosion, which now occurs because of the increased volume of wind funnelling between the built properties, which are larger than the properties that existed on the beach in 1976 (the year the authors began their study).[230]

In summary, the 2003 Whitford report indicates that there had been an increase in negative impacts on the beach area between the years 1976–1991 due to lawn, properties, and usage patterns, but these then stabilized or even decreased from 1992–2001, which is when Kingsburg Beach was designated and the legislative framework of the *Beaches Act* began. However, the entire beach area still requires protection.

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[227] *Ibid* at 29.
[228] See PL Stewart et al, *A Guide to Land Use Planning in Coastal Areas of the Maritime Provinces,* Canadian Technical Report of Fisheries and Aquatic Sciences, Report No 2443 (Dartmouth, NS: Department of Fisheries and Oceans Canada, Oceans Environment Branch Maritimes Region, 2003), online: <publications.gc.ca> [perma.cc/H9HD-Y7WV].
[229] Whitford, *Report on Managing Protected Beaches*, *supra* note 88 at 30.
[230] *Ibid* at 29.



1995

Figure 4.14: Aerial photograph of Kingsburg Beach and Kingsburg Pond[231]

The 2003 Whitford report also indicates that even though there is an ongoing need for environmental protection, built property has a part in this environmental management. The caption accompanying Figure 5 in the report highlights this tension between the need for environmental protection and the involvement of property holders in these locations, as it points out the positive and negative aspects of human activity on the beach. The full description reads:

> Aerial oblique view of the village of Kingsburg and Kingsburg Pond taken October 2, 1992. The north end of Kingsburg Beach in the foreground has a cuspate lower beach morphology backed by a gravel storm ridge and low erosional bank. Some of the coarser material was added by the landowners to slow shoreline erosion. Backshore dunes are absent at this end of Kingsburg Beach because of the scarcity of sand and the effects of human activities. The primary dune begins at the left side of the photo and extends southward.[232]

[231] Taylor, *Recent Geological Evolution of Kingsburg Beach*, *supra* note 80.
[232] *Ibid* at cover page.

The active involvement of property title holders along Kingsburg Beach is evident in the *Mariner Real Estate* decisions. The existence of environmental concerns and the veracity of information about dune fragility, particularly when subjected to property development, was not challenged at any stage of the court proceedings by the property lot holders. Instead, the focus was on the application of expropriation principles that can be utilized to recognize the rights of property holders.

One of the most important documents that aided in the understanding of the role of environmental concerns in the beach area was a 1994 Whitford report commissioned by the Department of Natural Resources[233] in consideration of the initial building permit applications made by the property holders along Kingsburg Beach.[234] The 1994 Whitford report was commissioned to provide "a detailed ecological study of Kingsburg Beach to assist in evaluating the potential effects of existing use and proposed development."[235] In its denial of building permits, the Minister of Natural Resources relied on the report for the observation that Kingsburg Beach was "ranked as one of the top 5 beaches in Nova Scotia based on a comparison with 36 other beaches relative to ecological values."[236] Furthermore, that "maintaining the integrity of the present sand dunes is critical to reducing or preventing widespread flooding of the backshore lowland by the sea and to preventing erosion and narrowing of the beach face."[237] Because of this sensitivity and concern for the dune area, no additional development was allowed and the holders

[233] Whitford, *Report on Ecological Study of Kingsburg Beach*, *supra* note 81, at 43.
[234] Letter from Mr. Don Downe, Minister of Natural Resources, to Mr. Rubin Dexter, Attorney for Lamont and Carole-Anne Mosher, 2102660 Nova Scotia Limited, Manson Mossman, Mariner Real Estate Limited, and Nick Sampson for their applications for development permits (later plaintiffs in the *Mariner Real Estate* decisions). See *Mossman v Attorney General of the Province of Nova Scotia*, 1995 CanLII 4477 (NSSC); *Mariner Real Estate,* NSSC, *supra* note 3 at paras 6–7.
[235] *Mariner Real Estate,* NSCA, *supra* note 3 at para 32.
[236] *Mariner Real Estate,* NSSC, *supra* note 3 at para 7, Tidman J.
[237] *Ibid*.

of property lots along the beach were denied building permits, which ultimately led to the litigation on the basis of expropriation.

The 1994 Whitford report was excerpted extensively in the NSCA case report. The report highlighted the fragility of Kingsburg Beach immediately at the waterline and in the dune area, and the impact of construction on this land area. The report observed, "dunes are fragile landforms which can be easily destroyed by human activities and displaced by natural processes," and "[t]he presence of houses on the dunes can affect the dunes in several ways,"[238] including acting as wind barriers and destabilizing dunes at lower elevations by creating wind funnels that further exacerbate erosion. The report states that the presence of homes or cottages will tend to lead to destabilize dunes because they serve as focal areas for increased human activity, vehicle use, and increased access to the beach.[239] Furthermore, the report concluded that without a detailed mitigation strategy from the local municipality as to management of the dune areas, and rules and regulations for the construction, use, and maintenance of homes and dwellings along the dune area, the additional development should not take place.[240]

Following this description of the beach and acknowledgement of the existence of private property, Justice Cromwell found no *de facto* expropriation, reasoning that there were ample other uses that could be made of the properties impacted by the beach designation, and that the government had not acquired a property interest by way of the regulations. This satisfied both prongs of the *de facto* expropriation test, which requires, first, that the government acquires

[238] Whitford, *Report on Ecological Study of Kingsburg Beach, supra* note 81; *Mariner Real Estate,* NSCA, *supra* note 3 at para 33.
[239] Whitford, *Report on Ecological Study of Kingsburg Beach, supra* note 81; *Mariner Real Estate,* NSCA, *supra* note 3.
[240] Whitford, *Report on Ecological Study of Kingsburg Beach, supra* note 81; *Mariner Real Estate,* NSCA, *supra* note 3.

beneficial interest in the property or interests flowing from it, and second the removal of all reasonable uses of the property.[241]

The management agreement signed in 1995 contains a host of obligations and restrictions, many of which reflect the stipulations contained in the *Beaches Act*. Broadly, the agreement contains rules that seem to have as their focus protecting aspects of the natural environment or removing property-related rights beyond that which already exist in the existing built environment. Examples of specific points agreed upon include the following:

> 4. The lands surrounding the dwellings may be landscaped to a maximum of thirty (30) feet on the north, east (ocean) and south sides of the dwelling. Landscaping between the dwelling and the road access to the dwelling on the west may extend beyond thirty (30) feet if necessary in order to cover the septic system.
>
> 5. No additional dune area adjacent to the dwelling are to be disturbed or altered.
>
> 6. Existing ridges may not be altered or destroyed.
>
> 7. Vehicular access to the dwelling by the Landowner, their guests, invitees, licensees and contractors will be along the existing travelled sand road and by way of the existing established driveway to the dwelling.
>
> 8. The Landowner may install, repair, maintain and, if necessary, replace existing fences, porches, boardwalking and decking on the property provided the provisions of this Agreement respecting boardwalks on the dune are compiled with.
> …
> 12. The Landowner may pump out and repair the septic system on the property. The Landowner will install clear outs to prevent excavation should pumping out become necessary. In the event replacement of the septic system is necessary the Landowner will consult with the Minister or his representatives respecting the manner and type of replacement.

This management plan, though restrictive, was possible on the basis of Order in Council 95-17 and had the result of excluding the properties from the beach designation as it relates to building the foundation for a dwelling.[242] The minutiae of the regulatory framework for beach use as is

[241] *Mariner Real Estate,* NSCA, *supra* note 3 at para 113.

[242] The management agreement, s 1, provides the following: "The recommendations will be made to the Governor in Council 93-253 to exempt from the provisions of the *Beaches Act* the existing dwelling ("the dwelling") located

contained in the statutory framework is ultimately the backdrop of the court's analysis in the *Mariner Real Estate* decisions of what a reasonable use of property is. The requirement that all reasonable uses of the property be removed is the second part of the test for *de facto* expropriation.[243]

4. 4. CONCLUSION

Property interests and titles; examination of the nature of the bundle of rights—the sticks of ownership, use, control, exclusion, and disposition—that are part of a property parcel; and the people and the activities that would typically be carried out on the beach are all part of the way the geography of the beach is created. In the *Mariner Real Estate* decisions, we can also add expropriation as an aspect of place used to create the beach.

This chapter has answered the questions "what is there, why there, and why care?" through the lens of private property and environmental concerns, which are the two aspects of place that the two courts in the *Mariner Real Estate* decisions considered. The analysis of these questions takes the starting point of the beach as a place of private property, which is an unavoidable aspect of the geography of the location of Kingsburg Beach. Private properties in Kingsburg Beach are part of the structured property titling system, and there exist historical personal histories for some of the property title holders; historicism in the built environment of the lots, one of which contains a community cemetery; and the cultural, economic, and personal significance of the beach itself for those title holders. These aspects are not simply "interests" in a location in the sense that property law may or may not recognize interests but are instead part of the unique ways in which

on the lands. The exemption will relate only to the foundation of the dwelling and its interior but not to the lands surrounding the dwelling." See *Kingsburg Beach Designation*, OIC 95-17, NS Reg 5/1995, adopted pursuant to the *Beaches Act, supra* note 5, s 5(1).

[243] *Mariner Real Estate*, NSCA, *supra* note 3 at para 5.

place comes to matter to people. Here the placeness is not an undifferentiated set of property lots, but is instead the place-based interests that have a past, a present, and a future.

This examination points to a duality in how we think about property systems. They are both central and integral to how places are used, at the same time as they are simply interpretations. These interpretations occurred at settlement and gave priority to some members of the community. There is a centrality to paper titles and the property titling system, as well as impermanence in the fact that they are nothing more than a human-created thing.

The link between geographical assessment of places—here beach areas—and what is eventually recognized and protected in legislation relies on a series of choices about geographical importance, reliance on evidence, and historicism. The interpretation of the meaning of "beaches" in Nova Scotia is partly a reflection of these pieces and partly based in forward-looking policy choices. Adopting an account of the beach as a place requiring environmental protection is an important goal, particularly if there is public support around that choice. As early as 1960 there was concern in the parliamentary debates about the environmental ethic that eventually led to the adoption of the modern *Beaches Act* regime that the limited approach to defining the geographic area of the beach could undermine efforts of environmental protection. The comments in the legislative assembly were to the effect that, if environmental concern were truly the aim of the legislative assembly, then they would need to include beach area (dunes) above the high-water mark and provide for compensation based on expropriation for any limitations or interference with property rights.

The context of the beach operates as the backdrop to the issue in the case, which is about the application of the law of expropriation. The context of the beach is thus central to the expropriation matter in the *Mariner Real Estate* decisions because it is the place to which the

Beaches Act was applied. The way in which the place of the beach is used in the two decisions highlights a tension between the context of a case subjected to the application of legal rules by way of definitional labelling (as a beach), but then applying the rules without consideration of their ongoing impact on the property holders in that location who find their property interests all but taken away. This process of agency in place for some aspects of the legal matter, such as concern about environmental degradation, but not for other aspects of the legal matter, most importantly the financial and personal impact on property title holders, replicates the long-standing concern that belies efforts to highlight the spatial actualization of law. This is that the location can too often be misunderstood simply as a backdrop to other processes (social, political, cultural, and legal)[244] and not as something that is created through these processes.

Taking consideration of the place of the beach as something that is constituted through property systems, people's connection to and development of that location, important concerns about environmental degradation, and changing needs of society highlights that the beach is not a pre-standing geographic phenomenon but is instead created through such factors.

Through the *Mariner Real Estate* decisions there are developed interpretations that could be labelled as the legal beach and the geographic beach. The legal beach is the beach contained within the *Beaches Act* and it is most concerned with regulating persons in relation to their beach use. Ostensibly these persons are members of the public, but as the two case reports show the regulations are immediately impactful on the private property holders, who I assume are themselves included as members of the public. The geographic beach is the physical geography, which is explained as a place of environmental concern because beaches face concerns of erosion and environmental degradation. These environmental factors are what triggered the use of the

[244] See Chapter 2, *above*.

Beaches Act in the first place. Neither of these understandings of the beach are satisfactory in terms of how they capture the place of the beach. The legal beach too is concerned with regulating human behaviour, but without reference to the environmental beach; while the geographic beach is too concerned with matters of the environment, but without reference to the role of persons and property in protecting that environment.

This chapter has been guided by an examination of the Nova Scotian courts that took up the *Mariner Real Estate* matter to provide the most definitive (at that time) consideration of the law of *de facto* expropriation. For this chapter I have sought to have the analysis be guided by the "law of place" as I constructed it using Gritzner's geographic questions of what is where, why there, and why care? In this framework, the law of expropriation is simply one more factor in how place can be created. For the *Mariner Real Estate* courts, the law of expropriation would seem to be the most important factor as it was actively argued throughout the two decisions. A close reading of the two decisions reveals, however, perspectives on place that the two courts then enacted through their use of expropriation. These two perspectives are, first, a concern with the places of real property along the beach and how the use of expropriation impacted the property values in that place, and second, on appeal, a concern with the beach as a place representing environmental concern and how the use of expropriation could protect that place. In the next two chapters I continue to take a close look at the law of place by bringing in two aspects of Kingsburg Beach not argued, but relevant to that location: the role of the public in Kingsburg Beach and the treatment of Indigenous land rights and expropriation in Kingsburg Beach.

CHAPTER 5: PUBLIC PLACE OF THE BEACH

Lunenburgh is a fine town and respectable colony, founded by some Germans in the year 1753. It is 70 miles northeast from Shelburn, and 36 south-west from Halifax, which place it supplies with cordwood for fuel, having a great number of small vessels employed in that and the cod fisheries. It also sends some lumber to the West Indies, and no place in the peninsula, notwitstanding the unpromising appearance of the lands at their first settlement, is in so [prosperous[1]*] in a way, excepting the two places above mentioned (Port Matoon, or Gambler Harbor, and Liverpool). Industry and perseverance have rendered it highly flourishing, while the primitive simplicity of manners, which remain uncorrupted to the present time, have very much endeared them to all their neighbors. The lands about Lunenburgh are greatly improved, and their population, which was at first about three thousand persons, may be estimated at nearly three times that number at present.*[2]

[1] Spelling in reprint is "prospeix)us."

[2] William Creech & T Longman, "The Present State of Nova Scotia" (London, 1786), cited in Mather B DesBrisay, *History of the County of Lunenburg*, 2nd ed (Toronto: William Briggs, 1895) at 74, online: <ia600202.us.archive.org/3/items/cu31924028897952/cu31924028897952.pdf> [perma.cc/46XU-Q3XF]. This excerpt was dedicated to "The Right Honorable John, Lord Sheffield" and republished in several issues of the *Halifax Morning Chronicle* in 1884.



Figure 5.1: Photograph from the north end of Kingsburg Beach showing in the background the whole expanse of the beach and properties along it, and in the foreground an empty grass lot. (Photograph by Tenille E Brown, 2016).

5.1. INTRODUCTION

> I am a friend to the preservation of the rights of property ... but I believe in the subordination of those rights to the public good. ... I deny that the people of my Province are insensible to or careless about the true principles of legislation. I believe they are thoroughly alive to them, and I am content that my rights of property, humble though they are, and those of my children, shall belong to the Legislature of my country to be disposed of subject to the good sense and right feeling of the people of that Province.[3]

This chapter introduces a second case study on Kingsburg Beach: the beach as a place for and of the public. Unlike the previous chapter, which highlighted the analysis of private property and environmental issues that were explicitly considered in the *Mariner Real Estate* decisions,[4] there is not a similarly explicit consideration of the public in the *Mariner Real Estate* decisions. In expropriation law, the "public" is brought into the analysis through the requirement that property only be expropriated for "public purpose."[5]

In the *Mariner Real Estate* decisions there is no examination of exactly who or what the public is as it relates to expropriation law. Instead, the idea of the public—either as a person or an idea of a place—is at times suggested in both the case reports and the legislature, though not with a consciousness about the discursive possibilities of the nature of the public. This chapter brings

[3] Excerpt of speech by the treasurer of the Law Society of Upper Canada and leader of the Liberal Party, Edward Blake, in 1882 (see Canada, *Official Reports of the Debates of the House of Commons of the Dominion of Canada*, 4-4, vol 12 (April 14, 1882) at 915 (Hon Edward Blake), online: <canadiana.ca> [perma.cc/RU33-N86P]).

[4] *Mariner Real Estate Ltd v Nova Scotia (Attorney General),* 1998 CanLII 1757 (NSSC) [*Mariner Real Estate*, NSSC], & *Mariner Real Estate Ltd v Nova Scotia (Attorney General),* 1999 NSCA 98 [*Mariner Real Estate*, NSCA]

[5] George Swan Challies, *The Law of Expropriation* (Montreal: Wilson & Lafleur, 1954) at 5–6; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2015) (loose-leaf updated 2024, release 1 7/2024) at s 29:5, p 29-8–29-9 [Hogg, *Constitutional Law of Canada*] (explaining the division of power between the federal and provincial government as it relates to use of expropriation for public purposes of both); Gerard V La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1968) at 24; Eric Todd, *The Law of Expropriation and Compensation in Canada,* 2nd ed (Toronto: Carswell, 1992) at 3–4 (explaining that the genealogy of expropriation law shows that the law is based on the need to acquire lands for the public purpose of building railways); Christopher J Williams, Andrea Skinner & Matthew Helfand, *Expropriation Law in Ontario* (Toronto: LexisNexis, 2021) at 9–10 [Williams et al, *Expropriation Law in Ontario*].

this third perspective of the public into the account of Kingsburg Beach, and in doing so it offers a critique of the legalities of the beach, which, as discussed in the previous chapter, the *Mariner Real Estate* decisions largely constructed as a conflict between private property and environmentalism.

Though the publicness of the beach is not something that is directly considered in either of the *Mariner Real Estate* decisions, there are possible interpretations of how the public in Kingsburg Beach could be understood. Based on comments made in the legislature, beaches can be understood as public in that they are generally for people in Nova Scotia, or, as the focus of the case law discussion suggests, beaches are public from the perspective that they ought to be preserved environmentally. Examination of how law includes the public in analysis is important for an area such as expropriation law, which has as its effect the removal of private property rights, transforming them into something that is for the public. However, as the consideration of expropriation in the *Mariner Real Estate* decisions suggests, the nature of what the public right or rights are is not clear. The right may be public in the sense of government action serving the public in some way, or it may be public in the sense that environmental protection serves the (undifferentiated) public, or it may be public in the sense of open use of and access to unpropertized land.

First, this chapter revisits the principle of expropriation to examine how the public is included through the concept of "public purpose." I consider the public policy that guides the public purpose requirement of expropriation and the importance of this requirement. This chapter then turns to apply the methodology for geographic inquiry by considering the ways in which the public could be brought into expropriation law to suit a variety of normative perspectives. Though the requirement that property be expropriated for public purpose was not directly at issue in either

stage of the *Mariner Real Estate* decisions, it is an integral but understudied area of the law of expropriation. In *Mariner Real Estate v Nova Scotia (Attorney General)* at first instance, the issue considered by the Nova Scotia Supreme Court was whether an expropriation had been caused by operation of the *Beaches Act*[6] and thus should be compensated.[7] On appeal, the court also considered whether an expropriation had occurred and specifically whether the loss of economic value of a property could constitute a taking.[8] Despite this gap in the *Mariner Real Estate* decisions, the public is present throughout the statutory framework. Examining the record as to what is the publicness of Kingsburg Beach is an important step for implementing public policy goals while also enforcing checks and balance on government power.

5.2. THE "PUBLIC" IN EXPROPRIATION

5.2.1. The Law of Public Purpose

Public purpose is part of expropriation law because it requires that the government only acquire private property for the needs of the general public. *Black's Law Dictionary* defines public purpose as "[a]n action by or at the direction of a government for the benefit of the community as a whole."[9] Typically, public purpose would include activities such as building public infrastructure such as roads, utility access routes, and parks.[10] Colonial-era statutes that provided for

[6] *An Act to Preserve and Protect the Beaches of Nova Scotia,* RSNS 1989, c 32 [*Beaches Act*].
[7] *Mariner Real Estate,* NSSC, *supra* note 4 at para 13.
[8] *Mariner Real Estate,* NSCA, *supra* note 4 at para 5.
[9] Bryan Garner, ed, *Black's Law Dictionary,* 11th ed (St Paul, Minn: Thompson Reuters, 2019) *sub verbo* "public purpose."
[10] See e.g. *Montreal (City) v Harbour Commissioners of Montreal,* [1925] JCJ No 6, [1925] UKPC 94, [1926] AC 299 (UK JCPC) (expropriation for navigation purposes); *Re Dyke and Cochin Pipe Lines,* 1978 CanLII 1850 (SKCA) (expropriation for construction of a pipeline); *Attorney General for the Province of British Columbia v The Canadian Pacific Railway Company (British Columbia),* 1906 CarswellBC 109, [1906] UKPC 11, [1906] AC 204 (UK JCPC) (expropriation by a federal railway company to use provincial Crown lands for the purposes of its railways); *Canadian Industrial Gas & Oil Ltd v Government of Saskatchewan et al*, 1977 CanLII 210 (SCC) (expropriation of oil and gas rights).

expropriation were called "Public Works" acts—the predecessors to modern expropriation acts.[11] For example, in the federal *Public Works Act* of 1872, public works was a broad reference to "every canal, lock, dam, hydraulic work, harbour pier, public building or other work or property."[12] At the centre of the requirement of public purpose is a concern for the general welfare of the public. Or to put it another way, public purpose is to be understood in contrast to private purpose, which would be the taking of a property that is then transferred to another private actor.[13]

Public purpose is and has been present as a part of expropriation law in both the civil and common law traditions. Historically it was included in treatises as far back as the 1789 *Declaration of the Rights of Man,* which requires that property only be taken for "public necessity."[14] In turn this was adopted in the *Napoleonic Code* of 1804, which refers to a requirement of "public good,"[15] later codified in Canada through the *Civil Code of Lower Canada* in 1866.[16] In the Anglo common law tradition, reference to the requirement of public purpose is explicitly included in circumstances where an expropriation has occurred. In the United States, protections for property granted under the Takings Clause of the Fifth Amendment provides that "[n]o person shall be … deprived of …

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[11] Jim Philips, Philip Girard & R Blake Brown, *A History of Law in Canada: Law for the New Dominion 1867–1914,* vol 2 (Toronto: University of Toronto Press, 2022) at 492–493 [Philips et al, *A History of Law in Canada*, vol 2].

[12] *An Act to remove doubts under the Act respecting the Public Works of Canada,* SC 1872 (35 Vict), c 24, s 1, online: <www.canadiana.ca/view/oocihm.9_08050_5/217> [perma.cc/9DQH-WUVG]; Philips et al, *A History of Law in Canada*, vol 2, *ibid.*

[13] Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed (Oxford: Oxford University Press, 2009) at 1388 [Gray & Gray, *Elements of Land Law*].

[14] *Déclaration du 26 août 1789 des Droits de l'homme et du citoyen,* Gazette nationale, ou le Moniteur universel, 26 August 1789, no 47, online: <avalon.law.yale.edu> at 193 [perma.cc/4SUN-V5PD]. Article 17 reads:

> Property is inviolable and sacred; no one can be deprived of it, except when public necessity, legally established, obviously requires it, and under the condition of a fair and prior indemnity.

See Yale Law School, the Avalon Project Documents in Law, History and Diplomacy, "Declaration of the Rights of Man—1789" at art 17.

[15] Code Napoléon (1807–1814), Title II, art 545: "No one can be compelled to give up his property, except for the public good, and for a just and previous indemnity." See The Napoleon Series, "French Civil Code, Book II: Of Property, and the Different Modifications of Property" at art 545, online: <napoleon-series.org> [https://perma.cc/2M4E-GMVW].

[16] Philips et al, *A History of Law in Canada*, vol 2, *supra* note 11 at 140; See *8811571 Canada inc c Procureure générale du Québec,* 2018 QCCS 4554 at para 59 [*8811571 Canada inc*]; Michael Wilhelmson, "The Meeting Ground: Common Law and Civil Law in Canada" (July–August 1994) *Inter Pares* No 177 at 10.

property, without due process of law; nor shall private property be taken for public use, without just compensation.[17] In England "compulsory purchase"[18] requires that a taking occur for public interest.[19] In New Zealand, legislation provides that the government is "empowered to acquire under this Act any land required for a Government work."[20] Michael Taggart carried out a study on the centrality of the "public purpose" in expropriation by examining the extent to which public purpose was incorporated into legislation of numerous commonwealth countries and found that many of these former colonies influenced by the British colonial powers later incorporated public purpose requirements for government acts of expropriation in constitutions adopted at independence.[21]

In Canada, "public purpose" is similarly adopted as a central principle to the law of expropriation.[22] Though it is not entrenched in the Canadian Constitution by explicit reference because the Constitution does not include protection for private property, expropriation has been described as "quasi-constitutional" in nature, and a central part of expropriation is that it relates to public purpose.[23] Expropriation is contained in article 952 of the *Civil Code of Quebec*, which provides: "The owner cannot be compelled to transfer his property, except by way of expropriation made according to the law for a cause of public utility and subject to a just and prior indemnity."[24]

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[17] US Const, amend V [*Fifth Amendment*].
[18] A term that is also used in Scotland, Australia, and New Zealand.
[19] Michael Taggart, "Expropriation, Public Purpose and the Constitution" in Christopher Forsyth and Ivan Hare, eds, *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford: Clarendon Press, 1998) 91 at 94–95, 103 [Taggert, "Expropriation, Public Purpose and the Contitution"].
[20] *Public Works Act 1981* (NZ), 1981/35, RS 1, s 16.
[21] Taggart, "Expropriation, Public Purpose and the Constitution," *supra* note 19 at 94–95, 103–104. Countries reviewed include India, Sri Lanka (then called Ceylon), Nigeria, Ghana, Tanzania (then called Tanganyika), Zimbabwe (then called Northern Rhodesia), Malaysia, Singapore, Australia, New Zealand, Fiji, Papua New Guinea, Saint Vincent and the Grenadines, and Saint Lucia.
[22] *Hall and Fineberg v New Brunswick (Attorney General) and Grand Bay (Village),* 1986 CanLII 5759 at para 16 (NBQB); Russell Brown, "'Takings': Government Liability to Compensate for Forcibly Acquired Property" in Karen Horsman & Gareth Morley, eds, *Government Liability: Law and Practice* (Aurora, Ont: Canada Law Book, 2007) (loose-leaf updated 2023, release 3), ch 5.
[23] Philips et al, *A History of Law in Canada*, vol 2, *supra* note 11 at 492.
[24] CQLR c CCQ-1991, art 952 [*CCQ*].

The Supreme Court of Canada in *Lorraine (Ville) v 2646-8926 Québec inc* affirmed the importance of public purpose to the law of expropriation:

> The concept of expropriation concerns the power of a public authority to deprive a property owner of the enjoyment of the attributes of his or her right of ownership. Because of the importance attached to private property in liberal democracies, the exercise of the power to expropriate is strictly regulated to ensure that property is expropriated for a legitimate public purpose and in return for a just indemnity.[25]

The words of Justice Michel Yergeau of the Quebec Superior Court simply summarize the requirement that property be taken only for public purpose and that this is done by right of the government:

> In short, no matter where you look, Western legal systems recognize that: a) public authority has b) the right to appropriate private property in the public interest c) with full compensation. The three form the general principle of [the law of expropriation].[26]

5.2.2. Public Purpose as a Limit on Government Power

The taking of properties is not an exceptional use of government power but is instead part of the foundation of the property system, which seeks to promote private property rights while allowing for instances of use of government power. Expropriation as a government power was "seen as critical for the economic development of British North America, a necessary tool for activist administrations looking to help develop local industries and transportation networks."[27] Samuel Pufendorf,[28] a seventeenth-century jurist, provides a reflection on the nature of this obligation in matters of expropriation by framing it as an equitable issue:

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[25] *Lorraine (Ville) v 2646-8926 Québec inc*, 2018 SCC 35 at para 1 [*Lorraine (Ville)*].

[26] *8811571 Canada Inc, supra* note 16 at para 63; Justice Yergeau:

> Bref, peu importe où on regarde, les systèmes de droit occidentaux reconnaissent que : a) l'autorité publique a b) le droit de s'approprier la propriété privée dans l'intérêt public c) moyennant pleine compensation. Les trois forment le principe général de droit précédemment mentionné.

[27] Philips et al, *A History of Law in Canada*, vol 2, *supra* note 11 at 492.

[28] Samuel Pufendorf (1632–1694) was a Saxon philosopher and jurist writing in the post Westphalian era who wrote about moral and legal relations between states. See Michael Seidler, "Pufendorf's Moral and Political

> Natural equity is observed, if, when some contribution must be made to preserve a common thing by such as participate in its benefits, each of them contributes only his own share, and no one bears a greater burden than another. And the same is true in states.[29]

According to Pufendorf, there will be times when "something belonging to one or a few citizens is required for the necessary use"[30] of the state, and because of this, equity or fairness requires that this be recognized through obligations of compensation. The law of expropriation as recognition of contributions made by individuals is reflected in the writings of Blackstone, who similarly wrote about expropriation as the right held by the government with rights of compensation held by individuals.[31] From this perspective, the requirement of public purpose in the law of expropriation can first be understood as an obligation owed toward individual citizens from the democratic state that they live in. The requirement that expropriation only be exercised for the public, or public purpose, or public use, operates as the central restraint on the government's ability to wield this power against an individual.

The importance of public purpose to the law of expropriation cannot be overstated. In the common law and civil law traditions alike, it is "universally accepted that the state may never authorise the unconsented transfer of property from one private actor to another private actor for the latter's personal benefit."[32] Hugo Grotius explained that a monarch "may take away from his subjects … [property] by the power of eminent domain," but "[i]n order that this may be done by

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Philosophy" in Edward Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Stanford: Metaphysics Research Lab, Stanford University, 2021), online: <plato.stanford.edu> [perma.cc/AX4X-28VJ].

[29] Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo (1672)* [Of the Law of Nature and Nations, Eight Books], translated by Charles & William Oldfather, *Classics of International Law*, No 17, vol 2 (London: H Millford, 1934) ch 5 at 1285; cited in Taggart, "Expropriation, Public Purpose and the Constitution," *supra* note 19 at 94–95.

[30] *Ibid*.

[31] William Blackstone, *Commentaries on the Laws of England in Four Books,* 5th ed (Oxford: Clarendon Press, 1773), vol 1 at 139, online: <babel.hathitrust.org/cgi/pt?id=njp.32101075718237&seq=157> [Blackstone, *Commentaries*].

[32] Gray & Gray, *Elements of Land Law, supra* note 13 at 1388. See also Todd, *Law of Expropriation, supra* note 5 at 20.

the power of eminent domain the first requisite is public advantage; then, that compensation from the public funds be made, if possible, to the one who has lost his right."[33] Blackstone, who was fiercely protective of individual private property rights, thought that private property should not be violated "not even for the general good of the whole community."[34]

Unlike the situation between two individuals, Blackstone turns to consider situations where the Crown would be taking the land of an individual private property owner, which requires a public benefit to justify it. For purposes of assessing the benefit, Blackstone underscored that "[t]he public is now considered as an individual, treating with an individual for an exchange."[35] Thus, the individual property holder has an equal status to the "public" as a collective whose interests might impede on the private property through an action in eminent domain.

Public purpose is important to the law of expropriation because of the *nature* of the expropriative power. The power to expropriate is one held by the government, and the *ability* of the government to wield that power is not in contention. Indeed, as is explained by Hohfeld in his important paper "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," the nature of a "power" is such that the entity "whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem."[36] In relation to expropriation, then, the ability to expropriate is a power held by the government, which holds the freedom to exercise that power with minimal conditions. In Hohfeld's analysis, the correlative to powers are "liabilities," or a loose synonym to this could be

[33] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres (1625)* [*On the Law of War and Peace*], translated by Francis W Kelsey, *Classics of International Law*, No 3, vol 2 (Oxford: Clarendon Press, 1925) Book 2, ch 14 at 385, online: <archive.org> [perma.cc/MWU9-FX2U] [Grotius, *On the Law of War and Peace*].
[34] Blackstone, *Commentaries, supra* note 31 at 139.
[35] *Ibid.*
[36] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16 at 44.

"duty" or "obligation."[37] Correlatives represent relationships of interests that exist in opposition to one another.[38] The liability created by the government's power of expropriation rests entirely on the private property holder who finds their property under this power. Public purpose operates as one of the few checks and balances on the expropriative power.

Statements on the law of expropriation are reflective of this power–liability correlative as treatises provide (1) a reference to requirements that the property under contention be used for the public and (2) there is ultimately no denial of the government's power to expropriate. Blackstone wrote on the importance of "private property, that [the law] will not authorize the least violation of it; no, not even for the general good of the whole community," but goes on to acknowledge that "[i]n this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce."[39] Grotius recognizes the monarch's power to exercise eminent domain, but that this must be done for "public advantage."[40] In the US context, the Fifth Amendment states that property cannot be taken "without due process of law" when "private property [is] taken for public use,"[41] assuming the right of the government to take property. The Quebec Civil Code allows the state to compel the transfer of property "according to law" but it must be done "for public utility."[42] The most recent affirmation by the Supreme Court of Canada that there be a "legitimate public purpose" starts from the proposition that there exists "the power of a public authority"[43] to expropriate. The law of expropriation is built on the principle that government may require use of private properties for government-defined purposes.

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[37] *Ibid* at 53.
[38] *Ibid* at 33.
[39] Blackstone, *Commentaries, supra* note 31 at 139.
[40] Grotius, *On the Law of War and Peace, supra* note 33 at 385.
[41] *Fifth Amendment, supra* note 17.
[42] *CCQ, supra* note 24 at art 952.
[43] *Lorraine (Ville), supra* note 25 at para 1 (Wagner CJ).

5.2.3. Assessing Public Purpose

Despite the importance of "public purpose" to the application of expropriation law, there is minimal engagement with it in the jurisprudence. An implication of the lack of attention given to public interest is that the component of defining who or what the "public" is often is not clear. The inattention might be the result of the facts or circumstances of a case, but the inattention may also hide assumptions about the nature of expropriatory actions, government powers, and ideas about acceptable property regulation. Three aspects of the law of expropriation contribute to understandings of public purpose: (1) the statutory source of the expropriatory power; (2) the tendency toward public acceptance of a high degree of regulation of land in Canada; and (3) assessment of the public purpose aspect of an expropriation and evidence of a wrong committed by an authority.

5.2.3.1. Public Purpose in the Statutory Framework

Expropriation is entirely a creature of statute,[44] and thus is subject to the terms and limits of the expropriation power contained in the originating statute.[45] The statutory framework for a *de jure* expropriation will contain detailed information about the procedure for effecting an expropriation, guidelines for compensation, and recourse for the property owner should there be incorrect procedure or should the owner want to appeal the compensation awarded.[46] The originating statute also would typically contain requirements that indicate the expropriation must only be done for the good of the public;[47] however, often the reference to the public purpose

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[44] *Rugby Joint Water Board v Foottit (Shaw-Fox)*, [1973] AC 202 at 214, [1972] 2 WLR 757 (UKHL (Eng)), Pearson LJ, cited in *Transport for London (formerly London Underground Ltd) v Spirerose Ltd*, [2009] UKHL 44 at para 128; Todd, *Law of Expropriation, supra* note 5 at 26; Hogg, *Constitutional Law of Canada*, *supra* note 5 at s 29:6, p 29-9.

[45] Taggart, "Expropriation, Public Purpose, and the Constitution," *supra* note 19 at 94–95.

[46] Todd, *Law of Expropriation, supra* note 5 at 29.

[47] Taggart, "Expropriation, Public Purpose, and the Constitution," *supra* note 19 at 94–95, 103–04.

requirement is minimally articulated. For example, the federal *Expropriation Act* concisely requires that the Minister of Public Works and Government Services use the power to expropriate for "public work or public purposes."[48] It is notable that the measurement of what might fulfil this requirement is "the opinion" of the minister.[49] At the provincial level expropriation powers are also contained in enabling statutes, which confer limited powers to expropriate on the basis of powers contained within the applicable expropriation acts.[50]

It is possible for expropriatory powers to be delegated to a private company. This would typically be done for purposes of building public infrastructure, such as utilities, railways, or pipelines.[51] In circumstances where a delegation has occurred, the requirements that expropriation be carried out for public use and according to the powers contained in the originating statute remain, and possibly become even more stringent. For example, as Justice EJ Graham at the Nova Scotia Court of Appeal emphasized in *Thomson v Halifax Power Co,* this expropriation section must be "construed strictly":

> The company, of course, must in a compulsory acquisition of property, be restricted to the purposes mentioned in the provision … I hardly think it necessary to cite authority to show that legislation to acquire land compulsorily should be construed strictly.[52]

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[48] *Expropriation Act*, RSC 1985, c E-21, s 4(1): "Any interest in land or immovable real right, including any of the interests or rights mentioned in sections 7 and 7.1, that, in the opinion of the Minister, is required by the Crown for a *public work or other public purpose* may be expropriated by the Crown in accordance with the provisions of this Part" [emphasis added].

[49] *Ibid.*

[50] *Ibid; Expropriation Act,* RSNWT 1988 c E-11; *Expropriation Act,* RSNS 1989, c 156 [*Expropriation Act,* RSNS 1989]; *Expropriations Act,* RSO 1990, c E.26 [*Expropriations Act,* RSO 1990]; *Expropriation Act,* RSPEI 1988, c E-13; *Act respecting expropriation,* CQLR c E-25 repealing *Expropriation Act,* RSQ c E-24; *The Expropriation Act,* RSS 1978, c E-15; *Expropriation Act,* RSY 2002, c 81.

[51] Todd, *Law of Expropriation, supra* note 5 at 27; Jamie Benidickson, "Private Rights and Public Purposes in the Lakes, Rivers, and Streams of Ontario 1870–1930" in David H Flaherty, ed, *Essays in the History of Canadian Law*, vol 2 (Toronto: University of Toronto Press, 1983) at 365.

[52] *Thomson v Halifax Power Co*, 1914 CanLII 478 at 432, 16 DLR 424 (NSSC (AD)), Graham EJ [*Thomson v Halifax Power*] (statutory authority granted expropriation powers for lakes or streams or lands covered by water was interpreted to not include public rivers at 429).

