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Property Says No: Relational (In)Equality, Encampments, and Property Rights

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For around two decades, if not longer, Canada has seen a number of cases dealing with tent encampments, typically, but not always, located in public parks. Often these decisions arise out of municipalities seeking interlocutory or interim injunctions against the tent encampments. Property and property rights have a significant role to play in these decisions as the alleged harm to property and property rights tends to be determinative of the matter. In this article I seek to explore why it is that these decisions are showing property rights more respect than the rights of those within tent encampments. I argue, that contrary to recent theoretical arguments, property does not reflect relational justice nor respect for individuals as individuals. Instead, property requires respect for property rights because of the fact that property is a communal endeavour. Thus, the question should not be whether these tent encampments are causing property rights irreparable harm but whether the legal treatment of these tent encampments and their residents reflect the broader community in which they exist.

In late October 2020, the Ontario Superior Court of Justice declined to grant an interlocutory injunction against the City of Toronto. The failed injunction had sought to "prevent the City, during the COVID-19 pandemic, from enforcing its By-law prohibiting camping…[and] that the City be restrained from taking further steps to evict or remove the applicants and other homeless individuals from encampments in City parks."[1] Justice Paul Schabas did not direct the City to enforce its bylaws, but he did note that as "in non-pandemic times, the City will have to consider how and when to enforce its By-law having regard to the continued availability of safe shelter spaces and the impact of the encampments on the parks and the public."[2] Schabas J's comment differs slightly from similar cases in British Columbia where courts direct cities to see that encampment removals proceed in an "orderly and sensitive fashion."[3] Eight months later, after significant planning and surveillance,[4] Toronto issued a trespass notice to the various encampments and, a month after that, sought to enforce it with the help of large numbers of police officers which led to multiple violent confrontations and injuries.[5]

As the increasingly voluminous litigation over tent encampments in Canada illustrates,[6] human rights, or at least public-law conceptions of human rights, such as those seen in the *Canadian Charter of Rights and Freedoms*, seem ineffective in the context of tent encampments. After at least two decades of cases in this area, legal protection is granted only to temporary, overnight shelter in municipalities which lack sufficient shelter space for

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[1] *Black et al v City of Toronto*, 2020 ONSC 6398 at para 1 [*Black*].

[2] *Ibid* at para 8.

[3] *Vancouver Board of Parks and Recreation v Williams* 2014 BCSC 1926 at para 61 [*Williams*], cited in *Nanaimo (City) v Courtoreille* 2018 BCSC 1629 at para 136 [*Courtoreille*].

[4] See Liam Casey, "Toronto planning encampment clearing operation for months, built profiles of residents", *Toronto Star* (1 May 2022), online: <www.thestar.com/news/gta/2022/05/01/toronto-planned-encampment-clearing-operation-for-months-built-profiles-of-residents.html> [perma.cc/HG3J-79WL].

[5] See Ali Raza, "Advocates push for better response to homeless encampments after violence at Lamport Stadium", *CBC News* (22 July 2021), online: <www.cbc.ca/news/canada/toronto/encampment-better-response-lamport-stadium-1.6113790> [perma.cc/DAV7-6EAQ].

[6] See part IV below for more. For a relatively recent judicial summary, see *Saanich v Brett*, 2018 BCSC 1648 at paras 43-79 [*Brett 2018*].

everyone to sleep indoors;[7] tent encampments remain invisible in law outside of the recitation of the facts in the decisions. Despite guidelines on approaches to encampments which respect human rights,[8] and despite the tacit supports offered by municipalities to encampments,[9] encampment residents remain encampment residents at the discretion of the municipality or landowner. The violence in Toronto was not inevitable but it is intimately bound up with property and the power it grants.[10] That property is a position of power is well accepted and property theorists have long puzzled over it.[11] Equally well accepted is the fact that being homeless is also bound up with property and can render homeless individuals powerless.[12] The question is whether this can be addressed and, if so, how? Two proposed solutions are that private property should be abolished,[13] or that because of how private property matters for respecting individuals as individuals, everyone needs private property to be equal.[14] In this article, my focus is on the latter solution's shortcomings and how it does not explain how property works, particularly how property works in the encampment cases.

The questions I seek to answer in this article are: when and under what circumstances does property law require owners to recognize others as individuals, and does property law even require this? There are those who argue that property law does or can require owners to recognize others as individuals.[15] While there is much to be praised in such accounts, I am doubtful that they offer a coherent account of property law. I argue that, despite societal commitments to equality and human rights, property law, as it currently operates, requires owners to recognize and defer to property rights rather than individuals.[16] That is to say, property does not contain any inherent normative commitment to recognising each individual as an autonomous individual worthy of respect. If anything, property rights appear to trump human rights and individual equality. The encampment cases reflect this by displaying deference to property rights time and time again, and by protecting these rights from "harm." Such a deference to property rights is, I argue, explained by how property is a communal endeavour. Paying attention to how property rights reflect the broader community might offer a better way of mitigating how property rights affect individuals.

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[7] See *e.g. Victoria (City) v Adams*, 2009 BCCA 563 [*Adams*].

[8] See Leilani Farha & Kaitlin Schwan, "A National Protocol for Homeless Encampments in Canada: A Human Rights Approach" (30 April 2020), online (pdf): <www.homelesshub.ca/resource/human-rights-approach-national-protocol-homeless-encampments-canada%C2%A0> [perma.cc/L26K-PSJW].

[9] By which I mean supports such as providing sanitation and so on.

[10] See also Alexandra Flynn & Estair Van Wagner, "A Colonial Castle: Defence of Property in *R v Stanley*" (2020) 98:2 Can Bar Rev 358.

[11] See *e.g.* Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275 at 293; Avihay Dorfman, "Private Ownership" (2010) 16:1 Legal Theory 1 at 5, 17, 35. Concerns about property's power also abound, see *e.g.* Gregory S Alexander *et al*, "A Statement of Progressive Property" (2009) 94:4 Cornell L Rev 743.

[12] See Jane B Baron, "Homelessness as a Property Problem" (2004) 36:2 Urban Lawyer 273; Jeremy Waldron, "Community and Property—For Those Who Have Neither" (2009) 10:1 Theor Inq L 161; Christopher Essert, "Property and Homelessness" (2016) 44:4 Phil & Public Affairs 266 [Essert, "Homelessness"].

[13] For these arguments, see *e.g.* Yin Paradies, "Unsettling truth: modernity, (de-)coloniality and Indigenous futures" (2020) 23:4 Postcolonial Studies 438 at 444-45; Manissa M Maharawal & Erin McElroy, "In the time of Trump: housing, whiteness, and abolition" in Maja Hojer Bruun *et al*, eds, *Contested Property Claims* (London: Routledge 2018) at 109. This list is not exhaustive. A full engagement with the argument for private property's abolition is beyond the scope of this article.

[14] See Avihay Dorfman, "The Normativity of the Private Ownership Form" (2012) 75:6 Mod L Rev 981 at 1008 [Dorfman, "Normativity"]; Essert, "Homelessness", *supra* note 12 at 290.

[15] See Avihay Dorfman, "When, and How, Does Property Matter?" (2022) 72:1 UTLJ 81 [Dorfman, "When and How"]. Dorfman's argument is explored below.

[16] There are occasions when particular features of the owner matters for property law, typically in the context of whether certain, prescriptive rights can be claimed. I do not have space to fully explore this point; however, it is worth noting that the particular features of the owner tend to speak to how the land is held rather than the owner as an individual.

In order to make this argument, I begin in part one by setting out accounts of property, which argue that property requires us to respect individuals *qua* individuals and their proposed solution—namely granting everyone private property—to the inequalities which result from this understanding of property. In part two, I argue that granting everyone private property would not solve the inequality issue because it overlooks the ongoing inequality in the owner-non-owner interaction, and the ways in which property rights relate to other property rights. Attempts to argue that property can respect individuals *qua* individuals, as laudable as they may be, end up undermining themselves. In part three I illustrate how property respects property rights rather than people by drawing on a dispute between neighbours in West Vancouver. In part four, I turn to the encampment cases and show how the law respects property rights rather than individuals. In part five, I briefly consider what this deference to property rights means.