In *Thomson v Halifax Power,* expropriatory powers were delegated from the government to a power company. The court clarified the statutory authority granting an expropriatory power must be strictly construed to minimize its impact on private property holders,[53] and an aspect of this is ensuring that the component of public purpose be maintained.[54] Applying this strict construction, the court held that the private company exceeded the authority of the delegating statute by expropriating a public river where the legislation had specified only lakes, streams, or lands covered by water only.[55]

In circumstances of *de facto* expropriation, the requirement of "public purpose" is still present, but tracing the way in which public purpose is contained in the applicable government regulation or statutory framework will not be as direct. As with *de jure* expropriation, an expropriatory power must exist in legislation. Often this power will be delegated to a secondary subject-matter-specific piece of legislation. This is particularly true for circumstances of alleged *de facto* expropriation where the impact of a subsequent legislation (or by-law) is often the source of complaint. [56] The secondary legislation can contain provisions that either allow for compensation according to the provincial or federal *Expropriation Act*, or contain provisions that oust the operation of sections of the *Expropriation Act*.[57]

The public purpose component of expropriation will be contained in the secondary legislation, though it will not necessarily be named as "public work" or indeed "public purpose" as in expropriation statutes, and it has been held that the objective of an act is synonymous with

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[53] *Park Projects Ltd v Halifax (City)*, 1981 CarswellNS 351 at para 28, 22 LCR 244 at 252 (NS Expropriations Compensation Board), affirmed (1982) at 24 LCR 303, 1982 CarswellNS 338 (NSSC (TD)) and 25 LCR 193, 1982 CarswellNS 138 (NSSC (AD)).

[54] Todd, *Law of Expropriation, supra* note 5 at 26.

[55] *Thomson v Halifax Power, supra* note 52 at 431, Graham EJ.

[56] See e.g. *Canadian Pacific Railway Co v Vancouver (City),* 2006 SCC 5; *Alberta (Minister of Public Works, Supply and Services) v Nilsson,* 1999 ABQB 440 [*Nilsson*].

[57] Hogg, *Constitutional Law of Canada*, *supra* note 5 at s 29:8, p 29-11.

purpose.[58] For example, in *Alberta (Public Works, Supply and Services) v Nilsson* an action in *de facto* expropriation was brought because the government adopted a "restricted development area" that put privately held property titles under a development freeze.[59] The enabling legislation, the *Department of the Environment Act,*[60] allowed for the creation of restricted development areas when they are done for the "public interest."[61] Public interest purposes include protection of natural resources from destruction, damage, and pollution;[62] protecting watersheds;[63] and generally preventing the "deterioration of the quality of the environment"[64] of an area. The *Department of the Environment Act* was amended in 1977 to explicitly allow for the "expropriation"[65] of any estate or interest in land, where the 1971 version provided for the "purchasing"[66] of these interests. Where an act grants powers of expropriation but the purposes of the expropriation are not detailed, the public purpose component may be gleaned from the goals of the Act.[67] For example in Ontario the *Metrolinx Act*[68] specifically allows the Metrolinx Corporation (a public transit company) to expropriate,[69] but it does not specify for what purposes the expropriation may occur. Instead, one would look to the objects of the legislation, which include transit development and operational activities.[70]

The *Mariner Real Estate* decisions illustrate how the statutory framework vis-à-vis public purpose operates. With *de facto* expropriation, the initial legislation's restrictions or conditions on

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[58] *1739061 Ontario Inc v Hamilton-Wentworth District,* 2016 ONCA 210 at para 57.
[59] *Nilsson, supra* note 56 at para 3.
[60] *The Department of the Environment Act*, SA 1971, c 24 [*Environment Act,* 1971], as amended by *The Department of Environment Amendment Act (No 2),* SA 1977, c 61 [*Environment Amendment Act,* 1977]
[61] *Environment Act,* 1971, s 15.
[62] *Ibid,* s 15(1)(a).
[63] *Ibid,* s 15(1)(b).
[64] *Ibid,* s 15(1)(d).
[65] *Environment Amendment Act,* 1977, *supra* note 60, s 2, amending *Environment Act*, 1971, *supra* note 60, s 9(1).
[66] *Environment Act,* 1971, *supra* note 60 at s 9(1).
[67] Williams et al, *Expropriation Law in Ontario, supra* note 5 at 10.
[68] *Metrolinx Act, 2006,* SO 2006, c 16.
[69] *Ibid,* s 20.
[70] *Ibid*, s 5.

land is what causes the alleged expropriation, but the claim is based in the applicable *Expropriation Act*. In Nova Scotia, the originating statute for expropriation is the *Expropriation Act*, which explicitly sets out the requirement that expropriation must occur for a "public purpose":

> (a) for any purpose for which a Minister or the Governor in Council is authorized under a specific Act or the former Expropriation Act to expropriate lands;
> (b) to implement or carry out or effect an agreement entered into between the Province and the Government of Canada or a city, town or municipality or any combination thereof if the agreement is financed from public funds;
> (c) for any public work;
> (d) for any purpose that is a public purpose.[71]

In the *Mariner Real Estate* decisions, the secondary legislation that is the source of the allegation of *de facto* expropriation is the *Beaches Act*. The *Beaches Act* imposes restrictions on designated beaches as to how they can be used, and this is this source of the alleged expropriation. The *Beaches Act* is silent on expropriation. Thus, the plaintiffs in the *Mariner Real Estate* decisions turned back to the originating legislation, the Nova Scotia *Expropriation Act*, to claim that an expropriation had occurred.[72] They sought compensation pursuant to section 24, which provides "Where land is expropriated, the statutory authority shall pay the owner compensation as is determined in accordance with this Act." That approach to interpreting the jurisdiction of the *Beaches Act* and the *Expropriation Act* was not at issue at either stage of the *Mariner Real Estate* decisions.[73]

The case report for the *Mariner Real Estate* decisions is silent as to the role of public purpose in the *de facto* expropriation analysis. Though the legislation that impacts a property may be the secondary legislation (here the *Beaches Act*) and not the *Expropriation Act* directly, the requirement that an expropriation only occur for public purposes still applies. To ascertain what

[71] *Expropriation Act,* RSNS 1989, *supra* note 50 at s 10.
[72] *Mariner Real Estate,* NSCA*, supra* note 3 at para 10.
[73] *Mariner Real Estate,* NSCA*, supra* note 3 at paras 6–12.

the public purpose is for a given piece of secondary legislation, the analysis should turn to the purpose of that Act, as set out, for example, in the preamble. The purpose of the *Beaches Act*, contained in section 2(2), is to

> (a) provide for the protection of beaches and associated dune systems as significant and sensitive environmental and recreational resources;
>
> (b) provide for the regulation and enforcement of the full range of land-use activities on beaches, including aggregate removal, so as to leave them unimpaired for the benefit and enjoyment of future generations;
>
> (c) control recreational and other uses of beaches that may cause undesirable impacts on beach and associated dune systems.

The public purpose of the *Beaches Act* was not in contention in the litigation, and the case reports from both the NSSC and the NSCA are silent as to public purpose. One can only assume that this is because concerns about dunes and beach matter articulated in the *Beaches Act* would fall into public purpose. Considered together—the *Beaches Act*, the *Expropriation Act*, and the courts' analyses in the *Mariner Real Estate* decisions—the framework is clear that a public purpose is required, but there is little elaboration as to the criteria, and the judgments do not provide further guidance as to the evidence because the courts did not explicitly consider the issue.

In relation to *de facto* expropriation this silence is, I think, an oversight. Not only is public purpose an essential component of expropriation, but it is recognized as such in notice and reporting requirements to homeowners, as is required by legislation.[74] By its nature, circumstances where *de facto* expropriation is alleged, landholders are not afforded the same candidness. The

[74] In Ontario, the procedure for carrying out an expropriation is detailed in the *Expropriations Act* (*supra* note 50). Regulation 363, Forms, enacted pursuant to the *Expropriations Act*, contains all the necessary forms that must be completed at various stages of an expropriation (see *Expropriations Act,* RRO 1990, Reg 363). In Nova Scotia, the *Expropriation Procedures Regulations,* NS Reg 103/74, enacted pursuant to the Nova Scotia *Expropriation Act*, *supra* note 50, also contains a host of forms.

extent to which public purpose is addressed as an aspect of litigation, and particularly in circumstances of alleged *de facto* expropriation, is discussed in the next section.

5.2.3.2. Public Purpose in Jurisprudence

While public purpose is always required in expropriative actions, for both *de facto* and *de jure* expropriation, there is a tendency toward acceptance of a high degree of regulation of land in Canada. In *Mariner Real Estate,* NSCA, Justice Cromwell emphatically said, "In this country, extensive and restrictive land use regulation is the norm."[75] This statement from Justice Cromwell was not a new statement of law or even a development of it, but it has served as a clear pronouncement on the approach to property rights in Canada. This statement has been reiterated and restated in innumerable expropriation cases since the *Mariner Real Estate* decisions, and in scholarship both on expropriation law and on property regulation more broadly.[76] The acceptance of regulation thus is a premise that broadly underlies Canadian expropriation law. The suggestion that there is a high degree of acceptance of land regulation has resulted in a degree of deference to policymakers' decisions that

[75] *Mariner Real Estate,* NSCA*, supra* note 4 at para 42, Cromwell JA.

[76] For expropriation cases that have directly quoted this statement, see *Nilsson, supra* note 56 at para 57; *Rodriguez Holding Corp v Vaughan (City),* 2006 CanLII 28338 (ONSC) at para 42; *Lynch v St John's (City),* 2015 CanLII 1204 (NLSC (TD)) at para 72; *Lynch v St John's (City),* 2016 NLCA 35 at para 39; *Gosse v Conception Bay South (Town),* 2019 NLSC 126 at para 39; *KMK Properties Inc v St John's (City),* 2021 NLSC 122 at para 19; *Halifax Regional Municipality v Annapolis Group Inc,* 2021 NSCA 3 at para 56.

For cases which rely on this sentiment and refer to *Mariner Real Estate,* NSCA*,* but do not directly quote it, see *Lobo Del Norte Ltd v Whitehorse (City of),* 2015 YKSC 40; *Coyne v Whitehorse (City),* 2017 YKSC 57; *Grant v Halifax Regional Water Commission,* 2019 NSSC 281; *Compliance Coal Corporation v British Columbia (Environmental Assessment Office),* 2020 BCSC 621; *Altius Royalty Corporation v Alberta,* 2021 ABQB 3; *Magnum Machine Ltd (Alberta Tactical Rifle Supply) v Canada,* 2021 FC 1112.

Recent scholarship that has reiterated this sentiment includes Deborah Curran, "Sustainable Development and Property Rights: Citizen Participation in Dismantling Urban Environmental Regulation in British Columbia" in Hoi L Kong & Tanya Monforte, eds, *Sustainability, Citizen Participation, and City Governance: Multidisciplinary Perspectives* (Toronto: University of Toronto Press, 2022) 93 at 100; Jane Thomson, "Disinheritance, Discrimination, and the Case for Including Adult Independent Children in Dependents' Relief Schemes: Lawen Estate v Nova Scotia" (2021) 44:2 Dal LJ 641 at 649–650.

an expropriation is for a public purpose.[77] Based on an examination of expropriation cases from the United States and Anglo-commonwealth law, Michael Taggart has observed that many courts have interpreted as final legislative requirements whereby an official merely has to state that they are satisfied that the expropriation is for public purpose.[78] In relation to Canadian courts' approach to examining whether an alleged expropriation is justiciable, Taggart writes that acceptance that a designated official's decision that an expropriation was for a public purpose:

> was particularly entrenched in Canada, where in sweeping language the courts said the issue was political in nature and not judicial, and refused to question the motives of the expropriating authority.[79]

Despite this sense that the purpose of an expropriation is not generally questioned by a court, public purpose remains as a central principle of expropriation law. Thus, the court remains able to pierce the veil behind a stated public purpose, though there are some different holdings on this. For example, in a 1949 Ontario Superior Court decision *Bawtinheimer v Niagara Falls Bridge Commission*, a suggestion to look at the purpose of the government in enacting an expropriation to build an international bridge was firmly rejected:

> A long line of cases has firmly established that where functions of this character are conferred on an administrative officer, his findings of fact and the exercise of his power are based on the facts as found by him are not reviewable by the Courts, provided he acts honestly and his finding is based on some evidence. He may even give himself jurisdiction to act by a wrong finding of fact, as long as he acts honestly.[80]

Though an unequivocal statement against close examination of public purpose, it is contrasted with a later decision, *LaRush v Metropolitan Toronto & Region Conservation Authority,*[81] wherein the

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[77] Todd, *Law of Expropriation, supra* note 5 at 2–3, 29; Taggart, "Expropriation, Public Purpose, and the Constitution," *supra* note 19 at 104.
[78] Taggart, *ibid* at 109.
[79] *Ibid.*
[80] *Bawtinheimer v Niagara Falls Bridge Commission*, 1949 CarswellOnt 65 at para 47, [1949] OR 788 (ON H Ct J), McRuer CJ [*Bawtinheimer*] at 803.
[81] *LaRush v Metropolitan Toronto & Region Conservation Authority,* [1967] OJ No 1131, [1968] 1 OR 300 (CA) [*LaRush*].

landholder had their lands expropriated ostensibly for purposes of flood control and pollution prevention pursuant to the *Conservation Authorities Act,*[82] the expropriation enabling statute. The landholder successfully challenged the expropriation, arguing that the authority acted with an improper purpose of protecting an economic investment and not for purposes of responding to environmental concerns. A central part of the appeal court's inquiry to ascertain the purpose of the expropriation relied on information from the authority about why they had carried out the expropriation. These informational points included reports, communications, and government resolutions, all of which the court was not entitled to see, according to the government body.[83] The appeal court firmly rejected this suggestion and instead unequivocally affirmed that "[t]he contents of these documents and anything which necessarily follows from a consideration of their contents bears in the most direct way upon the question of appellant's real purpose."[84]

The ability of the court to inquire into government purposes is important in judicial inquiry and remains relevant in circumstances where government goals change after an initial expropriation. In another Ontario decision, *1739061 Ontario Inc v Hamilton-Wentworth District School Board*, the court held that "it is not open to an expropriating authority to redefine the purposes after the fact so as to avoid an inquiry on the true purpose of the expropriation."[85] In *Hamilton-Wentworth*, an initial expropriation had occurred for purposes of the construction and operation of a school, and then later the school sought to transfer title to a third party, the City of Hamilton.[86] The landholders had not yet received compensation for the initial expropriation when

[82] *Conservation Authorities Act,* RSO 1960, c 62.
[83] *LaRush, supra* note 81 at paras 9–13. Point upheld in subsequent decisions (see *David Suzuki Foundation et al v The AG for BC,* 2004 BCSC 620 at paras 227–228).
[84] *LaRush, supra* note 81 at para 13.
[85] *1739061 Ontario Inc. v Hamilton-Wentworth District School Board,* 2015 ONSC 1442 at para 6 [*Hamilton-Wentworth*] at para 6. On the same point see, *Progressive Developments (1978) Ltd v Winnipeg (City),* 1982 CanLII 2978 (MBCA), leave to appeal to SCC refused, (1983), 21 Man R (2nd) 80, 27 LCR 142 (note) (SCC).
[86] *Hamilton-Wentworth, ibid* at para 2.

the authorities sought to change their intended use of the lands.[87] On appeal, the court concluded that when assessing the public purpose, "purposes and objectives to be considered in interpreting and applying the *Expropriations Act* flow from the legislation that authorizes the expropriation under scrutiny."[88] The statement from *Bawtinheimer* notwithstanding, the general requirement concerning public purpose appears to be that where a statutory body is authorized to expropriate lands for specified purposes, and exercises its powers for different purposes, the courts will interfere.[89]

Matters that are adjacent to the public purpose requirement, but which do not go to the heart of public purpose, tend to be more commonly raised in jurisprudence rather than challenging an expropriation on the basis of alleged lack of public purpose. These adjacent issues include (1) procedural requirements for carrying out an expropriation and (2) allegations that an expropriation was carried out in bad faith. Neither of these actions are the same as the requirement of public purpose and instead may be alleged as a separate cause of action. They are, however, tied to the public purpose requirement as they go to concerns around government action and permissible purposes.

As to the first of these, another check on the use of expropriatory powers (in addition to the requirement of public purpose) is the requirement of adopting procedure for carrying out the expropriation.[90] The procedural requirements of expropriation are subject to judicial review, while

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[87] Section 41(1) of the Ontario *Expropriations Act, supra* note 50, provides that "the land or any part thereof is found to be unnecessary for the purposes of the expropriating authority or if it is found that a more limited estate or interest therein only is required," the authority must offer the former owner an election between taking back the unnecessary interest in the land, or requiring the authority to acquire all the land nonetheless.

[88] *Hamilton-Wentworth, supra* note 85 at para 59.

[89] See *Re Thompson v The Queen in Right of Manitoba (1978),* 1978 CanLII 1979 (MBQB); *Campbell v Sydney (Municipal Council),* 1924 CanLII 616 (UK JCPC); *LaRush, supra* note 81; *Gray v City of Oshawa et al*, 1971 CanLII 583 (ON H Ct J); *Morton v British Columbia (Hydro and Power Authority),* 1998 CanLII 3958 (BCSC).

[90] Ontario, *Royal Commission Inquiry into Civil Rights*, Report No 1, vol 3 (Toronto: Queen's Printer, 1968) at 980.

public policy decisions of a government are not. In *Kings v Halifax Graving Dock Company,*[91] the court addressed this distinction when an expropriation carried out by the Nova Scotia government under the auspices of the *War Measures Act* was challenged. In response to an argument that the expropriation was *ultra vires* government power, the court per Justice Audette said:

> The Minister, as provided by the said section 8 [of the *Expropriation Act*], having deemed it advisable to expropriate, has exercised his statutory discretion and the Court has no jurisdiction to sit on appeal or in review of such decision. That it cannot go back of that decision is a legal truism. These questions are political in their nature and not judicial.[92]

The holding that "the courts cannot enquire into the motives which actuate the authorities or into the propriety of their decision"[93] is present, but this examination was unnecessary because the government was found to have met the procedural requirements contained in section 8 of the *Expropriation Act*. On public interest, the court found that the Crown was trying to meet the needs of the emergency affecting the "Empire at large" (World War I).[94] *Walters v Essex (County) Board of Education,* a 1976 Supreme Court of Canada decision, reaffirms this approach to considering government goals in an expropriation.[95] In *Walters*, productive farmland was expropriated for purposes of building a rural high school. An anomaly existed in the procedure taken to expropriate because on initial review the reviewing officer found that the expropriation was not defensible.[96]

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[91] *The King v The Halifax Graving Dock Company Limited,* 1920 CanLII 812 (Ex Ct Can) [*Halifax Graving Dock*].
[92] *Ibid* at 58.
[93] *Ibid*. Common law cases that support this statement of law and were cited in *Halifax Graving Dock* include *Dunham v Village of Hyde Park,* 75 Ill 371 (Ill Sup Ct 1874); *Gilbert v New Haven,* 39 Conn 467 (Conn Sup Ct Err 1872); *Beekman v Saratoga & Schenectady Rd Co,* 3 Paige Ch (NY) 45 (Ct Ch 1831); *Jackson v Winn's Heirs,* 4 Ky 322 (Ky Ct App 1823); *Brimner v Boston*, 102 Mass 19; *Matton v The Queen,* 1897 CanLII 167 (Ex Ct Can); *Vautelet v The King* (7 January 1908), 1908 WL14120 (Ex Ct Can), cited in Louis A Audette, *The Practice of the Exchequer Court of Canada,* 2nd ed (Ottawa: Copeland-Chatterson-Crain Limited, 1909) at 115, National Library Collection of Canada (OCLC: 423102723), online: <https://babel.hathitrust.org/cgi/pt?id=umn.31951d01815663k&seq=9>; *Wijeyesekera v Festing,* [1919] AC 646, 88 LJPC 52 (UK JCPC); *Attorney General v De Keyser's Royal Hotel Ltd,* [1920] AC 508, 36 TLR 600 (UK HL (Eng)).
[94] *Halifax Graving Dock, supra* note 91 at 58.
[95] *Walters v Essex (County) Board of Education*, 1973 CanLII 20 (SCC) [*Walters*].
[96] The relevant legislation was the Ontario *Expropriations Act,* 1968–69, c 36, s 7(6) which contained duties held by an inquiry officer who would give their recommendations to the relevant board concerning whether to approve

But when this recommendation was made to the board of education (the expropriating authority in this case), the board met in private to consider the expropriation action as a whole and ultimately approved it, which they had the power to do under section 8 of the *Expropriation Act*.[97] Despite the final decision having been made in private, and the expropriating authority also being the board that was applying for the expropriation (the board of education), the expropriation was upheld. Writing for the court, Justice Laskin emphasized that:

> The Legislature has, in my opinion, left little room for judicial supervision of an approving authority's discharge of its duty to approve or disapprove an expropriation.[98]

Justice Laskin went on to explain that the "sanction for a wrong-headed decision … having regard to its duty to give reasons, is public obloquy not judicial reproof."[99] The requirement of public purpose does not afford the court licence to scrutinize whether the legislature was effective in achieving their goal,[100] only that the court can assess whether a public purpose for the expropriation exists.

A second area on which acts of expropriation are often challenged is the allegation that a government has acted in bad faith. Allegations of bad faith are distinct from allegations that question whether public purpose is present,[101] and where there are facts that might lend themselves to allegations of bad faith, fraud, or other like wrongs, this ought to be explicitly and separately pled in an action.[102]

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the expropriation (see Ontario *Expropriations Act,* 1968–69, c 36, s 7(6), as amended by *Expropriations Act*, RSO 1970, c 154, online, Ontario: Revised Statutes (Osgoode Hall Law School) <digitalcommons.osgoode.yorku.ca> [perma.cc/KM7Q-DNLY]).

[97] *Walters, supra* note 95 at 484.

[98] *Ibid* at 487, Laskin J writing for the court.

[99] *Ibid* at 489, Laskin J writing for the court.

[100] David L Breau, "A New Take on Public Use: Were Kelo and Lingle Nonjusticiable?" (2006) 55:4 Duke LJ 835 at 844.

[101] *Hall and Fineberg v New Brunswick (Attorney General) and Grand Bay (Village),* 1986 CanLII 5759 (NBQB (TD)), Dickson J [*Hall v New Brunswick*]; *Walters, supra* note 95 at 489.

[102] *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36 [*Annapolis v Halifax*] notwithstanding. See

In *Walters*, discussed above, while Justice Laskin did find that the legislature had limited (or removed entirely) the role of the court in interrogating public interest, he went on to write that the court will consider merits of government expropriation action in circumstances where there is an "attack on good faith"[103] in the legal challenge. In another decision, *Hall v New Brunswick*, the court similarly was satisfied that an expropriation was in the public interest, and when that determination is made "a Court has no power, certainly in the absence of any suggestion of fraud or other impropriety to look behind that determination."[104] Many more cases have followed this principle.[105] It means that once a central part of the law of expropriation has been satisfied—that it be done for public purpose—government decisions are not examinable by the judiciary unless there are separate concerns of government acting in bad faith. From this perspective, reference to and reliance on separate tort actions such as bad faith or fraud is an important check on government power. At the same time, allegations of bad faith are distinct from allegations that question whether public purpose is present, and facts that support these other actions are required.

There is tension between the requirement that there be public purposes for an expropriation on the one hand and the general approach that the courts will not look behind a government action to ascertain the intent of the action on the other hand. Concerns about public purpose might not necessarily show facts that give rise to requirements for establishing bad faith (or like action) under the applicable statutory framework, but simultaneously in the "absence of bad faith [a government decision to expropriate a specific property] is final and not reviewable in this proceeding."[106] An example illustrating this tension would be useful. In *Hall v New Brunswick,* the property holders

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below at notes 109–114 and accompanying text for more discussion on this.

[103] *Walters, supra* note 95 at 487.

[104] *Hall v New Brunswick, supra* note 101 at para 17.

[105] See e.g. *Carol Holdings Ltd v Fredericton (City),* 2011 NBQB 101 at paras 16, 28 [*Carol Holdings*]; *DeMarsh v New Brunswick (Executive Council),* 2008 NBQB 96; *Calgary Power Ltd and Halmrast v Copithorne,* 1958 CanLII 73 (SCC); *Bawtinheimer, supra* note 80 at para 47.

[106] *Carol Holdings, ibid* at para 14.

attacked the validity of the public purpose component of an expropriation made for purposes of creating a sewage treatment facility. A central component of the applicants' allegations was that the lieutenant-governor in council, who has authority to decide on an expropriation,[107] did not hold a public hearing on the proposed expropriation, but rather made a determination on the basis of the proposed expropriation material submitted. The applicants alleged that this meant the expropriating body had no knowledge of what was in the public interest. In dismissing their claim, Justice Dickson highlighted that the expropriation framework afforded the lieutenant-governor in council the power to decide without a hearing, as they had done so.[108] That act alone did not suggest impropriety, nor did it raise questions for the court about the public interest component. Instead, the court wanted facts that suggested "fraud or other impropriety."

A majority of the Supreme Court of Canada has introduced some nuance or perhaps an entirely new aspect of *de facto* expropriation by looking at the goal of an expropriative action in the recent *Annapolis v Halifax* decision.[109] In *Annapolis v Halifax,* the majority found that government intention in the enactment of a regulation is relevant in a "supporting role"[110] to assess government action. The rationale offered for looking at government intent is that it might be used as evidence in the expropriative action. The majority wrote: "[T]he intention to take constructively, if proven by the claimant, may support a finding that the landowner has lost all reasonable uses of their land."[111] The majority took inspiration for considering government intention from the Quebec law of "disguised expropriation" contained in the Quebec Civil Code, which provides that "no owner may be compelled to transfer his ownership except by expropriation according to law for

[107] *Expropriation Act,* RSNB 1973, c E-14.
[108] *Ibid,* s 19(10).
[109] *Annapolis v Halifax, supra* note 102.
[110] *Ibid* at para 54.
[111] *Ibid* at para 53.

public utility and in return for a just and prior indemnity."[112] The law of disguised expropriation captures circumstances where a government carries out an expropriatory action but does not provide compensation. In the law of disguised expropriation there are some holdings from lower courts in Quebec that have indicated government intention is relevant to expropriation where the government had an "ulterior motive" for regulation.[113] The majority in *Annapolis v Halifax* found that this approach indicates that intention matters insofar as it relates to the effect of government action (and not to the decision itself).[114]

Public purpose is a real requirement, and it can be evaluated by courts, but it is up to policymakers to determine "public interest," and because there are few guidelines in the statutes, that issue has not generally been explicitly litigated to provide more criteria, because in most of the factual contexts of the cases the problem wasn't whether there was a sufficiently "public" purpose but whether the procedures complied with the statute. Although most cases haven't presented a controversy around whether the purpose was public—roads, bridges, and other infrastructure projects are straightforwardly "public"—the concept of a "public purpose" holds more space for a complex and nuanced approach to public purpose than the brief mention in the statutes and the sparse attention in the case law would suggest. This is particularly important for matters of *de facto* expropriation, which are not benefited by the stringent requirements of notice to property title holders. The next section delves into these complexities around the who, what, where, why, and so on of "public" and argues that a heightened focus on the "public" would change how expropriation law develops.

[112] *CCQ*, *supra* note 24 at art 952; *Annapolis v Halifax, ibid* at paras 46–48.
[113] *Lorraine (Ville), supra* note 25 at para 2.
[114] *Annapolis v Halifax, supra* note 102 at para 53.

5.3. GEOGRAPHICAL INQUIRY

Attention to the geography of the beach, and particularly the role of the public in that location, reveals a tension in the trilogy of areas considered in this thesis: the law of *de facto* expropriation, the geography of the beach, and the constitution of the place. Each one of these focus points could be centred in an interrogation of how the "public" is recognized in expropriation jurisprudence.

In using geographical questions, I do not limit myself to one focus point between expropriation, geography, and place. Instead, I use all three to explore how different configurations of the "public" may be construed. Introducing a substantive focus on the public would in and of itself be a development in how the law of expropriation is approached. This is true regardless of what approach to incorporating the public is adopted, whether it be to introduce a more substantive and reasoned account of the public when applying the principle of *de facto* expropriation, or to consider the definition of the public that is contained within applicable statutory frameworks (to the location under consideration, here Kingsburg Beach), or to take a normative approach so as to consider how the legislature (or other actors) would choose to formulate the public in this location. Each of these approaches to thinking about the public in the location of Kingsburg Beach are possible and would affect expropriation law in different ways.

In this section I consider these three areas of law, geography, and place as an exploration of how the "public" may be defined as part of the law of expropriation. This is a definitional goal setting of sorts, as the implications of the meaning of the "public" are flushed out, though not definitively answered.

5.3.1. What Is Where?

This first question from Gritzner—what is where?—is a definitional question.[115] It is an invitation to consider the way in which locations are defined. This first question is an opportunity to explore the trilogy of expropriation, geography, and place, but without the need to limit the agency of these three areas, whether it be the agency of law as it operates over a location, or the agency held by actors creating a place when choices are made about what kind of place ought to exist, or the agency of the physical geographic location itself. The action of each of these areas of inquiry will guide the way in which the "public" is brought into the location and indeed the definition of the "public" that is adopted in this process. Thus, the tension between the areas of expropriation, geography, and place is one of agency as between these three areas, where one is foregrounded as the agent, which in turn causes a place to be created.

The first question is undoubtedly geographical in that it focuses on the "where." As has been highlighted in earlier chapters, Gritzner states that the "where" is the most important aspect of geographic inquiry. But the subject matter (the "what") is a related component to "where," and so answering the question of "what is where" requires attention to how "what" is being defined. As a starting point, Gritzner would have us look at whether a research question is focused on either physical or human geography, following the typical division of areas of geography. Human geography looks at processes that are human created, led, or experienced, and from there, research will typically highlight spatial relations between people and institutions.[116] A beach location that is configured for the "public" is inherently human geography. A definition of *public* from the

[115] Charles F Gritzner, "What Is Where, Why There, and Why Care?" (2002) 101:1 J Geog 38.
[116] Pauline Couper, *A Student's Introduction to Geographical Thought: Theories, Philosophies, Methodologies* (London, UK: SAGE Publications, 2015) at 211–17 [Couper, *Student's Introduction*].

Oxford English Dictionary supports this beginning. As an adjective, describing something as public would mean that it is:

> [o]pen to general observation, view, or knowledge; existing, performed, or carried out without concealment, so that all may see or hear. Of a person: that acts or performs in public.[117]

Thus, publicness connotes something that is open and observable or knowable to people, though not necessarily participatory in the sense that there needs to be human participation in that which is open.

As a noun, "public" is defined as "[i]n a public place; before spectators or onlookers; publicly, openly, without concealment."[118] Here the word "public" could refer to people as a whole or used to describe "public spaces" as locations that the public "collectively values [as a] space to which it attributes symbolic significance and asserts claims … Citizens create meaningful public space by expressing their attitudes, asserting their claims, and using it for their own purposes."[119] Public spaces, such as parks, squares, markets, and indeed beaches,[120] are "co-produced," and the key principles for their development include "leaving room for self-organization, diversifying activities to encourage diverse people to participate, and maintaining access and availability"[121]

For purposes of regulation, public spaces are better understood as "public property" that is under the control of the state. Daniel H Cole and Elinor Ostrom define public property as property for which "the state or its agencies have the right to determine rules of access and use, but (at least in theory) to manage publicly owned resources for the public welfare. Individual members of the

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[117] *Oxford English Dictionary,* 2nd ed (Oxford: Oxford University Press, 1989) *sub verbo* "public (adj)", sense 1.a.
[118] *Ibid*, *sub verbo* "in public (n)", sense 1.a.
[119] Peter G Goheen, "Public Space and the Geography of the Modern City" (1998) 22:4 Progress Hum Geog 479 at 479 [Goheen, "Public Space"].
[120] Couper, *Student's Introduction, supra* note 116.
[121] Susan Mayhew, *A Dictionary of Geography*, 5th ed (Oxford: Oxford University Press, 2015); Melissa Mean & Charlie Tims, *People Make Places: Growing the Public Life of Cities* (London: Demos, 2005) at 42, 58, 62–63, online: <lx.iriss.org.uk> [perma.cc/DJ8H-8RPE].

public do not necessarily have a right of access or use, but they have a duty to observe access and use rules promulgated by controlling/managing agency."[122] The majority of all lands in Canada are held by governments as public land and are known as Crown lands.[123] Public property is to be distinguished from "common property," which is property for which "each member of the ownership group has the right to access and use group-owned resources in accordance with access and use rules established collectively by the group, and a duty not to violate access and use rules."[124]

The description of public space or of the public as an undifferentiated group more broadly is difficult to manage from a regulatory perspective for two reasons: (1) As a reference to a group of persons, this approach sees the public as a group of undifferentiated people. Though a trite point for its obviousness, approaching a place as it being for the public does not address individual needs, acknowledge the different ways in which people interact or exist in place, nor indicate how a place is to be used in a way that is appropriate for the public. (2) As a reference to a space or location that is for the public, the label "public space" does not indicate how a location may actually be put to use for the public, nor indeed is there any suggestion that a public space will actually be protected for purposes of "public welfare"[125] or for like descriptions. This can only result in seemingly endless iterations of how the interests are affected for the public. This insight is recognized in other non-legal disciplines. In the area of planning law, for example, "the concept of public interest is notoriously slippery" because "virtually every treatment in the literature—

[122] Daniel H Cole & Elinor Ostrom, "The Variety of Property Systems and Rights in Natural Resources" in Daniel H Cole & Elinor Ostrom, eds, *Property in Land and Other Resources* (Cambridge, Mass: Lincoln Institute of Land Policy, 2012) at 42 [Cole & Ostrom, "The Variety of Property Systems"].
[123] VP Neimanis, "Crown Land" (last modified 16 December 2013), online, *The Canadian Encyclopedia*: <https://www.thecanadianencyclopedia.ca/en/article/crown-land>.
[124] Cole & Ostrom, "The Variety of Property Systems," *supra* note 122 at 42.
[125] *Ibid* at 32.

even those that are squarely supportive of the idea—begins with the caveat that the public interest is susceptible to many different interpretations and approaches."[126]

5.3.1.1. The "Public" in the *Mariner Real Estate* Decisions

The definition of the "public" was examined as part of the *Mariner Real Estate* decisions in small ways that illuminated aspects of the *de facto* expropriation analysis, but it was not explicitly discussed (because the public purpose aspect of expropriation was not an issue before the court). The *Beaches Act* regulations were reproduced in the written case report from the NSSC decision.[127] Justice Tidman reviewed these regulations as part of a larger review of the legislative backdrop to the facts of the case. Justice Tidman interpreted the impact of these regulations as a burden on the interests of the private property holders, which in turn he interpreted as property interests that were acquired by the government for the public, thus constituting an expropriation. Justice Tidman writes that the "beach lands [are in] trust for the use and enjoyment of the public in general … paraphrasing Scalia J … the plaintiffs' lands 'have been pressed into public service.'"[128] For Justice Tidman this "pressing into public service" constitutes an expropriation because it is taking privately held property and putting it into public hands. This idea of privately held property being pressed into public service has support in Canadian jurisprudence. As Justice Tidman highlights, in *British Columbia v Tener*[129] the government received the benefit of an enhanced public park by expropriating mineral rights held by the plaintiffs.[130]

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[126] Patrick McAuslan, *The Ideologies of Planning Law*, Urban and Regional Planning Series, vol 22 (Oxford: Pergamon Press, 1980) at 4, in Leslie A Pal & Judith Maxwell, "Assessing the Public Interest in the 21st Century: A Framework," paper prepared for the External Advisory Committee on Smart Regulation (Government of Canada) (January 2004) at 3, online <oaresource.library.carleton.ca/cprn/25967_en.pdf> [perma.cc/556R-FNN6].

[127] *Mariner Real Estate*, NSSC, *supra* note 4.

[128] *Mariner Real Estate,* NSSC*, supra* note 4 at para 31, Tidman J, referring to *Lucas v South Carolina Coastal Council*, 505 US 1003 at 1018, 112 S Ct 2886 (USSC, 1992), Scalia J.

[129] *R (British Columbia) v Tener,* 1985 CanLII 76 (SCC).

[130] *Mariner Real Estate,* NSSC*, supra* note 4 at para 25, Tidman J.

On appeal, Justice Cromwell took an opposite approach to public purpose by instead focusing on the nature of private property rights and regulation in Canada. The starting point of his finding that no expropriation had occurred is the infamous statement that "extensive land use regulation is the norm," which sets the foundation for an approach focused on the contingent nature of private property rather than attention to who or what the public is. This approach of focusing on private property is done to carve out allowable usage of property titles and to remove any suggestion that private lands have changed ownership or become public lands. It is not done to reflect upon the impact of expropriation for either the private property title holders or the non-title holders so benefiting as part of the public. Addressing the argument successfully made at the lower court that the respondents' lands "had been effectively pressed into public service,"[131] Justice Cromwell simply distinguishes the Canadian jurisprudence from the US jurisprudence. While in the United States, "deprivation of property through regulation for public purposes is sufficient to bring a case within the constitutional protection against taking for 'public use'," this is not the law in Canada.[132] Regardless of any explanation about whom or what the public purpose may be, here the concern is with the private property holders themselves and not with interrogating the role of the government, public purpose, or indeed the public in how those properties had been impacted.