Before beginning there is one preliminary point to note: while it is true that homeless individuals can be understood as having no property,[17] the bigger problem is that they have no private property rights to land. For the most part, homeless individuals have personal property.[18] The point is not meant to be facetious but rather to highlight that the *real* issue is a lack of private property rights to land,[19] not a lack of property.

I. PROPERTY, EQUALITY, AUTHORITY, AND RESPECT

The idea that property is about rights between individuals is perhaps most closely associated with the bundle of rights account of property.[20] As the bundle of rights account fell out of favour in the 1990s, so too did relational accounts of property.[21] However, with the rise of arguments around corrective justice as the underlying goal of tort law[22] and other areas of private law, relational theories of property have undergone something of a revival. The more recent, relational accounts are the focus of this section. These accounts, at the risk of over-generalising, see property as being a position of authority over others. Many of these theoretical accounts are attempting to define what is distinctive about ownership as a position rather than differentiating property law from other areas of private law.[23]

The idea that property is a position of authority is nothing new. As an idea, it is arguably implicit, or explicit in most theoretical accounts of property, whether relational or not. What differs is the level of emphasis put on that authority and the subject of that authority. In the context of the subject of the authority, the subject can either be the things themselves or other people. An example of the former sort of theory is Larissa Katz's argument that what is distinctive about owners is their ability to set the agenda for the owned thing.[24] So too is it seen,

[17] See Baron, *supra* note 12 at 273.

[18] This personal property is not always well protected. See Nicholas Blomley, Alexandra Flynn & Marie-Eve Sylvestre, "Governing the Belongings of the Precariously Housed: A Critical Legal Geography" (2020) 16 Ann Rev L Soc Science 165.

[19] This point has been recognised by the scholars cited previously. See generally Paradies, *supra* note 13; Maharawal & McElroy, *supra* note 13.

[20] For this theory see Stephen R Munzer, "A Bundle Theorist Holds On to His Collection of Sticks" (2011) 8:3 Econ Journal Watch 265.

[21] *Ibid* at 266; see also JE Penner, "The "Bundle of Rights" Picture of Property" (1996) 43:3 UCLA L Rev 711.

[22] The idea is most closely associated with Ernest J Weinrib. See *e.g. Corrective Justice* (Oxford: Oxford University Press, 2012).

[23] But see JE Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) at 1 [Penner, *Idea*]. See also Jennifer Nedelsky, "A Relational Approach to Property" in Nicole Graham, Margaret Davies & Lee Godden, eds, *The Routledge Handbook of Property, Law and Society*, 1st ed (London, UK: Routledge, 2022). Jennifer Nedelsky's work, while relational, follows a very different approach.

[24] *Supra* note 11 at 278.

though with perhaps less emphasis on the owner's authority, in accounts which understand property as the law of things.[25] An example of the latter sort of theory where the subject of the owner's authority is other people, is the relational account of property which sees property as being about rights between individuals. There is an intermediate argument between the authority over things and authority over others approaches. Writing in the early-2000s, David Lametti argued that we relate to others through things,[26] and J.E. Penner, in his recent book on property theory, approvingly referred to this idea as being the layperson's idea of property.[27]

A key feature of recent authority-based accounts of property is that they rest on a normative idea, rather than trying to explain property as it is. There is, of course, the potential for overlap between these two approaches but the reliance on a normative idea means that case law and doctrine can be almost absent from these theoretical accounts. The other key feature of these accounts is that they are trying to explain property as an area of private law; they are not interested in the role of the state. In terms of what the underpinning normative idea is, it is some version of "the moral idea that no person is in charge of another."[28] By resting property on such an idea, the goal is to both explain what is distinctive about owners and to justify it. In this way, these authority-based accounts differ from earlier, relational accounts of property as the earlier accounts were more descriptive than normative.

According to recent authority-based accounts of property, property law respects individuals *qua* individuals. Here there is a clear overlap with Kantian-based theories of tort law,[29] and not surprisingly, authority-based accounts lean heavily on the property torts of trespass and nuisance.[30] The strictness of trespass is something of a puzzle for property theorists,[31] but, under authority-based accounts, the strictness reflects the idea that we should not substitute our judgement for the owner's judgment. When we trespass, we fail to respect the owner as an autonomous individual, capable of making decisions.[32] This has the effect of turning respecting property (by not trespassing) into respecting the owner as an individual so that property becomes an extension of, or a proxy for the individual.[33] A similar argument has been made by Essert for how nuisance works. Essert argues that our property functions as a place to retreat from the control of others, but for that to work our property must also be protected from actions which might affect our ability to enjoy our property.[34] Thus, in order for these authority-based accounts to work, the items of property must be understood as proxies for their owners.

However, by placing respect for the individual at the centre of what property is, authority-based theorists run into the problem of those without property. If what is distinctive about owners is their power to alter the relationships of others to the owned thing,[35] this means property rights grant owners power over others. This power has the potential to cause inequality

[25] See Penner, *Idea*, *supra* note 23 at 5.
[26] "The Concept of Property: Relations Through Objects of Social Wealth" (2003) 53:4 UTLJ 325.
[27] See JE Penner, *Property Rights: A Re-Examination* (Oxford: Oxford University Press, 2020) at 19.
[28] Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016) at 6.
[29] For examples of this theory see Weinrib, *supra* note 22; Ripstein, *ibid* at 28.
[30] By way of example, see Avihay Dorfman & Assaf Jacob, "The Fault of Trespass" (2015) 65:1 UTLJ 48; Christopher Essert, "Nuisance and the Normative Boundaries of Ownership" (2016) 52:1 Tulsa L Rev 85 [Essert, "Nuisance"].
[31] See *e.g.* Eric R Claeys, "Property 101: Is Property a Thing or a Bundle?" Book Review of *Property: Principles and Policies* by Thomas W Merrill & Henry Smith, (2009) 32:3 Seattle UL Rev 617 at 640.
[32] See Avihay Dorfman, "The Society of Property" (2012) 62:4 UTLJ 563 at 601.
[33] Dorfman is explicit about property acting as a proxy. See Avihay Dorfman, "Private Ownership and the Standing to Say So" (2014) 64:3 UTLJ 402 at 421. I have elsewhere called this the proxy problem. See Sarah E Hamill, "Community, Property, and Human Rights: The Failure of Property-as-Respect" (2017) 27 JL Soc Pol'y 7 at 10, 21ff [Hamill, "Community"].
[34] *Supra* note 30 at 102.
[35] See Dorfman, "Private Ownership", *supra* note 11 at 18.

because, as Essert puts it, "unless I am in charge of some location, then everywhere and always, I am in a location where others are in charge of me."[36] He is explicit about property rights affording a place of "refuge"[37] but he notes that the scope of an owner's control "must be understood in a way that allows for each owner to have fair and equal normative control over everyone else."[38] The solution that both he and Dorfman arrive at, though by slightly different paths,[39] is that *everyone* must have some private property to be equal.[40] For Dorfman, the "connection between the private ownership form ["the authority to fix the normative standings of others"][41] and an ideal of all persons standing in relations of freedom and equality to one another" means that "persons cannot stand in these relations to others when they lack some (non-trivial) measure of external objects to command the respectful recognition of their own points of view by others."[42] In short, unless everyone has property we cannot actually interact with them properly. Whereas for Essert, the need for everyone to have property is both to justify private property,[43] and to offer everyone a place where they are free of others' control.[44] As such, these authority-based accounts are concerned with realizing individual freedom and individual equality within property law.

II. PROPERTY'S RELATIONAL INEQUALITY

Authority-based accounts of ownership face two issues. First, granting everyone property does not solve the inequality inherent in the owner-non-owner interaction;[45] second, by focusing on individuals and individuals interacting, the theorists miss the systemic aspects of property.[46] While it may be true that some aspects of property can be read as following a normative idea about respecting individuals, others cannot.[47] In a recent article, Dorfman recognises the former point about the inherent power imbalance of property,[48] and attempts to argue that an owner has a duty to respect others. While it is welcome that property theorists are paying attention to the inequality property rights create, there is scope to criticize Dorfman's proposals. As such, this section sets out to critique this response, as well as explore how the authority-based accounts fall short by recognizing the relational aspects of property, but not how they actually work for property *qua* property.