The appeal court approached the "public" as an undifferentiated group of persons or places, as something that is simply the opposite of "private." The beach is not a public space, because that is the type of location in which citizens "[express] their attitudes, [assert] their claims, and us[e] it for their own purposes,"[133] rather, by result of the appeal court's finding, the beach is a place that is used to limit the use of the private property lots. This is demonstrated through a detailed

[131] *Mariner Real Estate,* NSCA*, supra* note 4 at para 100, Cromwell JA.
[132] *Mariner Real Estate,* NSCA*, supra* note 4 at para 101, Cromwell JA.
[133] Goheen, "Public Space," *supra* note 119 at 479.

examination of the remaining uses that the private property holders could make of their properties, which are for purposes such as camping or riding a horse,[134] rather than a positive examination of the possible ways that the public could use a beach designated under the *Beaches Act*. The publicness of the beach is not positively defined, explained, or explored. It could be said that the appeal court approaches the "public" by implicitly interpreting the beach location as public property, however, the regulations pursuant to the *Beaches Act* contain a list of *prohibitions* on what the public cannot do in order to achieve the purpose of a beach designation, not what they can do. In the appeal court's analysis, interrogation of the public property in the expropriation is missing (and indirectly denied as relevant). Perhaps it could also be argued that the "public" as the opposite of private is present in the attention given to environmental concerns as goals of conservation, which are contained in the *Beaches Act* and expert witness reports concerning degradation of the shoreline and were ultimately decisive in the decision.[135]

There is an obvious difference between the two courts in the *Mariner Real Estate* decisions as to how the "public" is understood. I suggest that a key aspect of the distinction between the courts in the *Mariner Real Estate* decisions is the unexamined approach to the meaning of public purpose that guides the different justices' analysis. How the "public" might be defined—whether it is persons (rather than a public space)—and if the public's interests ought to be considered in the analysis are all underexamined or not examined at all. From the lens of geographical inquiry, approaching the "public" as the other to "private" is not reflective of the discursive and iterative ways in which public spaces, people, and properties have meaning. In turn, the role of the public in expropriation is itself open to interpretation, but without examination of what the chosen interpretation is.

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[134] *Mariner Real Estate,* NSCA, *supra* note 4 at paras 27–28, Cromwell JA.
[135] *Ibid* at paras 32–34, Cromwell JA.

5.3.1.2. The "Public" in the Existing Statutory Framework

Though public purpose was not expressly considered in the *Mariner Real Estate* decisions, the "public" is present in the beach location through the operation of the applicable legislation, specifically the *Beaches Act*. The *Beaches Act* seems to identify the "public" as persons who may be accessing the beach. The relevant section of the legislation concerning public use of beaches is section 8. Section 8 has as its focus regulation of members of the public who access the beach, providing detailed information about what the public *cannot* do. Section 8(1) provides that "while on a beach no person shall:

> (a) be impaired by alcohol or drugs;
> (b) act in a noisy or disorderly manner;
> (c) create a disturbance;
> (d) pursue a course of conduct that is detrimental to the safety of other beach users or their enjoyment of the beach and its facilities;
> (e) wilfully destroy property and other natural resources found on or adjacent to a beach;
> (f) dump or deposit garbage or other material on a beach other than in a receptable so provided;
> (g) engage in any other activity prohibited by regulation."[136]

This section very clearly and directly regulates permissible activities in the place of the beach. It does not evidence a singular approach to regulation but instead includes a variety of concerns that are all about the activities of persons on the beach. Environmental issues are raised in the prohibitions against littering and the destruction of both built properties and natural resources. The regulations are concerned with creating a space free from unnecessary noise, disturbances, or activities that would impact other people's safety. Section 8(1)(a) prohibits an individual from being "impaired by alcohol or drugs" on the beach, which of course would not be an activity preventable on private property immediately adjacent to the beach. Incorporating regulations about public intoxication are a clear indication of the intended publicness of designated beaches. The

[136] *Beaches Act, supra* note 6.

regulations contained in section 8 are restrictions that show the mindset of the legislature as to what they envision the public is going to engage with on the beach. It is assumed that persons will be under the influence, loud, destroying property and leaving garbage; it is not assumed that the public will be using the beach quietly. Simultaneously, these regulations are a judgment about the types of activities that are acceptable in that public space, and so they could be described as making the space of the beach hospitable for public use of the beach.

The prohibitions contained in section 8 are backed by extensive powers held by peace officers. Section 7 of the Act provides that peace officers may search and seize vehicles without a warrant;[137] they may require a person who is removing beach matter (sand, gravel, stone, or other material) to return it;[138] and if they do not or they commit another offence under the Act, they can arrest that person.[139] Furthermore schedule 10 of the *Summary Offence Tickets Regulations*[140] enacted pursuant to the *Summary Proceedings Act*[141] contains a detailed list of fines that can be imposed under the *Beaches Act*.[142] These fines are extensive, and yet they are still focused on regulating the actions of persons who are entering the beach area. Fines are possible for "being impaired by alcohol or drugs on [the] beach," "creating disturbance on [the] beach," and "dumping or depositing garbage on [the] beach."[143] It seems that the "public" the legislature had in mind in the list of prohibitions are persons who are physically on the beach.

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[137] *Ibid* at s 7(1)(a).
[138] *Ibid* at s 7(1)(b).
[139] *Ibid* at s 7(1)(c).
[140] *Summary Offence Tickets Regulations,* NS Reg 281/2011.
[141] *Summary Proceedings Act,* RSNS 1989, c 450.
[142] *Summary Offence Tickets Regulations,* schedule 10, *Beaches Act, supra* note 6. The out-of-court settlement amounts increased as per NS Reg 339/2013 and NS Reg 274/2015, online: <novascotia.ca/just/regulations/regs/sot-schedules/sp-10.htm> [perma.cc/3CP2-BVWY].
[143] Schedule 10 provides the following fines:

1. Wilfully taking or removing sand, gravel, stone or other material from beach without permission of Minister. NIL
2. Wilfully failing to identify the person in charge of vehicle or vessel operated on beach in violation of the *Beaches Act* or regulations. $352.50

5.3.2. Why There?

"Why there" is the analytical step in the framework for geographical inquiry. In this step, the analysis is tailored to best consider and answer the research question. The analysis of "why there" is broad and dependent on the type of inquiry taking place. It may look at, for example, why something exists or occurs in a location, the processes that have an impact on the geography of a place, or what the implications are of activity in a location. The analysis could also rely on an array of informational points, including those such as legal issues, facts, persons, parties, legal rules, location, changes in that location, physical geography, or physical phenomena. Navigating these different factors is a challenge for adopting an analytical framework to answer the question "why there?" As has been shown throughout this chapter, discussion of and about the "public" is a complex inquiry, made even more complex when the aspect of the public as contemplated by the "public purpose" component of expropriation law is brought into the analysis.

From a legal perspective that introduces critical reflection and closer examination of the link between expropriation and the public, the question "why there" would initially ask the threshold question of why the public is involved at all in a location of private property. From there, any number of variations on this question would arise concerning how the public could already exist in a location or could be brought into a location. The approach taken in asking the question

3. Being jointly liable with operator of vehicle or vessel operated on beach in violation of the *Beaches Act* or regulations. $237.50
4. Failing to comply with order to return sand, gravel, stone or other material to beach. $237.50
5. Being impaired by alcohol or drugs on beach. $237.50
6. Acting in noisy or disorderly manner while on beach. $180.00
7. Creating disturbance on beach $180.00
8. Pursuing course of conduct on beach that is detrimental to the safety of other beach users or their enjoyment of beach. $180.00
9. Wilfully destroying property and other natural resources found on or adjacent to beach. $237.50
10. Dumping or depositing garbage or other material on beach other than in receptacle so provided. $237.50
11. Entering upon or being on beach when prohibited by order of Minister of Natural Resources. $352.50
12. Failing to leave beach when ordered by Minister of Natural Resources. $237.50

depends on the answer to the first question—which essentially asked how the location is being defined. If the "public" refers to humans, then the question "why there" can be more literally asked as: "In what ways are humans physically on the ground in (or above or below) this site? Are they taking shortcuts, walking on a bridge over the land, using a limited space in front of specific properties, visiting historical sites that exist along the beach (such as a cemetery)?" If the "public" is defined more conceptually to include a broader segment of society representing non-owners, then why these persons might have interests in locations of the beach are also broader and the public could "exist" in a location in ways that go beyond them being physically in that location. For example, should someone in Ontario who isn't physically in Nova Scotia but who feels their identity as a Canadian is invested in Canada having welcoming, open, and natural shorelines be taken into account when deciding how the public might be invited into locations of the beach?

The first two sets of questions addressed in this chapter—"what is where" and "why there"—are related. One depends on the other. If the location is defined to be a specific kind of place, as a location that ought to be left as a natural space, for example, this would make the public who might be in that location either undefined or possibly not welcome in that place. Thus, the answer to "why there" might be that persons are in that location for a limited time or not at all, and the reasons for that might be to preserve the location as a place of nature.

5.3.2.1. "Why There" in the *Mariner Real Estate* Decisions

Kingsburg Beach is intimately tied to ways of bringing the public into the beach area. The public is part of the *Beaches Act* framework, as is demonstrated through the prohibitions on individual behaviour in designated beach areas contained in sections 7 and 8 of the Act. The public is referenced directly in the legislation itself and was discussed in the legislative assembly at the

time of its adoption. Section 2 of the *Beaches Act* dedicates the beaches of Nova Scotia to the people of Nova Scotia:

> The beaches of Nova Scotia were dedicated in perpetuity for the benefit, education and enjoyment of present and future generations of Nova Scotians.[144]

This dedication was introduced in the 1975 version of the Act, which remains the foundation of the version that is in force today.[145] The parliamentary debates at this time indicate overwhelming support for the adoption of this dedication. Members of the Legislative Assembly (MLAs) from all parties agreed on the importance of beaches for Nova Scotians broadly, and supported the new approach that signalled an intent to consider beaches as part of the public policy framework for access to outdoor space. At the introduction of the bill, the Honourable Maurice E Delory, Minister of Lands and Resources, explained the shift in policy:

> This policy, Mr. Speaker, is about Nova Scotia's outdoors and how best to provide outdoor recreation resources for future generations. There is a need for a strong outdoor commitment from government to protect and improve our provincial Crown land estate, expand outdoor recreation opportunities, better identify and manage our outdoor resources and to safeguard its environment.[146]

The shift to public access is important because of the historical use made of the beach area for resource extraction. Though previous iterations of the *Beaches Act* had tried to protect the beach by limiting the ability to remove sand and gravel, the introduced changes provided an approach both for limiting removal and clearer requirements for obtaining a permit. The Minister of Lands and Resources went on to explain that the government policy was intended to make a change in

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[144] *Beaches Act, supra* note 6 at s 2(1).

[145] Bill 63, *An Act to Preserve and Protect the Beaches of Nova Scotia,* 2nd Sess, 51st Leg, Nova Scotia, 1975 (assented to 27 March 1975), S NS 1975 (24 Eliz II), c 6, online: <0-nsleg--edeposit-gov-ns-ca.legcat.gov.ns.ca/deposit/Statutes/1975/1975_ch6.pdf> [https://perma.cc/6GQJ-U5RM].

[146] Bill 63, *Act re Beaches of Nova Scotia*, 2nd reading, *Nova Scotia House of Assembly Debates and Proceedings,* 51-2 (5 March 1975) at 996 (Hon Maurice E Delory) [Bill 63].

which beach matter was not a resource that could be privatized by individual Nova Scotians. Instead, it was for all the people of Nova Scotia:

> If it is not replenishable, and they are taking sand off the beach, or they want to take sand, we will not give them permission. And at this point they may say to us, "You are taking away something which we own." But, we are saying, "You are destroying something that people of Nova Scotia should have preserved for them."[147]

This language strongly indicates that the direct concern of the legislature was preservation, however it also suggests that there are different "private" interests that exist among the public. These changes are in favour of private landowners who would have an interest in preserving the beach in front of property lots. The biggest statutory change to enable this policy shift was the removal of compensation rights for instances of expropriation.[148] Still, this was not framed as an expropriation issue, but instead the focus was on the role of the public. It was explained, "[i]n this bill we are not expropriating, we are not buying. We are protecting and preserving."[149] This comment, made specifically when changes were made to the proposed statute that might impact private property holders' rights, appears to be chosen to specially ward off *de facto* expropriation claims.

This interaction between the title holders for the private property lot and the new-found interaction with a public space was raised as a concern by just one MLA at the second reading of the last amendments to the *Beaches Act* in 1988. Mr. Bob Levy, member for Kings South, observed:

> One thinks, for example, of a person having a nice cottage on a nice remote lake and all of a sudden it becomes a far more public area which would be altogether different from what the person had contemplated. In general principles, I am

[147] *Ibid* at 996.
[148] Up until the 1975 amendments, there had been compensation rights included in every *Beaches Act.*
[149] Bill 63, *supra* note 146 at 996.

> certainly in favour of opening up as many beaches as possible to the public but I do think we have to be sensitive to the adjacent landowners.[150]

The point made by Mr. Levy is both ideological and practical. Ideologically, as is stated, there will be circumstances whereby a private property lot is purchased precisely for the way in which it is geographically situated. Levy specifically highlights privacy in a given area, which may be attractive for the property owner. Ideals of privacy may be undermined through the statutory creation of a designated beach, even if it is merely adjacent to, and not partially on, the property lots, which latter circumstance is the case for the property holders along Kingsburg Beach. The second point that can be inferred from Levy's statement is a practical one about how to manage different perspectives on property claims in a location. Levy went on to ask: "Does the minister contemplate a process which would be sensitive to the interest and rights of the adjacent landowners to privacy in that respect?"[151] There was no answer given to the suggestion of a process for managing what may be understood as public intrusions on private property.

These three informational points – (1) parliamentary discussions at the adoption of the 1975 *Beaches Act*, (2) provisions contained in the *Beaches Act* that are largely human-centred in their regulation, and (3) the purposes contained in the *Beaches Act*—indicate that there is discussion on the meaning and intention on what the "public" is.

5.3.2.2. Analyzing Why There

To help think through different configurations, I put together Table 5.1, "Analyzing Why There." Content in this table ranges from observational (reflecting on the publicness of a location) to normative, as choices (through instances of expropriation) could be made about the extent to

[150] Bill 65, *Beaches Preservation and Protection Act*, 2nd reading, *Nova Scotia House of Assembly Debates and Proceedings,* 54-4 (16 May 1988) at 3476 (Mr Bob Levy).
[151] *Ibid* at 3476.

which a location ought to be public from its original formulation as private property. The three rows of the table represent different levels of engagement with the nature of the "public" in the law of expropriation. Row one starts with the law of expropriation as it currently stands. Row two contains reflections on the law of expropriation as in common law and statutory frameworks but interpreted through the lens of geographic inquiry. Row three considers expropriation as a place-making tool. This is not an argument for or against adoption of public interests into private property through instances of expropriation, but rather an exploration of how public policy goals could be used to guide choices to expropriate and could motivate public engagement.

	Private property	**The definition of the public**	**Measuring the public**	**Type of place**	**Use of government power**
Current: Law of expropriation	Expropriation applies primarily to private property title holders	Largely unexamined. If anything, look to the purposes contained in the expropriating legislation	This is not defined in the law of expropriation	Not relevant	Not within expropriation law
Law of expropriation currently contained in common law and statutory frameworks interpreted through the lens of geographic inquiry and focused on place	Places of private property as it relates to personal use is disconnected from values and structures of property	Broader approach. Look at both the purposes contain in the expropriating legislation and supporting legislation for guidance as to the ways in which the public are	Consider reflecting on public purpose goals that are contained within the applicable law to guide analysis of who or what the public is	Should the type of private property holding, adjacent to the private property holding, or the location be relevant to analyzing an expropriation as it relates to the public	Greater attention to the "public purpose" component of expropriation law at both the administration and litigation stage

		represented in the statutory framework		purpose component?	
Possible future: Expropriation focused on place	Look to the goals, interests, and needs of the private property title holder	Look to the goals, interests, and needs of the public (persons or location) that benefit from the expropriation	Introduce the concept of scale to interrogate why the public is in or could be a location	Look to similar types of locations as guidance for the type of publics that are in contemplation when regulation of place occurs, particularly expropriation	If attention is on the way in which an expropriation is done for public purpose, then the government action will be more transparent and there will be greater accountability to the private property holder and to persons who are benefiting from the public interest

Table 5.2: Analyzing Why There

The five columns, especially columns two to five, address different aspects of expropriation that are helpful for thinking through the implications of using expropriation to give effect to government goals, which are required to be to the benefit of the public. The second column looks at the "definition of the public," taking up the discussion above concerning the different ways that the public may be defined and included in the law. The third column considers exactly whom or what is counted in the "public purpose" component of expropriation, such as whether it ought to be persons in the immediate locale of the properties impacted, or on a regional or provincial scale, for example. The fourth column considers the relevance of the type of location

when answering the question "why there," whereby it questions why the public, by whichever definition is chosen (such as persons or as a undifferentiated group in opposition to private), ought to be brought into consideration in erstwhile private spaces through acts of expropriation. One way to manage the complexities of different configurations of interests might be to respond to similar types of geographic locations as guidance to produce consistency and alleviate administrative burdens. The final column looks at "checks and balances on government power." This column emphasizes the continuing importance of public purpose to the law of expropriation and considers the role the law plays on managing government action.

A common point across the components contained in Table 5.1 is the question about "why" exactly the public ought to be brought into "there" (which is a place of private property). Framing acts of expropriation in this way names the operation of expropriation in which there is a private property, government action, and an aspect of being in the public interest. Expropriation is the mechanism through which interests held by non-property title holders are brought to bear on interests held by property title holders. Property title holders hold legal interests, while others that constitute the public can have non-legal interests related to that location. The recognition of the interests of the broader public through the application of expropriation can turn those choices and forces that might be social, political, or justice oriented into legal interests. However, these legal interests are exercised by the government and for purposes of a broad and undefined public. The impact of expropriatory processes on private property is not, in my opinion, fully captured within expropriation analysis,[152] and building a geographic focus in expropriation that provides clarity as to whom or what the public is requires greater attention to the private property holders, as there remains a single physical geography that is the subject of the expropriation. Attention to the type

[152] Recalling the discussions in Chapters Three and Four, *above.*

of public (individuals, preservation for an undifferentiated group, protection so surrounding members of the public are not harmed) might require opportunities for introducing the public into places that are erstwhile private property (physically or spatially, as limits on use are created through *de facto* expropriation). In turn, questions about the impact on private property rights will be raised. How might limits impact future parcel property holders or land value? If the public purpose is crystallized into interests held by the public, could that inadvertently create a direct relationship between property holders and the members of that public? What might private property title holders be required to do in that new relationship? In Table 5.1, I have included a column on private property holders so as to retain the perspective of relationality between rights of the public and rights of the private property holder (though the private property holder was discussed in Chapter 4). The private property interests are in grey font because they are not considered in this chapter.

Row 1: Current: Law of Expropriation

Public purpose is unquestionably a part of the Canadian law of expropriation, but it rarely arises as an issue in reported cases. This means that the public purpose requirement is often left unexamined in jurisprudence on the topic of expropriation. This gap is interesting because the "public purpose" component of expropriation is a threshold requirement for a legal expropriation, and essentially it is the justification for why the expropriation takes place in relation to a privately held property parcel, in the case of a *de jure* expropriation, or for why government action ought to take place even though it impacts the use of a privately held property, as in the case of a *de facto* expropriation. I have argued above that it helps to think about the public purpose aspect as operating as a check on government power. The point is not to question the power of a government body to indeed expropriate, but instead to adopt and maintain tools that afford impacted persons—

private property title holders, the public whom is benefiting from the expropriation—transparency and accountability. The current framework underexamines the persons or places that might be so impacted by an expropriation (either those who might be in support of the expropriation or against the expropriatory act) by looking primarily at the implementation of the statutory framework that guides the expropriation. From the perspective of geographic inquiry, such an approach does not explicitly account for or respond to the type of place that is captured by the expropriative action.

Row 2: Current: Law of Expropriation with Purposive Interpretation

Interpreting the current legal framework to respond to the importance of property, place, and people is possible. Geographic inquiry, particularly focused on place, brings additional lenses through which to view the importance of context in the law of expropriation. For example, as has been explicated in this chapter, the definition of the "public" at the centre of "public purpose" can be the subject of different definitions. Attention to this specific geographic inquiry would support expropriation in property law by contextualizing government goals as to whom or what is being supported through expropriatory action, which is considered in each of the columns in Table 5.1. First, a stronger articulation of the public purpose that underscores an expropriatory action would respond to this threshold requirement of public purpose by requiring a stronger justification for expropriation. A stronger approach would look at the purposes laid out in the statutory framework that allows for expropriation for guidance as to the ways in which the public are represented in the statutory framework. Guidance could be found in information about the legislative history and particularly how public purpose was explicitly discussed in the legislature, in the administrative context; information about the governmental approach to public purposes in their policy documents, in the litigation context; and information about the ways the public would in practice use a given location. The public purpose requirement to expropriatory action is the basis on which

the "public" is brought to bear on private property. Clear explanations about precisely what a statute seeks to achieve would strengthen an expropriatory action.

Second, given that public purpose is a threshold requirement of expropriation law and expropriation law is a tool for managing land and property by altering private property rights, the public purpose requirement ought to guide analysis of who or what the public *is* that is impacted by the expropriation. Place-based inquiry as to the impact of the property tool of expropriation shows that property is contextual, situated in community, and holds social and political meanings for both property holders and non-holders.[153] This means that persons impacted by an expropriation action will be more than the private property title holder. Reflecting on the public purpose goals of applicable legislation as is reflected in the expropriatory action would reveal different understandings of who is contemplated in the public purpose action (if anyone).

Recognition of different categories of "public" might depend on the facts of the case. For facts that indicate specific concerns around preserving/protecting properties or other features of importance in a local community, or even a specific street, the persons contemplated might be neighbours. For facts that indicate development needs for the immediate community, such as a need to build roads or for public utilities, then the public contemplated might be households in that specific community. For facts that indicate expropriation has occurred for purposes of protecting natural aesthetics of locations either for tourists or in recognition of natural places of historical importance, then the "public" purpose might be for groups of persons less differentiated and could include tourists, the town or city as a whole, the province as a whole, or even the country. This approach to "public purpose" would be harder to measure and may turn to government documentation on policy goals. For facts that indicate regulation is done for public purposes of

[153] Discussed in Chapter Two, *above*.

environmental protection, and not directly for persons as such, then information about how a measure achieves the public purpose ought to be required.

Third, there should be greater attention to the "public purpose" component of expropriation law at both the administration and litigation stage. The goal here is simply accountability—accountability to persons of the public who would directly or ostensibly benefit from the expropriation (and relatedly, to private property title holders). Accountability might involve granting standing to persons who would represent the public supported through the public purpose. This part of the analysis might inquire into the government use of an expropriated property done for purposes of the public, or it might look at what branch/es of government are involved in effecting the public purpose, or it might require that the government explain how it is going to use the parcel of property and the way in which the government action supports the public. Though the public policy decision on what the government will do with an expropriated property is not a question for the court, the threshold question of whether the government has indeed acquired the property for a public purpose may be considered.

Row 3: Possible Future: Expropriation Focused on Place

Taking an approach to expropriation that is focused on creating "place" in the sense of using expropriation to shape the geographical landscape of spatial contingencies that shape how a place can be used would require different frameworks and parameters through which expropriation is engaged with. First, a shift in this framework would require that the "public" that are the subject of "public purpose" be defined. This approach would look to the goals, interests, and needs of the public—these could be persons or location—that are (purportedly) benefited by the expropriation. Adopting a more clearly defined "public" is not to take away from the point that a government is able to adopt public policy goals that are given effect through an expropriatory action based on

powers granted by legislation; instead, it is a move that would recognize that the presence of "public purpose" means that there is a "public" that is impacted.

The idea of "public purpose" raises the notion that there is a public user. In *AG (Can) v Ritchie Contracting and Supply Co,* Justice Duff reflected on the presence of the public person, a necessary aspect of identifying whether there is a public harbour. He wrote:

> [I]t does not appear to have been disputed on behalf of the Dominion, that to constitute a "public harbour" … it not be sufficient to have simply an arm of the sea affording shelter to ships in certain states of the wind and that the phrase employed connotes in addition something in the nature of public user for loading or discharging ships.[154]

This comment is from a case that considered whether an undeveloped bay, English Bay in British Columbia, was a public harbour and thus a type of property, which would mean it was under federal jurisdiction[155] in the newly formed Dominion of Canada. The court concluded that it was *not* a public harbour because the location was not built in such a way as to invite people into that location. Though the case does not concern expropriation, the excerpt above is interesting in several ways. First, it recognizes that there is a connection between the type of place (in this case a public harbour) and the person who uses it (the public user). Second, this analysis goes further so as to require that the public user be present for the public harbour to exist. Could this insight be incorporated into expropriation law to consider the corollary of public purpose and the public user?

The second column in Table 5.1 suggests that taking a place-based approach to expropriation would require that tools be adopted to measure the public. Here we could look to introducing the concept of "scales," which is a tool from the geography tradition, to interrogate

[154] *Attorney General for Canada v Ritchie Contracting and Supply Co*, 1915 CanLII 28 at 103 (SCC), Duff J; said in reference to *In Re Provincial Fisheries,* [1898] AC 700, 1896 CanLII 76 (SCC).
[155] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 108–109 *(British North America Act, 1867),* reprinted in RSC 1985, Appendix II, No 5.

why the public is in or could be a location.[156] Scales refer to the level at which a geographical phenomenon is measured or observed. For example, using the *Mariner Real Estate* decisions as an example, the concept of "scale" provides insight into how the place of the beach as a public location and public property could be constructed dependent on either the granularity of the local area interpreted in large-scale relief, or the broader Nova Scotia or even Canada-wide interests that can be brought into the location through small-scale relief. As noted above, the persons who are impacted by a property could be the immediate neighbours through to the surrounding region and beyond, such as tourists. This approach can frame claims and interests in places that change from the private to the public through expropriation as reflecting public policy goals and with accountability for the way that the public purpose component is being met.

A comprehensive approach to public purpose when deciding matters of expropriation to consider the public as an identifiable group or identifiable place means that the analysis of different factors would become more complex as analysis moves away from being grounded solely in the binary of private property holders versus a government action. From an administrative perspective, this would not be a positive development as attention to the nature of the "public" and how that will be supported through "public purpose" requirements would be a burden by increasing the amount of factors to take into account in the creation of place (i.e., there would be an increased number of perspectives on the public and on the use of the expropriatory power). However, this administrative burden is an appropriate requirement when deploying expropriatory power, which has a substantive impact on property title holders and an important role in creating place.

[156] Discussed in Chapter Two, *above.*

5.3.3. Why Care?

The final step of a geographical analysis is the question "why care?" That is to say, why ought land and property law be responsive to the ways in which the public are introduced into places through expropriation? Answering "why care" is the normative component of the analysis. One approach may be to take a critical perspective of existing expropriation law and its public purpose component; a different approach might be to look at introducing a place-based approach to interpreting the public and requiring there be transparency in how policy goals are met. I would offer two specific points as to why the public purpose or public aspect of expropriation law requires more attention, and the *Mariner Real Estate* decisions are illustrative of these concerns. The first is to look at the way in which the public was discussed in the *Mariner Real Estate* decisions. The second is to consider public policy choices for Kingsburg Beach and other beaches in Nova Scotia at the time the *Beaches Act* was adopted. Together these sources of law show a troublingly unsettled understanding of just who it is or what it is that ought to benefit from the expropriation. Regardless of one's normative perspective as to the appropriate role of the public in matters of expropriation, the argument I make is that we ought to think about the public as substantive, rather than being the conceptual opposite to private property, and address it as such in the expropriation framework.

5.3.3.1. Requiring Definition of the Public for Expropriatory Acts

The "public" is present in the *Mariner Real Estate* decisions through the applicable legislation of the *Beaches Act,* but the public contained in the *Beaches Act* does not immediately and obviously correlate to the requirement that an expropriation occur only for public purpose. Instead, there are more steps in between to explain the public purpose of an expropriation and the extent to which the "public" in a legislative framework is a reference to any one of persons, places,

environmental locations, or multiple of these at the same time. The *Beaches Act* primarily contains prohibitions on human action (in sections 7 and 8). In effect, these sections bring the public to places previously created as private, but does so with detailed limitations on how the public—as persons—can behave in that location. The *Beaches Act* creates a beach that echoes one of Pauline Couper's explications on different ways that geographical thought can illuminate the type of place created.[157] In Couper's typology, the fifth approach to discussing the beach is through the lens of human geography, which considers the interaction between human and the physical environment.[158] In this human geography account of the beach, the beach is understood as a place for hyper-regulation of human activity while simultaneously being a site in which rules of behaviour are unique to that location.

Geographic thought highlights that a human geography–inspired approach to defining and interpreting a place is but one of many options for constructing a given location. The geographic foundation of who or what is meant by the "public" benefiting from public purpose is already part of the geographic imagination. Unfortunately, "if geography emerges at all within law, it is a passive and rather uninteresting surface upon which differences are inscribed."[159]

Attention to the meaning of central aspects of the geography of a place—here, the public, as is indicated in both the applicable legislation and required by the law of expropriation—is a step toward actively engaging with what is intended by reference to the "public" in such frameworks. One possibility would be to understand the "public" as people that have rights in relation to the beach location, but this provides little guidance about whom the people are that have rights, whether it includes natural and legal persons, and what the nature of those rights may be.

[157] Couper, *Student's Introduction, supra* note 116 at 7.
[158] *Ibid*.
[159] Nicholas K Blomley, *Law, Space, and the Geographies of Power* (New York: The Guilford Press, 1994) at 25.

Concerning people who are captured in the definition of public, is it those in the community who are somewhat able to access that location, or is it on a smaller scale so that the public is the entirety of Nova Scotia? Concerning the nature of rights that the public has, it does not provide guidance as to the tangibility of rights for the public: Is it that the public has rights to activities that would ordinarily take place on a beach (playing, walking, swimming, etc.), or are rights more focused on preserving the space of the beach as a public space but not facilitating use of that location? Similarly, looking at the location, a public beach would indicate simply that the beach is something for the public, though designating the beach as public doesn't include an explanation about the uses that the public may make of the beach. Instead, the beach as a public space merely indicates the opposite of private spaces. For the *Mariner Real Estate* decisions, a *de facto* expropriation occurred that had the impact of limiting the permissible uses of a private property, and thus the public space has encroached on the private space but without accounting of who or what the public is.

Attention to whom or what the public *is* is an important component of using expropriation as a tool. In particular, it allows for the public purpose component to be used to effect public purpose. The configuration of whom or what the public is does not exist in a vacuum but instead is part of a relational aspect between the "private" and the "public." As it stands, the use of expropriatory powers creates an asymmetric force on private property holders in aid of concerns for the broader public. The juxtaposition of private property versus public lands, private property holders versus the "public," or private property versus government does not respond to the variety of discursive interests that exist within these broad categories. The "public" as persons include environmentalists, property developers, those working in the tourism sector, and, importantly, also includes private property holders. The interests of the private property holder who does not want

motorboats in front of their property are not going to be the same as the interests of developers who want to build to attract persons (either to public spaces or to private properties). Nor can it be presumed that the interests of the private property holder are at odds with environmental goals, as a landholder might seek preservation of natural spaces immediately surrounding their property. Without an explication on the nature of the public interest being sought, expropriation operates as a one-way force on private property holders.

5.3.3.2. "Public" as More Than a Negative

Related to the point that the "public" can and should be used with precision is that once the nature of the public has been named (who, what, and by what scale), the question becomes how can those public purpose goals be met? In the case study of Kingsburg Beach, the *Beaches Act*, as the originating legislation of the expropriation, seeks to regulate human activity and primarily does so by prohibiting a host of human actions. As discussed above, these prohibitions concern behaviours that would create a disturbance—alcohol use,[160] destroying property or natural resources,[161] or being noisy.[162] Prohibited activity is supported by powers granted to a peace officer to enforce such prohibitions.[163] In effect, these sections bring the public to places previously created as private, but do so with detailed limitations in what those allowable activities are and thus with assumptions made by the legislature about the likely activities of the public. This approach to considering the public by focusing on the actions of persons discussed in the *Beaches Act* constitutes a *negative* prohibition around behaviours from the public that are not permissible, but not a *positive* articulation of persons who might benefit from the public purpose.

[160] *Beaches Act, supra* note 6, s 8(1)(a)
[161] *Ibid,* s 8(1)(e)
[162] *Ibid,* s 8(1)(b)
[163] *Ibid,* s 7(1)(c).

The negative account seems to limit how it is assumed people might act on designated beaches and does not provide a positive account of whom or what the public is. What is, in fact, the public policy being pursued through an act of expropriation? If public purpose is a central check and balance on the use of government power, then details of the beneficiary of the "public purpose" ought to be central. An opposite approach to simply prohibiting action would be to allow, encourage, or at least identify positive attributes of what or who the public might be in locations of beaches so designated. The "public" in beaches designated under the *Beaches Act* focuses on individuals by regulating their behaviour, rather than identifying who the public is or what they might be interested in doing in beach locations.

The positive goal articulated by the *Beaches Act* seems to be environmental. The *Beaches Act* states that the purposes are to protect sensitive environmental and recreational resources,[164] to regulate land-use activities for the benefit of future generations,[165] and to protect the dunes.[166] These three goals are not necessarily aligned with each other as they encompass environmental, recreational, and resource extraction goals. These three positive purposes—in addition to being demonstrative of the point made above on the discursive nature and complexity of the "public" who benefits from the public purpose—show primarily that the "public" in contemplation is an *a priori* environmental space. If this is the case, then the positive obligations tied to this public purpose must be focused on to ensure they are promoted, rather than negatively prohibiting actions of the public, which includes both public persons and the private property holder. The many regulations contained in the *Beaches Act* detail how the public is permitted to exist on designated

[164] *Ibid,* s 2(2)(a).
[165] *Ibid,* s 2(2)(b).
[166] *Ibid,* s 2(2)(c).

beaches in Nova Scotia by accommodating their interests, but it does not immediately and obviously correlate to the requirement that an expropriation occur only for public purpose.

5.3.3.3. Definitions of the "Public" Change

It is clear that the definition of the "public" is not a singular thing and, furthermore, that it might change over time. This is a central reason as to why we ought to care about the public in places of expropriation. Attention to this from the geographic perspective is particularly helpful because it reveals that the public is a substantive force actively created and that choices should be made toward the type of public to be created. The public might be people: groups of persons, specific interest groups, individuals, landholders. The public might be a space or a place: public property that is undeveloped as natural spaces or developed into parks or that is developed for specific uses of the public. These definitional choices are part of the public policy that a government adopts in the management of lands. In turn, the public policy ought to provide insight to the allowable "public purpose" for acts of expropriation. As a matter of public policy, these choices are entirely within the control of the government.[167] That is to say that just as the ability of the government to expropriate is not in question, so too the nature of the "public purpose" that is being affected is not in question.

Government choices in public policy will change over time as government policy adapts to different pressures and as societal needs change. As part of this, the public so regulated is something that is open to change. In the *Mariner Real Estate* decisions, the discussion of the public found in the relevant law are demonstrative of the discursive nature of the public, of its importance to the legislature, and that it changes over time. In relation to the *Beaches Act* specifically,

[167] See Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown,* 4th ed (Toronto: Carswell, 2011) at ch 11.

informational points discussed above are (1) the purposes of the *Beaches Act,* which includes environmental and management of the beach space for people; (2) provisions in the *Beaches Act* that are largely centred on human experience; and 3) the legislative discussions at adoption of the *Beaches Act.* Of these, the legislative debates at adoption of the latest version of the *Beaches Act* in particular show that the public is both person- and space-centric in the definition. Historically, there were concerns that beach matter was taken from beaches and also concerns about the impact designated beaches have on the individual landholders. In these materials there is a sense of different scales used to measure interests (e.g., beaches are of provincial cultural importance),[168] and so interests in beach areas extend beyond the immediate area of the beach. The public interest does change, and the legislature indicated this is something they grappled with.

On the basis of these important informational points, the *Mariner Real Estate* decisions can be criticized for not capturing or responding to the claims made by the public in Kingsburg Beach, and as a result not responding to the concerns of private property owners. The only broad reference to the "public" as being relevant to the designation and expropriation of Kingsburg Beach was made by the court at first instance in *Mariner Real Estate*, NSSC. Justice Tidman wrote that it was "public pressure and a recognition of the problem by government [that] led to the designation of the area in question on March 9, 1993 as 'beach' under the provisions of the *Beaches Act*."[169] I assume that the problem referenced by Justice Tidman is a reference to the conservation and concerns of the taking of beach material by the broader public, though the "public pressure" and "problem" are not explicitly stated in the decision. The court of appeal in *Mariner Real Estate,*

[168] See e.g. Government of Nova Scotia, Department of Environment, "Coastal Protection Legislation: Consultation Document" (June 2018) in East Coast Law, "Nova Scotia's Coastal Protection: The Journal to Develop Canada's First Dedicated Coastal Protection" (January 2024), online (pdf): <static1.squarespace.com/static/63f90734d9086a595a4b4a2a/t/65dcae18194c2d562dda8844/1708961314684/East+Coast+Environmental+Law_Coastal+Protection_Narrative+Report_January+2024.pdf> at Appendix A at 1 [perma.cc/SE56-NESQ].

[169] *Mariner Real Estate,* NSSC, *supra* note 4 at para 4.

NSCA, decided the *de facto* expropriation claim based on environmental concerns about degradation of the beach due to taking of beach matter and erosion.[170] The pleadings were focused on arguing aspects of *de facto* expropriation and only on the environmental concerns, thus the court of appeal did not consider all three purposes of the *Beaches Act,* which include both human and environmental concerns.[171] This means the possible ways the public might have an active interest in the case location and the importance of beaches in the provincial culture was not considered, nor with any great depth was the impact of the beach designation and refusal of a permit to build for the landowners considered.

Though government choices that are classified as public policy are not subject to judicial review, transparency in the content of public policy is required. Accessing clear information about what or who the public is and how it features in the public purpose component is the most important piece of information in an expropriation. Including informational records about the role of the public intended by the legislature, any changes in the same, and about how the action affects government goals in aid of public purpose are all ways to bolster understanding of what is meant by the public.

5.4. CONCLUSION

This chapter has examined the "public" that exists in relation to the *Mariner Real Estate* decisions. It began by discussing the law of expropriation and highlighted that the public purpose doctrine is

[170] *Mariner Real Estate,* NSCA, *supra* note 4.

[171] The three purposes of the *Beaches Act*, as set out in s 2(2), are:
(a) provide for the protection of beaches and associated dune systems as significant and sensitive environmental and recreational resources;
(b) provide for the regulation and enforcement of the full range of land-use activities on beaches, including aggregate removal, so as to leave them unimpaired for the benefit and enjoyment of future generations;
(c) control recreational and other uses of beaches that may cause undesirable impacts on beach and associated dune systems.

a central part of the law. Next, it discussed the implicit ways in which the "public" was discussed in the *Mariner Real Estate* decisions, though public purpose was not at issue in the decision. I then turned to examining the "public" in Kingsburg Beach through the lens of geographic inquiry by asking whether the notion of the "public" could change by highlighting different aspects of the beach, the legal framework, and the place. I argued throughout this chapter that though the public exists in the place at the centre of the *Mariner Real Estate* decisions, Kingsburg Beach, and also exists as a central aspect of expropriation law, there is imprecision in its use since it is largely unexamined. Given that expropriation is a legal tool that introduces the public into private places, this imprecision undermines the very thing that it seeks to promote: the appropriation of places of private property either completely or by regulation for public use.

The "public" exists in different ways in the place of Kingsburg Beach, in both a physical sense as is indicated in the regulations of the *Beaches Act* and also in more metaphorical ways through the application of the law of expropriation as applied in that location. The public is part of the law of expropriation through the principle of "public purpose," a principle not at issue in the *Mariner Real Estate* decisions but a central part of expropriation law nonetheless. The public is present in the applicable legislative framework—the *Beaches Act*—which dedicates all beaches in Nova Scotia to the public. The same legislative framework provides guidance on how the "public" may exist on beaches through details of prohibited behaviours in locations of the beach. The "public" articulated in the legislative framework suggests that the "public" are people, individuals that exist in and around beach locations doing individual activities, such as sitting around a campfire, walking, or enjoying the scenery. The "public" may also exist as a less differentiated force that is represented through environmental concerns, a sense that beaches are to be protected for purposes of ensuring that environmental degradation is minimized and ecological diversity is

fostered. This sense of the "public," though less precise than the details contained in the *Beaches Act* (pertaining to prohibitions on beach users' behaviours), is the one that prevailed in the *Mariner Real Estate* decisions.

As a legal tool, expropriation statutes contain a framework of requirements for carrying out an expropriation, thus limiting government action in relation to private property. In limited circumstances, when the requirements for expropriation are met, then public access to private property is facilitated and with that clarity about who or what the public *is* is required. Much like the tension between understandings of place and space broadly, the public is not a preconfigured construct that law works in relation to. Instead, public space is created through interpretation, assumptions, and ideas about a given location, and law is an important spatial actor in this process. Assumptions about the nature of the public rights afforded, if any, through a government act of expropriation obfuscates possible definitions and meanings intended through development of public policy or in the legislature. Furthermore, undifferentiated space (political, social, legal) is difficult to account for and to translate into place and certainly not into actionable legal places. Vague recognition of the publicness of a beach location without a firm understanding of what or whom the public is raises important questions about the difficulty of translating undifferentiated public beach areas into actionable place-based interests.

The analysis of the "public" in this chapter has gone beyond the notion of "public purpose" as a component of expropriation law to instead consider geographic thought that highlights the creation of place and how the public could appear therein. The interplay between the public and the private mirrors the interplay between space and place, as the public are undifferentiated in how they are to act in relation to the private (here, private property). The intent and meaning of the "public" so intended could be specified with more clarity, and for persons who are indicated, their

interests could be differentiated. Without attention to public goals in relation to private property, the public purpose component might fail the public as the exact goals are not identified, while simultaneously failing the landholder who might find their property taken for presumably important public policy goals but with limited checks and balances as to how expropriative acts contribute to the public purposes that impact their home.

The next chapter continues this process of introducing a perspective that is otherwise missing from the collection of Kingsburg Beach, *Mariner Real Estate* decisions, and expropriation law broadly. It considers Indigenous law and Indigenous land title. Indigenous law is not something that is at issue in any way to the *Mariner Real Estate* decisions. However, thinking through place with the questions "what is where, why there, and why care?" reveals that Indigenous title must be considered in the place of Kingsburg Beach.

CHAPTER 6: PLACE OF INDIGENOUS PEOPLES' LAND

I cannot cross the great Lake to talk to you for my Canoe is too small I am old and weak. I cannot look upon you for my eyes not see so far cannot hear my voice across the Great Waters. I therefore send this Wampum and Paper talk to tell the Queen I am in trouble. I have seen upwards of a thousand Moons. When I was young I had plenty: now I am old, poor and sickly too. My people are poor. No Hunting Grounds — No Beaver — no Otter — no nothing. Indians poor — poor for ever ... All these Woods once ours. Our Fathers possessed them all ... Now we cannot cut a tree to warm our Wigwams in Winter unless the White man please ... White man has taken all that was ours ... Let us not perish.[1]

A letter petition written by Chief Paussamigh Pemmeenaweet to Queen Victoria in response to encroachment and trespass on lands reserved for Mi'kmaq Peoples.

[1] Petition, n.d., but stamped "Received 25 January 1841," CO 217/179, ff. 406–04; found in Leslie Francis Stokes Upton, *Micmacs and Colonists: Indian-White Relations in the Maritime Provinces, 1713–1867* (Vancouver: University of British Columbia Press, 1979) at 188–192. Chief Paussamigh Pemmeenauweet was chief at the Shubenacadie Indian Reserve (No. 14), elected in April 1814.

6.1. INTRODUCTION

> [T]he fact is that when the settlers came, the Indians were there ...[2]
>
> Proprietary rights in land are, we may say, projected upon the plane of time.[3]

This chapter introduces a third case study on Kingsburg Beach: the beach as a place of Aboriginal land interests. Consideration of Aboriginal title at Kingsburg Beach is a new aspect that I introduce to the analysis of the *Mariner Real Estate v Nova Scotia* decisions and of the beach as public place as discussed in Chapter 5. Scholarship on *Mariner Real Estate* has not considered Aboriginal title and rights, because this is an area of law not directly at issue in the decision and it is not directly part of the expropriation analysis. Thinking through the place of Kingsburg Beach is important because of the central importance of the physical geography of the beach to this thesis. There are many interests in the same land. The places and properties along the beach change dependent on whether they are considered from a private property perspective, environmental concern, the public's access to the beach, or indeed as Indigenous lands.

There would be a significant gap if a multi-perspective approach to consideration of places of land and real property in Canada did not include issues of Indigenous lands. The concept of expropriation of lands can be thought about in multiple ways—as an expropriation of Aboriginal title (equivalent to an "extinguishment" in the language of Aboriginal title) or as a tool for Indigenous Peoples (which the courts have emphasized is not applicable).[4] Thinking about the

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[2] *Calder et al v British Columbia (Attorney General),* 1973 CanLII 4 at 328 (SCC).
[3] Sir Frederick Pollock & Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2nd ed (Cambridge: Cambridge University Press, 1898) vol 2 at 10.
[4] In the important *Tsilhqot'in* decision, the Supreme Court of Canada noted that the declaration of Aboriginal title did not apply to "privately owned or underwater lands" (*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 9 [*Tsilhqot'in*]).

connections between Aboriginal title and private property is not intended to throw either into disrepair: but it raises ideas about the possible use of private and public land and real property law tools and how these legal principles relate to each other. Just as the possible properties in the place of the beach do not exist in separate physical place, nor do they exist in entirely distinct legal worlds of Aboriginal rights as distinct from private property. Looking at land and properties in a single place that exist by way of different legal foundations is a challenge for traditional legal analysis, but one that a law and geography analysis can provide insight into as it requires that the location—with its divergent interests, tightly constructed legal processes, and division between legal arguments—be considered in its entirety.

I use the term "Aboriginal land rights" as a collective term to refer to Indigenous Peoples' interest in land when discussing in general terms. Aboriginal land rights include Aboriginal rights and Aboriginal title, as are affirmed in section 35 of the Constitution of Canada[5] and jurisprudence interpreting the same. It also includes rights as are contained in the *Indian Act*.[6] Rights contained and affirmed in the Constitution and in the *Indian Act* are referred to as "Aboriginal law," which are laws created by Canadian courts and legislatures and thus they refer to the legal relationship between Indigenous Peoples and the Crown. Aboriginal law is to be distinguished from Indigenous law, which refers to Indigenous Peoples' own legal systems.[7] Because of the nature of expropriation law—which is a creature of the common and civil law legal systems—the analysis contained in this chapter is in the area of Aboriginal law, not Indigenous law.

[5] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].
[6] *Indian Act*, RSC 1985, c I-5.
[7] John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, the Trickster, and Originalism" (2017) 98:1 Can Hist Rev 114; Lindsay Borrows, "Dabaadendiziwin: Practices of Humility in a Multi-juridical Legal Landscape" (2016) 33:1 Windsor YB Access Just 149; Frankie Young, "Positioning Indigenous Law in the Legally Pluralistic State of Canada" (2021) 6:1 Cambridge L Rev 30.

I have made three key points throughout this thesis that are also used to guide this chapter. First, the properties along the beach—whether considered from a private property perspective, environmental concerns, or the public's access to the beach—come from the same land. Though a simple point, this is a foundational factor that must animate our understanding of land and real property, which though they are constructed through different regulatory frameworks ultimately exist in one location. Second, thinking through place in the Massey[8] and Tuan[9] approach requires that histories be brought to bear on accounts of the importance of place. The histories of lands of Kingsburg Beach of course also entail Mi'kmaq land interests, relationships, and histories, even though these are not immediately or evidently relevant to consideration of the principle of expropriation. Third, as I work through the possibilities of introducing "place" to property law and introduce a multifaceted and responsive perspective to thinking about land and real property, it would be incongruous to not consider also Aboriginal lands. In short, there would be a gap in any work looking at land/real property in Canada that does not consider Aboriginal title and rights.

Expropriation of lands can be thought about in multiple ways: as an expropriation of Aboriginal title (an extinguishment) or, hypothetically, as a tool for Indigenous Peoples to reclaim lands for their use. In a place such as Kingsburg Beach, application of either the law of expropriation or the law of Aboriginal title would be the result of a tightly constructed legal process that relies on naming interests, divisions between interests, and prioritizing people's and individual's claims. Could the bringing together of the constitutional properties of Aboriginal title with the private law properties that expropriation interacts with highlight the limitations of both? How might Aboriginal title be reconciled with private property titles? This chapter argues that considering land and properties through the lens of "place" requires incorporation of Aboriginal

[8] Doreen Massey, *For Space* (London, UK: SAGE Publications Ltd., 2005) [Massey, *For Space*].
[9] Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (London: Edward Arnold, 1977).

rights. The goal is not to remove or limit rights associated with property holdings, but to think about what and how places could be constructed if Indigenous interests are included in the assessment of expropriation principles. Repeated assertions of the importance of reconciliation by the judiciary, in public policy, and by the legislature at both the provincial and federal level are argument enough for "why care" about Indigenous lands. As the Supreme Court of Canada (SCC) wrote in the *Mikisew Cree I* case:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.[10]

This chapters considers how these goals of reconciliation might be effected through or relevant to expropriation principles.

This chapter proceeds by applying Gritzner's geographical analysis and answering his set of questions.[11] There is no consideration of Indigenous lands in the *Mariner Real Estate* decision. Gritzner's framework of inquiry is used to highlight the possibilities and limitations of expropriation law and rationale in relation to Indigenous lands. In Section 6.2.1, this chapter answers "what is where?" The "what" refers to "expropriation." Answering whether expropriation law is present in or around Indigenous lands is easily answerable on a black-letter reading of the law because expropriation exists as a separate area of law, distinct from Indigenous land interests. The question thus becomes a consideration of expropriation and why it is not part of Indigenous land interests. In Section 6.2.2, the question "why there" raises the analytical consideration of how it is that expropriation and property principles broadly are not part of Indigenous land interests. In this section I consider histories of colonization in Lunenburg County, where Kingsburg Beach is located, which mirror stories of colonization in Canada. The law takes property interests—which

[10] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 1 [*Mikisew Cree I*].
[11] Charles F Gritzner, "What Is Where, Why There, and Why Care?" (2002) 101:1 J Geog 38.

expropriation principles deal with—as separate from Indigenous lands. This separation is a legal spatiality that does not reflect the reality of a singular physical place, neither at the time of settlement nor today. In Section 6.2.3 I answer the normative question of "why care" with three guiding points. First, as is pointed out above, there is a simple but forceful argument for reconciliation as a public policy choice. Second, this case study lays bare the place-making tool that is property law, and thus the possibility of expropriation also being used as a place-making tool is at least worthy of consideration. Third, the interaction between Indigenous land interests and private property law interests has only recently been at issue and not in a matter that has been completed.[12] But it will be in the future because of the ongoing treaty litigation, resulting in strengthened treaty rights over lands that hold a variety of property interests.[13] When conflict directly arises, what will be the policy, law, and norms that can be used to ameliorate this conflict? Is expropriation law, as a public law tool, helpful to think through in these instances? In this chapter I show that expropriation law is indeed useful, and furthermore the principle, guided as it is by considerations of private law balanced with public interests, holds potential for addressing erstwhile conflictual land relations between Aboriginal rights and private property rights. However, such a purposive approach is dependent on a robust account of expropriation as understood from the perspective of place.

[12] See, *Wolastoqey Nations v New Brunswick and Canada*, 2024 NBKB 203 [*Wolastoqey*]; *J.D. Irving, Limited et al. v Wolastoqey Nation*, 2025 NBCA 129 [*J.D. Irving, Limited et al. v Wolastoqey*] (the decisions are discussed below).

[13] The Supreme Court of Canada explicitly did not include consideration of the potential conflict between private property interests and Aboriginal rights in its discussion of Aboriginal title in *Tsilhqot'in*; instead, it did the opposite by affirming the private property titles in the land claim area. See *Tsilhqot'in, supra* note 4 at para 9. See also, John Borrows, "Aboriginal Title and Private Property" (2015) 71 Sup Ct L Rev (2d) 91–134 [Borrows, "Aboriginal Title and Private Property"].

6.2. GEOGRAPHICAL INQUIRY

Introducing Indigenous property or land considerations to an examination of Kingsburg Beach, or indeed other places that have been the subject of expropriation, requires close attention to the foundational parameters of the geography framework. Taking the physical geography as the central point for analysis and including historical information as one element of a physical geography, it becomes apparent that Indigenous histories are also part of the geography of Kingsburg Beach. However, identifying precisely how Indigenous Peoples' land interests intersect with aspects of expropriation is unclear. In addition, the subject matter of Gritzner's framework could take several interests as the basis for examination of what is where and why there, which means that the organizational potential for Gritzner's framework as it relates to Indigenous land interests is unlimited. The subject matter that may be foregrounded in analysis could be property, geography, or Indigenous land. What is clear is that whichever subject matter is foregrounded for analysis, Indigenous Peoples and lands are not present in the location of Kingsburg Beach. Traces of Mi'kmaq histories are present in Lunenberg County in "Indian Path," a rural community ten kilometres from Kingsburg Beach that derives its name from portage trails created by Mi'kmaq for transportation from the inland out to LaHave river.[14] The "Indian Path Commons" exists today as a municipal park of 350-acres.

[14] See online, Lahave Islands Marine Museum, "History of the LaHave Islands & Surrounding Area" (undated), online: <lahaveislandsmarinemuseum.ca> [perma.cc/SP7Q-53ZS] ; Virgil J. Vogel, "Indian Trails and Place Names" (1985) 33:1-2 Names 39 at 45.



Figure 6.1: Photograph of the sign for the "Indian Path Commons." (Photograph by Tenille E Brown, 2017)



Figure 6.2: Photography of the map for the Indian Path Commons hiking trails. (Photograph by Tenille E Brown, 2017)

Despite this interesting amalgamation of the property construct of the "commons" imported by the early settlers, with recognition of the First Peoples' original use and the creation of place as a connecting path, the geography of Kingsburg Beach neither indicates nor suggests any recognition of Indigenous Peoples' histories and land interests (but instead is marked with private property parcels). Indigenous land interests as are recognized within the Canadian legal system broadly, such as recognition of Aboriginal rights under section 35 of the *Constitution Act, 1982*, or land settlement agreements, or First Nations reserves, are not located in Kingsburg Beach.

6.2.1. What Is Where?

6.2.1.1. Property Law versus Aboriginal Law

Property law and Aboriginal law are different areas of law. They exist in different jurisdictional authorities, with property law under provincial jurisdiction and Aboriginal law under federal jurisdiction. They also represent different subject matter focus, with property law regulating property (a discursive understanding of property notwithstanding) while Aboriginal law is found in the Constitution and refers to more than property,[15] and indeed categorization of Aboriginal law as akin to property is problematic.[16] If a parcel of land is under the property titling system, then common law property principles are used; if the land is under the Aboriginal title system, then Aboriginal law applies. These two areas of law are in different legal jurisdictions; property law is in the jurisdiction of the provinces and territories,[17] while Aboriginal law is in the

[15] Brian Slattery, "Understanding Aboriginal Rights" (1987) 66:4 Can B Rev 727; Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015) 71:1 Sup Ct L Rev 45; Brian Thom, "Reframing Indigenous Territories: Private Property, Human Rights and Overlapping Claims" (2014) 38:4 Am Indian Culture & Res J 3; Sarah Morales & Brian Thom, "The Principle of Sharing and the Shadow of Canadian Property Law" in Angela Cameron, Sari Graben & Val Napoleon, eds, *Creating Indigenous Property: Power, Rights, and Relationships* (Toronto: University of Toronto Press, 2020) 120 [Cameron et al, *Creating Indigenous Property*].

[16] See generally Cameron et al, *Creating Indigenous Property*, *ibid*.

[17] Section 92(13) of the *Constitution Act, 1867* states that in each province the legislature may exclusively make laws in relation to matters concerning "property and civil rights in the province." *Constitution Act, 1867* (UK),

federal jurisdiction.[18] Today it remains the case that ownership of property is governed by section 109 of the *Constitution Act, 1867*, which provides that property belongs to the provinces.[19]

The impact of this fiction is that, historically, Indigenous Peoples were categorized as occupiers of the land and so granted usufruct rights, but they were not recognized as owners of the land and therefore were not beneficiaries of all that property ownership in the common and civil law would entail. As a result of this categorization, Indigenous property interests have unique characteristics: It is *sui generis*. Kent McNeil coined the term "common law Aboriginal title"[20] to refer to the land interests held by Indigenous Peoples in occupation of lands at the time the Crown acquired sovereignty.[21] Common law Aboriginal title, or Aboriginal title, is the result of a unique amalgamation of rules that are rooted in both English common law and Indigenous law,[22] and its existence is not dependent on recognition by the Canadian state, nor does it does need to correspond exactly to common law property interests.[23] Characteristics of Aboriginal title include that it is a communal right that originates in occupation of ancestral lands, lands may not be sold or purchased (though they may be surrendered to the Crown), and use of the land is bound up in historical practices (or Aboriginal rights).

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30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]. Section 92(13) together with s 109 establish that Ontario holds the beneficial interest to provincial lands (see *Grassy Narrows First Nation v Ontario (Natural Resources),* 2014 SCC 48 at para 22 [*Grassy Narrows*]).

[18] Section 91(24) of the *Constitution Act, 1867* states that the federal government has exclusive authority over "Indians and Lands reserved for Indians."

[19] *Constitution Act, 1867, supra* note 17, 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."

[20] Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) [McNeil, *Common Law Aboriginal Title*].

[21] *Ibid* at 211; In *Delgamuukw v British Columbia*, 1997 CanLII 302 at para 114 (SCC), the Supreme Court of Canada established that the source of Aboriginal title arises from the prior occupation of what is now Canada. *Delgamuukw v British Columbia*, [*Delgamuukw*].

[22] McNeil, *Common Law Aboriginal Title*, *supra* note 20 at 190; Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85:2 Can Bar Rev 255.

[23] McNeil, *Common Law Aboriginal Title*, *supra* note 20 at 194.

Aboriginal title has gone through important developments since the time of first contact. In recent years this includes the creation of a legal test for Aboriginal title[24] and the repudiation of the use of *terra nullius* to describe Canada.[25] In 2014 the SCC handed down a decision recognizing Aboriginal title held by the Tsilhqot'in Nation (British Columbia), the first of its kind. In *Tsilhqot'in Nation v BC*, the SCC recognized that there were private property titles in the geographic area of Aboriginal title but did not make a pronouncement on conflict or possible conflict between the Aboriginal title area and the private property parcels.[26] In fact, the court explicitly chose not to address this.[27] Thus, how to manage governance and ownership of these types of property holdings has not been directly addressed by the Supreme Court of Canada.

Aboriginal rights jurisprudence has developed a test to justify infringement of Aboriginal rights, though not the reverse. In the 1990 decision *R v Sparrow*,[28] the SCC confirmed the existence of an Aboriginal right to fish for the appellant, a member of the Musqueam First Nation, so overturning a criminal conviction of fishing without a licence. In the course of the decision, the SCC created a two-part test for (1) establishing whether an Aboriginal right has been infringed and (2) determining whether an infringement of that right is justified.[29] Of interest here is the second part of the test concerning justifications. The test for justification of infringement of an Aboriginal right requires that there be a valid legislative concern for which the Aboriginal right has been

[24] See *Delgamuukw*, *supra* note 21 at para 143. The three-part test for proof of Aboriginal title from *Delgamuukw* is (1) the land must be occupied prior to assertion of sovereignty; (2) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and (3) occupation must have been exclusive.
[25] *Tsilhqot'in, supra* note 4 at para 69.
[26] *Ibid* at para 8.
[27] *Ibid.*
[28] *R v Sparrow*, 1990 CanLII 104 (SCC) [*Sparrow*]; for academic commentary on *Sparrow*, see WIC Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15:2 Queen's LJ 217; Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29:2 Alta L Rev 498 [Asch & Macklem, "Aboriginal Rights"].
[29] *Sparrow, ibid* at 107879.

infringed.[30] In *Sparrow* the SCC confirmed that the order of priorities for valid infringement of Indigenous rights usage of property and lands are:

1) conservation,
2) Aboriginal right of fishing,
3) non-Aboriginal commercial fishing, and
4) non-Aboriginal sport fishing.[31]

Finally, the SCC noted that the "burden of conservation measures should not fall primarily upon the Indian fishery."[32] This list of the order of priorities for justifying infringement of an Aboriginal right have since been repeatedly upheld by the SCC.[33] In *R v Gladstone*, the court expressed the opinion that limiting Aboriginal rights according to valid statutory objectives is part of reconciliation.[34] In *Delgamuukw*, the court expanded on the list of permissible justifications for infringement of Aboriginal rights to include objectives such as developing agriculture, forestry, mining, and hydroelectric power; the general economic development of a province; environmental protection; infrastructure growth; and settling foreign populations.[35] *Sparrow* is of central importance to Aboriginal rights jurisprudence because on the point of justification of infringement it established that Aboriginal rights are not absolute[36]—indeed, that is one criticism of the decision made in the scholarship.[37]

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[30] *Ibid.*
[31] *Jack et al v The Queen*, 1979 CanLII 175 at 313 (SCC). Adopted in full in *Sparrow*, *supra* note 28 at 1116.
[32] *Sparrow, ibid.*
[33] See e.g. *R v Powley*, 2003 SCC 43 at para 48; *R v Badger*, 1996 CanLII 236 at para 79 (SCC) [*Badger*]; *R v Gladstone*, 1996 CanLII 160 at para 75 (SCC) [*Gladstone*]; *Delgamuukw, supra* note 21 at para 165; *R v Côté,* 1996 CanLII 170 at para 74 (SCC).
[34] *Gladstone, ibid* at para 75.
[35] *Delgamuukw, supra* note 21 at para 165.
[36] Evaleen Hellinga, "The Legacy of R v Sparrow" (February 2020), online: <thecourt.ca> [perma.cc/4JRY-GX9Q].
[37] See e.g. Asch & Macklem, "Aboriginal Rights," *supra* note 27 (arguing that Aboriginal rights have been curtailed by the court's interpretation of rights as contingent on acceptance by the state). See als: Kent McNeil, "How Can Infringement of the Constitutional Rights of Aboriginal People Be Justified? (1997) 8:2 Const Forum 33; Peter W Hogg & Daniel Styler, "Statutory Limitation of Aboriginal or Treaty Rights: What Counts as Justification?" (2015–2016) 1:1 Lakehead LJ 3.

The result of the historical development of Aboriginal law is that Indigenous interests were cast out of the ambit of "property law" because Indigenous Peoples' use of their lands did not comport with typical use of lands by Europeans, as was recognized in common and civil law traditions. In turn and over time, land interests have been recognized and affirmed in the Canadian Constitution through section 35 introduced in 1982. Jurisprudence before and after the adoption of section 35 developed the concept of "common law Aboriginal property" as a mechanism through which Aboriginal title is considered. Importantly, there are distinct differences between property law broadly and land and property interests that are recognized in section 35. Confrontation between property interests and Aboriginal title interests over a piece of land or propertied land has not been directly heard in a case; however, Aboriginal rights jurisprudence has developed a test to justify infringement of Aboriginal rights, though not the reverse—which is to say that a test to consider how Aboriginal rights could infringe on private property has not been created, nor is that in the contemplation of the Aboriginal rights jurisprudence.

6.2.1.2. Aboriginal Law and Expropriation

Expropriation in the Aboriginal law context concerns the taking of Indigenous Peoples' land. Typically, an action will concern allegations of an expropriation of reserve land or possibly of lands captured under a title claim.[38] There is no case in the Canadian context that has directly considered whether an act of expropriation was involved in the extinguishment of Aboriginal title.

[38] See e.g. *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 [*Osoyoos Indian Band*]; also *Osoyoos Indian Band v Her Majesty the Queen in Right of Canada,* 2012 SCTC 3; *Aseniwuche Winewak Nation v Greenview (Municipal District No 16)*, 2000 ABQB 839; *Canada (AG) v Canadian Pacific Ltd*, 2000 BCSC 933; *Tobacco Plains Indian Band v Her Majesty the Queen in Right of Canada*, 2017 SCTC 4; *Makwa Sahgaiehcan First Nation v Her Majesty the Queen in Right of Canada*, 2019 SCTC 5; *Canadian Natural Resources Limited v Elizabeth Métis Settlement*, 2020 ABQB 210; *Snaw-Naw-As First Nation v Attorney General of Canada*, 2020 BCSC 979; *Snaw-Naw-As First Nation v Canada (Attorney General)*, 2021 BCCA 333; *Iskatewizaagegan No 39 Independent First Nation v Winnipeg (City)*, 2021 ONSC 1209; *Southwind v Canada*, 2021 SCC 28 [*Southwind*]; *Reference re Impact Assessment Act*, 2022 ABCA 165; *Ressources Strateco Inc c. Procureure générale du Québec,* 2017 QCCS 2679.

As has been discussed above, this is because of the distinct ways in which jurisprudence has developed in this area to create the body of law called "Aboriginal law" as distinct from property law principles. What are the possibilities for applying the law of expropriation to respond to the different iterations of land interests that are owed to or held by Indigenous Peoples? The law of expropriation does apply in this area, though in different ways compared to expropriation in relation to private property systems. Three ways in which expropriation can arise in relation to land interests are (1) expropriation as a tool to adjudicate the initial taking of lands at colonization, (2) expropriation as it relates to reserve lands, and (3) expropriation as the mechanism through which reserve land areas are increased.

A basic summary of expropriation is that it occurs when government takes land that is privately held for public purpose. Were it not for the actions of colonial governments, which took Indigenous land with minimal concern for Indigenous Peoples and constructed types of persons and types of properties to which the newly imported law applied, it would be logical to use expropriation principles to at least ameliorate the harms caused by governmental action in taking Indigenous lands. However, explicit application of the law of expropriation to regulate the taking of Indigenous lands through colonization was not done.[39] There are several factors that contributed to this. First, treaties were completed with Indigenous Peoples as part of negotiations toward the surrendering of land.[40] Second, the treaties created as part of colonial expansion have been

[39] As Brian Slatterly has outlined, there are four principles of international law relied on to justify the acquisition of land: military conquest; cession, which is the formal transfer of land between sovereign nations; annexation; or settlement. Expropriation is not a principle that exists for the acquisition of land in international law. See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (PhD Thesis, Oxford University, 1979), reprinted Saskatoon: University of Saskatchewan Native Law Centre, 1979.

[40] There are many examples of treaty documents that it is argued do not reflect the intention of the parties at the treaty negotiations. Recognition of this reality has imbued the principles of treaty interpretation that guide courts' interpretation of treaties, see *R v White and Bob* (1964), CanLII 452 (BCCA); *R v George*, 1966 CanLII 2 (SCC); *Regina v Taylor and Williams,* 1981 CanLII 1657 (ONCA); *R v Marshall*, 1999 CanLII 665 (SCC) [*Marshall 1*]. The extent to which treaties did indeed cede land continues to be contentious, and research has shown the disparity

interpreted as a unique type of agreement, not entirely contractual in nature, but also not based in land or property law.[41] And third, the taking of lands and processes of colonial expansion into Canada were not done on the basis of expropriatory powers contained in statute, but instead were completed on the basis of royal prerogative and powers contained in the Royal Proclamation of 1763.[42]

In an early case from the US context, it was argued that lands were taken by the state on the basis of expropriation law. In *Tee-Hit-Ton v United States*,[43] a 1955 decision, the Tee-Hit-Ton First Nations brought an action for compensation under the Fifth Amendment to the United States Constitution for timber taken from tribal-occupied lands in Alaska. The community argued that an expropriation had occurred over its lands over which they had "full proprietary ownership" or at least a recognized right to unrestricted possession.[44] The government argued that if the tribe had any rights, they were to use the land at the government's will. The Tee-Hit-Ton First Nations were unsuccessful in their claim. A unanimous court found that the community did not have title to their lands, as any Aboriginal title they had held was extinguished by discovery and conquest, which gave the United States legal ownership of the land.[45] This finding was a direct application of one of the most foundational and influential cases in the area of Aboriginal law, *Johnson v McIntosh*, which established "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[46] This holding from *Johnson v McIntosh* is the

between the written terms of a treaty text and the oral understanding of the treaty by treaty signatories. See e.g. Leonard I Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 UNB LJ 11 at 21–22.

[41] *Marshall 1*, *ibid* at para 78 (McLachlin J, dissenting).

[42] *The Royal Proclamation*, 1763, George R, Proclamation, (3 Geo III), reprinted in RSC 1985, Appendix II, No 1 [*Royal Proclamation*].

[43] *Tee-Hit-Ton v United States*, 348 US 272 (1955).

[44] *Ibid* at 277.

[45] *Ibid* at 279–82.

[46] *Johnson v McIntosh*, 21 US (8 Wheat) 543 at 587 (USSC 1823) [*Johnson v McIntosh*].

foundation of the modern land law regime as it relates to Aboriginal title throughout the common law world. This foundation created a land law system in which Aboriginal title exists as a burden on Crown title, with historical development in which Aboriginal rights existed initially on the basis of the generosity of the Crown, but were strengthened over time such that they are now recognized as pre-existing to Crown recognition.[47] The implications of this ordering is that land and property rights are affirmed by way of section 35 of the *Constitution Act, 1982*, and as such expropriation law, which is connected to private law, has not historically been available as a legal tool for Indigenous communities to assert land interests.

Expropriatory actions can lie by way of reserve lands. This is the second way that expropriation arises in relation to Indigenous land interests. The *Indian Act* regulates all reserve land in Canada, which are lands held by the Crown for the use and benefit of a particular First Nation. Section 35 of the *Indian Act* provides that lands may be taken by an act of Parliament of a provincial legislature "for public purpose":

> Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.[48]

Section 35(4) provides that compensation for the "compulsory taking" that is "agreed on or awarded" will be paid to the Receiver General, a government entity responsible for accounting, for the benefit of the First Nation. An expropriation that occurs of reserve lands pursuant to section 35 of the *Indian Act* is unlike an expropriation that occurs pursuant to common law rules because different legal principles govern the underlying land structures. In the context of Indigenous lands,

[47] *Royal Proclamation*, *supra* note 42.
[48] *Indian Act*, *supra* note 6 at s 35(1).

which are *sui generis* by virtue of its "inalienability, communality, and the inherent limit on use,"[49] principles that guide regulation of these lands include fiduciary obligations, reconciliation, and the honour of the Crown.[50] These guiding principles apply as well in the reserve land context, which though distinct from Aboriginal title lands are fundamentally similar.[51]

In *Osoyoos Indian Band v Oliver (Town)*,[52] the SCC considered whether a historically enacted expropriation of reserve lands for purposes of creating a canal had the effect of taking that land out of the Osoyoos Indian Band reserve lands, which in turn impacted whether the First Nation could impose property tax over those lands to the burden of the town that operated the canal. Important for the discussion here are the points made concerning the nature of reserve land interests and its interaction with expropriatory acts. First, the SCC took judicial notice of the fact that First Nation bands have Aboriginal title to the lands in reserve,[53] and because of this, expropriatory power must be used in such a way that it minimally impairs Aboriginal rights.[54] In *Osoyoos Indian Band* the SCC articulated the two-part stage process to legally expropriate reserve land:

> In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public

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[49] *Tsilhqot'in, supra* note 4 at para 72.

[50] For an excellent summary of these guiding principles, see *Restoule v Canada (Attorney General),* 2018 ONSC 7701 at paras 476–483 (on honour of the Crown) and 499–505 (on fiduciary duties). Lorraine Land & Matt McPherson, eds, *Aboriginal Law Handbook,* 5th ed (Toronto: Thomson Reuters, 2018) at 22–24. On the importance of the honour of the Crown in particular, see the following statement from the then Chief Justice McLachlin at the SCC in *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73:

> The honour of the Crown is always at stake in its dealings with Aboriginal peoples … It is not a mere incantation, but rather a core precept that finds its application in concrete practices. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. (*ibid* paras 16–17).

[51] See *Guerin v The Queen*, 1984 CanLII 25 at 379 (SCC), Dickson J (as he then was) [*Guerin*]; *Delgamuukw*, *supra* note 21 at paras 116–21 (per Lamer CJ); *St Mary's Indian Band v Cranbrook (City),* 1997 CanLII 364 at para 14 (SCC) [*St Mary's Indian Band*].

[52] *Osoyoos Indian Band*, *supra* note 38.

[53] *Ibid* at para 29; also see *St Mary's Indian Band, supra* note 51 at para 14; *Guerin, supra* note 51; *Delgamuukw, supra* note 21 at paras 116–21.

[54] As was established in *Sparrow*, *supra* note 28.

> purpose. At this stage, no fiduciary duty exists. However, once the general decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable.[55]

Osoyoos Indian Band is the source of the rule that in the operation of section 35 of the *Indian Act* any expropriations must be guided by fiduciary principles, which require minimal impairment of reserve lands and related rights.[56] With reserve lands, as *Osoyoos Indian Band* indicates, the fiduciary duty arises in the assessment of the "public purpose" component of an expropriation. Though a public purpose may be identified for purposes of the expropriation—as is required for all expropriations—in the Aboriginal law context the "public interest cannot trump"[57] Aboriginal rights. The obligation is to protect reserve interests as much as possible; but, like expropriation powers that exist in the common law, the government power to enact that taking is not in question.

These two principles of law—infringement of Aboriginal rights held in the reserve through section 35 of the *Indian Act* and use of fiduciary principles to manage the application of expropriation to reserve land—are brought together in *Southwind v Canada.*[58] In *Southwind,* the SCC rejected entirely the applicability of principles of expropriation to protect reserve interests because "the principles of expropriation law are fundamentally different than those underlying Indigenous interest in land."[59] The facts were that the Lac Seul First Nation, a Treaty 3 First Nation in northern Ontario, had their reserve lands flooded by a hydroelectric generation project causing the First Nation to lose 17 percent of their reserve land area.[60] Though the SCC held in favour of the First Nation, they did so by relying on fiduciary obligations and equity, rejecting expropriation

[55] *Osoyoos Indian Band*, *supra* note 38 at para 53.
[56] *Ibid* at para 52.
[57] *Ibid* at para 52.
[58] *Southwind, supra* note 38.
[59] *Ibid* at para 94.
[60] *Ibid* at para 8.

law as an appropriate area of law to address the claim for damages. Justice Karakatsanis, writing for the majority, wrote that the fiduciary duty structures the "role voluntarily undertaken by the Crown" and "[i]n the context of our national history, the relationship between the Crown and Indigenous Peoples goes to the very foundation of this country and to the heart of its identity."[61] In relation to expropriation law, "the fiduciary duty may arise when the Crown exercises discretionary control over cognizable Indigenous interests or where the conditions of a private law *ad hoc* fiduciary relationship are met."[62] In the opinion of the court, "[i]nstead the fiduciary obligations … must reflect the nature of the interest, the impact of the loss on the First Nation, the importance of the fiduciary relationship, and reconciliation, which is the overarching goals of the fiduciary duty itself, based in the honour of the Crown."[63] The holding in *Southwind* is important because, rather than explore how to use expropriation as a tool to bring Indigenous Peoples' interests together into a single location through the operation of expropriation, the decision finds that the law of expropriation does not apply as it would not adequately respond to past takings of land. Looking ahead, could expropriation be used as a tool for redistribution of property interests, or even simply recognition of the underlying property interests as lying with Indigenous Peoples rather than then Crown?