The suggestion that everyone needs to have private property to be equal does solve a particular problem caused by how these authority-based accounts understand property. However, it is not necessarily the problem that authority-based theorists *think* they are solving. If being an owner is a position of authority over others with respect to a thing, and property doctrine can be understood as requiring non-owners to respect the owner as an individual, then there is a problem when some do not have private property. Granting everyone private property solves the problem of not having a space in which to retreat from others' control and avoids the problem of property law, in the guise of the property torts, never recognising an individual

[36] Essert, "Nuisance", *supra* note 30 at 102.
[37] *Ibid*.
[38] *Ibid* at 89.
[39] The differences need not concern us here.
[40] See Essert, "Homelessness", *supra* note 12 at 290; Dorfman, "Normativity," *supra* note 14 at 1007.
[41] This phrase is taken from Dorfman, "Normativity," *supra* note 14 at 1008, 1004.
[42] *Ibid* at 1008.
[43] "Homelessness", *supra* note 12 at 290.
[44] "Nuisance", *supra* note 30 at 102.
[45] See Hamill, Community, *supra* note 33 at 23-24.
[46] These aspects are sometimes referred to in passing. For analysis, see *ibid* at 22-26.
[47] See *e.g.* Sarah E Hamill, "Enduring Trespass: What Adverse Possession Reveals About Property" (2020) 96 SCLR (2d) 215 [Hamill, "Enduring Trespass"].
[48] Dorfman, "When and How", *supra* note 15 at 84.

as an individual.[49] It does nothing to solve the issue of the unequal interactions inherent in property law, particularly that of an owner's authority over others. By relying on an idea from tort theory—relational equality between individuals—authority-based accounts of property create a situation where an owner must always be respected by others but never has to respect any other individual. Yet here it seems as though what is respected is not the owner as an individual, but the property rights a person holds. If anything, arguing that what the law is *really* respecting here is the individual behind the right seems like an additional complication.

In owner-non-owner interactions, it does not matter if the non-owner owns something else, what matters is that they do not own the thing in question.[50] Dorfman calls this problem "interpersonal subjection."[51] His attempt to solve it rests on distinguishing between permissible and impermissible reasons for excluding others from the owned thing.[52] The difference between the two is whether the "exclusion count[s] as judging and treating the non-owner as un-interactable."[53] What this means is that the owner refuses to engage with the non-owner and denies them "the recognition of minimal eligibility to engage in a property interaction with the owner."[54] This sort of exclusion is a "not for you" rather than a "not now" exclusion; the latter sort is permissible, the former is not.[55] Here Dorfman is trying to address "the subjection that the very right to property brings into existence";[56] he is trying to make property interactions reflect individual equality.

Once again, Dorfman turns to trespass to make his argument but this time he argues that trespass to chattels offers a better way of managing exclusion. In the context of chattels an owner can only deny "access on the basis of preventing material interference, which is … impairing or dispossessing the thing."[57] This statement is based on the American law of trespass to chattels, and it should be noted that in other jurisdictions, trespass to chattels includes, like trespass to land, instances which do not cause "material interference."[58] Furthermore, trespass to chattels also includes dispossession and deprivation of use for a significant period of time.[59] The point here is that trespass to chattels is not *inherently* more flexible than trespass to land and the American approach is policy-based.

To illustrate impermissible exclusion and harmless trespasses, Dorfman turns to the case of *Jacque v Steenberg Homes*.[60] *Jacque* is a popular case among property theorists and is often used to illustrate the strictness of trespass.[61] It centres on a claim for damages for trespass arising out of Steenberg Homes traversing the Jacques' land to deliver a mobile home. Steenberg Homes had asked for permission to cross the Jacques' land and due to the weather could not deliver the home without crossing; they had offered to pay to cross but the Jacques refused. At least part of the reason the Jacques refused—which Dorfman neglects to mention

[49] Dorfman, "Normativity", *supra* note 14 at 1008.
[50] Hamill, "Community", *supra* note 33 at 23-24.
[51] Dorfman, "When and How", *supra* note 15 at 84, 101-103.
[52] *Ibid* at 86.
[53] *Ibid* at 103.
[54] *Ibid* at 103-108.
[55] *Ibid* at 103-109. The "not for you" approach has some overlap with the limits to exclusion imposed by public accommodations law. See Joseph William Singer, "Property and Sovereignty Imbricated: Why Religion Is Not an Excuse to Discriminate in Public Accommodations" (2017) 18:2 Theor Inq L 519.
[56] Dorfman, "When and How", *supra* note 15 at 112.
[57] *Ibid* at 113.
[58] *Ibid* at 112-113. For an overview of the divergence in the Anglo-American sense, see Shyamkrishna Balganesh, "Property Along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence" (2006) 35:2 Common L World Rev 135.
[59] Dorfman, "When and How", *supra* note 15 at 112-13.
[60] 563 NW2d 154 (Wis. 1997), 209 Wis.2d 605 [*Jacque*].
[61] See *e.g.* Henry E Smith, "Exclusion and Property Rules in the Law of Nuisance" (2004) 90:4 Va L Rev 965 at 983; Claeys, *supra* note 31 at 640. This list is not exhaustive.

in his recent recounting—was that they had already lost land to adverse possession.[62] Dorfman's focus is on how *Jacque*'s award of one dollar in nominal damages and one hundred thousand dollars in punitive damages was wrong.[63] He argues that the trespass was ultimately "harmless,"[64] which arguably contradicts his earlier defence of trespass's strictness as reflecting the non-owner's duty to respect the owner's decisions.[65] It would seem that on Dorfman's account, if I have understood it correctly, property law can either require the owner to treat others as interactable or require non-owners to respect owners, but not both.

Dorfman's objection to *Jacque* turns on the argument that the trespass was harmless,[66] but the problem with Steenberg Homes's trespass was that it was deliberate and unnecessary. Admittedly at the time of the trespass there was snow on the road which formed the delivery route,[67] but Wisconsin is not covered in snow year-round. Steenberg Homes could have waited. They did not. The nominal damages are small because the actual harm to the Jacques was small; the punitive damages are high because Steenberg Homes *knew* they did not have permission and trespassed anyway for their own convenience. Property law does not require owners to convenience their neighbours.

The argument that owners should be required to treat others as interactable is arguably seen in public accommodations law[68] and fair housing laws,[69] but it is not clear that it is inherent in property. The relational equality seen in tort law is impossible to map onto property law because, while the relational equality of tort law is based on an avoidable wrong, the relational aspects of property law are unavoidable: we are always, everywhere we go, in a property relationship. In situations like *Jacque*, the issue is not that the Jacques refused to aid Steenberg Homes, but that Steenberg Homes ignored this refusal; Steenberg Homes refused to respect the Jacques' property rights. The real harm in *Jacque* was not to the owner (nor for that matter, to Steenberg Homes) but to the idea of respecting property rights. To be clear, I am not saying that this is a good thing; rather, I am describing the decision.

Furthermore, Steenberg Homes's one-off trespass may have been harmless, but in many jurisdictions around the world, repeated trespasses can result in the trespassers gaining a right over the land at the expense of the owners. Adverse possession is the obvious example, but lesser rights such as easements and public rights of way (in some jurisdictions) can also result from repeated trespasses.[70] It is true that some jurisdictions grant public rights of access over otherwise private land, but such rights of access are largely recreational and do not cover the use of vehicles.[71] These rights of access are not necessarily inherent in property but speak to how property is understood in that particular jurisdiction.

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[62] *Jacque*, *supra* note 60 at para 3. For Dorfman's recounting, see Dorfman, "When and How", *supra* note 15 at 114-19.
[63] Dorfman, "When and How", *supra* note 15 at 114-19.
[64] *Ibid* at 114.
[65] Dorfman, "Normativity", *supra* note 14 at 998.
[66] Dorfman, "When and How", *supra* note 15 at 114.
[67] *Jacque*, *supra* note 60 at para 3.
[68] For more on public accommodation laws, see Joseph William Singer, "No Right to Exclude: Public Accommodations to Private Property" (1996) 90:4 Nw UL Rev 1283.
[69] But see Dorfman, "When and How", *supra* note 15 at 111-12.
[70] For public rights of way in England, see Alec Samuels, "Public right of way: some recent legal issues" (2012) JPL 5; Angela Sydenham, *Public Rights of Way and Access to Land*, 4th ed, (Bristol: Jordan Publishing, 2010) at para 3.5.1.
[71] Scotland is the jurisdiction Dorfman relies on. See *e.g.* ScotWays, "Outdoor Access," online: <scotways.com/outdoor-access> [perma.cc/9XJV-LWPY]; ScotWays, "What activities are not covered by rights of access," online: <scotways.com/ken/activities-not-covered-by-rights-of-access> [perma.cc/6JZJ-BLW8]. See also Dorfman, "When and How", *supra* note 15 at 118-19.

Authority-based accounts of ownership such as Dorfman's are, however, correct that you need property to be equal, but they have missed how this actually works.[72] The focus of authority-based accounts is on individuals relating to other individuals as individuals, and this bleeds over into their vision of what property is: clearly defined entitlements which are separable from each other. While it is true that some aspects of property reflect this vision, the common law of property is more nuanced than this. It must always be remembered that the common law does not recognise ownership of land but ownership of rights to land,[73] and that these rights can and do overlap. The bundle of rights account of property captures this idea, but it misses that these rights can relate to each other as well.

Easements offer a good example of what I mean. In layman's terms, an easement is a right over someone else's land. The classic example of an easement is a right of way. However, easements are understood as existing to benefit the land rather than any particular owner or tenant. As such, the land which benefits from the right of way—the dominant tenement—must be sufficiently close to the land over which the right of way passes—the servient tenement. The technical term for an easement is an incorporeal hereditament which captures the fact that the rights which make up an easement are intangible but heritable, that is, they can be passed from owner to owner.[74] Consequently, if there is an easement of a right of way over Blackacre for the benefit of Greenacre, whoever owns an estate in land over Greenacre will also have that right of way over Blackacre. The person with the estate in Blackacre still "owns" the land under the right of way but cannot use their land in such a way which interferes with the right of way.[75] The existence of the easement for the benefit of Greenacre will also be noted on the title of Blackacre.

The result is that the two estates over Blackacre and Greenacre are linked. The owner of Blackacre cannot block the right of way and, if they do, the owner of Greenacre will be entitled to clear the blockage. The owner of Greenacre will also have ancillary rights to allow them to repair the right of way but will have no greater rights than are necessary for the right of way. Thus, if the owner of Greenacre needs access to Blackacre to repair a building on Greenacre, one will need the permission of Blackacre's owner. In England, for example, there are now temporary, statutory easements to allow individuals access over neighbouring properties to repair their own.[76] The point here is that, under the common law, such repairs did not amount to necessity. From the perspective of property law, a person ought to be able to repair or otherwise address issues on their own property without accessing a neighbour's. A person only needs to respect the rights over their land that a neighbour actually has; to repeat, they are under no obligation to convenience a neighbour, but nor can they thwart their neighbour's use of what is theirs.

To suggest that property requires us to respect property rights rather than individuals is not to suggest that property rights have some autonomous, pre-political existence of their own. Property rights are created and supported by law and by social norms. The respect afforded to

[72] To be clear my criticisms of the "property for all" solution do not apply to calls for "housing for all." That said, absent legal changes to, for example, tenancy law, providing housing for all will still be subject to the power protected by property rights. For example, a tenant will have, in most cases, property rights in their housing, but those rights will be subordinated to the property rights of the landlord. I do not have the space to fully unpack the relationship between housing for all and property for all but suffice to say that without paying attention to how property works, any attempts to secure housing for all will fail. Not surprisingly, some calls for the abolition of private property suggest housing for all instead. See Maharawall & McElroy, *supra* note 13.

[73] See Christopher Rodgers, "Towards a Taxonomy for Public and Common Property" (2019) 78:1 Cambridge LJ 124.

[74] There was historically some doubt about this. See *e.g.* Charles Sweet, "The True Nature of an Easement" (1908) 24:3 L Q Rev 259 at 259-61.

[75] See Paul M Perrell, "The Creation of Easements" (2005) 30:4 Adv Q 487 at 491-93.

[76] See *e.g. Access to Neighbouring Land Act 1992* (UK), c 23; *Party Wall etc. Act 1996* (UK), c 40.

property rights is generally also tied with how the land is used, and theorists often argue that property is about our interest in using things.[77] Thus the respect shown to property rights arguably reflects the social role of property, rather than property's role—contested as it is[78]—in protecting individual rights.

In summary, property law requires owners to respect property rights—this can also be seen in nuisance—rather than others as individuals. While it is true that there are exceptions, both in the context of what Americans would call public accommodations law and in the fact that some jurisdictions grant a right to roam, these exceptions are about the broader community rather than the individual aspects of property. Outside of this, property law does not require owners to respect others; the respect that property law demands is to property rights. The reason it does this is because of the social role which property rights play. As will be seen, property rights are considered foundational. Thus, while challenges to property rights could be understood as a lack of respect for the individuals who hold them, this understanding imports a concern for individuals which does not seem to exist in property law.[79] If, on the other hand, challenges to property rights are understood as a challenge to the system which property rights represent, then what is at stake is not just a particular individual but something much broader. Before returning to how this aspect of property rights appears in the encampment cases, it is helpful to further explore how it works in property law.

III. RELATIONSHIPS AND RIGHTS ON THE GROUND: A DISPUTE BETWEEN NEIGHBOURS

The idea that granting everyone private property would solve the equality issues inherent in property is not borne out by case law. Nor does case law support the idea that property requires owners to interact with others as individuals. Property law does sometimes require an owner to treat others as equals or as interactable, but for this to happen they must also have property rights over the owner's land. To illustrate this point, this section examines a dispute between neighbours in West Vancouver.

Marine Drive is a nearly twenty-kilometre stretch of highway running from North Vancouver through West Vancouver, terminating at Whytecliff Park on the western edge of the British Columbia mainland. Along its western portion sits some of Canada's most desirable real estate in the country's wealthiest municipality.[80] Prior to residential development, Marine Drive had to be widened by blasting rock,[81] which left dramatic sheer rock faces along the road; this meant that not every property was built with a driveway nor was even capable of having a driveway built once construction was completed.

Numbers 6993 and 7019 Marine Drive were so situated that 6993 was accessible via 7019's driveway. Otherwise, 6993 was only accessible via 23 steps cut into the "near-vertical rock face" which marked the property's frontage onto Marine Drive.[82] At the bottom of these steps, there is a parking space for 6993 in an indent from the road.[83] When originally developed, 6993 and 7019 were in common ownership and 6993 was sold first.[84] Since 1951, 6993 had

[77] See Henry E Smith, "Property as the Law of Things" (2012) 125:7 Harv L Rev 1691 at 1691-93 [Smith, "Law of Things"]; Penner, *Idea*, *supra* note 23 at 49.
[78] See *e.g.* Carol M Rose, "Property as the Keystone Right?" (1996) 71:3 Notre Dame L Rev 329.
[79] See Hamill, "Enduring Trespass," *supra* note 47.
[80] See Alireza Naraghi, "Canada's richest communities 2019", *Macleans* (8 August 2019), online: <www.macleans.ca/economy/money-economy/canadas-richest-communities-2019> [perma.cc/5893-CCTD].
[81] For a recount of this history, see *Roop v Hofmeyr*, 2016 BCCA 310 at paras 11-20 [*Roop* CA].
[82] *Ibid* at para 6.
[83] *Ibid* at para 26.
[84] *Roop v Hofmeyr*, 2015 BCSC 1755 at paras 19-25 [*Roop* SC (TD)].