A third way that expropriation can arise in relation to Indigenous interests is for the government to use expropriation as a tool to regain private or public lands for purposes of turning them into reserve lands. In theory this expropriatory action would be done pursuant to powers held by way of section 91(24) of the *Constitution Act, 1867*, which reserves jurisdiction over "Indians, and Lands reserved for the Indians" for the federal government. In practice, the SCC has

[61] *Ibid* at para 60.
[62] *Ibid* at para 61.
[63] *Ibid* at para 94.

consistently held that beneficial interest in land belongs to the provinces and territories, and therefore the federal government cannot "unilaterally mark out provincial lands as reserves."[64] The holding that constitutionally Canada cannot unilaterally set aside provincial land for the creation of reserves has its beginning in the 1888 decision *St Catherine's Milling and Lumber Co v The Queen*,[65] which concerned the issuance of a tree-harvesting licence by the federal government over lands in Ontario. That these lands were Treaty 3 lands was not material to the issue of ownership of lands for timber-harvesting purposes, because the Indigenous interests were characterized as usufructory in nature and not akin to a fee simple interest.[66] The creation of Treaty 3 had extinguished the land interests in the surrendered lands, and the Constitution conferred interest in land to the provinces and territories.[67] In the article "The Road Not Taken," Kerry Wilkins explains that following the constitutional arrangement, which assigns property interests in land to the provinces and jurisdiction for reserves to the federal government, pursuant to section 91(24), there were a series of negotiations and agreements to create reserves.[68] In Nova Scotia, an agreement adopted in 1959[69] confirmed the creation of reserves that had been *ad hoc* or created through this misuse of Crown power.[70]

The potential for an expropriatory action by the federal government for purposes of creating reserve lands depends on the interpretation of federal powers and obligations held by way

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[64] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 171.
[65] See also *St Catharine's Milling & Lumber Co v The Queen,* [1888] UKPC 70, 14 App Cas 46 (UK JCPC) [*St Catharine's Milling,* UKPC].
[66] *St Catharine's Milling & Lumber Co v R*, 1887 CanLII 3 (SCC) at 60 [*St Catharine's Milling,* SCC]; *St Catharine's Milling,* UKPC, *ibid*.
[67] This interpretation of constitutional powers was later confirmed in *Ontario Mining Company v Seybold*, [1902] UKPC 46, [1903] AC 73 (UK JCPC); see also *Grassy Narrows, supra* note 17.
[68] Kerry Wilkins, "The Road Not Taken: Reserving Lands for Exclusive Indigenous Use and Occupation" (2021) 53:3 UBC L Rev 881 at 893 [Wilkins, "The Road Not Taken"]. See also Laura Bowman, "Constitutional Property and Reserve Creation: Seybold Revisited" (2006) 32:1 Man LJ 1.
[69] Memorandum of Agreement made this 14th Day of April, 1959, Schedule to *Indian Reserves of Nova Scotia Act*, SC 1959, c 50 and *Indian Lands Act*, RSNS 1989, c 219.
[70] Wilkins, "The Road Not Taken," *supra* note 68 at 893, 906.

of section 91 of the *Constitution Act, 1867*, including jurisdiction for "Indians, and Lands reserved for the Indians" under section 91(24). By a purposive interpretation, the potential for creating reserves is not only in the *power* of the federal government by way of section 91(24) but also is the *responsibility* of the federal government, which holds obligations under section 35(1) of the *Constitution Act, 1982*.[71]

Support for a purposive approach to interpreting section 91(24) as entailing positive obligations is found in the body of Aboriginal law. In *Sparrow*, the first decision from the SCC after section 35 of the *Constitution Act, 1982* was introduced, which protects Aboriginal rights and title, the court wrote that the power under section 91(24) "must … now be read together with s. 35(1)" and that reconciling these powers requires that the government "act in a fiduciary relationship with respect to aboriginal peoples" that is "trust-like, rather than adversarial."[72] Fiduciary obligations held by the Crown, coupled with exclusive jurisdiction pursuant to section 91(24) and the clear power of the federal government to expropriate when there is a legislative power to do so,[73] together indicate that expropriation for purposes of creating a reserve is in theory possible.

This section has explored three ways that expropriation can arise in relation to Indigenous lands. These are (1) expropriation as a tool to adjudicate the initial taking of lands at colonization, (2) expropriation as it relates to reserve lands, and (3) expropriation as the mechanism through which reserve land areas are increased. All three of these explorations show a reluctance to use

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[71] Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the Constitution Act, 1867" in David C Hawkes, ed, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Montreal: McGill-Queen's University Press, 1995) at 59; Brian Bird, "Federal Power and Federal Duty: Reconciling Sections 91(24) and 35(1) of the Canadian Constitution" (2011) 16:1 Appeal 3.

[72] *Sparrow*, *supra* note 28 at para 59.

[73] See *Florence Mining Co v Cobalt Lake Mining Co* (1909), 18 OLR 275 at 279, [1909] OJ No 196, and see generally Chapter three, *above.*

principles of expropriation to support Indigenous land interests. Of these three, expropriation in the reserve context is the most prevalent circumstance in which expropriatory actions arise, and this is explicitly provided for in the *Indian Act.* Despite expropriation existing as a tool to manage land interests, Indigenous land interests are not considered relevant to the framework of expropriation law, property law, or as part of the mechanisms of government regulation of property.

6.2.1.3. What Is Where? Conclusion

This section has the addressed the first question for geographic inquiry, which asks "what is where?" When looking at geographic interests from the perspective of Indigenous land interests viewed in the context of expropriation law, this question immediately encounters limitations in how property and expropriation are conceptualized. Distinct legal frameworks govern property law parcels versus land interests under Aboriginal law. In turn, expropriation exists in discrete ways within the Aboriginal law framework, and within this it is not clear to what end. Questions of Aboriginal and treaty rights are different in many ways from the issues courts normally decide concerning property interests, and at the least we would need more judicial guidance on how to manage competing interests in the expropriation analysis. The next section takes up the second question, "why there?" to consider why such distinct geographies have been created in the area of Nova Scotia.

6.2.2. Why There?

The reason why Aboriginal title and property holdings have developed as distinct areas of law is answered through an examination of histories of settlement. The histories of Nova Scotia mirror the histories of Canada: First, there were complex relations developed between colonial governments and Indigenous leaders, which were later codified in treaties (in Nova Scotia and

New Brunswick with the creation of the Peace and Friendship Treaties),[74] and still later there was the creation of reserves. Encounters between settlers in Lunenburg County and Mi'kmaq First Nations is mentioned in the early histories of the settlement of Lunenburg County. In these histories of Lunenburg County, Nova Scotia, and Canada, Indigenous interests as we see them today were not considered and certainly not through the lens of Aboriginal rights or title. Instead, property holdings were developed for settlors without attention to Indigenous Peoples. In this way property rights and interests were considered separately from Indigenous interests, which on a jurisdictional basis were part of treaties concluded on a nation-to-nation basis with the federal government[75] (a distinction that still exists today and can be seen in the description of the two areas of law discussed above).

What is now known as the Town of Lunenburg was called Malagash, spelled variously as Merliguesh, Malegash, and Merligash,[76] which some translate as "milky bay" in Mi'kmaw,[77] though the correctness of this translation is uncertain. One account suggests that "milky bay" is an incorrect translation of the name Malliggeak, which was used to refer to the whole coast along Lunenburg County, and that the reference to milky bay is a mistake as the word for "milk is Melegech, and this comes nearer to Malegash than any word."[78] There were early efforts to settle the area of what is now Lunenburg County. As early as 1630 there is evidence of early letters

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[74] See, Government of Canada, "Treaty Texts—1760–61 Peace and Friendship Treaties between His Majesty the King and the LaHave Tribe of Indians" (last modified March 2016), online: <rcaanc-cirnac.gc.ca/eng/1100100029046/1581293947580> ["Peace and Friendship Treaties"].

[75] The source of this jurisdictional distinction is *Royal Proclamation*, *supra* note 42, which would reserve jurisdiction to treat with Indigenous populations to the Crown.

[76] Helen Creighton, *Folklore of Lunenburg County*, *Nova Scotia* (Toronto: McGraw-Hill Ryerson, 1976) at 1; Mather B DesBrisay, *History of the County of Lunenburg* (Toronto: William Briggs, 1895) at 16 [DesBrisay, *History of the County of Lunenburg*]; Beamish Murdoch, *A History of Nova Scotia or Acadie*, vol 2 (Halifax, NS: J Barnes, 1866) at 137 [Murdoch, *History of Nova Scotia or Acadie*]; Harry W Hewitt, *History of Lunenburg County* (Nova Scotia: publisher unknown, 1959), Halifax, Nova Scotia Archives (PANS Microfilm Cabinet, Places: Lunenburg, History) at 18 [Hewitt, *History of Lunenburg County*].

[77] DesBrisay, *History of the County of Lunenburg, ibid* at 16; Murdoch, *History of Nova Scotia or Acadie, ibid* at 137; Hewitt, *History of Lunenburg County, ibid* at 18.

[78] DesBrisay, *History of the County of Lunenburg, ibid* at 18.

patent granted to "Sir Claude de St. Etienne, Lord of La Tour, and his son … certain lands … along the coast, unto Merliguesche, near unto and beyond the port and cape of La Hève," which is currently known as LaHave in Lunenberg County. And in 1656 Lord Cromwell granted to Sir St. Etienne, Thomas Temple, and William Crowne grants of land for rent "[c]ommencing at 'Merliguesche,' and extending from thence to Port La Hève, following the coast to Cape Sable" and from there to settlements of families.[79] In 1720 the governor of Nova Scotia, Governer Philips, recommended there be a settlement at "Mirliguesh" and from that time there was a sparse, mostly French, settlement.[80] In 1723, 17 fishing vessels were captured by Indigenous persons at Canseau who then took "a large number of prisoners."[81] These persons were rescued by English military. There were eight settlors mentioned in a letter written by government officials on 12 September 1745,[82] and Lord Cornwallis visited "Mirligueche" on 14 June 1749 on his way to Halifax.[83]

The permanent settlement of Lunenburg under the protection of the British government began in 1753 when 450 settlors, including soldiers,[84] travelled from Halifax to Lunenburg by boat, arriving on 7 June.[85] During the early years of settlement, fear of Indigenous Peoples was strong, though this was tied up with fear and prejudice against the French, who were Mi'kmaq allies.[86] Historical records contain accounts of colonial governments' brutalization of the Mi'kmaq population, including incidents of the deliberate spread of disease[87] and food poisoning at

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[79] *Ibid.*
[80] Murdoch, *History of Nova Scotia or Acadie, supra* note 76 at 137; DesBrisay, *History of the County of Lunenburg, ibid* at 13.
[81] *Ibid.*
[82] Desbrisay, *History of the County of Lunenburg, supra* note 76 at 14.
[83] *Ibid.*
[84] Hewitt, *History of Lunenburg County, supra* note 76 at 17.
[85] DesBrisay, *History of the County of Lunenburg, supra* note 76 at 16.
[86] See e.g. Tod Scott, "Mi'kmaw Armed Resistance to British Expansion in Northern New England (1676–1761)" (2016) 19 J Royal NS Hist Soc 1; Thomas Chandler Haliburton, *A General Description of Nova Scotia: Illustrated by a New and Correct Map* (Halifax, NS: publisher unknown, 1823) 47.
[87] Virginia P Miller, "The Decline of the Nova Scotia Micmac Population, AD 1600–1850" (1982) 2:3 Culture 107 at 108.

gatherings.[88] The British governor of Nova Scotia had issued a proclamation (14 May 1756) offering rewards for the killing and capturing of Mi'kmaq persons throughout Nova Scotia, which then included New Brunswick.[89] Preparations for settlors to move from Halifax, where they had been waiting for two years after immigrating to Nova Scotia from Europe, to Lunenburg was planned around fears of settlors being attacked by Indigenous populations:

> The movements attendant upon this expedition had not gone unnoticed by the French and Indians. The Indians had never been able to make an attack upon Halifax or its inhabitants, because of its garrison and defences, but stragglers from the town and the inhabitants of Dartmouth, just across the harbour, had been scalped. It was reported that they would resist the landing of the settlers at Malagash and for this reason it was at first planned to send the colonists in two detachments. First to sail would be 450 persons, including soldiers, all well armed. As soon as these had obtained a footing the rest of the settlers would follow, H.M. sloop "Albany", Captain Rous, was to accompany the fleet of transports, to afford protection in the event of resistance.[90]

It was with the arrival of the German, Swiss, and French immigrants that Merliguesh was renamed to "Lunenburg" as "a reference to the former home of so many of its inhabitants"[91] (a reference to Lüneburg, Germany). Settlors were eventually granted property titles in the Town of Lunenburg and were allocated farmlands outside of the town into the county.[92]

Historical accounts from settlors of their experiences during the early days of settlement at Lunenburg contain reports of Indigenous persons attacking settlors.[93] Security measures were

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[88] *Ibid*; Thomas Pichon, *Genuine Letters and Memoirs Relating to the Natural, Civil, and Commercial History of the Islands of Cape Breton and Saint John* (London: printed for J Nourse, 1760), online: <https://archive.org/embed/genuinelettersme00pich> [perma.cc/E4FK-HVZW]. See generally Jennifer Reid, *Myth, Symbol, and Colonial Encounter: British and Mi'kmaq in Acadia, 1700–1867* (Ottawa: University of Ottawa Press, 1995) at 73–96.

[89] *Marshall 1, supra* note 40 at para 3. A bounty for the killing of Indigenous persons was set by Lieutenant-Governor of Nova Scotia Charles Lawrence by proclamation in 1756: "Ten Guineas for every Indian Killed or Taken Prisoner, above the Age of Sixteen Years, brought in alive for a Scalp of such Male Indians, Twenty-five Pounds." See Murdoch, *History of Nova Scotia or Acadie, supra* note 76 at 308. Lawrence had prior to this been appointed in charge (as major) of overseeing the settlement of Lunenburg.

[90] Hewitt, *History of Lunenburg County, supra* note 76 at 17.

[91] *Ibid* at 16.

[92] See Chapter Five, *above*.

[93] DesBrisay, *History of the County of Lunenburg, supra* note 76 at 21; Hewitt, *History of Lunenburg County, supra*

adopted throughout Lunenburg County primarily by construction of blockhouses and smaller military posts, which were "designed to afford protection to the settlers when they should leave the security of the town for the insecurity of their farmlands."[94] "These [outposts] were located at Mush-a-Mush, (to this day known as Blockhouse), Morriet Brook, North West Range, Lower LaHave, Upper LaHave and at Jacob Hirtle's mills."[95] These places all still exist. It does not seem that there was a military outpost at Kingsburg Beach or indeed lower or upper Kingsburg when Lunenburg County was first settled, however the locations mentioned above geographically surround Kingsburg Beach. For example, LaHave is northwest of Kingsburg, and Jacob Hirtle's Mills was located at Bridgewater, which is also northwest of Kingsburg.[96]

6.2.2.1. Legal Relations

This movement of settlors was done without informing the local Mi'kmaq populations and certainly not in partnership or in negotiation with them. This was despite the fact that at the time Lunenburg was settled, a variety of legal relations, including treaties, legislation, and proclamations related to sovereignty, including or implicating land and resources, already existed. After the settlement of Lunenburg, more of such legal relations would follow. The first treaty signed between the Mi'kmaq and the British is the "Article of Peace and Agreement: Annapolis Royal 1726," which William Wicken in his book *Mi'kmaq Treaties on Trial* argues established co-existence between Mi'kmaq and British as equal partners.[97] Later the "Peace and Friendship Treaties" were adopted as a series of agreements concluded between Indigenous nations in the

note 76 at 25; Murdoch, *History of Nova Scotia or Acadie, supra* note 79 at 222, 248.

[94] Hewitt, *ibid* at 25.

[95] *Ibid.*

[96] Later, at the time of the War of 1812, there was a military outpost established at Kingsburg also. See Hewitt, *ibid* at 26; DesBrisay, *History of the County of Lunenburg, supra* note 76 at 41.

[97] William Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002) [Wicken, *Mi'kmaq Treaties on Trial*].

Maritime provinces and the British between 1725 and 1779. The intention was for these individual Peace and Friendship Treaties to be consolidated into one treaty, but that single treaty did not materialize.[98] Some Peace and Friendship Treaty documents have gone missing, but the text across the existing documents is similar.[99] The Peace and Friendship Treaty concluded over the lands of Lunenburg County is known and it was reproduced in full in the SCC's decision in *Marshall* [*Marshall 1*].[100]

The "Treaty of Peace and Friendship" over the lands of Lunenburg County was entered into by Governor Charles Lawrence in Halifax on 10 March 1760, four years after the settlement of Lunenburg, and the treaty was concluded with the LaHave First Nations.[101] The signing of the 1760–1761 Peace and Friendship Treaties provided welcome relief from the perceived safety concerns held by settlors in Lunenburg. According to one account that reflected specifically on Lunenburg, the creation of the Peace and Friendship Treaties was thought to bring relief to the local settlor population and eased the concerns of troops posted throughout Lunenberg County:

> With the signing of the peace treaties with the Indians in 1760 the necessity for the presence of regular troops seems to have disappeared, and the local militia proved equal to all demands made of them.[102]

As the name of the treaties suggest, they primarily seek to support relationships between nations by agreeing to cease hostilities in return for which the British colonial government would not interfere with Indigenous Peoples' hunting, fishing, and farming activities. The treaties do not specifically grant land or provide for the creation of reserves, in contrast to provisions contained in the numbered treaties signed across Canada.[103] Any potential property or land-like rights

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[98] *Marshall 1, supra* note 40 at para 5.
[99] *Ibid.*
[100] *Ibid.*
[101] See "Peace and Friendship Treaties," *supra* note 74.
[102] Hewitt, *History of Lunenburg County, supra* note 76 at 25.
[103] The "numbered treaties" are the post-Confederation numbered treaties 1–11, which were signed between 1871–1921. They contain provisions concerning land and resources and were an integral part of colonial expansion and

contained in the treaties would be the "trade clause," which was the subject of *Marshall 1*. The trade clause provides the following:

> And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.[104]

In *Marshall 1*, the issue before the SCC was whether this trade clause protected a modern-day right to fish for trade. The answer the court came to was that this clause protected rights of sustenance allowing Mi'kmaq to bring the products of their hunting, fishing, and other gathering activities to trading posts (the truck houses).[105] This trade clause was interpreted as a "restraint on the ability of the Mi'kmaq to trade with non-governmental individuals."[106] The "subtext" to this treaty was "reconciliation and mutual advantage" between the Mi'kmaq and the British following the end of hostilities between France and the British.[107] The goal was to secure peace, not to deal with land cessions. The trade clause highlighted that though the treaties did not contain provisions for land and rights, that fact should not be used so as to disadvantage Mi'kmaq signatories by removing Aboriginal rights that were not explicitly addressed in the treaties. For this thesis I want to draw attention to the impact of the treaties on land rights, which, though the treaties did not address land rights, provided the means through which land rights were removed.

Later, after the series of Peace and Friendship Treaties were concluded, the Royal Proclamation of 1763 was issued by King George III. The Royal Proclamation recognizes the sovereignty of Indigenous Peoples and protects the relationship on a nation-to-nation basis. An

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settlement. See John J Borrows & Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 5th ed (Toronto: Lexis Nexis Canada, 2018) at 285.

[104] See, "Peace and Friendship Treaties," *supra* note 74.

[105] *Marshall 1, supra* note 40 at para 4.

[106] *Ibid* at para 5.

[107] *Ibid* at para 3.

important implication of the Royal Proclamation as it relates to land is that it provided that only the Crown had the right to deal with Indigenous lands. Part of the text of the Royal Proclamation of 1763 provides:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians … We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians.

The requirement that only the Crown be allowed to purchase lands from Indigenous populations was implemented in part as a response to encroachments on Indigenous lands by settlor populations, with the Crown seeking to retain such possibilities for itself.[108] At Confederation, the powers to "purchase lands of the Indians" was reserved to the federal government, and the control of Indian affairs was taken over by the Superintendent-General of Indian Affairs Hector-Louis Langevin.[109] Aboriginal rights would be later entrenched in the Constitution through section 35 of the *Constitution Act, 1982*.[110] That Aboriginal law is under federal power has existed as a central and ongoing feature of the constitutional arrangement of Canada:

> Federal policy toward Aboriginal people has its roots in a power set out in the constitution of 1867. Since early British colonial times a legislative power has been reserved to the central government to protect the interests of Aboriginal peoples, first from local settler interests and, since 1867, from provincial interests.[111]

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[108] Kent McNeil, *Flawed Precedent: The St Catherine's Case and Aboriginal Title* (Toronto: University of British Columbia Press, 2019) at 96 [McNeil, *Flawed Precedent*].

[109] Andrée Désilets & Julia Skikavich, "Sir Hector-Louis Langevin," *The Canadian Encyclopedia* (20 January 2008) (last modified 29 June 2017) online: <thecanadianencyclopedia.ca> [perma.cc/5H5G-D9YW].

[110] Section 35 of the *Constitution Act, 1982* states:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[111] *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Canada Communication Group, 1996) at 8.

As the 1996 Royal Commission on Aboriginal Peoples highlights, with this federal power comes the responsibility of using federal power in a positive manner: "This unique feature of Canadian federalism has continuing significance today, since it includes the means to carry out positive obligations owed to Aboriginal peoples … which must be exercised in furtherance of the interests of Aboriginal peoples and not in derogation of those interests."[112]

6.2.2.2. Encroachment on Indigenous Lands

During these early days of settlement there was ongoing engagement with land, rights, and sovereignty through various mechanisms. Nova Scotia created the office of the Superintendent of Indian Affairs in 1783, since it quickly became apparent that the geography of Nova Scotia meant "there was nowhere the Indians could maintain even a semblance of the old life (as in Canada or New Brunswick) in ignorance of the whites."[113] In Nova Scotia encroachments on Indigenous land were extreme and exacerbated by its geography as a small land area with minimal arable land available for farming and widespread interest in access to lands on the coast. Early during settlement, Indigenous populations were forced to ask for land by petitioning the Nova Scotian government for land grants, in the same way that settlors did. These petitions could be made at one's own volition or at the encouragement of a settlor.[114] As part of these petitions, Indigenous persons had to show that they were using the lands productively by farming the lands. Leslie Upton recounts petitions to the Superintendent of Indian Affairs for land. Such petitions were done either on an individual basis or for a group of persons, the latter of which was done by Chief James

[112] *Ibid.*
[113] LFS Upton, "Indian Policy in Colonial Nova Scotia 1783–1871" (1975) 5:1 Acadiensis 3 at 5 [Upton, "Indian Policy in Colonial Nova Scotia"].
[114] Elizabeth Ann Hutton, "Indian Affairs in Nova Scotia, 1760–1834" in Harold McGee, ed, *The Native Peoples of Atlantic Canada: A History of Indian-European Relations* (Ottawa: Carleton University Press, 1983) 63 at 76 [Hutton, "Indian Affairs in Nova Scotia"].

Pemmenwick who petitioned for a licence for "land sufficient for nine families being his children."[115] One reported petition concerns Lunenburg County, where it was reported that:

> John Rudolf of Lunenburg presented the arguments of Solomon Jeremiah, M Jeremiah and others for a grant near the La Have River, citing the decline of hunting and their desire to farm: five hundred acres was approved lieutenant governor.[116]

This petition, made in 1784, concerned lands that Solomon Jeremiah already lived on and had made improvements on.[117] These early attempts to gain land supported the colonial goal of having communities settle in specific locations, rather than continue a semi-nomadic way of life, in which communities would live inland in winter months and move to their village along coastal areas in the summer (including a summer village at La Heve in Lunenburg County[118]). Permanent settlement of Indigenous populations would serve the colonial goals of opening up available land to accommodate European settlors.[119] As Upton points out, these petitions did not result in "overall rights to land,"[120] nor was there a "systematic method of tackling the problem of granting land,"[121] but rather they were a recognition of pressures on land brought by the new settlor populations.

At points prior to Confederation lands were set aside—or reserved—for Indigenous communities in Nova Scotia. In 1820, Lord Dalhousie made the first Nova Scotia-wide attempt to scale up and centralize government responsibilities toward Mi'kmaq Peoples when he proposed a

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[115] Upton, "Indian Policy in Colonial Nova Scotia," *supra* note 113 at 5–6.
[116] *Ibid*. See also Nova Scotia, "Nova Scotia Commissioner of Crown Lands: Open Data Set," online: <data.novascotia.ca/Arts-Culture-and-History/Nova-Scotia-Commissioner-of-Crown-Lands/pfje-8tuj/data> [perma.cc/2SWP-4SR6]. Note that the name is reported also as "Solomon Geremy."
[117] See *ibid*:
> This is data of petitions made to government by individuals or groups of people seeking grants of Crown Land in early Nova Scotia, 1765–1800. The database contains 11,464 names of intending settlers, as identified in 1,890 surviving petitions; data fields also include year of each petition, location of land by county, brief description of land applied for, and notations concerning related documentation (e.g. warrants to survey, surveyor's reports, licences to occupy, etc.)."

[118] Wicken, *Mi'kmaq Treaties on Trial, supra* note 97 at 38.
[119] *Ibid*.
[120] Upton, "Indian Policy in Colonial Nova Scotia", *supra* note 113 at 5.
[121] Hutton, "Indian Affairs in Nova Scotia", *supra* note 114 at 76.

reserve for Mi'kmaq Peoples in each county, not to exceed 1,000 acres.[122] Lands set aside would later be codified by adoption of the *Indian Act* in 1876. Today three reserves remain in Lunenburg County. New Ross 20 reserve was established on 3 March 1820, and Pennal 19 reserve was established on 3 March 1754. Both of these are part of the Sipekne'katik First Nation. The Gold River 21 reserve was established on 8 May 1820 and is part of the Acadia First Nation. A fourth reserve, New Germany Reserve 19A,[123] located at Lake Peter on the eastern branch of the LaHave River, was created and then disenfranchised in 1934 when the land was sold to its residents for $1 per acre. It is now known as the town of Elmwood.[124]

Across Nova Scotia in the early days of lands set aside for Indigenous groups, taking of these lands was rampant. Acts of encroachment on—or we might term it expropriation of—Indigenous lands occurred both prior to and post Confederation. In Nova Scotia the pressures caused by geography were exacerbated by the pressures of settlors who would take up land without land grants and without concern for Indigenous interests. Upton writes unequivocally on this:

> They [the settlors] were accustomed to squatting where they pleased on Crown Lands and making their peace with the authorities sooner or, preferably, later. They saw no reason to treat Indian lands any differently and assumed the government would take an equally indulgent view of their presence on them. Generally speaking

[122] Commissioner of Public Records, "Minutes of His Majesty's Council Series, 1749–1867" (22 December 1819, 8 May 1820), Nova Scotia Archives PANS (RG 1, Vol. 2141/2A, 91, 136–139), online: <ns-archives.accesstomemory.net/minutes-of-his-majestys-council> [perma.cc/3WZV-S9RC]. The manuscript report and plans are in Indian MSS, see Commissioner of Public Records, "Mi'kmaq and Government Relations Series, 1751–1866" (1842), Nova Scotia Archives (RG 1, Vol. 432, 43–58), online: <ns-archives.accesstomemory.net> [perma.cc/HVG2-F3YC].

[123] I have minimal information about the creation and disenfranchisement of the New Germany reserve. The Department of Indian Affairs includes the New Germany reserve in a 1928 list compiled by the chief surveyor of reserves in Canada, and this document indicates that the land was surveyed in 1880; see Chief Surveyor, Donald Frazer Robertson, *Schedule of Indian Reserves in the Dominion of Canada: Part I*, Catalogue No R31-5-1928-1E (Ottawa: Department of Indian Affairs Canada, Surveys Branch, 1928), online: <publications.gc.ca> [perma.cc/D55W-Z9E7].

[124] John Gervais, "History of Hammond Beeler Families," *Ontario Metis Family Records Center (OMFRC) Newsletter* (April 2012) at 1, online: <omfrc.org> [perma.cc/7QLN-5RCC]; Mercedes Peters, *We've Always Been Here: Tracing Shifts in the Portrayal of Status, Agency and Mi'kmaw Women's Activism in the Micmac News, 1971–1979* (thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts, Dalhousie University, 2018) [unpublished], online: <dalspace.library.dal.ca> [perma.cc/NL5V-F3FW]; Nation Talk, "The History of the New Germany Reserve 19A" (November 2015), online: <nationtalk.ca> [perma.cc/J2FR-B8A2].

> the squatters were right: it was very easy for a white official to see the virtuous hard work of a squatter with a large family to support, less easy to remember that those who had been dispossessed had some claims on colonial justice.[125]

Instances of taking Indigenous lands are many. Harold McGee tracked instances in his article on the topic, "White Encroachment on Micmac Reserve Lands in Nova Scotia, 1830–1867."[126] McGee writes on the management of reserve lands that were established prior to or in 1820 by the Indian Committee of the Legislative Assembly petitioned by Scottish settlors who encroached on Mi'kmaq lands for title to those lands. The work of the committee was guided by recognition that "the Indians are legally and morally in the right to insist that trespassers" to their lands be removed.[127] Settlors were persistent in their use of the land, and in many instances they built on reserve lands. In 1859 the Indian Committee of the Legislative Assembly proposed that the "lands which had been trespassed upon be sold to the violators at varying sums—the longer the trespasser had been in possession of the land the cheaper it was."[128] In 1862 the Commissioner for Crown lands, Samuel Fairbanks, began to compile a list of trespassers in lands in New Brunswick (then part of Nova Scotia) and the amount that these trespassers were willing to pay for lands; ultimately, a fourth of money owed was paid.[129] Later, Samuel Fairbanks would be appointed the Indian Commissioner, where he received a host of petitions by trespassers in a "rush for Indian lands."[130] This rush and the "obvious irregularities in their sale" led the Committee for Indian Affairs to end the selling of reserve lands: "[T]hey will not advise the selling of any more

[125] Upton, "Indian Policy in Colonial Nova Scotia," *supra* note 113 at 14–15.
[126] Harold Franklin McGee, "White Encroachment on Micmac Reserve Lands in Nova Scotia, 1830–1867" (1974) 8 Man in the Northeast 57.
[127] *Ibid* at 57.
[128] *Ibid* at 60.
[129] *Ibid* at 61.
[130] *Ibid* at 62.

Indian reserves without due investigation, and certainly not without the unanimous concurrence of the Indians interested thereon."[131]

As a result of these expropriations of reserve lands, Mi'kmaq land areas were greatly reduced by the time of Confederation. A pathway for encroachment on reserve lands by expropriation was created in the first iteration of the *Indian Act,*[132] which required that surrender of reserve lands only be carried out with the assent of the First Nations[133] and afforded rights of compensation for First Nation bands "[i]f any Railway, road or public work passes through or causes injury to any land belonging or in possession of any tribe, band, or body of Indians."[134] In the current *Indian Act*, expropriation is expressly protected for public purpose. Section 35(1) allows for expropriation by an act of Parliament or provincial legislature in "right of a province, a municipal or local authority or a corporation."

6.2.2.3. Why There? Conclusion

The question that this section has considered is "why there?" I have approached this question with a focus on people, expropriative acts of settlors and government alike, and types of properties over land. As the previous section on "what is where" had already discussed, the law of expropriation as is found at the common law does not apply to Indigenous lands. Thus, this question "why there" is used to examine why expropriation and underlying property interests have been removed from Indigenous Peoples. The histories of Nova Scotia, including incidents from the histories of Lunenburg County and Lunenburg, mirror the histories of Canada at settlement. The histories show a systematic removal of Indigenous Peoples from their lands, the creation of

[131] *Ibid* at 62; Nova Scotia, Legislative Assembly, *Journals and Proceedings of the House of Assembly*, 22-1, Session 1864 (4 February 1864) at 5, online: < https://www.canadiana.ca/view/oocihm.9_00946_115/3>.
[132] *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, SC 1868 (31 Vict) c 42.
[133] *Ibid*, s 8(1).
[134] *Ibid*, s 25.

reserve areas, and the later confirmation of reserves lands and adoption of a singular legislative framework to manage these lands in the form of the *Indian Act.* The histories of Nova Scotia also show that the initial approach to colonization was to recognize Indigenous rights. Simultaneous to land and property interests being initially recognized and later trampled on, there was recognition of sovereignty of Indigenous nations, as is reflected in the Royal Proclamation and the Peace and Friendship Treaties. The rights contained within these documents do not contain property rights in a clearly defined manner, though as the *Marshall 1* decision shows, early provisions concerning trade certainly had property implications. These implications continue to be worked out through jurisprudence that interprets and upholds section 35 of the *Constitution Act, 1982* concerning Aboriginal rights.

The answer to the two questions "what is where?" and "why there?" highlights that property and land interests as contained within Western property systems do not exist in the same way within law concerning Indigenous lands. The reserve land regime is a geographic and legal separation from the common law property and land law regime, as distinct land interests were created and a distinct legal regime was created for management of them. What is similar across these two regimes is the existence of "expropriation" as a legal mechanism to manage those interests. Expropriation was a concern in the early days of settlement, when colonial officials expressed concern that Indigenous Peoples were being expropriated of their land by settlors who were squatting on lands. Expropriation was then protected in the first iteration of the *Indian Act* for purposes of building railway lines, which was also the first type of expropriation explicitly allowed across Canada in the earliest expropriation statutes.[135] Expropriation is still explicitly protected as an applicable legal principle that can be used over property titled lands (such as

[135] See Chapter Three, *above*.

Kingsburg Beach) and over reserve lands (such as of the Sipekne'katik First Nation reserve lands in Lunenburg County) through operation of section 35 of the *Indian Act.* What this means is that though land and property types that are defined and then recognized by the relevant legal regimes (of property law and of Aboriginal law), the principle of expropriation is protected as a tool regardless of the underlying property interests.

6.2.3. Why Care?

It may seem that this critique of treating property law as distinct from Aboriginal law seeks to destroy a constitutional framework that could be described as simply approaching different aspects of land law through different areas of law, but the argument of this chapter is ultimately a redemptive one. Attention to the geographies of property law and how it interacts with constitutional law reveals the prevalence of choice in how laws have been used to create place. In turn, the interaction between these legal spatialities may be the opportunity for creating places for recognition of Indigenous land. I have explored the possibility of actively using expropriation law to manage these places. The "why care" question is the part of the analysis that considers the normative argument for why we ought to consider the role of public property law principles to include Indigenous land interests. Three points are explored in this section as supporting why this exercise is carried out. First, there exists a normative argument for reconciliation as something that Canada has expressed a commitment to. Second, as has been alluded to, this case study lays bare the geographies of place as place-making activities, an observation that lends itself to consider the variety of interests that could be brought into location. Third, outside of expropriation law explicitly, the interaction between property law and Aboriginal title has not been decided. What law will be adopted when conflict arises between private property holders and Aboriginal title or Indigenous land interests?

6.2.3.1. Place-Making and Interrogating the Foundations of Canadian Land and Property Law

Geographic imagination is an integral aspect of the creation of places in land and real property law. A demonstrative example of land and real property law's reliance on place and space is the principle of *terra nullius* and the doctrine of discovery and their use during colonization. This geographic imagination is an integral aspect of places in the creation of land and real property law. In international law, there are four ways that a state can acquire sovereignty over a territory: conquest, cession, occupation, or annexation.[136] In the process of colonization of Canada, the United States, Australia, and New Zealand (and other countries), sovereignty was claimed through occupation of the discovered lands on the basis of the doctrine of discovery. The premise of the doctrine of discovery is that a state that "discovers" an uninhabited land first and in which there are no other claims acquires territorial sovereignty. This process was a total reimagining of the geographies of lands colonized, in which existing legal structures relating to the land were ignored, people were ignored, and in which the geography was imagined as empty and ripe for colonial taking up. The striking part about this imagination of colonized lands is that the imagination was acknowledged even at its inception.

The earliest reference to the doctrine of discovery and *terra nullius* used together to justify colonial taking of lands is the Marshall trilogy, a series of three cases from the Supreme Court of the United States in the early nineteenth century. In the Marshall trilogy, Justice Marshall broadened the application of *terra nullius* by designating land in the state of Virginia as *terra*

[136] Emer de Vattel, *The Law of Nations; or Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, translated from the French (Northampton, Mass: printed by Thomas M Pomroy for S & E Butler, 1805) [de Vattel, *The Law of Nations*]; Ian Brownlee, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) [Brownlee, *Principles of Public International Law*].

nullius, even though these lands were evidently inhabited by Indigenous Peoples.[137] Justice Marshall presented an expanded theory of *terra nullius* in which lands could be treated as empty because the Indigenous inhabitants were considered outside the community of civilized nations.[138] In turn, existing Cherokee laws and systems were not recognized by the US colonial powers, particularly as they related to land and property systems. In *Johnson v McIntosh*, the first case heard in the trilogy, Justice Marshall justified these sweeping steps in the following words:

> According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of civilized nations on this continent are founded on this principle. The right derived from discovery and conquest, can rest on no other basis; and all existing titles depend on the fundamental title of the crown by discovery.[139]

Recognition by US powers of the land use and management carried out by Indigenous Peoples depended on the types of use made of the land. Demonstrated use of lands for cultivation purposes within a system of property law that was regulated by peoples existing within nations and nationhood that was recognized by European nations was essential.

In the Aboriginal law context, the SCC established early in its jurisprudence, in the seminal case *St Catharine's Milling & Lumber Co v R*,[140] that though proprietary or beneficial ownership of lands lies with the provinces and territories, the land itself is vested in the Crown.[141] Lord Watson found:

> [I]t must always be kept in view that, wherever 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 to its proceeds, has been appropriated to the Dominion or the Province, as the case may

[137] For the three cases of the Marshall trilogy, see *Johnson v McIntosh*, *supra* note 46; *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (USSC 1831); *Worcester v Georgia*, 31 US (6 Pet) 515 (USSC 1832).
[138] *Johnson v McIntosh*, *ibid* at 567.
[139] *Ibid* at 570.
[140] See McNeil, *Flawed Precedent, supra* note 108.
[141] *Attorney General of Quebec v Attorney General of Canada Re Indian Lands,* [1920] JCJ No 3, [1921] 1 AC 401 (UK JCPC).

> be, and is subject to the control of its legislature, the land itself being vested in the Crown.[142]

This statement established the foundations of Aboriginal law in Canada. The issue in *St Catharine's Milling* was who had jurisdiction—the federal or provincial governments—over lands that were contained in Treaty 3. The SCC held that the beneficial interest in those lands was acquired by the Ontario government. Notably, it was in *St Catharine's Milling* that the SCC imported the doctrine of discovery into Canada, importing jurisprudence from the United States. The doctrine of discovery is the basis on which a sovereign entity can acquire sovereignty over lands.[143] Importantly, the doctrine of discovery requires that land be "*terra nullius*," which translates to "land belonging to no-one."[144] Commenting directly on the Marshall trilogy in *St Catherine's Milling,* Justice Taschereau opined:

> There is no doubt of the correctness of the proposition laid down by … Johnson v. McIntosh, that on the discovery of the American continent the principle was asserted or acknowledged by all European nations, that discovery followed by actual possession gave title to the soil to the Government by whose subject, or by whose authority, it was made not only against other European Governments but against the natives themselves.[145]

After *St Catherine's Milling,* this version of the doctrine of discovery, as is enabled by the false application of the principle of *terra nullius,* continued to run through jurisprudence on the topic of Indigenous land rights within common law systems in Canada and elsewhere.[146] It was only in 1992 that a shift in common law state jurisprudence began to occur when arguments highlighted

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[142] *St Catharine's Milling,* UKPC*, supra* note 65 at para 9.
[143] de Vattel, *The Law of Nations, supra* note 136; Brownlee, *Principles of Public International Law, supra* note 136.
[144] Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Oxford: Hart Publishing, 2014) at 28 [Secher, *Aboriginal Customary Law*].
[145] *St Catharine's Milling*, SCC, *supra* note 66 at 643 (Taschereau J).
[146] Rovianne Amber Leigh, "Renegotiating Law and History: Australian and American Approaches to Native Land Claims" (2005) 2:1 Indigenous Peoples' J L, Cult, Resist 106; Marc Gumbert, *Neither Justice nor Reason: A Legal and Anthropological Analysis of Aboriginal Land Rights* (Queensland, Aus: University of Queensland Press, 1984) 11, 26; Dieter Dorr, "The Background of the Theory of Discovery" (2014) 38:2 Am Indian L Rev 477; George D Pappas, *The Literary and Legal Genealogy of Native American Dispossession: The Marshall Trilogy Cases* (New York: Routledge, 2017).

the misuse of *terra nullius*.[147] In the case *Mabo v Queensland,* the Australian High Court acknowledged that using *terra nullius* in Australia was a fiction deliberately adopted to "predicate Crown acquisition of ownership of land in a colony already occupied by Indigenous inhabitants."[148] Canada relied on *Mabo* and made a similar acknowledgement at the SCC a few years later in the *Delgamuukw* decision. The impact of this fiction is that Indigenous Peoples were categorized as occupiers of the land, not owners of the land, and therefore not beneficiaries of all that ownership in the European legal model would entail.