been owned by the Roop family and from 1976 to 2009 their neighbour in 7019 was Ann Buitenhuis. For part of this time, a hedge blocked vehicular access to 6993 but from 1981 Buitenhuis allowed the Roops, or their tenants, to use her driveway to access their property. She always advised that this was "temporary" or a "temporary favour."[85] Nonetheless, she allowed the Roops to repave "the driveway at their expense"[86] and was aware that the Roops had built a parking pad by their house.[87] In return, the Roops allowed Buitenhuis to use their stairs to access the road, which she did on occasion.[88] When the Roops asked, however, Buitenhuis refused to grant an easement.[89]

In 2009, Buitenhuis sold 7019 to the Hofmeyrs who, in 2011, indicated their intention to "reclaim the driveway for their own use"[90] once the tenants of the Roops moved out.[91] The Hofmeyrs' decision was motivated by the fact they had young children.[92] In 2014, the Hofmeyrs finished building a fence which blocked vehicular access to 6993.[93] In the interim between 2011 and 2014, the Roops made "a number of proposals to … resolve the issue of their shared use of the respondents' driveway. None of the proposals were acceptable."[94] Finally, the Roops launched a legal action arguing that they had had an implied easement of vehicular access since 6993 and 7019 had been subdivided in the 1930s. Both the British Columbia Supreme Court and the Court of Appeal held that there was no such implied easement and, even if there were, the Court of Appeal held that the operation of land titles registration would nullify it.

Roop is important precisely because it adheres strictly to doctrine while illustrating that neighbours can be flexible if they so choose. As the facts of *Roop* make clear, the inhabitants of 6993's use of the driveway was lengthy but always at the discretion of the owners of 7019. In effect, *Roop* illustrates a neighbourly relationship of mutual accommodation—even when the Hofmeyrs sought to reclaim the driveway, they were willing to wait out the term of the Roops' tenants. Admittedly, the Hofmeyrs' predecessor-in-title seemed to encourage the Roops' use of the driveway, but both parties knew what an easement was and what the effects of one would be. It cannot be said that the Roops were under any misapprehension about the extent of their ability to use the driveway.

According to the authority-based accounts of property, the Roops and the Hofmeyrs are equal, as both are owners. That equality is of no use to the Roops in solving their issue because property law allows the Hofmeyrs to decide who uses their driveway. If the authority-based theorists are right and ownership does allow a person to change others' relationships with what they own, the only way for someone else to resist that power is if they also have a property right over the owned thing. By claiming that they had an easement—a property right—over the driveway, the Roops argued that they should have an equal right over the driveway. As *Roop* makes clear, property law does not require owners to interact with others except in situations where those others have property rights over the owned thing.[95] Owners have the discretion to

[85] *Roop* CA, *supra* note 81 at para 21; *Roop* SC (TD), *supra* note 84 at para 53.
[86] *Roop* CA, *supra* note 81 at para 21.
[87] *Roop* SC (TD), *supra* note 84 at para 53.
[88] *Ibid*.
[89] *Roop* CA, *supra* note 81 at 21.
[90] *Ibid* at para 22.
[91] *Roop* SC (TD), *supra* note 84 at para 32.
[92] *Ibid* at para 33.
[93] *Roop* CA, *supra* note 81 at para 22.
[94] *Ibid* at para 23.
[95] In some instances, these may be captured by a "right of entry." For a recent analysis of this right in the American context see Bethany R Berger, "Property and the Right to Enter" Wash & Lee L Rev [forthcoming in 2023]. What is interesting about the cases which Berger examines is that they typically involve disputes between workers and

interact with others or to allow their neighbours temporary access, but they are not required to do so by property unless their neighbours also have a property right over the land.[96]

In fairness, there is an argument to be made that the Hofmeyrs' refusal falls into the "not now" category rather than the "not you" category of exclusion,[97] except that the Hofmeyrs' refusal seems to be both categories simultaneously given that they were happy to let 6993's tenants use the driveway until the end of their tenancy. Indeed, it would have been open to the Hofmeyrs to continue to allow the Roops to use the driveway without granting them an easement. The key point is that, from the perspective of property law and based on the facts of this case, the Hofmeyrs were not required to do so because the Roops—or any occupant/owner of 6993—had no right of way over the driveway, nor did they need a right of way over the driveway to access 6993. The right of way was not necessary. As the jurisprudence on easements of necessity makes clear, necessity means necessity, not convenience.[98] While a flight of steep stone steps might be inconvenient, it is a route of access and the only route of access the Roops had a right to use.[99]

Nor is it clear that relying on a trespass to chattels model would be of assistance here. Approaching property's exclusion through a tort lens misses the ongoing nature of the claim in *Roop*. The exclusion in *Roop* is all or nothing: either the Roops get the easement and the Hofmeyrs lose a property right, or the Roops get nothing and the Hofmeyrs' estate suffers no diminishment. The Roops' use, in one sense, might be harmless; but had they succeeded, the Hofmeyrs' would have suffered a loss of sorts. A one-off use of the driveway might be harmless, but ongoing use falls under a different category altogether. However, without an easement the Roops had no claim to use the driveway; their neighbours' no was, as far as property was concerned, the end of the matter.

As a dispute between neighbours in one of the wealthiest municipalities in Canada, *Roop* seems a world away from the tent encampment cases. However, the tent encampment cases also illustrate the ways in which an owner can rely on their discretion to allow or refuse certain uses, as well as the ways in which the law respects property rights at the expense of individuals and cleaves to a very strict conception of necessity.

IV. HARM TO PROPERTY VERSUS HARM TO PERSONS: THE TENT ENCAMPMENT CASES

For almost two decades, if not longer, Canadian courts and municipalities, particularly in British Columbia, have been engaged in a game of whack-a-mole with tent encampments. The clearest illustration of this is seen in *Vancouver Fraser Port Authority v Brett* where the court

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the owner of the land—that is, the owner is attempting to use property rights to thwart union organising or similar rights of access granted by public law. As such, their "temporary invasions" are qualitatively different from that seen in *Jacque*. I would argue that the rights of access challenged in certain cases should properly be understood as part of the regulation of use rather than a taking. See *Cedar Point Nursery v Hassid*, 141 S. Ct. 2063 (2021). I do not have space to fully explore this argument and it would be beyond the scope of this article.

[96] Certain instances of necessity will provide an exemption here, but the necessity is very strict. An illustration of the strictness can be seen in the English legislation allowing for temporary, statutory easements to allow access for essential repairs. See *supra* note 76.

[97] These categories are taken from Dorfman, "When and How", *supra* note 15 at 84.

[98] AJ Bradbrook, "Access to Landlocked Land: A Comparative Study of Legal Solutions" (1983) 10:1 Sydney L Rev 39 at 44-45. Admittedly, the Roops were not arguing for an easement of necessity, and some implied easements have a lower bar than strict necessity.

[99] As surprising as it may seem, it is likely that this inconvenient route of access would be held sufficient even if the owner or occupant of 6993 had mobility issues and was thus physically incapable of using the steps. Easements of necessity, for example, do not have to grant anything beyond pedestrian access. Easements benefit the land *not* the owner.

notes that, following *Williams*, Vancouver's Oppenheimer Park was cleared only for the tent encampment to return a short while later.[100] When Oppenheimer Park was once again cleared, this time on the foot of a ministerial order relating to the pandemic, a new encampment appeared on lands owned by the Vancouver Fraser Port Authority ("VFPA").[101] In turn, this move lead to further litigation: *Brett 2020*. In this section, I set out how property matters in these cases.