The imagination of colonized lands was acknowledged even at its inception. When Justice Marshall adopted *terra nullius,* he wrote of the incongruity between the principle and using it in an inhabited country:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[149]

Essentially, even at the time of naming how lands became occupied and when citing legal precedent in support of colonial actions, Justice Marshall acknowledged that there is a disconnect between available legal narrative and the experiences of the people in the lands involved. Regardless of this disconnect, Justice Marshall felt that the force of the property system that was already being used in settlement processes of the Americas could not be disturbed.

Contemporary responses to the willingness of the court in the Marshall trilogy and other commensurate courts to adopt the fiction of *terra nullius* have reflected on the underlying racism

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[147] David Ritter, "The 'Rejection of Terra Nullius' in Mabo: A Critical Analysis" (1996) 18:1 Sydney L Rev 5; Gerry Simpson, "Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence" (1993) 19:1 Melbourne UL Rev 195; Secher, *Aboriginal Customary Law, supra* note 144 at 28.
[148] *Mabo v Queensland [No 2],* [1992] HCA 23 (AustLII) at para 46, 175 CLR 1 (HC Austl), Brennan J.
[149] *Johnson v McIntosh*, *supra* note 46 at 591.

toward Indigenous Peoples as the motivating factor for the choice to adopt *terra nullius*.[150] Racism can be correctly understood as the central factor in the use made of the principle, but its manifestation was not possible solely on the basis of how Indigenous Peoples were viewed. Instead, manifestation was possible also because of how place/space was understood and then acted upon. The discovery of the Americas related to the lands and acceptable uses of lands, which themselves were (and remain) Eurocentric. According to the Eurocentric view of lands in the Americas, the types of places that would be recognized and respected by colonizers are places reflective of the types of lands in Europe. These are lands permanently settled with built environments, and if not built then farmland for cultivation. Ultimately, these types of lands are recognized within a system of property ownership.[151]

From the perspective of Europe's own activities and land use, the "discovered" lands were easily interpreted as empty. [152] Imagination of empty space was possible without any place/geography indicators to contradict this, nor any (accepted) system of law that reaffirmed a Eurocentric settled geography. In the application of the concept of *terra nullius*, coupled with the doctrine of discovery, geographical indicators relating to acceptable use of land (cultivation) and demonstration of such (fences) with the support of law (land title or the original land patent) provided the tools to create the kind of place colonial powers were interested in.

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[150] See Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005); Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010); Permanent Forum on Indigenous Issues, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery,* UNESC, 9th Sess, UN Doc E/c.19/2010/13 (2010).

[151] On the importance of acts showing an intention to occupy land within common law, see Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888) at 28–36; and on the importance of physical control to ownership of land through what he terms "acts of ownership," see John Mason Lightwood, *A Treatise on Possession of Land with a Chapter on the Real Property Limitations Acts 1833 and 1874* (London: Stevens & Sons Ltd., 1894) at 10–14. More recently, see Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed (Oxford: Oxford University Press, 2009). For an account of how the requirement of showing possession was used in the legal acts to dispossess Indigenous Peoples in Canada, see McNeil, *Common Law Aboriginal Title*, *supra* note 20 at 197–204.

[152] Massey, *For Space, supra* note 8 at 71.

The geographic imagination in which places are pre-existing and singular and space is used as empty vessels of possibility had a devastating impact on Indigenous Peoples.[153] Constructing an imagination of the geography of the Americas relied on a mischaracterization of the existing legal, cultural, and political structures and resulted in widespread dispossession, where communities were devastated and cultures were destroyed. Knowledge of the existence of people and of existing systems of governance relating to all aspects of life, including land management, did not prevent the colonial expropriation. The role of place and space and how it is used in processes of land and real property law relates not just to appropriation of land occupied and owned by Indigenous Peoples, but is a facet of property law systems generally. The geographic imagination relation to "productive" use of land resources, and the affordance of property systems to support land uses, is a central feature of how land and real property law operates. The interplay between places as something secure, bounded, and identifiable and space as difficult to define and co-optable is an integral component of this system. The terms place and space are in many ways synonymous with ideas of property/land, developed/undeveloped, common law recognized property title (particularly privately owned property)/outside forms of land organization. Land and real property laws themselves are spatially contingent (between space and place), and thus legal actions relating to land use are enacted through a process of mediating between these two terms.

The status of the doctrine of discovery and the use of the legal fiction of *terra nullius* remains unsettled. In *Tsilhqot'in,* the SCC repudiated *terra nullius* but then also reaffirmed that underlying title to lands in Canada lie with the Crown. The tension between these two ideas was explained by the SCC in the following way:

> At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and

[153] Cole Harris, *A Bounded Land: Reflections on Settler Colonialism in Canada* (Vancouver: UBC Press, 2020).

> used the land prior to European arrival. The doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.[154]

This is a very dense statement of law from the SCC. On the one hand, it corrected the record to assert that what is now Canada was not "land belonging to no-one" but instead very much an inhabited place. But on the other hand, this passage indicates that property and constitutional structures will be retained, which hold that all property ultimately vests in the Crown. Herein lies the tension: It does not make sense for Indigenous Peoples' sovereignty in what is now Canada to be recognized, but then also for the Crown to have acquired title by discovery.[155]

The implications of a full repudiation of the doctrine of discovery enabled by the legal fiction of *terra nullius* remain unresolved. John Borrows writes that "[t]he emptiness at the heart of the [*Tsilhqot'in*] decision is disturbing."[156]

6.2.3.2. Conflict between Private Property and Indigenous Land Interests

The final reason offered in support of considering expropriation in relation to Indigenous land interests is that, as conceived, there is a direct conflict between private property holdings and Indigenous land interests. When conflict arises between Indigenous interests and privately held property, what policy frameworks and law will be adopted to resolve this conflict? Will this be managed not as a conflictual relationship between property and land interests, but rather managed through policy shifts or the adoption of property law tools to ameliorate the harms to property

[154] *Tsilhqot'in, supra* note 4 at para 69.
[155] *Delgamuukw, supra* note 21 at para 145; John Borrows, "The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia" (2015) 48:3 UBC L Rev 701 at 703.
[156] *Ibid.*

interests held? Could expropriation law principles, particularly *de facto* expropriation, be used as a tool to manage these interests?

The courts have only recently begun to address the inevitable clash of legal interests—inevitable because there is only one physical geography over which interests are claimed. In *Tsilhqot'in,* the SCC handed down its first decision to recognize and affirm Aboriginal title under section 35(1) of the *Constitution Act, 1982*.[157] In finding that Aboriginal title existed, the SCC declared that the Tsilhqot'in Nation had "ownership rights similar to those associated with fee simple"[158] such as "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land."[159] The finding of Aboriginal title was all the more important because much of the traditional land area claimed by the Tsilhqot'in Nation it was used in a nomadic or semi-nomadic way.[160]

Although the SCC confirmed that Aboriginal title existed, the decision made no finding with respect to private property holdings that exist within the borders of the land claim. The SCC explains very simply at the beginning of the case report:

> A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court.[161]

As a result, the issue of whether private property interests trump Aboriginal title, or vice versa, was not decided by the SCC in *Tsilhqot'in,*[162] and this remains an open legal question.

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[157] In the earlier decision, *Delgamuukw*, the SCC had recognized that there was a possibility that Aboriginal title existed, but the decision was turned back to the lower court without a determination on its existence (see *Delgamuukw, supra* note 21).
[158] *Tsilhqot'in, supra* note 4 at para 73.
[159] *Ibid*.
[160] *Ibid* at para 44. The SCC had found that it was possible to establish Aboriginal title over lands used by nomadic or semi-nomadic peoples in an earlier decision, *R v Marshall; R v Bernard*, 2005 SCC 43.
[161] *Tsilhqot'in, supra* note 4 at para 8.
[162] On this point generally, see John Borrows, "Aboriginal Title and Private Property," *supra* note 13.

A recent matter, which directly addresses the potential conflict recognized in *Tsilhqot'in* between Aboriginal title and private property, discusses expropriation as a possible solution. In *Wolastoqey Nations v New Brunswick and Canada*, six Wolastoqey First Nations filed a claim to Aboriginal title against the government, both provincial and federal, and also against seven private property title holders who are referred to as "industrial defendants."[163] The claim is for more than 50 percent of the land of New Brunswick.[164] The claim includes 252,758 parcels of fee simple title land, which are held by both private individuals and corporate entities.[165] These paper title holders are referred to as "strangers to the claim,"[166] an attempt to name properties as captured by the title claim but without implicating them directly in the litigation as a party. The plaintiffs seek damages from the government for the parcels of land owned by strangers to the claim (not from the title holders themselves).[167] However, for the seven named defendants, who are engaged in forestry, the plaintiffs "seek a declaration and consequent relief [of] an order cancelling the original Crown grants" and "returning possession of the lands to the plaintiffs."[168]

In the 2024 *Wolastoqey* decision, the court of first instance heard preliminary matters establishing the parties and the cause of action. and responded to the defendants' "motion to strike pleadings." The defendants argued that there was no reasonable cause of action against them and that the claim is a vexatious or frivolous one according to the applicable rules of civil procedure.[169] While the court disagreed,[170] it struck the part of the claim that would have found the named private

[163] *Wolastoqey, supra* note 12 at para 8.
[164] *Ibid* at para 11.
[165] *Ibid* at para 12.
[166] *Ibid* at para 17.
[167] *Ibid* at para 56.
[168] *Ibid* at para 69.
[169] *Ibid* at paras 61, 81.
[170] *Ibid* at para 81 (a conclusion made with little fanfare as the court simply stated: "I find nothing vexatious, frivolous and/or abusive about the pleadings here despite the vehement arguments to this effect by the Moving Defendants.").

property holders liable because there was no "legal relationship" between the named title holders and the First Nations' claim to Aboriginal title.[171] The court found instead that the Crown could be held responsible because of the legal relationship that exists between the First Nation claimants and the Crown.[172]

On appeal, the claim for a *declaration* of Aboriginal title over privately held property titles made against the Crown (and not against the private property title holders directly) was also struck down.[173] Instead, Drapeau J, writing for the Court, held that a *finding* of Aboriginal Title could be made without the need for a declaratory order that would impact the title held by private property title holders.[174] The Court wrote very strongly on the implications of issuing a declaratory order over privately held properties observing that "a judicial declaration of Aboriginal Title would confer [] ownership, rights, and I am unable to see how those rights can co-exist with the very same rights vested in fee simple owners."[175] Reconciliation is the "fundamental objective of the modern law of Aboriginal rights" and achieving reconciliation does not require that all of other rights be subordinate.[176] The Supreme Court of Canada refused leave to appeal from the New Brunswick Court of Appeal.[177]

The court of first instance highlighted two components to the analysis of Aboriginal title claims over privately held property parcels that are relevant to this thesis as they touch on expropriation and the framing of the legal issue. First, the court highlighted that Aboriginal title

[171] *Ibid* at paras 109, 119.
[172] *Ibid* at para 127.
[173] *J.D. Irving, Limited et al. v Wolastoqey, supra* note 12 at para 189.
[174] *Ibid* at paras 194–96.
[175] *Ibid* at para 191.
[176] *Ibid* at para 197
[177] *Wolastoqey Nation at Welamukotuk (Oromocto First Nation), et. al. v J.D. Irving Limited, et. al.,* leave to appeal to SCC refused, [2026] S.C.C.A., No 42204.

was a matter of constitutional law and not a matter of property law. The distinctiveness between these areas of law is summarized as follows:

> The Supreme Court has for decades now carved out an area of law known as Aboriginal rights law. Aboriginal title is a particular aspect of that area of the law that is considered so unique—*sui generis*—that it cannot be categorized under the recognized areas of the law such as civil or property law. While aspects of Aboriginal title point to similarities in fee simple title, noted by the Supreme Court, we are guided by the seemingly incongruous caution against treating Aboriginal title as anything other than utterly unique.
>
> Thus, pleading for a declaration of constitutional proportion against private parties who have no constitutional authority or obligation, posits the property law relief sought against the IDs as the legal link/interest between the Plaintiffs and the IDs. This, in my opinion, is wrong in law...[178]

The nature of Aboriginal title is a unique legal construct that does not exist between anyone other than Indigenous communities and the government. This initial legal holding on the motion to strike did not review the law of expropriation as it relates to Indigenous land interests, though this might be due to the nature of the case report, which is on an early matter grounded in civil procedure.[179]

The second point is the decision's reference to expropriation law. Having found that the named private property holders could not be named as defendants because they did not have a direct legal relationship with the First Nation plaintiffs but that the government did, the court suggested that as a remedy the government could expropriate these private parcels to give them back to the First Nation plaintiffs. The comments made spanned only two paragraphs and are worth excerpting in full:

> To strike the pleadings that draw private parties into a constitutional claim arising between the Crown and the Aboriginal group does not mean that the Aboriginal group will be denied the possible remedy of repossessing land owned by the IDs.

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[178] *Wolastoqey, supra* note 12 at paras 124–25 (reference omitted) (The acronym "ID's" refers to "industrial defendents").

[179] In particular, an interesting thing to note is that the court did refer to the *Southwind* decision, which is the latest decision on expropriation law in relation to reserve land where the record showed historical incidents of land takings, but not for any point related to expropriation law, but rather for a comment on the importance of reconciliation as a principle animating Aboriginal law. See *Southwind*, *supra* note 38; *Wolastoqey, supra* note 12 at para 136.

> The Crown holds the allodial or radical title to fee simple land. While fee simple is indeed the bedrock of settler society, it grants only the beneficial interest in the land: see *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, for a discussion of expropriation powers, the meaning of "beneficial interest" and the common law power inherent in private property rights.
>
> Should the Court determine that such a remedy is warranted flowing from a declaratory judgment (and should reconciliation fail), the Crown may be directed or ordered to use its expropriation powers and may be subject to a claim by the fee simple holders for compensation arising therefrom. This is of course yet to be determined in the course of this litigation.[180]

These statements suggest that part of the solution to future conflicts between Aboriginal title lands and private property will be through an ordering of the various land and property interests that exist. The court refers to *Annapolis v Halifax* (the most recent SCC decision on expropriation law as it relates to private property) and the concept of "beneficial interest" as standing for the proposition that private property title holders only ever hold something akin to radical title (which has historically and legally been the framing of Aboriginal title within Canadian legal ordering). With respect, this statement misstates the definition and use of beneficial interest discussed by the majority in *Annapolis v Halifax*[181] (albeit perhaps the point being made by the court was too briefly stated to give a full explanation). In *Annapolis v Halifax,* the attention to beneficial interest concerned the test for *de facto* expropriation and the exact nature of the property interests that must be acquired by the government action for a finding of expropriation. The term "beneficial interest" was adopted by the majority of the SCC to indicate that property interests could be considered broader than only a taking of title.[182] It was not about the ordering of property regimes.

[180] *Wolastoqey, supra* note 12 at paras 133–34.
[181] *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36.
[182] See Chapter Three, *above*, for a full discussion of *Annapolis v Halifax* and on the idea of "beneficial interest" adopted by the majority.

The *Wolastoqey* matter is relatively new, and thus the the way that expropriation may become relevant in subsequent matters on the intersection of an Aboriginal title claim and the law of expropriation is unknown.

The use of expropriation as it is used in the *Wolastoqey* matter is likely to be met with resistance. It is a clear restructuring of property holdings to achieve the goals of one interest group over another, the importance of land to Indigenous culture notwithstanding. The inevitability of conflict between perspectives on land and property holdings, and concomitant recognition of these interests, can be considered with respect to two points made by the 1996 Royal Commission on Aboriginal Peoples. Volume 2 of that commission's report, titled "Restructuring the Relationship,"[183] extensively reviews the importance of land to Indigenous culture and argues for reallocation of land as an aspect of correcting past wrongs. In the commission's perspective, land and resources are one of four pillars required to establish a new relationship between Indigenous and non-Indigenous Canadians, along with treaties, governance, and economic development. The first point made concerns what it writes is the priority need to address imbalances in land holdings between Indigenous Peoples and non-Indigenous peoples. On this point the commission reflects:

> Aboriginal peoples have been systematically dispossessed of their lands, not just in the first rush of settlement but continuing with the erosion of reserves, the elimination of hunting and fishing rights, and interference with other traditional uses of lands and resources. As a matter of elementary justice, the spirit and intent of historical treaties with respect to sharing lands and resources have to be honoured. It is a matter of Canadians keeping their word, of fulfilling the commitments on which Canada was founded. But it is also critical for the future of Aboriginal nations, which cannot survive if they remain without resources, excluded from the bounty of the land and confined to parcels left over from settlement.[184]

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[183] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Canada Communication Group, 1996) at 2 [*RCAP Report*, vol 2].

[184] *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol 5 (Ottawa: Canada Communication Group, 1996) at 2.

Any number of statements made by the commission (and subsequent case reports from the SCC and other lower courts) can be referenced in support of this statement. The point made by the commission is that land and resources are an integral part of the healing, growth, and rejuvenation of Indigenous communities. For this process it must be recognized that "[l]and is absolutely fundamental to Aboriginal identity."[185] The honouring of this identity is imperative.

A second point to reflect on are limits to this goal of restructuring property holdings to give effect to Indigenous Peoples' land rights by a restructuring of property holdings. The commission reassures that taking of private property holdings is not the goal of property restructuring:

> Aboriginal people do not expect to obtain full restitution: they do not want to push non-Aboriginal Canadians into the sea or deprive them of their backyards, as the recent history of land claims settlements makes clear. But they do expect to be dealt with fairly, in a manner that recognizes their relationship to the land and their right to share in its resources, and in a way that respects the solemn agreements enshrined in the treaties.[186]

The limit articulated here is a limit in intent, rather than a limit imposed by law or policy or existing property holdings. The point made in this excerpt is that reallocation of land interests does not mean taking personal properties, incursion into backyards, long-held family plots, or indeed beachfront properties. That is not the goal. Instead, there is an intent that any "redistribution of lands and resources must be just and equitable to all concerned."[187] The commission goes on to propose that new categories of land be recognized to effect a structural change without causing conflict. These categories are "Aboriginal land, shared land and Crown land."[188] Such a structural change may well be a way to think more equitably about land holdings in Canada (though that is not the focus of this study); but as I have argued throughout this chapter, the law of expropriation

[185] *Ibid.*
[186] *Ibid*.
[187] *RCAP Report*, vol 2, *supra* note 183.
[188] *Ibid* at 422.

may also be an avenue to bring together erstwhile public and private areas of land law into a single legal-geographical framework.

What are the limits and opportunities for using expropriation law to negotiate legal interests that exist in a single location? The intentional limit articulated by the commission concerning the choice not to disrupt private property holdings notwithstanding, it is likely that courts will turn to limits that are already found in Aboriginal law and in expropriation law. It is important to highlight these as they will guide how property/land can be protected, respected, and altered through the lens of place-based interests and the possible ways that common law property rules can be considered alongside an Aboriginal rights framework, and vice versa.

6.2.3.3. The Future of Expropriation and Aboriginal Title

What might be the future possibilities of the government-held power to expropriate and how it interacts with Indigenous land interests? Specifically, how might the expropriatory power, as formulated at the common law, be used in relation to Aboriginal title lands, both proven and unproven? Examination of this question is interesting because it requires answering the two points raised above, first on the shaky foundations of how Aboriginal title has been constituted in Canada and second on the inevitability of Aboriginal title encountering private property interests in the future. The question is thus: What would be the legal analysis that examines government expropriatory action on Aboriginal title lands, proven and unproven?

As an initial proposition, a government's' expropriatory power is not in dispute. The power of expropriation held by the government has not been abrogated by treaty. Instead, the possible analysis will consider whether an expropriation has been carried out following the correct procedure, and from there the analysis will undertake a calculation of appropriate damages.[189] This

[189] *Ibid.*

is true for both *de jure* and *de facto* expropriations. This government power is not negated if it is used in relation to Indigenous lands.

Treaties are indicative of the presence of the government's expropriatory power on Aboriginal title lands. Modern land claim agreements, such as the proposed *Algonquins of Ontario Agreement-in-Principle*,[190] the *Nunavut Land Agreement*,[191] the *Inuvialuit Final Agreement*,[192] and the *Nisga'a Final Agreement*,[193] all contain provisions that protect the government power to expropriate treaty lands.

The *Algonquins of Ontario Agreement-in-Principle* simply affirms the government's ability to expropriate settlement lands: "Settlement Lands would continue to be subject to expropriation, subject to any special provisions that may be set out in a Final Agreement."[194] The *Nunavut Land Agreement* likewise preserves the federal and territorial governments' powers of expropriation, in accordance with the terms of the land agreement[195] and the current expropriatory powers held by government (i.e., the *Nunavut Land Agreement* does not confer *more* expropriation powers).[196] The *Nunavut Land Agreement* does go on to provide additional checks and balances on expropriation (compared to expropriation over non-Aboriginal title land) by limiting the amount of land that can be expropriated to 12 percent of total Inuit-owned lands.[197] The *Nisga'a Final Agreement* and the *Inuvialuit Final Agreement* are interesting because they also preserve the

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[190] *Agreement-in-Principle among the Algonquins of Ontario and Ontario and Canada*, June 2015, online (pdf): <ontario.ca/algonquins_of_ontario_agreement_in_principle.pdf> [perma.cc/323X-X28F] [*Algonquins of Ontario Agreement-in-Principle*].

[191] *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada as amended*, consolidated version incorporating amendments to 13 April 2017 (25 May 2018), online (pdf): <tunngavik.com> [perma.cc/4WQG-WQ5N] [*Nunavut Land Agreement*].

[192] *The Inuvialuit Final Agreement*, 18 August 1979, entered into force 25 July 1984, online (pdf): <eia.gov.nt.ca> [perma.cc/TS2V-GZZQ] [*Inuvialuit Final Agreement*].

[193] *Nisga'a Final Agreement*, 27 April 1999, entered into force 11 May 2000, online (pdf): <gov.bc.ca> [perma.cc/9T38-X2KC] [*Nisga'a Final Agreement*].

[194] *Algonquins of Ontario Agreement-in-Principle*, *supra* note 190 at Chapter 5, s 12.

[195] *Nunavut Land Agreement*, *supra* note 191, s 21.9.1.

[196] *Ibid*, s 21.9.2.

[197] *Ibid*, s 21.9.10.

government's power to expropriate,[198] but they require that compensation be granted by way of finding suitable alternative lands.[199] Only if there are no available alternative lands or the expropriated party chooses would the government provide monetary compensation.[200]

Historical treaties also preserved expropriatory power. Historical numbered treaties 1 through to 11, concluded between 1871 and 1921,[201] also protect government powers of expropriation. The numbered treaties 3 through 11 contain a "taking up" clause. The "taking up" clause protects treaty land until such a time as the government wants to use land ("take up" land) for its use. For example, Treaty No 8 contains the following language:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[202]

This taking up clause puts geographic limitations on the treaty provisions of hunting, trapping, and fishing rights to make room for "settlement, mining lumbering, trading, or other purposes." In *Badger,* the SCC interpreted this taking up clause to determine the legality of hunting carried out by persons Badger, Kiyawasew, and Ominayak outside of hunting seasons and without a hunting licence. The lands hunted on were all privately owned.[203] The SCC affirmed the taking up clause,

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[198] *Nisga'a Final Agreement*, *supra* note 193, s 55; *Inuvialuit Final Agreement, supra* note 192, s 7(50).
[199] *Nisga'a Final Agreement*, *ibid*, s 57; *Inuvialuit Final Agreement, ibid*, s 7(51).
[200] *Ibid.*
[201] Government of Canada, "The Numbered Treaties (1871–1921)" (15 March 2023), online: <https://www.rcaanc-cirnac.gc.ca/eng/1360948213124/1544620003549>.
[202] Government of Canada, "Treaty Texts—Treaty No 8," IAND Publication No QS-0576-000-EE-A-16 (last updated 30 August 2013), online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572>.
[203] *Badger*, *supra* note 33 at para 23.

which was used in this case to take lands that were originally included in the treaty for settlement purposes, changing them to private property.[204]

Nigel Bankes describes the taking up clause as a mechanism through which land changes from one land use to another.[205] Such changes in land use constitute government expropriation. Though it is likely that an expropriation of general application applies to Aboriginal title land (with the appropriate enabling statute),[206] it does not follow that the expropriatory power can be used without regard to other aspects of Aboriginal constitutional law. In the *Mikisew Cree* decision, the Alberta government argued that the use of the taking up clause of Treaty No 8 to build a road was merely an implementation of treaty provisions, "[implying a] rejection of the Mikisew procedural rights."[207] The SCC rejected this suggestion, instead finding that the procedural rights of duty to consult and accommodate apply.[208] This is particularly true if the taking of lands impedes the ability of treaty beneficiaries to exercise other treaty rights, such as the right to hunt.[209] The mechanism for managing conflict between different sets of rights and intended land uses is the *Sparrow* test.[210] The *Sparrow* test provides the basis for justification of infringement of Aboriginal rights, and consideration of the *Sparrow* test would require there be a more fulsome justification for an expropriation (i.e., more fulsome than the public purpose requirement of expropriation would currently allow).

Across different Indigenous land interests created through legal land categories, the government power of expropriation is preserved. It is present in relation to treaty lands, in both

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[204] *Ibid* at para 49.
[205] Nigel Bankes, "Mikisew Cree and the Lands Taken Up Clause of the Numbered Treaties" (2006) 92/93 Resources 1. See also Shin Imai, "Treaty Lands and Crown Obligations: The Tracts Taken Up Provision" (2001) 27:1 Queen's LJ 1.
[206] *Tsilhqot'in, supra* note 4 at para 102.
[207] *Mikisew Cree*, *supra* note 10 at para 44 (per Binnie J).
[208] *Ibid* at para 47 (per Binnie J).
[209] *Ibid* at para 48 (per Binnie J).
[210] *Sparrow, supra* note 28 at 1078–79.

historical treaties and modern treaties; it is present in reserve lands by way of the *Indian Act*: and constitutional law provides a process by which Aboriginal title rights, proven or unproven, might be infringed (or expropriated) by government. Against this backdrop, the holding in *Southwind,* in which the SCC held that expropriation law does not apply to guide equitable compensation in the circumstances of a historical expropriation in favour of fiduciary duties, is puzzling. The *Southwind* decision demonstrates a reluctance on the part of the SCC to engage with the legal principle of expropriation, though factually an expropriation has occurred. Such a separation does not reflect the singular location that is legalized through a framing of issues as either expropriation or Aboriginal law, nor the facts which might indicate circumstances of expropriation.

Such a separation between areas of law creates uncertainty in land use, management, and ownership. In *Tsilhqot'in* the SCC recognized the potential uncertainty that would be created by finding that Aboriginal title exists over lands and how such a holding would interact with retroactive government action in relation to those same lands. The SCC recognized that a finding of Aboriginal title might make it "necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward."[211] This means that if the government has begun to develop lands that ultimately are recognized as Aboriginal title lands, "it may be required to cancel the project … if it would be unjustifiably infringing."[212] Rather than frame issues as an expropriation law matter *or* an Aboriginal law issue, there is need to consider anew the singularity of places and the spaces created by multiple places of law as a method for addressing land claims and producing certainty in property in land.

[211] *Tsilhqot'in*, supra note 4 at para 92.
[212] *Ibid*.

Practically speaking, the expropriation provisions contained in modern treaties demonstrate very clearly how expropriation can be named as the correct area of law engaged when Indigenous interests over land are removed, and that this legal principle can be applied in accordance with constitutional rights. For example, the *Nunavut Land Agreement* provides that, first, in cases of expropriation, compensation should be offered in the form of alternative lands,[213] and second, if financial compensation is chosen by the Inuit or is the reasonable option, there are a variety of factors that should be taken into account when calculating the compensation. Factors listed include points such as the market value of land, value of lost use, the cultural attachment to land, and the peculiar and special value of the land to the Inuit.[214] Most directly these provisions provide clarity on how the law of expropriation interacts with treaty lands and does so in such a way that it protects treaty rights. In addition, these provisions demonstrate how the gap between common law property rules and section 35 of the *Constitution Act, 1982* might be reduced to provide clarity and certainty in property and land rules.

6.3. CONCLUSION

This chapter has considered Indigenous land interests and their interaction with private property law, focusing on the possibility of the principle of expropriation as a tool to recognize and manage intersecting interests in land. Introducing Indigenous land interests to legal frameworks that exist over private and public lands would only occur as part of a normative public policy decision to bring those interests to bear on these otherwise private and public propertied places. It is my position that property and land law has not contended with Indigenous land rights and the colonial foundations of property in Canada. Public policy in the area of land and property must consider

[213] *Nunavut Land Agreement*, *supra* note 191, s 21.9.6.
[214] *Ibid*, s 21.9.9.

Indigenous land rights as a matter of reconciliation. The spatiality of property as a created entity becomes particularly transparent through the example of Indigenous land interests, as has been considered in this chapter, and I argue for consideration of using expropriation as a tool for further engaging with this spatiality.

There will be winners and losers if Aboriginal title is brought to bear on private property. This is an inevitable part of a process that approaches property entitlements more broadly to encompass more persons, groups, and possibly locations to bear on the expropriation analysis. From this perspective I think there is an important point to be made about the nature of treatment of private property within expropriation, particularly *de facto* expropriations, which is that the acceptance of expropriatory action—without providing compensation—belies the importance of property to Canadian culture. This would be an important point to grapple with should more interests or diverse interests be brought into places of private property.

This approach of bringing in Indigenous interests to private and public lands also reveals a central conflict in the way that law has been operationalized over different locations. This conflict is that different aspects of place have been legalized through different areas of law, creating a false spatiality whereby there is separateness between different legalities. Property law exists entirely separate from Aboriginal law. Property law is private law, and it exists as part of a set of rights that manage relationships between persons. Jurisdictionally, property law is within the control of the provinces and territories. Recourse for any harms upon private property rights is through civil action. On the other hand, Aboriginal law is public law. Jurisdictionally, Aboriginal law is within the control of the federal government. Recourse for any harms upon Aboriginal title or rights is against the different levels of government, who in turn have obligations toward Indigenous groups. Thus, though property law and Aboriginal law operate to manage real property and land interests,

and furthermore that these interests may exist in the same location, they are entirely distinct within the legal process.

Centralizing the physical geography of places is one organizing tool for managing complex interests and complex legal spatialities. As a single place, the more interests and perspectives that are acknowledged in a location will mean that limited resources, complex histories, and entrenched land holdings will become more apparent. Orienting the subject of property law around the geography of the place includes the histories, experiences, and knowledges of that place broadly. However, even complex property relationships do not exist in an intangible vacuum. The physical location creates limits and opportunities to how property interests can be manifested. The presence of types of lands, built properties, dilapidated properties, waterways, and histories of land use all create limits on the type of property relationships that can be created. Bringing in Indigenous land interests to erstwhile private property spaces or public property spaces through expropriation law will also have limits and opportunities. From this perspective, the physical geography operates as a unifying component of potentially competing (though not necessarily) property and land interests enacted through expropriation.

The conflict that law creates between different legal subjects (of property and Aboriginal law) requires that mechanisms be adopted to ameliorate this conflict if they are going to be brought together onto a singular geographical plane. Expropriation law could be a tool for bridging this gap between different subjects of law. Expropriation law is a public law tool that is operationalized to allow interference with private property rights, either in the form of a *de jure* or *de facto* expropriation. In the next chapter I explore mechanisms that could be adopted to bring together different legal subjects to bear on the use of expropriation as a place-making activity. A "forum for place" could be adopted to allow for the legalities of Aboriginal law and Indigenous land

interests to be brought into deeper reflection with private property interests as discussed in this chapter, as well as public interests, private interests, and environmental interests as discussed in previous chapters.

CHAPTER 7: A FORUM FOR PLACE

Places, to the geographic illiterate, are meaningless. They have no grasp of those unique physical and human features that give each spot on Earth's surface its own distinctive character, from which each draws its identity and importance. ... Those who are ignorant of basic geographic principles also have little knowledge of environmental potentials and limitations. Under these circumstances, how can they possibly be expected to make enlightened decisions relating to the use and sustainability of our finite global natural endowment?[1]



Figure 7.1: Photograph of street signs near Kingsburg Beach. (Photograph by Tenille E Brown, 2017).

[1] Charles R Gritzner, "Why Geography?" (2003) 102:2 J Geog 90 at 90.

7.1. INTRODUCTION: THE IMPORTANCE OF GEOGRAPHY

This thesis concludes by introducing a "forum for place" as a new venue for adjudicating place. Introducing place as an analytical framework would be a major shift in how property law issues (here, expropriation law) are viewed within an adversarial system. Place as a concept is both intangible as it seeks to capture a sense of a location, which is not so easily captured in traditional legal avenues, and tangible as something personally experienced by everyone. Attention to place requires that the tangible (but personal) and intangible (but recorded about locations) be analyzed within a legal system and with regard to property laws. To carry out this analysis, I argue that a forum for place must be created that would allow for analysis of place as both a geographic and legal concept.

The work of Reginald G Golledge, an Australian-American geography scholar, is helpful for highlighting that analysis in geography does not happen automatically but rather has to be explicitly identified and pursued. In "The Nature of Geographic Knowledge," an article written at the tail end of his prestigious career as a scholar of behavioural and disability geography, and then-recent past president of the American Association of Geographers, Golledge reflected on analysis as a key development within geography:

> Perhaps the single greatest changes in the nature of Geographic Knowledge over the last half-century have been:
>
> 1) Recognition of the difference between the acts of accumulating geographic facts and representing the spatial form embedded in these facts, and understanding the processes involved in understanding and analyzing those facts to produce new information and knowledge that is not directly observed during data gathering.
>
> 2) The development of spatially relevant theories about the location, arrangement, and distribution of geographic phenomena and the spatial interactions among both physical and human components of phenomena.[2]

[2] Reginald G Golledge, "The Nature of Geographic Knowledge" (2002) 92:1 Annals Assoc Am Geog 1 at 2.

This summary of development in geographic thought, highlighting first that there needs to be concerted effort to analyze geographic facts and second that physical and human phenomena are connected, is remarkably relevant to this thesis. These two developments would be central also to a forum for place. Without taking this step of processing information about place to understand and analyze it for purposes of producing new information, place-based information will remain the backdrop to decision-making processes, resulting in factual assumptions about place. In legal reporting, factual assumptions would look like descriptive accounts of a location, such as mention of a historically important thing about that location, but without linking that to the legal analysis. That Golledge identifies analysis of geographic facts developed as an academic pursuit relatively recently, from the 1950s onwards, highlights that developing frameworks for analysis is a lengthy process that does not automatically happen, so for law and geography scholarship, concerted effort would have to be made to develop such analysis.

Section 7.2 of this chapter argues that a new forum is needed to respond to this complexity, which encompasses place, physical geography, law, and property interests. A "forum for place," referred to as the "forum," would be a forum that requires consideration of, for the purposes of this thesis, expropriatory action from a multifaceted perspective. Section 7.3 reflects on recommendations for substantive developments to the law of expropriation that would support place-based legal assessment in the forum. Section 7.4 considers procedural aspects of the forum, looking at how the forum might respond to some of the challenges a place-based analysis creates and responds to the challenges of handling an increased volume of information, of identifying the public, and of modifying laws of evidence. Section 7.5 takes the final step of reflecting on how the

forum would adjudicate the *Mariner Real Estate* decisions. In conclusion, I offer some final thoughts on the importance of physical geography as the guiding aspect for expropriation law.

7.2. FORUM FOR PLACE

This thesis constructed a law and geography methodology to interrogate property law, arguing that real property and land are both legal and geographic in nature and part of an ongoing place-making process. Three different lenses of property and environment, the public, and Aboriginal law and histories were used to examine Kingsburg Beach and the *Mariner Real Estate* decisions. These individual case studies showed how law and geography create place. The creation of place in the location of Kingsburg Beach, Nova Scotia, shows that place is an integral aspect of real property and land law and reveals the potential for introducing place into legal processes.

This argument has broad implications for how property-related interests are considered and realized. It requires a shift from thinking about property interests as constructed solely through property titling systems to thinking about places as encapsulating informal, historical, future, and cultural interests, in addition to the formal property titling rights. Ultimately this challenges property law by demonstrating how claims to place can be assessed and protected through the auspices of property law and how they are currently being overlooked. Taking "place" broadly as central to how a location is interpreted requires that a formal property title be considered with reference to surrounding and connected activities. In turn, incorporating notions of place into property law requires that we consider how propertied places are recognized, governed, and ultimately adjudicated.

7.2.1. Creating a "Forum for Place"

Taking up "place" as the primary factor around which the application of expropriation law would be oriented in such a way that the elements of location, geography, people (space), and law, as discussed throughout this thesis, are equally foregrounded would be a drastic shift in legal analysis—drastic because such an approach is built on the observation that these factors are equally important to the adjudication of property. Although place is intuitively known by persons, the problem of how to effectively respond to place—with all of its complexities—through processes of law is a new problem. This raises the question: "Do new problems require new courts?"[3] The possibility of introducing a new forum for adjudication, a "forum for place," is my response to this problem.