Many of these cases centre on whether the municipality or other property owner can secure an interlocutory injunction. There are a handful of cases whereby the courts have examined the constitutional issues that encampment residents raise or attempt to raise,[102] but the vast majority are decisions about temporary injunctions. Interlocutory or interim injunctions are meant to be temporary, and theoretically a trial on the issues or an application for a final order should typically follow. However, where municipalities or other landowners succeed in getting such an injunction, it is often determinative of the issue, or at least the end of the litigation.[103]

The fact that many of these encampment decisions are about temporary injunctions also tends to result in a similar structure in each decision. The decisions typically refer to the crisis of homelessness,[104] recount the benefits which the encampment residents claim they get from the encampment,[105] contrast that with the issues the encampment is causing other residents of the city,[106] and then grant the municipality its requested injunction. Two exceptions to this pattern are *Vancouver (City) v Wallstam* and *Black*.[107] In *Wallstam*, the British Columbia Supreme Court ("BCSC") declined to grant the interim injunction.[108] The encampment in *Wallstam* was erected on an empty lot earmarked for social housing rather than public land.[109] A month later, however, the developer was able to secure an injunction against the encampment.[110] Conversely, in *Black* the representatives of the encampment were seeking an injunction rather than the city or property owner seeking an injunction against the encampment.

It is worth noting that the request in *Black*, namely a waiving of enforcement of the relevant park bylaws during the pandemic, was actually the approach followed by the City of Victoria during part of 2020. In *Victoria (City) v Smith*, the BCSC noted that the city had suspended the operation of the bylaw prohibiting daytime shelter.[111] The numbers of people sheltering in parks increased and Victoria sought an interim injunction to prohibit shelter "in the environmentally and culturally sensitive areas of Beacon Hill Park."[112] *Smith* centred on whether a not-for-profit friends of the park organization could be added to the litigation rather

[100] 2020 BCSC 876 at paras 10-15 [*Brett* 2020].
[101] *Ibid* at para 16.
[102] For the leading example, see *Adams*, *supra* note 7.
[103] Some cases, such as *Courtoreille* emerge out of an attempt to get a final order via petition which then becomes an application for an interlocutory injunction. See *Courtoreille*, *supra* note 3 at paras 48, 60-134. Some cases do proceed to a final order. See *Saanich (District) v Brett* 2018 BCSC 2068. It is also possible that the final orders are not published online. Where the interlocutory injunction is not abided by, the plaintiff may seek prosecutions for contempt. See *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 1368.
[104] *Williams*, *supra* note 3 at paras 19-36; *Brett* 2018, *supra* note 6 at paras 35-39.
[105] *Williams*, *supra* note 3 at paras 19-36; *Courtoreille*, *supra* note 3 at paras 27-33.
[106] *Courtoreille*, *supra* note 3 at paras 17-26; *Williams*, *supra* note 3 at 8-17.
[107] *Vancouver (City) v Wallstam*, 2017 BCSC 937 [*Wallstam*]; *Black*, *supra* note 1.
[108] *Wallstam*, ibid, at para 64.
[109] *Ibid* at paras 9, 45.
[110] Jeremy Lye & Estefania Duran, "BC Supreme Court grants injunction against 10-Year tent city" *Global News* (26 June 2017), online: <globalnews.ca/news/3556575/last-day-of-hearings-for-10-year-tent-city-injunction> [perma.cc/5M94-ZNF7]. I have been unable to find any record of the decision relating to this injunction.
[111] *Victoria (City) v Smith*, 2020 BCSC 2201 at para 4 [*Smith*].
[112] *Ibid* at para 5.

than the injunction itself. The not-for-profit group was objecting to the city's decision to allow camping in the park.[113] As such, *Smith* is not fully examined here.

The structure of the encampment cases is driven by the nature of the relevant test. When it comes to granting an interlocutory injunction, the relevant test in the encampment cases is the test from *RJR-MacDonald Inc v Canada (Attorney General)*.[114] In *RJR-MacDonald*, the Supreme Court of Canada upheld a three-part test to be applied in applications for an interlocutory injunction:

1. Is there a serious question to be tried?
2. Will the applicant suffer irreparable harm if an application is not granted?
3. Does the balance of convenience favour the granting of the remedy?[115]

The second and third limbs of the test are where property rights, whether in the form of a public park or privately-owned land, come to the fore. On occasion as in *British Columbia v Adamson*,[116] the relevant public authorities will argue that *RJR-MacDonald*[117] does not apply where there is trespass. That line of argument failed in *Adamson*, not least because the province was unable to prove the trespass and because *RJR-MacDonald* is the appropriate test where *Charter* violations are alleged.[118]

RJR-MacDonald defined "irreparable harm" as "the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[119] Despite the fact that these encampment cases invariably recite the benefits which the encampment residents derive from the encampment and the horrors of the ongoing homelessness crisis, the irreparable harm typically focuses on property rights. Admittedly this focus flows from the fact that the plaintiffs or applicants are typically the municipality or the private owner. *Williams* illustrates how the discussion of irreparable harm works in the context of public parks while *Courtoreille* and *Brett 2020* illustrate it in the context of land other than public parks.

In *Williams*, the Park Board submitted that irreparable harm had been made out because it could not "be properly compensated in damages" given that the harm was preventing "other members of the public" from using the park.[120] The defendants tried to argue the homeless residents of the encampment would "suffer harm" if the injunction was granted,[121] but the conclusion of Justice Jennifer Duncan was that as the "bylaws have been clearly and continuously breached despite notice to cease," the test for injunctive relief had been met.[122]

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[113] Roxanne Egan-Elliott, "Friends of Beacon Hill Park Society heading to court to remove campers," *[Victoria] Times Colonist* (17 September 2020), online: <www.timescolonist.com/news/local/friends-of-beacon-hill-park-society-heading-to-court-to-remove-campers-1.24204550> [perma.cc/6ZGT-ZPQW].

[114] [1994] 1 SCR 311 [*RJR-MacDonald*].

[115] This phrasing is taken from *Brett* 2018, *supra* note 6 at para 41. For the phrasing in *RJR MacDonald*, see *ibid* at 334. For the sake of completeness, see also *R v Canadian Broadcasting Corporation* 2018 SCC 5 at paras 15-16. It should be noted that the Supreme Court amended the first limb of the test in the context of mandatory interlocutory injunctions. Following this case, those seeking such an injunction must show a strong *prima facie* case that they will succeed. Mandatory injunctions require a party to do something whereas prohibitory injunctions require a party to stop doing something or to refrain from doing something. Although not clear from the case law—as the line here is very fine—the encampment cases are prohibitory injunctions.

[116] *British Columbia v Adamson*, 2016 BCSC 584 [*Adamson*].

[117] *Ibid* at paras 23- 35; see also *Coutoreille*, *supra* note 3 at para 101.

[118] *Adamson*, *supra* note 116 at paras 23-35.

[119] *RJR-MacDonald*, *supra* note 114 at 341.

[120] *Williams*, *supra* note 3 at para 53.

[121] *Ibid* at para 57.

[122] *Ibid* at para 60.

In *Courtoreille*, the land at issue was owned by Nanaimo and was subject to both a lease to the Island Corridor Foundation and a sub-lease to the Southern Railway of British Columbia.[123] The fact that the property "may not be purely public in nature … strengthens rather than weakens the case for an injunction" because "interference with third party rights in respect of the Property, is a form of harm that is not quantifiable or compensable in monetary terms."[124] So too did the effect of the encampment on "neighbouring residents and businesses" prove to be irreparable harm.[125] The potential harms of forced eviction fell to be examined under the third limb, the balance of convenience.[126]

In *Brett 2020* the encampment was on lands "vested in The Crown in the Right of Canada c/o Vancouver Port Authority in fee simple."[127] The lands were "licensed for use by a company that offers public parking … and licensed for use by participants in the cruise ship industry," the letters patent for the land did not "allow residential use" and residential use was further prohibited by the *Port Authorities Operations Regulations*.[128] In examining injunctive relief in *Brett 2020*, Chief Justice Christopher Hinkson began his analysis with reference to the preamble of the *Constitution Act, 1982* and recognition of the rule of law.[129] He went on to quote from the decision in *Vancouver (City) v Maurice* which noted the "personal hardship" caused by the requested injunction was "outweighed by the public's interest in having the law enforced."[130] The point being that the encampment was illegal.

Hinkson CJ then turned to the jurisprudence on access to public property and noted the importance of the "intended purpose of the government owned property."[131] The homeless litigants tried to argue that the port authority lands were "akin to parklands, airports, or Parliament Hill"[132] but that failed.[133] Such a decision is entirely in keeping with how Canadian courts consider disputes over access to publicly-owned property where constitutional rights are at stake: how the land is used matters for the rights you can claim over it.[134] As for the question of irreparable harm under the *RJR-MacDonald* test, Hinkson CJ noted that "the plaintiff is entitled to the use of its land" and because the encampment residents "have no apparent means of indemnifying the plaintiff" the harm was made out.[135] Finally as "alternate housing" was available, the homeless litigants could not argue the balance of convenience favoured them.[136]

In *Black*, given that it was the encampment residents seeking the injunction they argued they would suffer irreparable harm. That harm included "psychological and physical harm … a real and substantial risk of contracting COVID-19 within the City's shelter system" and a loss of their personal property and community supports.[137] While Schabas J accepted that this amounted to irreparable harm, it is striking to see the differences between the harms in *Black* and other cases.[138]

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[123] *Courtoreille*, *supra* note 3 at para 10.
[124] *Ibid* at para 118.
[125] *Ibid* at 119.
[126] *Ibid* at paras 120-34.
[127] *Brett* 2020, *supra* note 100 at para 4.
[128] *Ibid* at paras 5-6.
[129] *Ibid* at para 44.
[130] *Ibid* at para 46 citing to *Vancouver (City) v Maurice*, 2002 BCSC 1421 at para 22.
[131] *Brett* 2020, *supra* note 100 at para 52.
[132] *Ibid* at para 93.
[133] *Ibid* at para 98.
[134] See Sarah E Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58:2 McGill LJ 365 at 369, 392-96 [Hamill, "Private Rights"].
[135] *Brett* 2020, *supra* note 100 at para 107.
[136] *Ibid* at para 114.
[137] *Black*, *supra* note 1 at paras 70-71.
[138] *Ibid* at para 75.

However, in *Black*, the third limb of *RJR-MacDonald*, the balance of convenience, worked against the encampment residents. Under this limb of the test, Schabas J detailed Toronto's pre-pandemic shelter system and supports for the homeless,[139] Toronto's steps to make the shelter system safe during the pandemic,[140] and how Toronto had responded to the encampments.[141] The decision notes that encampments in Toronto's parks "increased" in number and were "larger" as a result of the pandemic.[142] Toronto provided supports, including sending in outreach workers, providing sanitation in the form of removing "hazardous materials, waste and debris," providing "portable toilets and handwashing stations … expanded access to public washrooms and shower facilities in parks and community centres … [and] provided drinking water."[143] Toronto's steps in providing these additional services are not unique, either to Toronto or to the pandemic context. The earlier case of *Saanich v Brett* saw Saanich provide various services to an encampment within its boundaries,[144] before ultimately seeking an injunction to limit camping to night-time.[145]

In *Black*, immediately after the City's supports for encampments were mentioned, the decision went on to note complaints about the encampments and the ongoing concerns around the sanitation and safety within them.[146] The potential harm of removing the encampments was then returned to but Schabas J noted that "[a] large number of people have moved out of encampments into shelters"[147] and, again, referred to the steps Toronto had taken to make its shelters safe.[148] Finally, Schabas J turned to the public interest—here, the need to keep the parks open to all proved determinative.[149]

It is somewhat jarring to go from an acknowledgement that the applicants in *Black* had shown that irreparable harm would result if the injunction was not granted, to a conclusion that the balance of convenience favoured not granting the injunction. At least part of the reason the applicants lost on the balance of convenience was the fact that the encampments were no longer necessary, and housing was available. Such a conclusion undercuts the repeated references to the sense of community found in *Black* and other encampment cases.

In *Black,* under the balance of convenience analysis, the idea that the City and other residents were suffering irreparable harm because they could not access public parks returned. Here, *Black* echoes the idea in other encampment cases that an owner not being able to use their property amounts to an irreparable harm. In the context of publicly owned parks, the harm is that members of the public cannot use the parks in their intended manner. As I have argued elsewhere, the right to use and particularly the right to the primary use is a key property right in Canadian jurisprudence.[150] In regulatory takings and adverse possession cases, the loss of the primary use of the property is often determinative of whether there has been a taking by the government or whether the adverse possessor has successfully dispossessed the prior owner.[151] As such, these encampment cases can be considered to adhere to an understanding of property seen elsewhere in Canadian jurisprudence. Even in *Brett 2020* where the Court found that the

[139] *Ibid* at paras 79-85.
[140] *Ibid* at paras 86-99.
[141] *Ibid* at paras 100-123.
[142] *Ibid* at para 100.
[143] *Ibid* at paras 102-103.
[144] *Brett* 2018, *supra* note 6 at para 8.
[145] *Ibid* at paras 1, 8.
[146] *Black*, *supra* note 1 at paras 104-109.
[147] *Ibid* at para 133.
[148] *Ibid*.
[149] *Ibid* at paras 143, 150.
[150] Sarah E Hamill, "Common Law Property Theory and Jurisprudence in Canada" (2015) 40:2 Queen's LJ 679 at 692.
[151] *Ibid* at 690-67.

other uses VFPA were planning for the land were unlikely, the ultimate holding was that VFPA should not be kept out of the use of its land.[152]

That irreparable harm to property should prove so much more compelling than the experiences of encampment residents is telling. It echoes the theoretical observation that property becomes a proxy for the individual who owns it. For property like parks which are both publicly owned and publicly accessible, the property and its use is a proxy for the community at large. The homeless are not necessarily excluded from this community but, because the homeless have no greater rights to the park than anyone else, they cannot use it as a site for an encampment. The most that *Charter* rights can do is offer a temporary moratorium on prohibitions on camping; outside of this, property rights prevail.

V. UNDERESTANDING THE DEFERENCE TO PROPERTY RIGHTS

Writing in the late 1980s, Jeremy Waldron noted that "there is no rights-based argument to be found which provides an adequate justification for a society in which some people have lots of property and many have next to none."[153] Yet what we see in the encampment cases in Canada are property and property rights being used to justify evicting homeless individuals. To be clear, the encampment cases are not seeking to justify property, but are using property rights to justify a decision around where homeless people should be. Although the cases rightly go to some lengths to canvass the experiences and opinions of homeless people, the harms they suffer are construed as less compelling than the harm which property rights are suffering. In this section, I seek to explore why property rights are deferred to as well as suggesting that, legal outcomes notwithstanding, these encampment cases illustrate some reasons to be optimistic about the plight of homeless people even if property law cannot (yet) recognise them.

It would be a mistake to understand the way the law defers to property rights as excessive deference to some individualistic conception of property.[154] In fact, property law's own seeming deference to individuals is uneven.[155] To understand why property seems to defer to property rights over and above individuals and why it appears to have an outsized role in the encampment cases, we need to understand property's social role.

The comments in *Brett* 2020 about the rule of law in the context of encampments reveal that respect for property rights is considered a key component of the rule of law.[156] The problem with this respect is, as authority-based theorists have noted, that not everyone will be entitled to such respect. However, the authority-based theorists are starting from the assumption that private law does, or should originate from and reflect equal respect for each individual as an individual, although that is not necessarily where the law starts from, nor what the law reflects.