The challenges when orienting expropriation law around place are clear. Taking a context-driven assessment of places of land and real property law through a forum created for that purpose will result in more information about the interests in that place. It brings into relief areas of law that are not typically part of property law, or as in the case of Aboriginal law, are explicitly outside of property law structures. A forum would not offer a singular or definitive solution to claims of place. There may be circumstances in which the real property owner is disenfranchised or when claims by the public would not be recognized. The more people that make claims, the more likely it is that already-recognized interests may take on new aspects.

However, the complexity of place exists whether it is explicitly addressed through application of property law or not. Even without intent—innocuous or nefarious—a physical location is created through a series of choices, and in expropriation law these choices do not always

[3] This question is taken from an article of the same name written by Philip C Jessup in which he contemplates the effectiveness of the International Court of Justice. See Philip C Jessup, "Do New Problems Need New Courts?" (1971) 65 Am Soc Int'l L Proc 261.

or often adequately recognize different interests. Rather than resolving issues only through isolated interpretation of land and real property rights that are largely constituted through property titling, approaching property as the sum of people and natural and built environments requires assessment of the demonstrated claims to place, of the impact that many different areas of law have on parcels of property, and consideration of the long-term public policy goals for that place.

In short, it is precisely because of the challenges presented by place that a new forum in which place could be interrogated is required.

7.2.1.1. Legal Forum

The forum would be a legal forum. It will operate by applying legal rules to the aforementioned information about place, and decisions made will have the force of law. Two key aspects of the forum for place are (1) the forum would rely on land and property law principles as the primary legal framework that is being analyzed in relation to place, and (2) the forum would either operate as a tribunal with rights of appeal to the provincial or territorial court of first instance, or would exist directly as a part of the provincial or territorial court of first instance.

The forum is oriented around principles of property law as they exist at the common law. Such common law principles concern ownership of land and property and its use as ordinarily exists in connection to a parcel of property. This thesis has analyzed expropriation law, specifically *de facto* expropriation, as an example of a property principle that directly shapes place. The challenge with *de facto* expropriation is that it is looked to by property holders to respond to interference with property ownership where the government would not recognize such interference. An expropriatory action is not simply a response to a government power; instead, it is a response to government action that constitutes an interference with the foundational agreement that is at the centre of property law: certainty in property interests for property title holders. In this

way, expropriatory action is a tool for place, both in terms of allowing government to re-create property from one type into another, and also in terms of providing mechanisms for the impacted title property holder to hold the government accountable. Other examples of areas of property law that are similarly relevant to an analysis of place include adverse possession, nuisance, the law of waste, and others. The forum for place will respond to claims to places that are impacted by the use of property law principles that are, at their core, the legalization of creation of place.

Property law principles are distinguished from government regulations as may exist in other areas of law, such as municipal by-laws. Such regulations have the impact of interfering with property *use*, but not limiting rights of ownership. Examples of these include zoning, municipal by-laws, environmental protection zones, and limitations on property development as found in city plans. Rather, the law that will be at issue in a forum concern legal principles that create place by taking away property interests entirely. Expropriation is a clear example of a legal tool that has the effect of taking away a property right. This means that the forum would not interfere with powers that can exist at all levels of government to regulate land held by a municipal government to create by-laws for property, and community regulation will still exist and is not impacted by the introduction of rules guided by place.

The forum also does not operate as a political forum. There will be information introduced that is non-legal in nature. This includes information about histories, land policies, community interests, the way property holders have exercised property ownership, how that has changed due to government actions, the regulatory framework that relates to that location, information about the statutory framework, and more. These informational points will be used to create an understanding of place, both as it exists for relevant persons in that location and as it is being

developed based on public policy. Taking a broader approach to identifying what is important about a location does not replace legal analysis—it supports it.

The existing legal framework of property law principles will provide limits and opportunities for the creation of place. The importance of a property system across Canadian institutions means that dismantling or replacing the property law system would be difficult, and that is not the goal of a forum. However, focusing on the law of expropriation, which is both private property law and public administrative law in nature, is a useful starting point for examination of property structures because its core action is to regulate place.

7.2.1.2. Civil Court v Tribunal

As a forum that responds to the use of property law principles, it should be housed within existing court systems. It should not be housed in an institution that is only political in nature, such as a community gathering to discuss proposed property developments or other development issues. Nor should it be housed within existing venues that are used to develop other regulatory frameworks, such as city council meetings in which by-laws are discussed and adopted. Two options for incorporating a forum into existing court systems would be to either (1) directly incorporate it within existing court systems or (2) frame the forum as an administrative tribunal with rights of appeal to court systems.

The simplest and most impactful approach to creating a forum is to have it operate within the existing court system. As the forum is centred on legal principles of property law, this means it would address civil law issues and thus would be within the jurisdiction of civil law courts. Civil law would be addressed within trial courts, which in jurisdictions across Canada are called the Supreme Court, the Court of King's Bench, or the Superior Court of Justice.[4] For example, in

[4] Government of Canada, "The Judicial Structure," online: <https://www.justice.gc.ca/eng/csj-sjc/just/07.html>.

Ontario jurisdiction would lie with the Ontario Superior Court of Justice.[5] A second approach to creating a forum is to have it exist as an administrative tribunal. An administrative tribunal would require designating legislation that establishes the forum and details rules of that forum. The designating legislation should contain procedural rules touching on aspects such as rules of evidence, requirements relating to whether a hearing must be granted, the makeup of said hearing, requirements that the affected party receive written reasons, and other details. An interesting aspect of tribunals that would be useful for the creation of a forum is that the tribunal adjudicators can be experts in subject matter relevant to the tribunal but are not legally trained. This detail would be helpful for a forum as it would allow professionals trained in law and in geography-related subject areas to serve as adjudicators. If an affected party wants to appeal a decision made by a tribunal, recourse may be made to the other provincial or territorial court for provincial or territorial tribunals, or to the Federal Court for federal administrative tribunals. Typically, a court will not be bound by decisions made by a tribunal, though any findings of facts made by a tribunal might be binding and courts may refer to tribunal decisions.

An apt example of an administrative tribunal relevant to place in Ontario is the Ontario Land Tribunal (OLT),[6] which replaced the Local Planning Appeal Tribunal in 2021.[7] The OLT is an amalgamation of several former tribunals, and it hears decisions that were formally made under the "board of negotiation continued under the *Expropriations Act*, the Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal."[8] The subject matter that the OLT typically deals with includes land-use planning, land valuation, heritage protection, compensation for expropriations, and others. For all of these

[5] Ontario Superior Court of Justice, "Jurisdiction of the Court," online: <ontariocourts.ca> [perma.cc/LEE6-4Z8Y].
[6] See Ontario Land Tribunal, online: <olt.gov.on.ca/> [perma.cc/X47K-BLG8].
[7] See *Ontario Land Tribunal Act*, SO 2021, c 4, Schedule 6.
[8] *Ibid,* s 2.

land-related matters, the job of the tribunal is to interpret and apply the applicable legislation. Administrative procedures at tribunals are less formal compared to courts, and this will be evident through more relaxed rules of evidence. At the OLT, part of the submissions may involve the use of expert opinion evidence; however, the expert witness must be qualified as an expert by the tribunal before evidence can be admitted.[9]

Of these two possibilities for creating a forum for place that is recognizable within existing court frameworks, creating a forum for place directly within the civil law system is preferable compared to creating an administrative tribunal. This is because tribunals have limitations as to what subject matters can be examined based on the legislative framework, compared to an approach centred on common law property, which could allow for analysis of broader legal principles. For example, for a review of expropriatory action, the OLT will ordinarily hear complaints relating to whether legislative procedures have been adhered to by government and review appeals as to the amount of compensation granted.[10] These two points are procedural in nature, reflecting the point that expropriation is a government power. They do not respond to a concept of place that is guided by the physical geography, property parcels thereon, and peoples' experience of the same. Affordances for such considerations would need to be explicitly articulated within the Ontario *Expropriations Act* for the tribunal to have the power to take them into account.

Instead, by housing the forum within the civil law system there is greater possibility for taking up place and geographic analysis more broadly as the perspective through which property tools that create place, such as expropriation, are examined. Under the common law approach to property, there is an inherent flexibility to analysis that would take into account common law

[9] *Ibid*, s 18(1)(a)(iii). For more information see, Ontario Land Tribunal, "Hearings Guide" (16 February 2023), online (pdf): <olt.gov.on.ca> [perma.cc/PPN6-NG8M].
[10] Eric CE Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Scarborough: Carswell, 1992).

principles relating to both the relevant legal principle and to property, as well as the applicable legislative framework. The elusiveness of the concept of property provides an interpretive framework that could include concepts of place, geography, communities, histories, social meanings, and assessments of the intimate impact of expropriatory action on property title holders. In Canada, the law of property has not been assembled into a singular definition of property or a singular property framework, as might be achieved through inclusion of property in the Constitution. Instead, property as a concept that receives legal protection exists in freedom of expression,[11] in privacy,[12] and in section 35 of the *Constitution Act, 1982*[13] relating to Aboriginal rights, albeit in a definitionally unclear way. This assemblage of property pieces may provide the "space" that is required to introduce "place" into how property is adjudicated.

7.2.2. Place-Making Analysis to Guide the Use of Expropriation

Regardless of where the forum is housed, whether it be styled as a specialist area within the civil law system or created as an administrative tribunal, the approach to analyzing claims to an expropriatory action should follow a "place-making" analysis.

The guiding point for a place-making analysis in a forum for place is a geographic analysis of factors that together create place, which includes property. The starting point is *not* the legal analysis of property law. This change from legal analysis to geographic analysis as the starting point for analysis at the forum is the foundational change that would be introduced. The goal of the forum would be to use information about place to navigate relevant laws to resolve disputes about place. To do this, the forum must gather information about the location, its histories, and the

[11] See Russell Brown, "The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling" (2007) 40 UBCL Rev 315.
[12] See Bruce Ziff, "Taking Liberties: Protections for Private Property in Canada" in Elizabeth Cooke, ed, *Modern Studies in Property Law,* vol 3 (London: Hart Publishing, 2005).
[13] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

nature of legal and other interests that exist in that location and assess these against the law being applied and against the type of place that is either mandated in existing legal and government frameworks or that exists in a location through histories and current community uses. The geographic features of a location would be important measures for identifying the limitations and possibilities of a location. Geographic features that would be important include the already-present property parcels, features of the natural environment, features of the built environment, and other relevant physical geography aspects, including natural spaces or features that require protection.

To assess current experiences of place and any future goals in place, information about the normative goals of public policy in relevant levels of government and how that intersects with interests of property holders and community interests would be important. By identifying what is considered important in a place, the purposes of property law and its intersections with other areas of law would mean a more complete representation of regulation of that place. An immediate outcome of such a process would be greater transparency in how property protections through property law are used by government when it exercises its expropriatory power. The long-term outcome may veer toward developing a deeper critique of how property law as a system is used to affect place.

The guiding questions for a geographically informed assessment of place is that which has guided this thesis: "What is where, why there, and why care?" The geographic analysis should interrogate what is the location at issue, what is the nature of the place in that location, what are the histories in that location, what types of places are captured in relevant legal documents (such as the statutory framework), and what are the normative geographic aspirations for that location. Pauline Couper's deceptively simple description of different accounts of what a beach is acts as a

guide for the many ways in which geographic interpretation can be used to create different places in a singular location.[14]

Expropriation is a tool that is used to actively change property, and by implication it is used to change the geographies in place, though this process is not currently named as such. Thus, geographic interpretation should be used in circumstances of expropriatory action to reflect on existing locations and to make choices about future permutations of that location.

Questions to be asked by adjudicators or judges that would guide assessment of place would include the following:

- What is the primary description of that location? Is it a natural space? Is it a built environment? Given the primary type of geography, is the goal for that location to have the geography remain the same, or is there an effort to change the type of place in that location? If there is intent to change (through expropriation or other legal action), is this done according to a broader vision? If so, where does this vision come from? Government policy documents, community forums, historical uses of that location, or other sources?
- What laws are at issue that affect place? Is this an expropriation law matter or another area of property law? Or multiple areas of property law? Who is the rightsholder in the property matter? If it is a private property holder, are they an individual or is it a commercial holding? If the property holder is the Crown or the public, what "public" is the Crown acting on behalf of? Is it the local community members, the broader sense of the public for purposes of environmental protection, or someone (or something) else?

[14] Pauline Couper, *A Student's Introduction to Geographical Thought: Theories, Philosophies, Methodologies* (London: SAGE, 2015).

- What is the relationship between the property lot and its surrounding location? Is the property title holder in accord with the vision of that location as outlined in relevant frameworks (public policy, statutory frameworks) or in opposition to it? In matters of expropriation, the agreement of the property title holder to the expropriation is not required. However, for purposes of managing the type of place in that location, the action of the title holder will provide insight into the extent to which expropriation is required and the management of that place.
- What is the role of persons that do not hold title but are in the location that is under expropriatory action? People nearby the expropriated property might be property title holders of other property, or members of the public who hold interests in the place, though not related to property title. The nature of the location will guide whether it is persons in the immediate ambit of the property lot who are relevant to that location, or whether it is persons in the neighbourhood or region who should be considered in relation to that location.
- What is the responsibility of the title holders for management of place in that location? Are these responsibilities contained within any applicable laws? Examples of these might be responsibilities for managing heritage properties.
- Does the applicable legislative framework contain a vision for that location? Does this vision reflect existing phenomena in place? How is that vision being implemented currently?
- Does the expropriatory action reflect the goals contained within the legislative framework? If the framework is silent or there is room for interpretation, does the expropriatory action support the collective vision for that place? If an expropriatory

action purports to be in support of legislative or other governmental goals, what is the supporting information indicating that it does indeed do that?

The types of questions used to guide analysis would be different depending on the type of location in question. The *Mariner Real Estate* decisions concerned a beach; thus, concerns about management of the shoreline would naturally arise. Urban locations might raise other concerns that are more focused on managing pressures in the built environment.

In summary, the questions to be asked when taking a place-making analysis will be (1) what are the public policy goals for the type of place that could exist in a given location? (2) what are the limitations to place in that location, given existing geographic phenomena such as the physical geography, existing property titling systems, and the built environment? and (3) what are the limits and affordances in the legal framework as it relates to land and property law legal principles?

7.3. SUBSTANTIVE DEVELOPMENTS

When the law of expropriation is considered from the lens of geography, the legal principles as developed within the legal framework prove themselves to be inadequate. If this inadequacy could be distilled into one point, it is that law takes a limited account of a place and that limited account is defined by law itself. By contrast, a geographic lens instead insists on a contextualized location-based assessment of that same place. To create the most fully realized forum, and in the spirit of arguing for the most ideal version of this forum, there would need to be changes made to the law of expropriation.

7.3.1. Centring the Public

The law of expropriation has as its central and foundational requirement that an expropriation be carried out for a public purpose, and yet for the most part there is not any consideration of what, who, or where the public is in expropriation analysis. Public purpose requires that a government only carry out an expropriation for purposes that have a benefit to the public. Therefore, the requirement that an expropriation only be used for purposes of public good ought to be explicitly used in legal analysis and addressed in case reports as the first part of the legal test for a *de facto* expropriation.

Highlighting public purpose as step one to the test for *de facto* expropriation is not an addition to the test, since it has always existed as the foundational requirement. Instead, explicitly identifying public purpose as step one reflects the fact that the requirement of public purpose is essential to the law of expropriation. Public purpose acts as one of the only limits on government powers of expropriation. Legal analysis in expropriation matters does not ask *can* the government carry out an expropriation. Rather a legal action might be concerned with whether correct procedure has been followed, as is outlined in the applicable expropriation legislation, or whether appropriate compensation has been granted to a private property title holder, again as outlined in the applicable expropriation statute. In the case of allegations of *de facto* expropriation, the legal proceeding will be focused on whether an expropriation has indeed occurred. Inserting the requirement that an expropriation occur only for purposes of the public as part one of the test for *de facto* expropriation ensures that consideration of the public is of central consideration.

The requirement that an expropriatory action only be for public purposes is different from an action that argues there is improper government intent in how an expropriation is carried out. Instead, improper government intent is dealt with on a different tortious basis, which is the tort of

misfeasance in public office. The tort of misfeasance is "founded on the principle that those that hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of ordinary citizens."[15] A successful action in misfeasance requires that a public officer has "engaged in deliberate and unlawful conduct in his or her capacity as a public office"[16] and that they knew this was likely harmful.[17] The tort of misfeasance in public office may be alleged in addition to claims of an expropriation, and it often is;[18] however, it remains a separate action.

Public purpose is also different from a "disguised expropriation." Disguised expropriation was referred to by the Supreme Court in *Annapolis Group Inc v. Halifax Regional Municipality* as part of the second part of the test for *de facto* expropriation, which requires that all reasonable uses of property have been removed by the government action.[19] I have argued that disguised expropriation is distinct from the principle of *de facto* expropriation and should not be brought into this area of law, and second that consideration of a government act should be centred on the requirement that expropriation be carried out for public purpose.[20]

If public purpose as an element of expropriation law does not include in its analysis circumstances that might lead to a claim of misfeasance in public office nor of disguised expropriation, what then does the first step of requiring that an expropriation only be carried out for public purpose entail? As has been explored in Chapter 5 of this thesis, for cases of both *de jure* and *de facto* expropriation the requirement of public purpose is largely unexamined. This oversight can be explained in part because the government regulations that have been at issue in

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[15] *The Catalyst Capital Group Inc v Dundee Kilmer*, 2022 ONCA 168 at para 13.
[16] *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 23.
[17] *Ibid*.
[18] See e.g. *Anglehart v Canada*, 2018 FCA 115; *Chitaroni v Coleman (Township)*, 2023 ONSC 2432; *6165347 Manitoba Inc v Robinson*, 2025 MBCA 33.
[19] *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36.
[20] See Chapter Three, *above,* s 3.4.3.

the prominent *de facto* expropriation cases suggest clear public purposes, and so the facts lend themselves to easy analysis on this point. In broad strokes, the public purpose aspect of expropriation was historically fulfilled by activities focused on building public infrastructure, such as roads, utility access routes, and parks.[21] It is also used generally for activities supporting the public welfare.[22]

Beyond the vague reference to public good, public goals, and public welfare, the content of public purpose requires greater clarification. The element of public purpose then needs to be defined and explored in more depth. As I explored in Chapter Five, the legal engagement with the diverse instances in which the "public" can be defined could be incorporated on a spectrum, from slight amendments to the test for *de facto* expropriation that is largely within the confines of current legal thought, through to a more radical addition to the test guided by geographic thought.[23] For example, the definition of the public could range from:

- remaining largely unexamined, other than to look at the purposes contained in expropriation legislation;
- taking a broader approach to the public to look at expropriation legislation, supporting legislation, and other non-expropriation-related legislation, which can together provide insight to how the "public" has been considered in relation to that location; or
- looking at public policy goals in that location and the possible interests of the public (persons or location) that benefit from the expropriation, though these are not enumerated in expropriation or other related legislation.[24]

[21] See Chapter Five, *above,* s 5.2.1.
[22] See generally Chapter Five, *above*.
[23] See Table 5.1.
[24] *Ibid.*

How the public aspect of "public purpose" is defined through legal argument—whether it be guided by the individual or collective people or a physical place—will impact the normative considerations of the public purposes that animate an expropriation, and in turn this would enhance transparency and accountability in government action.

7.3.2. Property-adjacent Areas of Law

Creation of land and real properties through the auspices of individual subject areas of law does not allow for a full account of that place. Legal subject areas that propertied places often get characterized under include property law, municipal law, administrative law, Aboriginal law, planning law, and others. The result of these subject matter characterizations is that aspects of a place may be regulated in different ways. There might an actionable property right, or a potential administrative review, or a municipal board review of the impact of by-laws. Taking an approach based in one of these individual legal areas is dependent on how issues are framed, and collectively these may capture aspects of people's interest in a given place, but likely not all of it.

Addressing legal claims to place through separated areas of law could also be used to undermine claims to place. For example, if a place-based interest is not actionable through principles of *de facto* expropriation, then regardless of claims to place those interests are not relevant. If a community interest in public lands does not meet the threshold to receive administrative review, then, likewise, the interest becomes nullified. But these individual subject elements are not reflective of place-based interests, which are inherently multifaceted and exist whether one legal test is privileged over another, and whether a legal test is met. The law and geography approach highlights how inconsistent adjudication of place through land and real property laws can be, because management of place is dependent on these constraints of law. Instead of relying on individual legal subjects, analysis should be guided by a sense of place, which

is constituted first through the physical geography, which provides the backdrop, framework, and material matter that is engaged with. Individualized areas of law must then be analyzed in relation to each other.

An example of the importance of multiple areas of law to a place-based analysis was underscored in Chapter 6, which introduced a new aspect of place and land law to the location of Kingsburg Beach: that of Indigenous land interests. Though Indigenous land claims were not part of the *Mariner Real Estate* decisions at any point,[25] applying the law and geography lens to construct place through the law of expropriation requires consideration of factors that make up place. Consideration of Aboriginal law is helpful because in Canada Indigenous land interests are one of the central aspects of land and property. Looking at Indigenous land interests with respect to a place that has undergone expropriatory action highlights the role of expropriation as a tool for the management and creation of place.

The tension that arises from a broader consideration of expropriation and how it relates to different legal categories of land interests (here, Indigenous land) is very clear. Aboriginal title and private property exist on the same geographic plain; however, in law they exist in entirely distinct areas. This duality lies at the heart of geographic thought on the creation of space and place. Geographically, Aboriginal title and private property exist in the same place; but spatially, they are constructed as distinct areas of law. The conflict between these two approaches to legal categorization of land and real property is because of two different accounts of the places and geographies that have been propertized. Resolving the tension between these two legal geographies will require analysis of the different legal aspects of that place, under both expropriation law and Aboriginal law and with attention to the affordances and limitations of law in that place.

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[25] *Mariner Real Estate Ltd v Nova Scotia (Attorney General),* 1998 CanLII 1757 (NSSC) [*Mariner Real Estate Ltd v Nova Scotia,* NSSC] & *Mariner Real Estate Ltd v Nova Scotia (Attorney General),* 1999 NSCA 98.

Possible responses to this tension seem to be to maintain boundaries found in legal subject making—of constitutional law on the one hand versus private property on the other. Another option is to use expropriation as a government power that can be used to redistribute land. The first of these options is not satisfactory because of the reality that there is a single physical geography; indeed, the singularity of place is the reason for potential disputes over land. The second option is not satisfactory because, as the recent discussion of expropriation in *Southwind v Canada*[26] and *Wolastoqey Nations v New Brunswick and Canada*[27] show, the law of expropriation relating to Indigenous lands is established as different from expropriation relating to private property.

Underscoring any purposive analysis of Aboriginal rights considered in relief to private property rights is the threshold issue whether it is possible to use property principles to give effect to constitutional legal obligations. When different areas of law are brought together, threshold issues will exist, though these will differ depending on the legal subject matters. It might be jurisdictional issues between different sources of law operating as a barrier to considering laws in the same place, or standing as the court makes decisions about who or what is relevant to that place., Legal and geographic boundaries already exist to guide the decision making around such threshold issues. Geographic boundaries are created by the physical geography, which includes the natural and built environment, and the geographic relationships that exist among interest groups. Legal boundaries are created by existing legal categories and applicable laws. The legal relationships, when examined from a property law lens, currently are between those who traditionally have standing, but they could also be broadened to consider new geographies and thus new legal relationships.

[26] 2021 SCC 28.
[27] 2024 NBKB 203; *J.D. Irving, Limited et al. v Wolastoqey Nation,* 2025 NBCA 129.

7.4. PROCEDURAL DEVELOPMENTS

Whether a completely new forum that adjudicates place is established or the less radical approach of bringing geographic thought to bear on analyses of expropriation but within current frameworks is adopted, changes will be made to the way that matters are heard and decided. To guide the process of adopting place-first analysis, procedural mechanisms that would need to be considered include aspects such as the rules of procedure, attention to evidence, consideration and management of the role of the "public" in places under consideration, and management of increased information. These developments do not necessarily require that amendments be made to the law of expropriation (or other relevant land and property law principles).

7.4.1. Rules of Procedure

It is argued above that a forum would ideally be located within the civil law system as the forum will engage with matters of property law with the ultimate goal of the forum being to adjudicate place. Within the civil law system there is much opportunity for adapting procedure to meet the need to take up both geographic and legal analysis.

A mechanism that currently exists is the use of specialist practice areas. Specialist practice areas allow justices who are experts in specific matters to be appointed to exclusively preside over said matters. For example, in Ontario there is the "estates list," which is located in the geographic region of Toronto.[28] The estates list consists of judges who are appointed to exclusively hear matters related to estate, trust, and capacity law. The benefit of a specialist practice area is that it provides efficiency for lawyers and persons engaged in that area. A forum for place would provide benefits to those involved because they would have access to information solely focused on this

[28] Ontario Superior Court of Justice, "Estates List," online: <ontariocourts.ca> [perma.cc/SM64-C8KD].

area of law, and it affords the opportunity of having matters heard by a judge who is solely focused on matters of property law and place.

If the forum was located within the civil law system, either broadly within the existing court framework or through a specialist subject matter list, the forum would adopt the procedures of matters that would ordinarily be heard within the civil system. Thus, it would be appealed to the provincial or territorial court of appeal, and from there to the Supreme Court of Canada. The procedures adopted would follow ordinary rules of civil procedure as established by provincial and territorial legislatures. However, in addition procedure could be adapted to respond to the unique circumstances of a forum by amending the rules to allow for procedure that lends itself to matters of place. Rules adopted might include requirements for submitting evidence, rules for self-represented persons, rules for establishing standing that respond to the fact that orienting property issues around place and geographic location would mean there are more persons impacted by a property law issue, and so on. It would be appropriate for the court hearing place-based matters to sit in the location under dispute, and there is precedent for this. The Supreme Court of Canada has sat in location, outside of its home court in Ottawa, twice: in Winnipeg in 2019[29] and in Quebec City in 2022.[30] In the Aboriginal law context, trial courts have heard matters in location, and the Federal Court's "Practice Guidelines for Aboriginal Law Proceedings"[31] require that trials be

[29] The Supreme Court heard the cases of *R v KGK,* 2020 SCC 7, and *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 in Winnipeg. For general information see, Supreme Court of Canada, "News Release" (13 May 2019), online: <decisions.scc-csc.ca> [perma.cc/2PUF-NWNG]. Interestingly, *Conseil scolaire francophone de la Colombie-Britannique v British Columbia* was on appeal from the Court of Appeal for British Columbia, so it did not have any geographic connection to Winnipeg, Manitoba. *R v KGK* was on appeal from the Court of Appeal of Manitoba.

[30] The Supreme Court heard the cases of *R v Breault*, 2023 SCC 9, and *Murray-Hall v Quebec (Attorney General),* 2023 SCC 10 in Quebec City. For general information see, Supreme Court of Canada, "News Release" (17 May 2022), online: <decisions.scc-csc.ca> [perma.cc/7JLR-YPLC].

[31] Federal Court, "Practice Guidelines for Aboriginal Law Proceedings," 4th ed (September 2021), online (pdf): <https://www.fct-cf.ca/Content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20Sept-2021%20(ENG)%20FINAL.pdf>.

conducted partly in location to accommodate the appropriate collection of Elder evidence (if that is part of the trial proceedings).[32] Standardized procedures for conducting legal matters related to place in location could be established.

As an alternative to amending the legislative framework for procedural rules, the courts might also consider adopting "practice directions,"[33] which would provide subject-specific guidance for matters of place. Interestingly, practice directions that exist currently can be geographically specific to respond to the needs of different geographic regions. For example, the Ontario Superior Court of Justice has regional practice directions for the Central East, Central South, North West, and so on.[34] The practice directions respond to the procedural needs in specific locations to ensure timely hearing of civil matters. Such a geographic approach demonstrates the importance of responsiveness to the needs of different locations, and this approach could be adapted to include location in a substantive way, according to the framework of a forum for place.

7.4.2. Analysis of Geographic Information

An important change to the processes for managing expropriation through the creation of a forum will be the handling of information about place. This information will appear as evidence about a given location. Information about location, when understood broadly through the lens of place-based analysis, would be diverse and far reaching. It could include information about people, histories, property usage, plans for future use, the community, anything unique or significant about that location, and other considerations, depending on the facts before the forum. The variety of information from a potentially more diverse array of interested parties means that inevitably there

[32] *Ibid* at 44.
[33] Ontario Superior Court of Justice, "Consolidated Civil Provincial Practice Direction" (amended 1 February 2024, effective 1 June 2023), online: <ontariocourts.ca> [perma.cc/S9UF-2NWE].
[34] See Ontario Superior Court of Justice, "Regional Practice Directions and Forms," online: <ontariocourts.ca> [perma.cc/S78D-WYT6].

will be a large volume of information before the forum. Such a broadening of types of evidence and volume of evidence that support claims to place is important because, as the law and geography methodology demonstrates, there are place-based points of information that are essential to understanding claims in a place and thus assist with adjudicating the same.

Place-based information has a specific role within the forum, which is that it assists the trier of fact to make findings on the nature of place in each location and findings on how that place is reflected in processes of expropriation law. The increased information, which includes non-legal information that might previously have been overlooked, must then be linked to elements of decision making about place, as outlined in the step of asking "what is where, why there, and why care," and also to elements of law as outlined in the applicable legal test. This analytical step is what will make the increased information useful for decision making rather than merely descriptive of place. Moving from description of place toward analysis of place is a key endeavour for geographic and legal processes alike.

Two examples of stories of place were explored through two vignettes discussed in Chapter Three. In one example, in the Canadian decision *Canadian Pacific Railway v Vancouver (City)*,[35] the case report begins with an anecdote about a historical actress who is the namesake for a location on the route of a railway line, the railway corridor later at issue in the expropriation action. In the second example, in the US decision *Palazzolo v Rhode Island*,[36] the case report begins with a lengthy and detailed account of the historical use of a place as a holiday destination. In the Canadian decision, the anecdote is not referred to again and its role in the legal analysis of the expropriation matter is unclear, though it is interesting. In the US decision, the account of place is

[35] *Canadian Pacific Railway Company v City of Vancouver*, 2006 SCC 5.
[36] *Palazzolo v Rhode Island*, 533 US 606 (2001), 150 L Ed 2d 592, online: <law.cornell.edu> [perma.cc/Y3DW-PBT7].

traced as a reoccurring aspect through time to the present day and as relevant to the present-day intended use of the property parcel lot and thus to the amount of compensation owed due to an expropriation. The US decision is preferable as a representation of how geographic history can be brought to bear on present understanding of place, which in turn, can guide analysis of an expropriatory action.

That place is discussed in the two case reports is interesting because it indicates a sense that the details of place matter to the adjudicators and judges who have included such details in their reports and to others who have appeared before the court or tribunal and brought attention to such details. However, without a legal framework that is able to respond to such details and guide their use within the legal process they become superfluous and easily dismissed from legal consideration, or worse, myopic as they represent personal observations. The missing step, then, is that a sense of the importance of place must be brought to bear on the legal analysis, and by doing this the forum will be carrying out analyses of place.

7.4.3. Utilizing the Methods of Location and Scale

Use of a law and geography methodology could have a *substantive* impact on the adjudication of expropriation, at the same time that the management of increased volume of material is also a *procedural* concern as methods will have to be adopted to sort through and prioritize information relating to place in a principled way. Two geographic methods will help guide the procedure for selecting legal and geographic interests for adjudication: location and scale.

A location is the geolocated place where something exists. It is where spatial interests can become place-based interests as they become transcribed in physical location. The location is

essential to the "Where" component of Gritzner's definition of geography,[37] which in turn, I have explored extensively through consideration of the methodological enquiry "what is where?" for the case studies in Chapters Four, Five and Six. For a law and geography study, the location includes at a minimum both the property lot that is geolocated, and also the physical geography that frames the possibilities and limitations of a given location. These two aspects of location act as the first tool for managing an increased volume of material. Locations can be site specific, which is that it is a single geo-location under consideration, or situation specific, which is that it is analyzed in relation to other similar locations.[38] For purposes of adjudication, the location provides some practical guidance to the assessment of whether an interest is relevant to adjudication of place. There is the practical point that a physical location will be burdened with a title property lot, which from a legal perspective suggests relevant and applicable property laws, and that title property lot is located within a physical geography, which from a geographic perspective suggests that specific kinds of geographic phenomena exist. These two components of law and geography must be understood together as providing a more complete account of that place, and they are the starting points for identifying the "location" under adjudication.

Even as identification of the location is guided by the specifics of laws and geography in that location, there will still be the difficulty of managing an increase in variety of perspectives on—and sometimes legal interests—in that place. A practical method for organizing the increased volume of information into relevant and irrelevant information is the tool of "scale." A scale is "the degree to which a map is smaller than the area that it represents. If the scale of a map is known, a measurement on the map can be converted to its equivalent on the ground."[39] For example, a

[37] See Chapter Two, *above*, s 2.4.3.
[38] *Ibid*, referencing Anthony C. Gatrell, *Distance and Space: a geographical perspective* (Oxford: Clarendon Press, 1983).
[39] Malcolm Skinner, David Redfern, & Geoff Farmer, *Dictionary of Geography,* 1st ed (Routledge: New York, 1999)

scale indicating that a survey has a representative scale of 1:50000, where one represents an inch, means that an inch on the map represents 50,000 of the same units on the ground.[40] Within cartography a small scale will be utilized to render a large areas of land on a small space; while a large scale will be utilized to render a smaller area of land but show more detail.

The choice of measurement that may be adopted for scale is not a valueless step in map-creation; instead, the chosen scale will impact every aspect of how locations are measured and recorded.[41] Scales will be used to bring together ideas, records, and modes of analysis through the lens of a single measurement. These forms of measurements can be used for a variety of reasons and will result in different records of a place. No matter the scale adopted, a fundamental aspect of scale is that a singular scale-value is to be used across all information points. The common measurement (or scale) brings together issues through the lens of a common frame of analysis, thus allowing comparison, and highlights the relationship between elements that occur in an identified location (the "where").

As a tool for managing interests in a given location, a particular scale could be adopted that would signify the geographic reach of interests (legal and geographic) that are relevant to adjudication of place. For one case, a scale could be adopted to highlight locations that exist in a specific area, such as a street or a beach, which would afford the possibility of representing specific properties (and related interests) in more detail. In another case, scale could be adopted to highlight locations that exist across multiple areas revealing relationships across space by adopting the same scale for similar locations. Adopting a particular form of measurement will result in the prioritizing some perspectives, at the expense of others. However, this process of organization will also

"Scale" at 242.

[40] *Ibid.*

[41] Kang-tsung Chang, "Measurement Scales in Cartography" (1978) 5(1) The American Cartographer 57–64.

provide the necessary limits to what counts as relevant interests for adjudication of place in a given instance, thus limiting unnecessary information points and providing clarity on the nature of the place that is being adjudicated.

7.4.4. Evidence

Taking a law and geography approach to adjudicating place will inevitably increase the volume and variety of information; however, if the law and geography framework is articulated and followed, then existing rules of evidence will be equipped to guide the admissibility of evidence. The forum will likely engage with devices such as expert witnesses who can speak to a broader array of information, particularly social science evidence, "Brandeis briefs,"[42] and in some circumstances, relaxed rules of evidence.

The opinion evidence of expert witnesses will be important for speaking to elements of place that includes topics such as the physical geography and history. To be admissible, expert opinion must meet the threshold requirements of relevancy, necessity in assisting the trier of fact, a demonstration that there are no rules that would not allow such information, and the qualifications of the expert.[43] Expert qualifications indicating that they are specialized in the subject matter they speak to are always important as a threshold issue of admissibility, but this requirement will become all the more important in a forum to distinguish expert evidence from the opinion evidence of persons who have an interest.[44]

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[42] Brandeis briefs are named after Louis D Brandeis (later Justice Brandeis of the Supreme Court of the United States), who, then acting as counsel, presented a collection of social science information to that court that supported claims as to the constitutionality of limits on the hours women could work. The brief was filed in the case *Muller v Oregon* (1908), 208 US 412.

[43] These are the "Mohan criteria" for assessing whether expert opinion is admissible. See *R v Mohan,* 1994 CanLII 80 (SCC), and *R v Morin*, 1988 CanLII 8 (SCC); David Paciocco, Palma Paciocco, & Lee Stuesser, *The Law of Evidence,* 8th ed (Toronto: Irwin Law, 2020) at 251 [Paciocco et al, *The Law of Evidence*].

[44] Paciocco et al., *ibid* at 239 (on lay opinion evidence).

Brandeis briefs should be available as a tool to bring social science evidence before the forum,[45] though they should be used with caution. Brandeis briefs have been increasingly used in Canada for *Charter* litigation.[46] They are used to bring before the court a wide variety of information about the social context of the facts of a case, frequently resulting in often large briefs that are submitted to the court. For example, in *Bedford v Canada*,[47] a single joint brief was filed containing information from sources such as academic articles and books, news and investigative reports, autobiographical works, and others.[48] In total there was over 25,000 pages of evidence collected over two and half years of litigation.[49] An obvious challenge with Brandeis briefs is handling the volume of information that could be included; however, the content of Brandeis briefs is not automatically admissible, and parties may object to inclusion of any of its contents. It is possible that the parties could agree to the information they want to have contained in a brief and file a single joint brief, as happened in the *Bedford* case.[50] At the same time, Brandeis briefs might undermine the examination of geographic information that is needed. Geographic analysis, of the kind discussed throughout this thesis guided by spatial theory, would need to be developed in the forum and guided by the adjudicator.

From a law and geography perspective, the bigger concern is the content of a Brandeis brief and whether it provides material that would allow *analysis* rather than *assertion* of geographic information. The law and geography approach challenges the assumption that geographic

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[45] See *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at para 106 [*Polygamy Reference*].
[46] See e.g. *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Canada v Bedford*, SCC]; *Polygamy Reference*, *ibid*; Jula Hughes & Vanessa MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2012) 32:1 NJCL 23.
[47] *Bedford v Canada*, 2010 ONSC 4264 [*Bedford v Canada,* ONSC]; *Canada v Bedford*, 2012 ONCA 186; *Canada v Bedford*, SCC, *ibid* (considering the constitutionality of prostitution laws).
[48] *Bedford v Canada,* ONSC, *ibid* at paras 122–27.
[49] *Ibid* at para 84.
[50] *Ibid* at para 108.

information about place is background information, and instead requires that geographic information be integrated as a central part of legal analysis. Therefore, information that is accepted by the court through a Brandeis brief must not be conclusory in its geographic analysis. In terms of managing the content of a Brandeis brief, parties to the matter can object to the admissibility of any materials contained in the report.[51] Ultimately, it is the judge who decides whether the information will be used by the court. This occurs on a theory of judicial notice, whereby the judge can make note of uncontroversial information.[52] The difficulty of using judicial notice in the context of geographic interpretation is discussed below.