There can be no doubt that individual rights and individual equality are dominant themes in much current legal scholarship. Yet respect for individual rights and equality are values which emerge out of a particular social context and are not inherent in private law or property law. As Henry Smith pointed out several years ago, not every aspect of property law will respect "efficiency, fairness, justice, and virtue promotion" but such values might be emergent.[157] Smith's observation is echoed by recent work on original acquisition which

[152] *Brett* 2020, *supra* note 100 at paras 103-107.
[153] *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 5.
[154] Though admittedly, courts can struggle to understand non-private forms of property. See Hamill, "Private Rights," *supra* note 134.
[155] Hamill, "Enduring Trespass", *supra* note 47.
[156] *Brett* 2020, *supra* note 100 at para 44.
[157] "Law of Things", *supra* note 77 at 1719.

effectively concedes that the emergence of property cannot be made distributionally just, and that issues with distribution should be fixed later rather than at the point of emergence.[158]

With this is mind, it is helpful to turn to the decision in *Batty v Toronto (City of)* and its opening questions of "How do we live together in a community? How do we share common space?"[159] Property appears in the answer to both questions. In the context of the argument of this article, we divide up the common space we share into property rights, which can be private or public.[160] Private property rights often depend on public rights to be useful, or even need to relate to other private property rights to function (as can be seen with easements).

While property rights bind us in relationships with others, property rights also relate to other property rights—not because of respect for individuals, but to keep property functioning. Writing about contract law, Prince Saprai argued "The purpose of contract law is not to enforce private morality or promises per se, but to help forge a sense of community and collective endeavour, which is essential for the justification of any state or legal system."[161] The equivalent for property law might be that it is not about relational justice, but about the same "sense of community and collective endeavour" that Saprai sees in contract law. The challenge for this "sense of community" will be how inclusive that community is or can be.

This still leaves homeless people in an awkward situation, but it does help explain the levels of opprobrium which are directed at homeless encampments. As the cases make clear when the encampments are described by non-residents, they are depicted as lawless and dangerous. Following the logic of property law, there is a sense in which encampments are lawless and dangerous because of how they undermine respect for the communal endeavour of property law. A similar level of opprobrium was directed at Steenberg Homes in *Jacque*, and would be directed at the Roops if they continued to use the driveway.

Of course, condemning homeless encampments for being lawless is the height of cruelty against the backdrop of a lengthy housing crisis. This is why the decisions also often go to extreme lengths to highlight that the encampments are not necessary, that alternatives are available. In other words, the decisions continue to adhere to the rule as set out in *Adams*.

As disappointing as the lack of progress from *Adams*' 2009 holding may be, a closer look at the decisions suggests that the law may not have moved, but the municipalities have. In *Adams*, the City of Victoria claimed that the outcome would impose positive obligations because they would be forced to house the homeless.[162] The judiciary disagreed; the law was simply being modified to allow homeless people to survive the night, nothing more, nothing less.[163] In effect, *Adams* presents municipalities with a choice: ban overnight camping and provide adequate shelter, or allow overnight camping and continue to provide inadequate shelter. A close reading of the post-*Adams* encampment decisions suggests that municipalities are increasingly opting for the former solution. Municipalities are housing the homeless, not because of the right to housing, not because property law demands respect for individuals, but because the law has presented municipalities with a version of the "choice" that a homeless person faces. There is still room to criticize the municipalities' actions here, not least because some homeless people do not wish to use the shelter system and forcing people into the shelter

[158] Michael JR Crawford, "Justifying Possession (or How We Get From Here to There)" in Simone Degeling, Michael Crawford & Nicholas Tiverios, eds, *Justifying Private Rights* (Oxford: Hart, 2020) 155 at 176-78.
[159] *Batty v Toronto (City of)*, 2011 ONSC 6862 at para 1.
[160] This is, of course, not the only way of sharing common space and Indigenous scholars have argued for alternative methods. See *e.g.* Paradies, *supra* note 13.
[161] *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (Oxford: Oxford University Press, 2019) at 7.
[162] *Adams*, *supra* note 7 at paras 90-92.
[163] *Ibid* at paras 93-97.

system is hardly an approach which respects human rights.[164] Nonetheless, there are reasons to be optimistic that alternative and mutually agreeable solutions are possible given municipalities' willingness to provide more and different kinds of shelter.[165]

VI. CONCLUSION

The purpose of this article was to explore the role that property plays in the encampment decisions. I have argued that property does not reflect respect for relational equality but respect for property rights. This is due to the social role which property plays. The encampment decisions reflect rather than challenge this aspect of property. As I note, the decisions show that municipalities are taking steps to address the homelessness crisis, but these steps continue to help justify the respect for property rights.

To be clear, none of this justifies the violence in Toronto. That violence is bound up with property law and the respect shown to property rights. But, if that respect for property rights is bound up, as I argue it is, with a "sense of community and collective endeavour," we might want to ask whether the violence in Toronto reflects the community/ies it sees itself as being. If the answer is no, then the violence represents a choice that Toronto did not have to make.

VII. POSTSCRIPT

Since this article was submitted a number of other encampment cases have been heard. Two are worth mentioning for the slightly different approach they adopt. These decisions are *Prince George (City) v Stewart*[166] and *Prince George (City) v Johnny.*[167] *Stewart* centred on Prince George's efforts to clear two encampments within its boundaries: one in an empty city lot, and one on green space zoned for park use.[168] As in earlier encampment decisions, Hinkson CJ noted the benefits the encampments provided but was "unable to accept that such considerations alone can justify the occupation of property belonging to another."[169] Yet unlike other decisions, Hinkson CJ allowed one of the encampments to remain in light of the housing issues.[170] In fact, his conclusion states that "absent other suitable housing and daytime facilities, the occupants … must be permitted to stay at the encampments."[171]

Johnny represented Prince George's second attempt to remove the encampment which remained after *Stewart.*[172] In *Johnny*, Prince George asserted that it had "provided suitable housing and daytime facilities" and thus the remaining encampment could now be dismantled.[173] The City had, however, already dismantled part of the remaining encampment which the respondents in *Johnny* alleged was a breach of *Stewart.*[174] *Johnny* surveys the harm caused by the dismantling which included, for some encampment residents, the loss of

[164] For a critique of municipalities' turn towards providing shelter as missing those who choose to reside in tent encampments, see Mark Zion, "Making Time for Critique: Canadian 'Right to Shelter' Debates in a Chrono-Political Frame" (2020) 37 Windsor YB Access Just 88.
[165] See *Black*, *supra* note 1 at paras 10, 19, 23, 112.
[166] 2021 BCSC 2089 [*Stewart*]. I am indebted to David DesBaillets for bringing this case to my attention.
[167] 2022 BCSC 282 [*Johnny*].
[168] *Stewart*, *supra* note 166 at paras 2, 12-13.
[169] *Ibid* at para 95.
[170] *Ibid* at para 116.
[171] *Ibid* at para 115.
[172] *Johnny*, *supra* note 167 at paras 1-2.
[173] *Ibid* at para 5.
[174] *Ibid* at paras 8-9.

"identification" and "the ashes of their loved ones."[175] Justice Simon Coval agreed that Prince George's actions were a breach of the *Stewart* Order and that "[t]his breach inflicted serious harm on vulnerable people."[176] While *Johnny* left it open for the city to meet the terms of *Stewart*, Justice Coval declined to grant the requested injunction. Following *Johnny*, the City of Prince George issued a public apology to encampment residents and withdrew its appeal of *Stewart*.[177]

Both *Stewart* and *Johnny* are important for the close judicial attention to the issue of whether there were in fact "alternative" forms of housing available. Had either decision found there to be sufficient housing, the City would probably have succeeded in securing its desired injunctions. As such *Stewart* and *Johnny* are perhaps evidence of stricter judicial attention towards the realities on the ground, rather than a radical departure from the existing holding in *Adams*. Nonetheless, both decisions are to be commended and *Johnny* in particular is to be commended for its careful assessment of the steps Prince George had taken and still needed to take. Perhaps the most striking aspects of the decision in *Johnny* are its explicit recognition of the harm caused by the dismantling of the encampment and the subsequent apology from Prince George. Such acts recognize the dignity and worth of encampment residents. The contrast with earlier events in Toronto could not be starker.

[175] *Ibid* at para 53.
[176] *Ibid* at para 82.
[177] Andrew Kurjata, "City of Prince George apologizes for 'trauma' caused by destroying part of homeless camp" *CBC News* (24 March 2022), online: https://www.cbc.ca/news/canada/british-columbia/prince-george-apologizes-homeless-1.6396206 [perma.cc/K26E-3K86].