7.4.5. Judicial Notice

Judicial notice is the acceptance by a court of facts considered common knowledge, even though formal evidence has not been proven in court. Notice can be made by a judge in a formal court of law and also by an adjudicator in an administrative tribunal.[53] The taking of notice is a matter of efficiency, as it avoids the requirement that evidence be led for matters that are already known, and evidence can only be admitted on a theory of judicial notice if it cannot be reasonably questioned and thus protects the reputation of the justice system.[54] American scholar Edmund

[51] See generally *Bedford v Canada,* ONSC, *supra* note 47.

[52] See *ibid* at para 107, where the court notes: "The materials have not been sworn to under oath by their creators, and may therefore only be received as legislative facts through judicial notice."

[53] The enabling legislation for an administrative tribunal will contain the rules for receiving evidence at that tribunal. These will either specifically state that judicial notice is permissible or contain provisions that allow for judicial notice, though it is not specifically numerated. See e.g. the *Immigration and Refugee Protection Act* (SC 2001, c 27), which allows for the tribunal to "take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge" (s 170(i)), and the *Specific Claims Tribunal Act* (SC 2008, c 22), which allows for the admission of "other information" that has been interpreted to include judicial notice (s 13(b); *Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 2, found judicial notice permissible under s 13(b)). A number of court decisions on appeals from administrative tribunals have upheld the use of judicial notice by adjudicators. See e.g. *Peel Law Association v Pieters*, 2013 ONCA 396 at paras 120–123 (judicial notice taken by the Ontario Human Rights Tribunal); *Silver Campsites Ltd v James*, 2013 BCCA 292 at paras 37–38 (judicial notice taken by the BC Human Rights Tribunal); and *Hardono v Canada (Citizenship and Immigration),* 2025 FC 1707 at paras 39–43 (judicial notice taken by the Refugee Appeal Division).

[54] See generally, Edmund M Morgan, "Judicial Notice" (1943–1944) 57 Harvard L Rev 269; John Henry Wigmore, *Wigmore on Evidence* (Toronto: Canada Law Book Company; Boston: Little, Brown, and Company, 1905)

Morgan summarized the threshold for when it is permissible to take judicial notice. The "Morgan criteria" require that:

> [t]he party seeking judicial notice has the burden of convincing the judge that (a) the matter is so notorious as not to be the subject of dispute among reasonable men or (b) the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy.[55]

The Morgan criteria has been affirmed by the Supreme Court of Canada as the "gold standard"[56] for receiving notice. Judicial notice may be made of three types of facts: adjudicative, legislative, and social facts. Adjudicative facts are those that go to the heart of the legal matter before the court.[57] Legislative facts are those that concern law and the legal framework, including contextual information about the adoption of a piece of legislation.[58] Social facts are social science evidence that are used to "construct frame of reference or background for deciding factual issues crucial to a resolution of a case."[59] More recently, social facts have arisen in *Charter* litigation.[60] Within a newly created forum, the question will be whether judicial notice could be made of geographic information within a place-based dispute.

Guidance for use of judicial notice can be taken from the existing civil law rules. Judicial notice is not taken dependent on established subject matter categories of types of information, such as geographic information. Rather it is quite the opposite, with Justice Binnie warning that "simply

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[*Wigmore on Evidence*]; Mr Justice Ian Binnie, "Judicial Notice: How Much Is Too Much?" in Law Society of Upper Canada, *Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2004), 543; Claire L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26 Ottawa L Rev 551 at 556 [L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice"]; Elizabeth F Judge, "Curious Judge: Judicial Notice of Facts, Independent Judicial Research, and the Impact of the Internet" 2012 Ann Rev Civ Lit 325 [Judge, "Curious Judge"].

[55] Morgan, *ibid* at 286; adopted in *R v Find,* 2001 SCC 32 at para 48 and *R v Spence,* 2005 SCC 71 at para 61 [*Spence*]. See also, Paciocco et al, *The Law of Evidence, supra* note 43 at 575.

[56] *Spence, ibid* at para 61.

[57] *Danson v Ontario (Attorney General)*, 1990 CanLII 93 (SCC) at 1099 [*Danson v Ontario*]; *Spence*, *supra* note 55 at para 58. See also Kenneth Culp Davis, "Judicial Notice" (1955) 55 Colum L Rev 945 at 952 [Davis, "Judicial Notice"]; Paciocco et al, *The Law of Evidence*, *supra* note 43 at 576–77.

[58] *Danson v. Ontario, ibid* at 1099.

[59] L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice," *supra* note 54 at 556.

[60] See generally *Canada v Bedford*, SCC, *supra* note 46; *Polygamy Reference*, *supra* note 45.

categorizing an issue as 'social fact' or 'legislative fact' does not license the court to put aside the need to examine the trustworthiness of the 'facts' sought to be judicially noticed."[61] However, in his classic text on evidence, Dean John Henry Wigmore enumerates geographic data as a specific type of data that has often received judicial notice.[62] Wigmore states that "common instances" of geographic data "are the facts of time or season and of distance."[63] Examples of instances of geographic data that have been noticed include that "the first Monday of August, 1853, was August 1,"[64] "that the use of a farm in cropping season is more valuable than in winter,"[65] "time of moon-rising,"[66] and "coincidence of days of the month and week, noticed, by refreshment of memory from the almanac."[67]

However, these types of geographic data are different than the types of geographic facts that would arise within a place-based analysis. The Wigmore facts are scientific in nature, such as references to calendar days. In the law and geography methodology, these are the most basic geographic data that might be used to analyze place, and they do not touch on the complexity of place. Furthermore, taking notice of geographic information raises the possibility that geographic place is only considered as a backdrop to legal matters, thus missing entirely that interpretation occurs for geographic information just as it does for legal information. Instead, operationalization of a robust theory of place through adjudication of property would require assessment of more than individual scientific data points, such as dates and geographic coordinates, to instead consider a broader array of social science data.

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[61] *Spence*, *supra* note 55 at para 58.
[62] *Wigmore on Evidence*, *supra* note 54, § 2581.
[63] *Ibid.*
[64] *Sprowi v Lawrence*, (1859) 33 Ala 674, 684; found in *Wigmore on Evidence*, *ibid*.
[65] *Ross v Boswell*, (1877) 60 In 235; found in *Wigmore on Evidence*, *ibid*.
[66] *People v Mayes*, (1896) 113 Cal 618, 45 Pac 860; found in *Wigmore on Evidence*, *ibid*.
[67] *State v Morris*, (1879) 47 Conn 179; found in *Wigmore on Evidence*, *ibid*.

Guidance for how to manage meaningful geographic data is given by considering how central a fact is to a legal dispute. As explained by Justice Binnie in *Spence*:

> [T]he permissible scope of judicial notice should vary according to the nature of the issue under consideration. For example, more stringent proof may be called for of facts that are close to the center of the controversy between the parties (whether social, legislative or adjudicative) as distinguished from background facts at or near the periphery.[68]

Proof of a fact will be most strictly required when it is central to the legal matter before the court.[69] Thus adjudicative facts that consider "who did what, where, when, how and with what motive or intent"[70] go to the heart of the legal dispute and would require both notoriety and that they be indisputably accurate to receive notice.

Applying this framework to the use of geographic facts within a place-based analysis reveals the types of assessment a court might make concerning notice. First, geographic information might relate to all three categories of facts: adjudicative, legislative, and social. Geographic information is adjudicative because in matters of expropriation law claims to place through property is the who, what, and where of legal adjudication. It is legislative because the legislative framework will be the basis on which an expropriation is carried out, and it will contain the government goals concerning management of that place. It is social because the broader context of persons, histories, environment, and property holdings in which the physical property is located and the government goals that guide the expropriation and the place are central to the expropriation. The fluidity between these three categories of facts in the geographic analysis demonstrate that the existing approach, which holds that which category of fact is being considered for judicial notice is not dispositive to whether judicial

[68] *Spence*, *supra* note 55 at para 60 [italics in original removed].
[69] *Ibid* at para 61.
[70] Davis, "Judicial Notice," supra note 57 at 952.

notice is received, is correct. The court will be able to attend to all three categories of facts as being potentially adjudicative to place in various degrees, depending on the facts before it.

Second, picking up the point that facts central to adjudication can come from both law and geography, there would need to be an understanding that geographic information is not merely background information. Historically when taking judicial notice, when a fact falls at "the low end of background facts … the court will likely proceed (consciously or unconsciously) on the basis that the matter [of whether the fact receives judicial notice] is beyond serious controversy."[71] As the Wigmore assessment of geographic fact shows, there might be a presumption that the types of geographic data points presented before a court are background points. However, this is not the case. Whether a forum or a court takes up place-based analysis within the existing framework, geographic data will fall on a spectrum from pre-existing to central to the dispute. At the lower end of a law and geography approach, there will be geographic analysis that already exists in non-legal documents that is acknowledged but where the geographic analysis is not carried out by the court itself. In this case judicial notice might be sought, but never as a mere background fact. At the higher end, the forum focuses on geographic engagement in the analysis. In this case, dispute on the nature of geography would be dispositive to the issue, and thus judicial notice would at the least be used through a strict application of the Morgan criteria, but on the whole judicial notice would be far less likely. If facts are not judicially noticed, they would come within standard evidentiary rules for admissibility of relevant information.

Third, it is important to mention the role of the judge and their knowledge about the specific place that is before the forum. Regardless of whether a judge has personal knowledge of a fact, what matters for judicial notice is whether a point is generally accepted.[72] The standard for what is generally

[71] *Spence*, *supra* note 55 at para 65.
[72] Judge, "Curious Judge," *supra* note 54 at 341.

accepted knowledge is the community where the trial is held.[73] It is helpful to excerpt Paciocco, Paciocco, and Stuesser at length on this point to consider the implications of personal and community knowledge about a location. In a particularly apropos passage, they write:

> For example, in a Kenora, Ontario, courtroom, judicial notice is taken that there are numerous cottages on the Lake of the Woods. Judicial notice of this same fact may not be taken in a Toronto courtroom. On appeal, none of the members of the panel hearing the case may be familiar with Kenora, but that is of no moment; the appellate court must look to what is or is not the local community's common knowledge.
> . . .
> Moreover, should one of the justices actually have a cottage on Lake of the Woods and have a detailed knowledge of that area, it is equally clear that this Judge is not justified in acting on that personal knowledge, unless, once again, it can be seen to be common knowledge within the local community.[74]

This means that notice of information about geography that may be generally accepted depends on where the court is sitting and where the legal dispute originates from. It does not matter if a judge has personal knowledge of a location, and furthermore, judges ought to be very careful not to insert their personal knowledge about a location into a matter through judicial notice.

7.5. *KINGSBURG BEACH* IN THE FORUM

A forum for place would create opportunities for examining expropriation within a place-based framework. The motivation for the forum is to have place, with all its complexity, foregrounded in analysis in a legal forum. How then would using the forum have impacted the adjudication of the *Mariner Real Estate* decisions?

As a starting point, the forum takes the geography as equal to the law and as such the style of cause for the case could be developed to reflect that. Thus, referring to the matter as "*Kingsburg*

[73] Paciocco et al, *The Law of Evidence*, *supra* note 43 at 575.
[74] *Ibid*.

Beach, Nova Scotia: Mariner Real Estate Ltd v Nova Scotia (Attorney General)," or similar, would appropriately frame how adjudication at the forum would proceed. Although only a slight reframing of how case reports are presented, this change to the style of cause would have a strong impact on the perception of the case as it insists that the law be situated in the location being discussed.

A substantive change I recommend to the legal test for *de facto* expropriation is that the public-purpose requirement of expropriation be explicitly adopted as the first step in what would be a three-part test. The adjudicator would have to contend with who or what the public in Kingsburg Beach is that is benefitted through the expropriatory act. In the *Mariner Real Estate* decisions, the content of the public purpose component would come from the *Beaches Act.* An exploration of that Act showed that the goals and content of the Act include a number of concerns from behaviours of persons who would use the beach through to beach protection.[75] In order to adjudicate on the place-based interests that exist in Kingsburg Beach, the beneficiary of those interests—the type of public that benefits through the expropriatory action—would need to be explicitly identified and named. Kingsburg Beach could be framed as a location for use by the public, as a place for conservation efforts that will be used to protect the beach, or as a place of natural geographic phenomena to be left as wildlands. This interpretive turn, if foregrounded in analysis, would reveal the geographies that are privileged in legal frameworks and in turn guide the legal interests that attach.

The question of scale would support the identification of the public (as persons) who ought to be heard in the course of analysis. Should the viewpoint be on the property and property title holders that are along Kingsburg Beach? The property survey indicates there are 25 property lots

[75] See Chapter Four, *above*, s 4.3.2.2.

along the beach.[76] Figure 7.2 shows the expanse of Kingsburg Beach in a photo taken from the south end. This photo clearly shows the individual property lots, some with built property on them, and it is a manageable size of lots and persons.



Figure 7.2: Photograph from the south end of Kingsburg Beach showing the whole expanse of the beach and properties along it. (Photograph by Tenille E Brown, 2017).

Or should the viewpoint be on the broader Kingsburg Beach community which spreads back from Kingsburg Beach and behind Kingsburg Pond, where the properties do not have direct access to the beach, but the people do as members of the public? Figure 7.3 is the property identification

[76] See Chapter Four, *above*, s 4.3.1.1.

map and it is at a scale of 1:5000. At this scale, the map includes properties behind Kingsburg Pond.

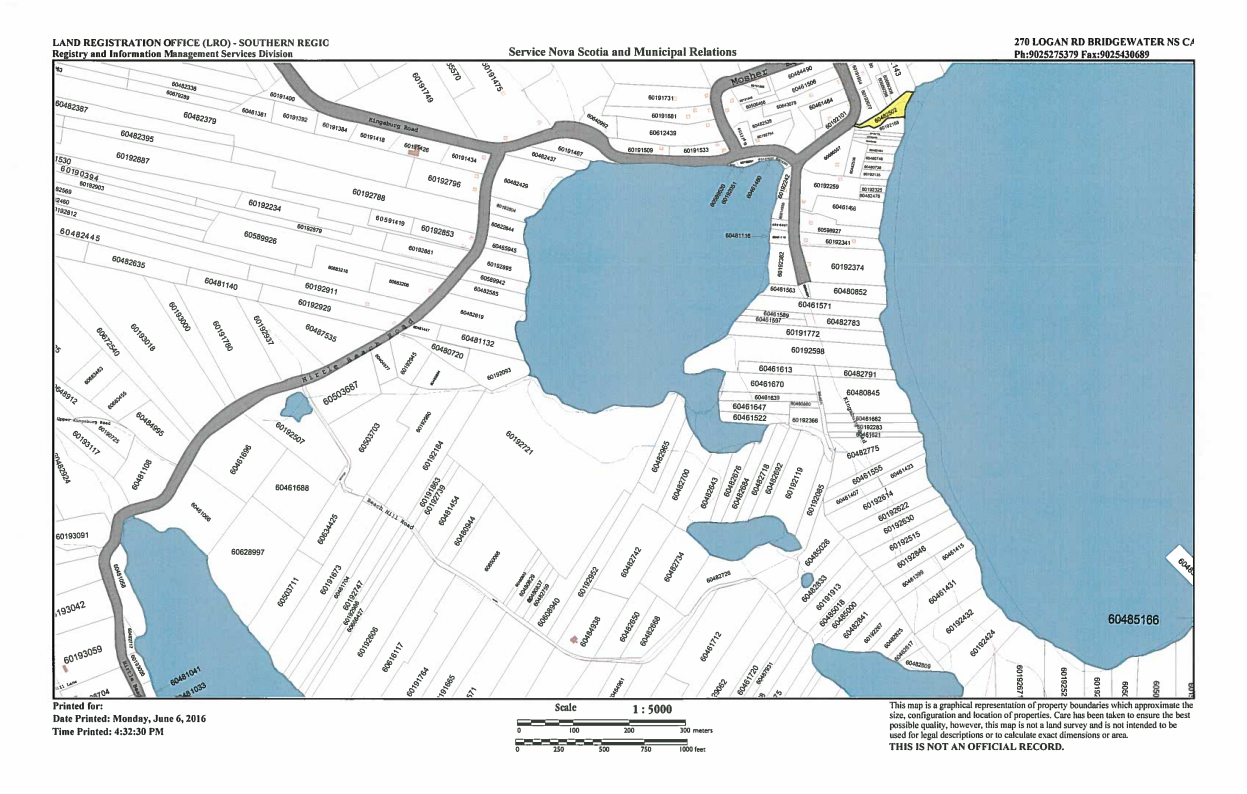


Figure 7.3: Property Identification Map showing property lots along Kingsburg Beach, around Kingsburg Pond and lots inland.

The processes for adopting the scale of intervention might be contained in the forum guidelines (like court guidelines adopted under the rules of procedure), with the possibility that the forum adjudicator adopt an amended scale to respond to the unique circumstances of a location. For Kingsburg Beach, would it be appropriate for the adjudicator to adopt a smaller scale which would capture a larger land area thus including persons and organizational groups who have an interest in conservation in Lunenburg County (where Kingsburg Beach is located) broadly? If such a scale

is adopted, the Kingsburg Coastal Conservancy would be a group with an interest in Kingsburg Beach.[77]

The types of information that will guide the adjudicator would be broad and guided by the nature of the "public" that is captured in the applicable framework. The forum might be assisted by relaxed rules of evidence that would support the hearing of evidence from the 25 property lot title holders, or if there is an even a broader array of interest holders identified, then Brandeis reports could possibly be submitted. Information from experts in fields such as history could highlight the patterns of settlement and give a sense of the depth of historical attachments to place held by family settlers. Experts in historical-geography could highlight the physical geography of Kingsburg Beach historically and today, with attention to significant changes in the geography of the beach and surrounding areas, including the extent of resource extraction. While environmental experts would describe the geomorphic context of Kingsburg beach, and analyze ecological pressures. Geographic information such as maps, deeds, surveys, photographs could be used throughout and would be important for representing the location. These information points would likely be included in the case report. In particular detailed geographic information, likely with diagrams, could be useful for showing the areas of the beach that are Crown land in both high and low tides, and the areas of the beach-dune areas that are private property titles. The adjudicator may be appraised of information about Aboriginal rights, perhaps relating to resources or use of the beach area. These types of information would be managed by the selection of scale thus identifying what geographic land area is directly relevant to the expropriatory action.

It would be appropriate and very possible for the forum to sit in location at Kingsburg Beach. The court of first instance[78] sat in the courthouse at Bridgewater, which is the closest court

[77] See Chapter Four, *above*, s 4.3.3.3.
[78] *Mariner Real Estate Ltd v Nova Scotia,* NSSC, *supra* note 25.

to Kingsburg Beach at a mere 29 kilometers or 30 minute drive away. If the forum sat in location, or at least undertook a field visit, the adjudicator would see how small the community is. They would see that the road is hidden by vegetation, ending abruptly and leaving little room for turning around, thus requiring the driver to make use of private laneways to do so. They would see that the public entry way for the beach is very small, and barely noticeable as it is tucked in beside a prominent but private graveyard. They would notice signage and references to historical families, some of whom are also part of the litigation. These details become prominent when the expropriatory analysis is grappling with the public, who and what an expropriatory action serves, and how information about place can be analyzed within this legal framework (and not simply relegated to background information). By sitting in location, a sense of the community of place, of persons, and of the physical geography of that location will be foregrounded in the analysis of the adjudicator. This sense of place must be compiled based on the record before them and so the adjudicator must resist taking judicial notice of these points or at least be very alive to the limits of the record before the forum compared to where their personal knowledge begins.

The outcome of the *Mariner Real Estate* decisions as decided within the forum might or might not result in a different outcome. Attention to place calls into question the adequacy of an approach that would highlight the monetary value of property lots, both with and without the benefit of a built home, without situating those lots in the context of place. It also calls into question whether focusing on discrete instances of cultural-use of property lots unduly emphasizes the preservation of the rights of property holders, without acknowledging the context of property and home ownership which holds personal importance, including economic value for property title holders. What would result from the forum is a record of the location of Kingsburg Beach revealing the complexity, contradictions, and importance of people in that place. It would also serve as an

accounting of an instance of expropriatory action and require in response information about how the claimed public purpose is being promoted and protected.

7.6. CONCLUSION

This chapter has argued for the creation of a "forum for place" as a venue for adjudicating issues of land and property law through a law and geography lens. As has been explored throughout this thesis, adopting an analytical lens of "what is where, why there, and why care" challenges law to critically engage with the ways in which place is created and to use this knowledge to strengthen and guide land and real property law. The forum would be an important avenue for developing law through a law and geography analytical lens. The forum could be either a fully realized new legal venue or a less radical adoption of a place-first assessment that would guide application of existing property law principles, such as expropriation. Both of these approaches would be a marked shift in how property law is applied to regulate property title because in essence these approaches ask that analysis of rights pursuant to the property title be reconceptualized to consider the physical location (which includes geographical-histories), the environment, and people in that place. Ultimately, beginning the legal analysis with a sense of the place at issue would be a shift in how land and real property systems are understood because it would reconstruct these systems as processes of interpretation—not just in an intangible spatial sense, but in a physical and tangible sense as physical geographies have and continue to be altered.

The law of expropriation serves to demonstrate the ways in which courts and administrative bodies currently consider place and provides some insight into the challenges to which a forum will have to respond. Acknowledging place within the law of expropriation admittedly introduces tension, as the court or forum would need to strike a balance between the need for government

expropriatory action on the one hand and the increased claims to place that would be recognized on the other. In the case of *de facto* expropriation law, prioritizing notions of place centred on the place would require the courts and government precisely articulate what the public's rights may be in a location or how environmental efforts interact with and limit private properties. If a robust vision of place-making through expropriation is enacted, this means that more interests must be considered within legal analysis. As a result, a more nuanced accounting of the interests of private property title holders would be enabled through the expropriation analysis. Likewise, there would need to be a more comprehensive and structured assessment of the public purpose requirement of all expropriations. The broadening of interests is reflective of a place-making process that recognizes the variety of aspects of the physical geography, histories, and policy goals that together create place.

Taking up a place-first analysis of the location of a property law matter such as expropriation, either in a forum or as an interpretation undertaken by a specialist judge, requires careful consideration of procedure to manage increased information and new types of information before the court. Existing procedures relating to evidence, rules relating to where a court can sit, tools such as creating courts that work in a specialist practice area, and location-specific rules can all be adopted and developed to reflect a place-first analysis. The forum will be bound by existing laws, but it will have the benefit of approaching matters with consideration of multiple areas of law that are relevant to place. It is likely that, with time, as areas of law related to place are brought into consideration in the forum, property law will develop to reflect challenges and opportunities of place. Finally, there are geographic considerations that already exist in current laws but which require naming and analysis—for example, reaffirming the public purpose requirement for expropriation. As an initial step, a forum would be created through development of existing laws,

procedures, and practical consideration of where courts exist within the justice system. Taking this approach will serve to remove the uncertainty of introducing "place-based" analysis into legal proceedings.

Ultimately, a forum seeks to reflect land and real property as it is experienced, and from that perspective, creation of a forum is a significant suggestion. In addition to the often-limited account of places that may be contained in a property title, places that people inhabit are historically contingent, intangible, personal, difficult to quantify, and—often for individual property interests—are considered by individuals as something that is forward looking for them. The management of private property through isolated property law principles does not reflect the place-making character of property law. Rather, property is something that always sits at the interface of private and public, and when expropriatory action is taken in relation to a property, government goals are directly brought to bear on the complexity of property use, ownership, and protection.

Through a forum for place, an adjudicator or judge would have the benefit of information on the complexity of place. Decision making about property does not have to exist on a binary of private property holders versus the government, private property holders versus the environment, or private property holders versus the community of which they are a part. Instead, there will be collective interests that can be individually actioned by different rights holders, though the implementation may be different for someone who has a specific private property interest compared to someone who has an interest by way of being a member of the public. As place-based interests are considered by a forum, there will be detailed representations of government goals and accounting of their impact on the property landscape. The creation of a forum is needed to recognize the complexities of place.

CHAPTER 8: IN CONCLUSION

8.1. ON EXACTITUDE IN SCIENCE

The epigraph at the beginning of this thesis is a one paragraph short story written by Jorge Luis Borges titled "On Exactitude in Science,"[1] which Borges attributed to the fictional author Suárez Miranda. "On Exactitude in Science" tells the story of an Empire that is skilled in the "Art of Cartography," creating maps of an increasingly small scale, thus increasing the detail of the map and resulting in a larger and larger physical map. The "Cartographers Guild" created a map of the city that was so accurate it was the size of a province, and then a map of the province so detailed that it covered the size of the entire Empire. No longer satisfied with these maps, they created a new map that "coincided point for point" with the whole Empire. In time, the next generations discarded this map, which was exactly the size of the land it captured, with detailed information about everything on the land. It was unwieldy, ultimately useless as a map, and most importantly, the following generations "were not so fond of the Study of Cartography."

I have thought about this story many times while writing this thesis. It has provided parameters to bringing spatial thought to bear on law through an examination of the law of expropriation. The cartographic work carried out in the Empire is overwhelmingly large in the detail the map captures, while also being demonstrative of the importance of the discipline of cartography. In my reading of "On Exactitude in Science," I reflect on law as the technical apparatus used to create maps of place.

[1] Jorge Luis Borges, "On Exactitude in Science" in Jorge Luis Borges, *Collected Fictions,* Andrew Hurley, trans (Penguin Books, 1998) 325. The short story is credited fictionally as authored by Suárez Miranda, *Viajes de varones prudentes*, Libro IV, Cap XLV, Lérida, 1658.

First, the story of the map created at the 1-to-1 scale serves as a warning. The map of the Empire is described as a perfect map. It is a complex undertaking to capture the details of the entirety of the Empire. Umberto Eco, also reflecting on Borges' short story, postulates that this perfect map would need to capture the following details:

> That the map be faithful, depicting not only the natural reliefs of the empire but also its artifacts, as well as the totality of the empire's subjects (this last is an ideal condition, which may be discarded in the production of an impoverished map).[2]

Eco highlights that the perfect map requires attention to both the physical geography, which includes both natural and built environments, and also the people located in the Empire, the human geography. That the perfect map was ultimately discarded raises questions on the utility of reproducing a geography to be exact in its replication. Instead, showing the representation of all that is in a location, here through cartography, ends up being self-referential and as unwieldy as the physical terrain itself.

Applying Borges' insight to the subject of place and property highlights that seeking to include the many details and aspects of place can produce such complexity that the endeavour might ultimately be unusable. The aspects of place highlighted by examining Kingsburg Beach include historical formation of private property holdings, current use of property holdings by title holders, environmental concerns, the elusiveness of the public, and finally the absence of Aboriginal law in that location. Taking a place-based analysis of matters of expropriation and other property-related areas of law risks the legal matter becoming so large as to be non-justiciable. It is not difficult to imagine replacing the large map in Borges' story with a large set of legal documents

[2] Umberto Eco, "On the Impossibility of Drawing a Map of the Empire on a Scale of 1 to 1" in Umberto Eco, *How to Travel with a Salmon & Other Essays*, William Weaver, trans (New York: Harcourt Brace and London: Secker, 1994) 96.

for a complex case and come to the same conclusion as the future generations of the Empire who did not study cartography.

However, hidden in Borges' short story is a second important warning. Borges writes that with time the remains of the map would be scattered throughout the Empire, so that

> [i]n the Deserts of the West, still today, there are Tattered Ruins of that Map, inhabited by Animals and Beggars; in all the Land there is no other Relic of the Disciplines of Geography.

Thus, even though the discipline of geography that was practised by cartographers fell into disuse in the Empire, geography remained. The map could not withstand the weather of the Empire, people and animals live throughout the Empire, and, in some locations, the map has become part of their environment. Though the discipline of geography might be considered a relic, geographies continue, except now they are unexamined. The reflection is on the role of professional work and how it interacts with locations.

Umberto Eco makes the same point about the role of disciplinary examination in the use of the map, though from a different perspective. Rather than the discipline of geography being overlooked, active engagement with it would result in an over-reification of the map. Eco supposes that to create the 1-to-1 scale map, an opaque map would have to be suspended above the Empire so that it does not interfere with the physical geographies underneath. To read the map, persons would have to look at the map from above, thus taking themselves out of the locations that have been mapped and rendering the map imperfect in its representation of the populations.[3] The creation of the 1-to-1 map is an impossible endeavour.

[3] *Ibid* at 98–99.

The point made by Eco is complex, as he senses that the persons using the map would in effect be over-relying on the cartographic representation of the Empire. The disciplinary work of cartography takes precedence over the actual location.

Borges and Eco reflect on the same points but from opposite perspectives: the role of professional practice of geographic work, the geographic location being mapped, and the relationship between these two. Borges warns that removing the practice of geography will result in lack of knowledge about geographic processes, which will nonetheless continue but be unexamined; Eco warns that a geographic practice that hyper-fixates on the creation of a map would result in lack of attention to reality.

This second point reflects on what the appropriate use of technical knowledge might be. It operates as a warning against leaving geography unexamined, since it will continue to operate regardless of whether it is analyzed, or, and perhaps even worse, geography may be over-relied on as a scientific method without critical attention to the geography of the physical location it applies to. Taking the map in Borges' story and replacing it with law makes this insight all the more critical. The technical apparatus of law can refer to itself in the form of laws—statutes and other like legal information—when carrying out legal analysis, and this can occur with inattention to the places that are impacted. Concern about the self-referential aspect of disciplinary work (in Borges' short story the discipline of cartography and in this thesis the discipline of law) without attention to the physical geographies that exist are particularly striking when considered in the context of real property and land, which are always place-based. This observation is the central point that animates scholarship in law and geography.

These two insights from Borges—first, concern about the volume of information that is required to create an exact replication of locations that are mapped, and second, concern about the

impact of inattention to geographic place—have served as parameters for this thesis. It is the second concern, which asks that geography be a point of analytical reflection, that is the more critical issue for the development of a law and geography methodology. This is because geography is the new component that is brought to law, and a key question for the future of law and geography is how geographic thought should be treated within law. This thesis posits that currently expropriation law operates without a coherent theory of place that can be used to guide the aspects of property, (expropriation) law, and geography. Without a unifying theory to guide it, law operates as a technical framework to create place, while place itself remains unexamined.

8.2. FROM THEORY OF PLACE TO PRACTICE OF PLACE

The Borges' story is interesting because it highlights not just a theoretical perspective, but also a practice-oriented perspective on the task before it. Cartography is bound up in theory of place and space, as choices are made to capture perspectives on place through their representation. It is also bound up in professional practices, as the people actioning spatial theory are the map-makers who follow disciplinary practices in the production of maps. The task is theory and practice in one. This duality is what constitutes methodology and, while there is a developing understanding of the *theory* of place and space in law, the *practice* of spatial theory is missing. It follows that the task of developing a coherent theory of place and space that law can use requires both the introspection of theory as it grapples with spatial thought that is brought to bear on places and the realization of that theory through legal practice.

Space and place theory has a young but strong lineage within geographic thought, and it has brought much insight to the topics of property law and expropriation law examined in this thesis. Within the field of law and geography, the theory of space and place has brought a new

perspective to understanding the subject of law, how it operates, and its impact. The unifying insight made by scholarship is that bringing spatial perspectives to the operation of law reveals power structures that otherwise remain hidden behind technical application of the law. In *The Legal Geographies Reader*, a foundational text in this field, the editors highlight three insights on what spatial thought can bring to law, which still resonate today: (1) Space challenges assumptions that law is stable; (2) attention to space reveals what actual political and social practices are impacted by law; and (3) law has a role in creating social space.[4] These insights focus on spatial structures, which are intangible, relational, and lend themselves to capturing phenomena of political, social, and economic processes.[5] Such insights have mostly come out of research in the area of human geography, which, as it sounds, examines the lives of people and their interactions with spaces.

For this thesis I introduced a second perspective by bringing geographic insight from the field of physical geography to the study of law and geography. Physical geography can be constituted by both natural and built environments, and it is these environments that are the basis for all human activities. The physical environment provides limits and affordances by way of its natural features, its location, and how it has developed in use over time, including propertied uses. Reflecting on physical geography of propertied places requires attention to the ways in which people, law, social, and political interests are guided by physical places.

Although the theoretical contribution of spatial thought to law and geography scholarship broadly is strong, the importance of physical geography and how to implement insights from both the physical geography and human geography tradition within law is not immediately clear. The

[4] Nicholas Blomley, David Delaney & Richard T Ford, "Preface: Where Is Law?" in Nicholas Blomley, David Delaney & Richard T Ford, eds, *The Legal Geographies Reader: Law, Power and Space* (Oxford: Blackwell Publishers Ltd, 2001) xiii at xvii–xviii.

[5] On the definition and understanding of space, see Chapter One, *above*, s 1.2.5.

practice of law and geography requires an extra step to move geographic thought from observation to practice. The definition of geography from Charles F Gritzner, a preeminent geographer, articulated as research questions provides the tool for this implementation.[6] I adopt these questions and create a methodology for law and geography. This law and geography methodology can be used to engage with geographic thought in legal practice. The deceptive simplicity of the definition of geography, articulated as the question/s "WHAT *is* WHERE, *why* THERE, *and* WHY CARE?" provides a tool that allows the physical place where space is located to be foregrounded in the analysis. Examining the methodology's three questions from the points of view of private property versus the environment, the public, and Aboriginal land law reveals deep theoretical perspectives on what a location is and can be.

Law brings great complexity to the already complex field of geography. Repurposing Gritzner's definition as a methodology brings some organization to this complex undertaking. Answering the methodology's three questions requires reflection on observable facts and normative goals, and also unearths geographic and legal processes that manifest in that location that might otherwise go unnamed. In this complexity, however, is the most important thing for creating an actionable law and geography methodology: Each of the three questions can be answered from both a geographic perspective and a legal one. The question "WHAT *is* WHERE?" is an opportunity to name the physical features of a place that can be geolocated, while simultaneously, when this question is asked in a legal setting, it requires that specific areas of law be identified and named. The question "WHY THERE" requires attention to processes and relationships that cause geographic and legal outcomes. The question "WHY CARE?" is the normative aspect of both law and geography, and answering it allows for consideration of public

[6] Charles F Gritzner, "What Is Where, Why There, and Why Care?" (2002) 101:1 J Geog 38.

policy concerns, and also consideration of individuals who hold legal and geographic interests. The duality required of the three Gritzner questions allows for both the practice of law and the practice of geography to be addressed through a singular analytical framework.

8.3. LOOKING OUTWARD FROM EXPROPRIATION AT KINGSBURG BEACH

Before going into the archives, before reading the historic information about the community at Kingsburg, and before reading the details of many expropriation decisions from other places in Canada, a simple walk along Kingsburg Beach felt like I was walking along a private place. This is so even though I know that beaches generally are reserved for public use, and specifically from reading the *Mariner Real Estate* decisions, that Kingsburg Beach is a public beach. There is a gap between my reading of a legal decision and my experiences walking along a beach in Nova Scotia that I had no connection to other than having read that legal decision. The separation between the physical place of Kingsburg Beach and a legal text that regulates that place is stark. It is through these observations that the attention to the practice of law and geography was born.

The site of Kingsburg Beach demonstrates how the principle of expropriation interacts with and creates place. The *Mariner Real Estate* legal decisions are simultaneously about the property title holders, who live in that location and rely on the use of their legally recognized property, and about the surrounding environment as the government stepped in to manage that location (through expropriatory action). This legal intervention is an act of place-making because it alters permissible uses of place while allowing government policy goals to be met. Reframing expropriation as a government tool for place-making highlights the normative use of expropriation as a tool to decide on rights and entitlements between the public and private. Through this reframing, the importance of expropriation is revealed, and, in turn, I have argued that there should

be more consideration and accountability in its use. If the use of expropriation alters propertied places, then it follows that there ought to be greater reflection on the creation of place.

Attention to Kingsburg Beach meant a focus on the failed claim of *de facto* expropriation in that place; the law of expropriation is not, however, the only area of law that uses public law tools to impact private property interests, thus creating place. Looking outward, place-making through law occurs most clearly in areas of law that are based in land and real property law as they engage with physical place. Examples of other legal principles that are directly involved in place-making include adverse possession, wherein persons may gain legal title to property through using it; the law of waste, wherein property may not be used in such a way as to destroy it ("waste it"); and easements, wherein non-property title holders hold a property right of use over a title holder. All of these property law principles are tools that can limit the use of private property for public goals.

Claims to place are going to get more complex and more conflictual. In recent years there have been decisions handed down from the Supreme Court of Canada on the topic of expropriation[7] and adverse possession,[8] with lower courts beginning to assess Aboriginal law claims over lands encumbered with private property.[9] There have been numerous cases and substantive public discourse on the use of public space for encampments and claims to property as a human right. I have suggested that a forum for place must be created to respond to and engage with matters of place. This forum would be largely centred on land and property law. A forum

[7] *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36; *St John's (City) v Lynch*, 2024 SCC 17.
[8] *Kosicki v Toronto (City),* 2025 SCC 28.
[9] *Wolastoqey Nations v New Brunswick and Canada et al,* 2024 NBKB 203 and *J.D. Irving, Limited et al. v Wolastoqey Nation,* 2025 NBCA 129; *Cowichan Tribes v Canada (Attorney General),* 2025 BCSC 1490. Recently a title claim was filed in Quebec by the Kitigan Zibi Anishinabeg First Nation over large areas of land that include private property titles in the claim area; see Canadian Press, "Kitigan Zibi Files Lawsuit Demanding Aboriginal Title over Lands in Western Quebec" (29 October 2025), online: <aptnnews.ca> [perma.cc/9U84-ATHN].

must be equipped to situate place-based legal matters within their physical geography as a foundational step of responding to the affordances and possibilities of place. The central analytical step for such a forum is to analyze both law and geography claims to place, asking WHAT *is* WHERE, *why* THERE, *and* WHY CARE? It is hoped that through this question, legal adjudication of property law will use both legal and geographic analysis to understand place, reflecting both the interests in and experiences of place.

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